

Looking for Hegemony in All the Wrong Places: Critique, Context and Collectivities in Studies of Legal Consciousness

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Introduction

The law is one of the most enduring of social institutions. Although, particular rules change and the organization of roles evolve, the basic legal form remains. To the law, communities delegate the legitimate use of force to resolve conflicts, prohibiting citizens from using violence to manage differences while reserving for the enforcement agencies this exclusive power. The ‘rule of law’ carries with it exactly this aspiration to confine the use of violence -- to confine the field of pain and death — through complex processes of interpretation and decision (Cover 1986). For thousands of years, the toms of legal writing have regulated the times, places, and conditions for the uses of state sanctioned violence/force allocated by a third-party decision-maker through adversarial processes (Bobbio 1965, Holmes, Cardozo, scandnavian third party lit). Socio-legal research on legal consciousness attempts to explain this long-lived institutional durability. What, in other words, sustains this institution?

Current events may belie the law’s claim to the legitimate monopoly of violence. Daily news reports are saturated with accounts of pain and death: massacres of diners in Parisian cafes, of children in elementary schools, of workers in public welfare offices, of peasants plowing fields, of native and mercenary armies in continual punctuated battle, all accompanied by one or another assertion of just, legitimate cause for what appears to be illegal violence. Whether we are living in a time of actually greater violence is unclear. After all, nearly ten times as many people died every single day for six years in World War II as died in the one day of the World Trade Center attacks of September 11, 2001. However, it is clear that force outside of the state, until recently, has not been normatively sanctioned across large swaths of the globe.

The increasing use of urban terror as a political strategy begs us to reconsider the durability and power of law, as institution and aspiration. Imagine, for a moment, how we might think about legal consciousness as a theoretical concept as well as social fact if, following September 11, 2001, George W. Bush had announced that, rather than making war on Iraq and Afghanistan, the United States was going to hunt down the perpetrators of the World Trade Center attack and bring them to trial before the International Criminal Court in the Hague? What would the world be like now?

Both contemporary terrorism and the rule of law are sustained in no small measure by ideological commitments. We begin this essay by coupling the interests and conceptual terms of socio-legal studies on legal consciousness to the horrific events of our historical moment in order to emphasize the role of ideology in shaping not only the broad contours

of history but also the minute events of everyday life. Indeed, our research on legal consciousness began with a focus on ideology as a counterbalance to narrowly behavioral accounts of legal processes. As we address in this workshop questions about the boundaries of law, the difference between law and non-law, and the allocation of legal authority, we would like to revive that animating question about the source of law's power and durability. As a theoretical concept and topic of empirical research, legal consciousness developed among socio-legal scholars to explain how law sustains its institutional power across wide spans of time, space, and variable performance; yet increasingly, legal consciousness is used to refer to actors' thoughts, ideas and actions with respect to law. We have, in other words, been looking for hegemony in all the wrong places.

Empirical studies of legal consciousness characteristically collect information about how people talk and use (or not talk or not use) law. The field developed by first moving socio-legal research from formal legal settings where both the official and unofficial work of official legal actors were the focus of study to the activities of ordinary citizens as they interacted with formal organizations and actors. A second move took place as scholars began to track the ways in which law and legal schemas were present in the words, actions, and interpretations of ordinary citizens outside of interactions with legal agents or official settings. Researchers 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.

In making this move, this research shifted empirical focus from a preoccupation with both formally legal actors and legal materials to what had in sociological theory been designated as the life-world, the everyday life of ordinary people. For the most part, but not entirely, researchers were foregoing a focus on measurable behavior and reinvigorating the Weberian conception of social action by including analyses of the meanings and interpretive communication of social transactions. 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, communicate, and interpret social relations even where law might seem distant or formally absent. Importantly, 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 activities within official legal settings to the analytic concept legal consciousness: that is, how legality is an ongoing structure of social action (Ewick & Silbey 1998, pp. 33–56). European social theory had been addressing similar 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).

Along the way, however, the research field split. The empirical data collection -- observing and interviewing people in various settings to trace the ways in which law was present, or not, in their activities -- was similar across the field but the analysis of the data and the questions addressed altered. Once the data were collected, the words of

informants were analyzed and interpreted differently. For some researchers, the informants' accounts were indicators of ordinary citizens' attitudes and perceptions of law, signs about the ways in which law was relevant or irrelevant for their lives. For others, e.g. Ewick and Silbey, informants' accounts of their experiences were used to depict (by constructing a model of) a particular social structure, which we call legality. We found that embedded in informants' accounts were cultural schemas – not exclusively associated with law -- describing law and legality as both a universal, ahistorical norm of disinterested decision-making and at the same time a set of particular, pragmatic, and malleable procedures open to manipulation by skilled, self-interested and resourceful actors. The durability of law, we argued, derived from this schematic plaiting, enabling diverse and contradictory experiences and interpretations to be contained within commonly circulating conceptions and meanings of law. In other words, while it is true that researchers in both camps collect signs of legal consciousness by observing social actors thinking, doing, talking, legal consciousness -- defined as participation in the production of legal meanings -- cannot be reduced to these actions, thoughts or words.

