

Going Where Theory Leads

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Although law has become marginalized as a subject within sociology and the social sciences generally, it originally had a central place in classical sociological theory. When law had this more central place, its conceptualization was more capacious than conceptualizations that came to predominate in twentieth century American scholarship. Durkheim gave considerable attention to law throughout his writings, theorizing that law was the fundamental material social fact to get at such immaterial social facts as the collective conscience. Within societies with an advanced division of labor, law displaced the traditional role of religion, providing the grounds for a new civic ethic of interdependence and reciprocity. For Durkheim, "law is the example par excellence of the social fact. It is a visible symbol of all that is essentially social" (Hunt, 1978:65). For Weber too, law was a central focus, the lynch pin in his description of processes modernization. Modernity was characterized by a shift in the forms of domination (command relationships in which obedience is experienced as both voluntary and obligatory), epitomized by the rise of formal legal rationality which itself is associated with the rise of bureaucratic administration. In classical social theory, the law is not simply the armed receptacle for values and priorities determined elsewhere; nor is the law merely a limited device of the modern state as conceived in positivist and behaviorist perspectives. It is part of the complex social totality in which law constitutes and is constituted, shapes and is shaped. Despite the centrality of law in classical sociological theory, the twentieth-century understanding of the relationship between law and society shifted: law was dislodged from a central role in the constitution of society to a peripheral position as a technical instrument of the modern state. What law tells us *about* society became less important than what law does *to* society. Law became defined primarily in terms of the processes of creating and enforcing formal rules, as machine rather than as meaning.

Beginning in the 1960s with the work of Philip Selznick, socio-cultural analyses of law gained renewed energy and attention, spawning what are now several generations of scholars mapping the cultural lives of law. Selznick eschewed any transcendental grounding and plays down the absolute authority of law. He suggested instead that legality is like a Weberian ideal type which humanly made law approximates and to which it aspires. He described legality as a socially constructed ideal, albeit an imperfectly institutionalized ideal, for limiting arbitrariness in social organizations and behavior (1969:13). Although a product of self reflection and systematic critique, legality was presented as a practical norm, an empirically derived concept of variable instantiation.

Some years ago, Patricia Ewick and I set out in a Selznickian trek to understand how, in the face of enormous variability and contradictions, law nonetheless manages to be experienced as a powerful, determining institution. We attempted to understand how law is emergent in the activities of ordinary people. Rejecting overly idealist or materialist conceptions, exclusively agential or structural determinacy, we introduced the concept of legality as a reciprocal process in which actions and interpretations given by individuals to their world -- and law and legal institutions as part of the lived world -- become repeated,

patterned, stabilized as part of the material and discursive systems that limit and constrain future meaning-making. To frame our inquiries, we deployed concepts from contemporary social theory (e.g. Bourdieu, Connell, de Certeau, Foucault, Garfinkel, Giddens, Goffman, Smith and others). We found that in pursuing our research, we had to deal with some of the central theoretical controversies, and it is our belief that what we learned makes a contribution not just to the sociology of the law, but also to social theory.

We claim that legality is a structural component of society. (We use the word *legality* to refer to the meanings, sources of authority, and cultural practices that are recognized as legal, regardless of who employs them or for what ends. Legality is an analytic term rather than a socially approved state of affairs. In this rendering, people may invoke and enact legality in ways neither approved nor acknowledged by law.) Legality consists of cultural schemas and resources that operate to define and pattern social life (Sewell 1992). Through repeated invocations of the law, legal concepts and terminology, as well as through imaginative and unusual associations between legality and other social structures, legality is constituted through everyday actions and practices. Legality is produced through every package of food and electrical appliance with a label warning us about its dangers. Newspapers, television, novels, plays, magazines and movies are saturated with images of legality, while at the same time, invoking legal claims, such as copyright. Legality is enacted every time we park a car, deliver clothing for dry-cleaning, or leave an umbrella in a cloakroom. We pay our bills because they are due; we respect our neighbor's property because it is theirs; we carry plastic bags when we walk our dog in the park because it is public property. We rarely consider, however, through what collective judgments and procedures we have defined "coming due", "theirs", or public property. If, by some chance, we trace the source of these meanings to some legal institution or practices, the specifically