In the remaining sections of this paper, we first address the two paths of legal consciousness research: one stream relying on the actor as the unit of analysis and the explanation, the other focusing on the institution, synthesizing across the diverse empirical accounts to model the structure of legality. We animate this discussion with some recent critiques concerning the role of collectivities as productive sites of legal consciousness, offering examples from current research to illustrate the importance of site-specific studies. We then focus on points of contestation and confusion concerning the meanings of consciousness, ideology and hegemony. In the final section, we address the fundamental question of how the multitude of interactions that form everyday life come to assume the unity and consistency we recognize as a social structure, and as a durable institution?

I. Legal Consciousness Redux: Collectivities and Institutional Contexts

One must not think ill of the paradox, for the paradox is the passion of thought, and the thinker without the paradox is like the lover without passion: a paltry mediocrity. But the highest pitch of every passion is always to will its own downfall, and so it is also the ultimate passion of Reason to seek the collision, although in one way or another the collision must become its downfall. (Kierkegaard 1962, 46)

Socio-legal scholars, like philosophers, love paradox. Not just the head-scratching contradictions that demand to be solved like a puzzle or reconciled by logic for, as Kierkegaard notes, that would be the end of passion. We love the paradox that does not need explaining because it does the explaining, is the explanation. Foucault gave us the prison that produces the delinquent. Marx identified the contradictions of inherent in capitalism as the engine of history. These are different kinds of paradoxes because they are not produced by contradictions that exist between two distinct things (ideas, systems, possibilities) that collide; rather they inhere within one thing, indeed they constitute the thing. In some cases, the internal contradictions are destabilizing and thus a source of change or crisis. According to Marx the internal contradictions of capital would finally

lead to revolution; for psychologists cognitive contradiction or “dissonance” is eventually harmonized as thought or action are, by seeking alignment, changed. In other cases, the internal contradictions operate in countervailing opposition creating a tensile stability. Some cultural narratives describe law as both God and gimmick and that this duality is a source of law’s durability.

Because meaning and sense making are dynamic, internal contradictions, oppositions, and gaps are not weaknesses or tears in an ideological cloth. On the contrary, an ideology is sustainable only through such internal contradictions. These contradictions become the bases for the invocations, reworkings, applications, and transpositions through which structures are enacted in daily life. In short, contradictions and oppositions underwrite everyday ideological engagements, and thus ensure an ideology’s vitality and potency (Ewick and Silbey 1998, 226).

We arrived at this understanding by mobilizing a familiar tool box of sociological concepts and theories, relying heavily on the Chicago School ethnographers, and the twentieth century canon of American qualitative sociology as well as social construction (e.g. Mead, Dewey, Hughes, Becker, Mills, Goffman, Garfinkel, Berger and Luckman). We also read the French sociologists, Crozier, Foucault, Bourdieu, Lefevre, and de Certeau, directing us to the capillaries of social action within which power and institutional authority acts/travels. Like many social scientists of our generation, we were preoccupied with questions of agency and structure, struggling to understand how these capillaries animate recognizable patterns of social action that persist over time and yet consistently alter and change. What sustains institutions over the long duree? We were heavily influenced by William Sewell’s (1992) reconciliation of Bourdieu and Giddens, ultimately relying on Sewell’s theory of social structure as schemas and resources enacted in the most improvisational as well as organized transactions for our theorization of legal consciousness. With these resources in hand, we went about collecting stories of life experiences from over four hundred people to identify the circulating schemas with which people make sense of their lives to themselves and to others.

We used conventional methods of qualitative data analysis, thematically coding and recoding the transcribed interviews with inductively emergent codes/categories as well as themes derived from the abundant empirical research in socio-legal studies. We asked ourselves, as any empirical researcher should, does our data confirm what has already been demonstrated. In what ways, can we validate previous research? Where do we find variation? What do we observe that others may not have identified as yet? Our first question for organizing all the coded data was simple: What do people talk about when they talk about law, explicitly, elliptically, metaphorically? To organize the coded data, we relied on the fundamental basic concepts of sociological analysis with which we began: norm (what normative claim is offered for law/legality); structure (what constrains legal action); capacity or agency (what enables legal action); and where is legality located in time and space. Importantly, we used these basic concepts to develop the matrix of the schemas of law and legality, thus representing how the institution is experienced and interpreted. The object of analysis is the institution of law or, as we argue the social

structure of legality, not the person, whom we observed with rare exception would deploy multiple, even contradictory, schemas.

As many critics have noted, however, we did not systematically analyze the conditions – group memberships or social locations – generating or associated with the individual accounts from which the narrative model of legality was built (Neilson). By collecting data through interviews with a randomly selected sample of individuals, we did not pay attention to the role of social movements and organizations in shaping experiences and interpretations. By contrast, recent scholarship on legal consciousness has fruitfully focused on the situational and institutional fields within in which legality is narrated and enacted. This scholarship has also considered the importance of collective actors – particularly challenging groups – in confronting legal hegemony (Blackstone, Uggen, McLaughlin 2009; Fritzvold 2011; Halliday and Morgan 2013).

Focusing on radical environmental activists, for instance, Halliday and Morgan examine the collective voices of dissent. They base their analysis on Mary Douglas's grid/group theory of culture. Douglas's formulation offers a generalized two by two matrix for characterizing actor's interpretations — she calls them attitudes — of their social position and orientations toward justice and the allocation of blame. One axis, the grid dimension, describes variation in authority: whether hierarchy is embraced on the basis of traditional rules and roles or rejected by emphasizing substantive equality. The second axis, the group dimension, describes variation in agency: whether social action is more likely driven by individual actors or constrained by groups. By relying on Douglas's culture theory to analyze legal consciousness, Halliday and Morgan describe, as Douglas intends, the attitudes of actors, not the structure of an institution. In other words, how do actors' interpretations vary along these dimensions of hierarchy and agency? While Douglas uses the grid/group model to identify attachment to basic variations in social ordering (“a bid for space, time and resources for a particular form of social organization”), Halliday and Morgan use the grid/group matrix to situate the before, with and against schemas/narratives of legal consciousness, identifying in the process a blank cell in Douglas's four-four typology. Halliday and Morgan conclude that there is a fourth type of legal consciousness which rejects, rather than extols, plays with or subversively resists the law.

Halliday and Morgan show that this cell can be occupied by radical environmental activists. Through a secondary data analysis of interviews with activists, they describe what they call a collective rejection of the authority of state law. The activists also voiced conceptions of transcendental, universal law, (which they opposed to what they saw as illegitimate state law) while simultaneously employing the strategic gaming potential of state law. Rather than see these contradictory views as sustaining law's hegemonic power -- as we argue -- they claim that the disparate views of law fueled the activists critique and challenge. Following Douglas' model of typologizing actors' interpretations and claims for social ordering, Halliday and Morgan ask how the actors they study interpret the role of actors and social groups within the institution rather than how the institution performs its roles. The object and unit of analysis is the social actor. In characterizing types of legal consciousness among dissenting collectivities, Halliday

and Morgan end up treating the social actor (albeit a collective one) as the focus of analysis (as the “bearer of a legal consciousness”) rather than the processes of ideological formation.

Rather than conceive of legal consciousness as participation in a collective and emergent process, people and groups are said, in this line of research, to “have” a particular type of consciousness. In her study of offensive public speech, for instance, Neilson also reports that people think such speech is morally wrong, and yet they do not favor legal limitations. She explains the apparent contradiction: “The answer lies in varieties of legal consciousness: that is, differing attitudes about the law.” Some respondents, she goes on, “hold staunch First Amendment ideals. Others distrust the state. Still others are unwilling to be defined as victims...” (2005 9). More recently, in his study of radical environmental activists, Fritsvold states, “This research seeks to investigate the role of civil disobedience and law-breaking within the environmental movement and the corresponding legal consciousness of movement actors” (Fritsvold 2009 emphasis added).

In sum, these rich, complex and provocative pieces of research show how the varieties of legal consciousness are distributed among different social actors, rather than analyzing how they coalesce in the social structure of legality. This research shows how law is used or not used but does not move to the question of how these variations may be entwined, sustaining legal institutions over time. We assume some responsibility for this tendency for legal consciousness to be conceived of as a property (or orientation) of actors rather than an analytically constructed model of circulating tropes, schemas and narratives. The metaphors of before, with, and against the law which we used to label the schemas suggested that the actor sits before, plays with, or experiences herself up against the law. Describing the data this way and the term consciousness itself, generating entailments of cognition and subjectivity, invites such a distortion of the concept.

While there is nothing inherently wrong with these typologies of legal consciousness as a heuristic, they nonetheless end up creating bounded, non-overlapping, and relatively homogeneous categories. They sort and label and thus tend to flatten or erase the emergent relationship between and among that which the bounded cells contain. Most importantly, by treating the variety of expressions as types of legal consciousness, the research converts a process into a static snapshot. One of the theoretical casualties of this typology heuristic is precisely the loss of that tensile relationship and paradox among (and within) the cultural schema that are, we have argued, the source and engine of law’s hegemony: of social change as well as stability.

The contribution of recent work lies not, therefore in identifying yet another narrative of legality; rather, by focusing on group interactions within local settings such work promises to reveal more about the collective processes through which law and legality are constructed. In other words, if legal consciousness is talked and acted into existence, this will always occur within groups who are simultaneously situated in multiple domains of meaning. This collective constitution occurs in work and professional groups, families, schools, prisons, indeed throughout social life, as well as through popular culture that

homogenizes across disparate settings. We therefore need to be attentive to the ways in which groups provide a medium and resource for constructing legality, and, as importantly, at what point these constructions sustain or undermine the ideological power of law.

These questions suggest that our accounts of legal consciousness would vary considerably if data were collected from actors embedded in social settings with strong normative orders. We might amend, or confirm, our model of legal consciousness if we studied actors located in highly organized settings where legal norms, tropes and schemas compete with (or complement) equally compelling normative orders, more characteristic of modern rather than postmodern cultural production in mass media which encourages homogenized schemas and interpretations. Our current research projects --- an ethnographic study of Voice of the Faithful (Ewick and Steinberg) and an ethnography of how one university responded to enforcement of environmental regulations -- seek to capture the ways in which these circumscribed social settings and social groups process legality.

Case: Voice of the Faithful

On Sunday Jan. 6, 2002 the Boston Globe's 'Spotlight' investigative team, published the first of a series of extensive reports on the archdiocese cover up of sexual abuse by priests under the banner headlines, "Church Allowed Abuse by Priest For Years, Aware of Geoghan Record, Archdiocese Still Shuttled Him From Parish to Parish" (France 2004: 296). Almost immediately following these revelations a group of faithful and shocked Catholics formed a group to respond to the crisis. Within months the group they called Voice of the Faithful counted in the tens of thousands. Their formation represented the collision long-standing norms of obedience, deference to hierarchy, presumptions of ecclesiastic immunity and distrust of secular law with American and modernist commitments to the individual conscience, liberty and democracy. Caught between their loyalty to the Church and their sense of being empowered citizens, they faced a discursive field that was not well structured. The Globe framed the Geoghan story in terms of criminal and civil legal violations and dark organizational malfeasance. But, when they engaged in public discussions the group struggled with how to fashion a collective voice that framed the injustice. Modern law, it would seem, belongs to the secular, rational world of the empirical, the material, the individual; religious law emanates from the transcendental sphere of faith, the sacred, and the collective (Fitzpatrick 2007; Sarat, Douglas and Humphreys 2007). Within civil society most of the members of VOTF are highly educated, professional adults; within the Church they are relatively powerless and voiceless within one of the oldest, richest and culturally most powerful hierarchies in the world.

As much of the literature on the legal consciousness of highly religious or traditional groups and communities has demonstrated the apparent tension between secular and sacred authority in a particularly acute way (Engel 1987; Greenhouse 1986) In her study of Baptists of Hopewell, for instance, Carol Greenhouse reported a reluctance or unwillingness to rely on law to define or settle conflicts insofar as doing so would entail

conceding to the profane authority. Their resistance, she wrote, "...is rooted in the logic of sacredness that obviates not only applications of human authority, but human authority itself" (206).

By contrast, for members of ST X VOTF, the sacred and profane are shifting and overlapping realms of meaning and action. Within their repertoires of strategy, discourses, and identity, we found plaited references to law and religion, to reason and faith. Rather than oppositional or competing, the secular and the sacred are interwoven throughout their activism, each enabling one another and in doing so challenging the familiar binary between the sacred and the profane.

On one hand, members of St. X VOTF in describing their own experiences within the group invoke the language of faith and traditions of Catholicism. Participating in the activities of VOTF – and thus assuming the costs, sacrifices and public disapproval that such participation entails - is variously described as “a calling,” “a cross they have to bear,” and having been “inspired by the Holy Spirit.”

At the same time that the members of VOTF interpret their activism as divinely inspired, they are firmly rooted in the pragmatic world of reason, politics and law. They sought a Church “that is more responsive and open, a Church, in short, that is like the rest of America” (Wolfe, 263) In their search to become “citizens” of the church, they readily acknowledge the utility and power of secular law. Like the media, the legal system offers VOTF activists and victims an institutional authority powerful enough to challenge the Church. And from the onset of the scandal, the law figured prominently in strategies of the group. When asked to reflect on the role of the legal system in exposing the pattern of sexual crimes and institutional cover-up, Thomas, a strong supporter of survivors who has attended a weekly vigil in front of the Cathedral (?) for the past 6 years, observed.

None of this would have happened without Constance Sweeney [Superior Court judge who ordered the Archdiocese of Boston to release information related to sealed settlements to the Boston Globe] – one single judge -- ordering the release of the documents. We never would have known the extent of what was going on, for that we can thank our common law system.

In addition to using legal authority to prise open culpatory Church records, legal change remains a central objective of VOTF nationally and at the affiliate level. Some member engage in lobbying legislators to pass laws – such as extending or eliminating the statute of limitations for sexual assault, removing charitable immunity in civil awards, and securing mandated financial accountability – that would prevent future abuses from occurring .

Yet, given the role of courts in instigating the scandal and the continuing level of legal activism among VOTF, the frequency with which members employ explicit dis courses of rights or justice is rare. Indeed, unless we explicitly probed members about their view of law in the context of the church scandal, or their own effort to reform the church, few people mention it spontaneously. Generally, legal language is not used to frame their claims or anchor their identities as Catholics or activists.

It would be a mistake, however, to interpret the infrequency with which the problems within the Church, or their own activism, are framed within explicitly legal discourse as a rejection of law's presence, legitimacy or power. As socio-legal research has repeatedly shown most people do not typically experience their lives, relationships or even disputes as principally legal events (Engel and Munger 2003, Ewick and Silbey 1997; Neilsen 2004). Where legality is present, it is often liberally interwoven with alternative discourses, such as religion (Ewick and Silbey 1997), science (Silbey and Ewick 2003), and family (Hartog, 1993). Indeed, it is out of this fashioning that both law and these other institutional discourses are mutually constituted in an on-going dynamic of application and transformation. Among the VOTF for instance, while there has been only occasional use of rights language, it is sometimes heard in the least expected contexts. For instance, during a discussion of the Church's refusal to authorize lay Catholics to perform certain liturgical rites, one member of the group asserted that without including lay ministers, in the face of a severe shortage of priests, his "right to receive the Eucharist" would be compromised, thus framing his challenge to clerical authority in the apposite roles of rights bearing citizen and devoted penitent. Indeed, for the members of St. X VOTF, secular law and sacred faith are not experienced or understood to be separate realms of meaning as they pursue justice.

Case: Governing Green Laboratories

For more than a decade, Silbey has been studying the ways in which legal regulations have been incorporated within laboratory science. This is a study of law entering the house of science rather than science and scientific objects, such as evidence or invention, entering the house of law. The work began, quite directly, in response to criticisms leveled at *The Common Place of Law*. One voice of criticism suggested that we were wasting our time studying ordinary people, that the world is made by elites and that if we wanted to understand how the law worked, as we claimed, we ought to study elites. This criticism challenged, without engaging, the theoretically driven focus on the role of the masses, "we the people," in sustaining legal systems. Provoked by this naïve conception of social ordering, and the role of elites, Silbey decided to study a different kind of elite, cognitive elites: laboratory scientists. Looking at laboratory scientists, she would be studying one of the most insulated, protected, and privileged populations in modern society. To what degree was the work of laboratory scientists influenced by legal mandates; to what degree did legal norms concerning safety, health, environmental protection penetrate and shape laboratory routines; what role did the law have, or not have, in the design of scientific experiments? The results have been dribbling out for some years. With regard to questions of legal consciousness, what stories do scientists tell about law that might confirm or alter the model of legality we constructed? For the most part, scientists tell stories not unfamiliar to readers of *The Common Place of Law*. For the most part, legal norms are irrelevant other than as licenses enabling the legitimate use of animals in experiments or hazardous materials (eg. toxins, radioactive materials). Those rules are legitimate because in large measure they have been made with the collaboration of the scientists themselves. When the rules intrude beyond what the

scientists consider reasonable and in the public's interest, they may engage to change them or the implementation, and sometimes actively ignore.

As this work has developed, however, the analysis of laboratory regulation has transformed from a study of legal consciousness into a study of complex organizations with long chains of distributed expert labor. Rather than law governing science, rather than an analysis scientists' interpretations into models of legal consciousness, it is a story of the intersection of two recent trends. In the first, organizations are increasingly adopting forms of self-regulation in response to multiple, often competing, demands for accountability from consumers, investors, competitors, employees, and the government through law. Risks are proliferating as expectations for risk reduction and accountability also escalate. At the same time, the conventional model of a hierarchically governed organization reliably commanding compliance -- which has always been more an aspiration than an empirical description -- is also disappearing, even as an aspiration. Across almost all economic sectors, organizations are adopting decentralized, flexible, and ostensibly lean structures alongside various forms of offshoring, outsourcing, and short-term employment relations. Through the diffusion of these two trends/ fashions in private firms and public agencies, the state is, in effect, delegating responsibility to promote the general welfare to organizations that operationally lack the capacity to do this well. Considering the rapid diffusion of increasingly complex technologically generated risks, it is a recipe for disaster, which is exactly what has happened in deaths and maiming in university laboratories in California, Texas, New York, the 2010 BP spill in the Gulf of Mexico, the 2014 anthrax contamination at the Centers for Disease Control, the 2014 lapses in Presidential security, and the September 2014 death from Ebola virus at a Dallas hospital. Some observers would also add the financial collapse of 2008 as just such a disaster borne of systemic risks bred in contemporary organizational practices. It is less a story of law within a particular intersection of institutional forces than a study of a new social formation, dominant model for the organization of labor and the erosion of accountability.

Nonetheless, legality is hegemonically present in this particular intersection of institutional forces. Although many scientific workers recognize no legal constraints on what they do, laboratories are saturated with law, signs of law are everywhere: in the safety showers outside every lab, on the Biohazard signs adorning every door, on the notices of laser and radiation dangers, of the demand to wear both protection in coats and eyeglasses, in the presence and design of vents, drains, sinks, as well as the locations and labels for hazardous waste. The labs are filled with law: legal facts, remedies, strategies, and institutions were constantly present. However, the scientific mind and sensibility is not determined by law. Scientists may bargain in the shadow of law, yet the law in whose shadow they bargain is a complex and contradictory structure, experienced as an external control and constraint, reconstructed regularly in conversations and arguments, intertwined in significant tension with scientific knowledge and professional norms.

II. Legal consciousness and Hegemony

These two projects show that precisely because law is both an embedded and an emergent feature of social life, it collaborates with other social structures (in these cases religion and science) to infuse meaning while enabling and constraining social action. Furthermore, because of this collaboration of structures (science and religion), law may be present in many instances although subordinate. To recognize the presence of law in everyday life is not, therefore, to claim any necessarily overwhelming power for law or legality, although it does suggest that law's durability derives from its overlay with other domains of meaning and thus its ideological availability.

An ideology always represents particular arrangements of power, and 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. Ideologies vary, however, in the degree to which they are contested, conventionalized or institutionalized. Thus, ideology and hegemony can be understood as the ends of a continuum of representations that serve power. 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 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. Just as ideology and hegemony constitute the poles of a continuum of the seen and unseen, contest and convention, norm and deviance, social knowledge and experience vary along a continuum of variable processes of awareness and critique of the forms and structures as well as the openings and possibilities of everyday lives.

To appreciate these links among consciousness, ideology and hegemony, it bears noting that Gramsci's use of the word "consenso" in of his discussion of hegemony, from which we and many other draw inspiration, has generated considerable confusion. Many scholars, relying on different translations, use the term "consensus" rather than "consent" in discussing hegemony, noun rather than verb. This semantic replacement is not trivial in that it implies vastly different process through which power is secured. Consensus suggests a process in which information is exchanged, considered and some degree of "agreement"[or lack thereof] is reached among interacting parties. While such processes certainly do occur, in every interaction there is a prior, and largely unacknowledged, realm of meaning that grounds the communicative and deliberative processes.

This grounding for collective participation raises the spectre of a dominant hegemony emergent within taken for granted, inter-subjective meanings. "[C]onvergence of belief or attitude or its absence presupposes a common formulation that can be opposed," Charles Taylor writes. Like Durkhiem's concept of a social fact, this inter-subjective realm of meaning -- while observable in the thoughts and actions of individual actors -- is not reducible to any individual actor. Taylor writes, "When we speak of *consensus* we speak of beliefs and values which could be the property of a single person, or many, or all; but inter-subjective meanings could not be the property of a single person because they are rooted in social practice (Charles Taylor, "Interpretation and the Science of Man," *The Review of Metaphysics*, 1971, 351) More importantly for our argument here,

dissensus itself is rooted in ideas, language, values that are themselves rarely contested, and often are the ground upon which challenges are constructed.

Gramsci's use of the word *consenso* refers to this non-reducible realm of meaning, rather than to the consensus or dissensus that it enables. The point is that even in cases of contest — regarding what is law or what are legitimate uses of law -- consent may be present insofar as the conflict entails an acceptance of the fundamental categories of thought that make the expression of dissensus possible. The environmental dissidents studied by Fitzvold (2009) and Halliday and Morgan (2013), for instance, invoked law's own claim of transcendence in asserting the righteousness of their cause; in other words, their commitment to the idea of a transcendent, just law underwrote their activism as much as their cynicism about the law as a game.

To further unpack this distinction, consider two different versions of hegemony. In one account, a dominant hegemonic ideology persuades "subordinate groups to believe actively in the values that explain and justify their own subordination" (Scott 1990: 72). As a consequence, they readily comply with laws, rules, and regulations that more powerful groups enact to sustain and enhance the powerful groups' interests. A different version suggests that hegemony achieves law abidingness and conformity through "non violent forms of control exercised through the whole range of dominant cultural institutions and social practices, from schooling, museums, and political parties to religious practice, architectural forms, and the mass media" (Mitchell 1990: 553). In the first account, subordinates provide consent, the version of *consenso*, we are rejecting; in the second, compliance and resignation are sufficient. The growing body of literature on legal consciousness suggests that the first, consenting version of hegemony is untenable as a model of the ways in which legal ideology enacts power. Empirical socio-legal research describes complex interactions between the law and compliance to law, which has never been total nor complete. Not only does law make provision for its own violation, but cynicism about the neutrality and majesty of law has persisted alongside grandiose claims for its transcendent legitimacy, as the studies of environmental activists beautifully illustrate.

The "resigned compliance" version of hegemony, more commonly deployed in socio-legal scholarship, recognizes that conflict and resistance are consistent with the existence of a dominant hegemony. All that is required is that the order of things seem inevitable. "A degree of distaste for, or even hatred of, the domination experienced" is not incompatible with hegemony in this sense in which neither agreement, consensus, nor harmony is necessary. "The claim is not that one's fated condition is loved, only that it is here to stay whether one likes it or not" (Scott 1990: 75). Sociologists sometimes describe what we are referring to as hegemony when they speak of the sedimentation and institutionalization of structures of everyday life. Giddens, for example, talks about "the naturalization of the present" in which existing socioeconomic arrangements, especially those that existed for several generations and centuries, come to be taken for granted (1979: 195). And Bourdieu describes how "every established order tends to produce (to very different degrees and with very different means) the naturalization of its own arbitrariness" (1977: 164). Thus, when law is understood as a hegemonic phenomenon (in

contrast to contested ideology), it refers to this ability to inscribe arbitrary and varied cultural forms with the aura of the natural and inevitable.

Ideologies, even when contested, can be said to distort and mystify experience, to falsely portray unity, and to conceal class relations. But it is not "the truth"- an immutable natural reality knowable through positivist science - that is concealed. Rather, law in its ideological and hegemonic capacities masks the possibilities of alternative understandings and accounts of social relations. By suppressing alternative interpretations, ideologies also deny that they are themselves creations. In short, neither ideology nor hegemony announce themselves as such. For example, the ideologies of economic growth, meritocracy, competitive individualism, desert, and fairness simultaneously construct and deny systems of structured inequality. Therapeutic professionalism, founded on the rhetoric of diagnosis and intervention, denies its role in creating pathologies of mind and body it then seeks to treat.

Hegemonic ideologies, even in the version that assumes only resigned compliance rather than active agreement and consensus, may not merely naturalize the social world but may encourage subordinates to believe that current arrangements are just, that is, the justice that is possible. What is perceived as *is* becomes what *ought* to be, "necessity becomes virtue" (Scott 1990: 76). Imagining an alternative system becomes not only difficult, not only undesirable, but undesired. Even though serfs, peasants, and other widely subordinated groups are regularly imagining alternative worlds, hegemony may nonetheless persist. The resistant imaginings of peasant farmers that Scott (1990:80) describes from his fieldwork merely upend – and only in imagination - the system of subordination in which the peasants struggle. Those peasants' imagined revolutions do not question the inevitability of stratification and inequality, merely their own subordinate location (misplacement) in a world of purportedly inevitable and apparently natural inequality. Thus, in this example of peasants' imagined revolutions, the notions of inequality and stratification are hegemonic. In contrast to the peasants' embrace of hegemonic inequality, Fitzvold, Halliday and Morgan's accounts of dissident environmentalists, offer signs of emergent counter-hegemonic ideology in the degree to which they reject the ways in which state law naturalizes the exploitation and commodification of the earth.

The "non-reducible realm of meaning" should be the focus of legal consciousness research.

In sum, legal consciousness is not a trait of social actors nor solely ideational; it is a type of collective social practice reflecting and forming social structures. Legal consciousness is a reciprocal process in which the meanings given by social actors (both individual and collective) to their world become patterned, stabilized, and objectified. These meanings, once institutionalized, become part of the material and discursive systems that limit and constrain future meaning making. By virtue of being institutionalized, these systems are resilient, but not invulnerable to critique and change.

Having argued that legal consciousness is a collective process framed but not determined by prior sedimented meanings, we close this section by asking the necessary next question. How does this process appear to have an a priori existence and integrity, what Andrew Abbott has called “thingness.” If, in other words, legality is an emergent aspect of social relations, we need to figure out how the multitude of interactions that form everyday life come to assume the stability, unity and consistency we recognize as a social structure?

III. Boundaries, processes and entities

Recent advances in social theory offer a coda to this discussion of legal consciousness and to the workshop focus on boundaries, demarcating what is in and out of law, and hopefully an advanced on work thus far. Rather than begin with institutions, or social actors, recent scholarship by Latour in *Reassembling the Social* (date) and Abbott in *Time Matters* (2001) offer models of social *processes* rather than social categories or things; they describe how actions (events and process) become entities. Implicit in the question “what are the boundaries of law”, for instance, is the idea that law as an entity exists prior to the construction of its boundaries; in other words, that something called “the law” exists and is only then encapsulated or bounded in particular ways. Latour and Abbott question that ontology proposing instead that boundaries emerge *before* entities. With this reversal, Abbott suggests that we should talk about the “things of boundaries” rather than the “boundaries of things.”

Although, we experience the world as constituted by entities such as persons, the law, the family, or the state — the “thingness” we attribute to the social world ignores the processes that constitute both the entity, and the appearance of its ontological integrity. Taking interactionism as the ground level of sociological analysis, Abbott suggests that we excavate those processes offering what he calls a *processual* view of social structure. Is “a social entity a merely accidental stability in a process, a kind of standing wave? [Are] boundaries in fact literally ever-changing and, hence, not in any real sense boundaries at all?” How can we explain both stasis and change, after all that is *the* question for sociological theory. If we can better model what we mean by a boundary, and the relations among boundaries, we might be able to identify “the conditions under which social entities can be said to come into or leave existence.” And, we might then have stronger theoretical grounding to understand the long duree of legality, and the variety of models of legal consciousness.

Both Abbott and Latour are strong interactionists for whom the world is one of events that are contingently stabilized into entities. Organizations, fields, institutions, even persons are formed through the enactment and identification of differences that are then collected in more or less stable configurations.¹ The general process begins with the

¹ Latour, *Reassembling the Social*, p. 7 (?) describes CPL as an example of research that assembles a social institution from an account of its component transactions – mediations and intermediations in Latour’s phrase.

alignment of “points of difference,” which are identified, yoked together, and finally coalesce into what appears to be a more or less stable entity.

An organization is a set of transactions that are later linked into a functional unit that could be said to be the site of these transactions. A legal corporation is a set of market (and other) relations that are later linked in a certain, specified fashion. A profession is a set of turf battles that are later yoked into a single defensible position in the system of professions. (Abbott, PAGE)

Latour talks about the various differences and yoking together in terms of “mediations and translations,” Abbott talks about how “locally random sites of difference become proto-boundaries only when they line up into some kind of extended opposition along some single axis of difference.”

Thus, we might have two kinds of people who do some task and find that difference lining up into a systematic difference across many work sites or across several types of institutions. The kind of boundary that emerged between systems analysts and programmers in the 1970s and 1980s is an example of this difference. It appeared and reappeared independently in organization after organization. In this case, we have an extended set of boundary points that began to take on a special reality by virtue of the precedence of one or a limited number of types of difference. The names were conveniences to describe the boundary, which emerged well before there was any really systematic social reality to the entity "systems analysis" or "programming." It is rather that a dimension of difference-in this case over how one approaches a computing problem emerges across a number of local settings to produce a proto-boundary (Abbott 2001: 269)

To speak of the emergence of an entity, then, means that two or more proto-boundaries are aligned so that such that one side of each becomes defined as "inside" the same entity. This yoking or tying together often takes place by either filling a social space, such as the emergence of social work in the late 19th and early 20th century. Alternatively, an entity might emerge by dividing an existing crowded space. Bernard Harcourt has documented, for instance, the ways in which beginning in the 1970s the prison took over the role of mental hospitals in the business of confining persons who were deemed unable to live in civil society. In the latter case, Abbott suggests that the only way to create an entity is to delegitimize old differences. The emergence of equity law, or legal services offer similar examples.

A processual theory of social entities emphasizes the ways in which social structures emerge from interactions in time and space. Without having to conjure an imagined big bang of social life, we might simply assert that at any moment in time, there exist zones or noticeable collections of differences among the transactions, which can be yoked or assembled into social entities. There are many ways for the yoking or assembling to take place, as we just mentioned, but, “if this proto-entity is to persist, it must have both internal reproduction and some kind of causal authority.” Abbott concludes by noting that entity status usually involves more than one dimension of

difference. “It may well be that social entities cannot exist without the tension provided by the differing pulls of different structural dimensions. That is, *what gives entities their structural resilience is their defensibility, their endurance in several different dimensions of difference*” [our emphasis].

Here we come full circle to the model of legal consciousness explaining the durability of legality as a structure of social action. “Strength lies in overlapping cohesiveness of several kinds,” Abbott writes. The durability and power of an institution thus derives from what some might call its polyvocality its ability to operate in multiple spheres and transactions infusing meanings and norms. An institution is causally more effective when it can bring its “force to bear in so many different arenas, where [it] can play so many different roles.”

This polyvocality and overlapping cohesiveness may also help explain how this durable institutional nonetheless alters over time. If we rest content with typologies, we have not identified either the processes by which institutions persist nor how they change. It turns out that narrative and normative contradictions characterize not only law but other institutions as well (Ewick and Silbey 2002). Those plural narratives not only create a protective covering that inures institutions against more systemic challenge, but social structures actually rely upon the articulation and polyvocality of each distinct narrative in order to exist. As a corollary, and most important for understanding the importance the model of legality as plural schemas, we suggest that that absence of that polyvocality, or what we might call significant imbalances in the narrative constitution of a social structure, create vulnerability and increase the likelihood of structural transformation. If we, and Abbott, are correct about structures relying upon the contradictory rendering of experience, it should be possible to trace the cultural ascendance of institutions and social structures such as law to the degree of contradiction they encompass. By taking a broad historical view, we should be able to trace the rise and fall of institutions to the sorts of stories people tell, or are enabled to tell by the availability of diverse, and sometimes contradictory schemas.

As a final, and legal example, consider the canonical descriptions of the development of equity jurisdiction within Britain as an instance of how ideological consistency rather than complexity erodes institutional authority, enabling change over time. Some authors describe the invention of equity as a means of alleviating what had become an overly formalistic system of writs and actions that limited the possibilities and range of legal redress for all sorts of grievances. By creating an alternative route to the Lord Chancellors office, the British crown kept itself in the business of dispute resolution when its maturing legal processes had threatened to make the law all but irrelevant to most, or many, of its citizens. Other accounts describe equity as a means of moderating and softening the rigor of abstract generalizations which are always at some point found to be incomplete. The moderations are regarded as equitable relief to distinguish it “from the normal rule which would otherwise be enforced.” Thus, equity is seen as a correction for either universal ambitions or the practical constraints of legal rules. In any case, the parallel existence of jurisdictions and processes for law and for equity highlights the basic duality. This example suggests to us that it was the absence of heterogeneous

processes and jurisdictions that was experienced as a threat to the power and durability of legal processes.

In conclusion, legal consciousness can be understood as the meanings persons attach to legal phenomena, and may be differentially distributed among populations to form taxonomies. Legal consciousness may also be understood as the processes of participating in the constitution of the social structure of legality. As participation in the constitution of legality, the meanings attributed to legal phenomena would not constitute types of consciousness but would provide empirical evidence of the circulating schemas that can be organized to reveal a polyvocal, yet durable entity, institution or social structure of legality.

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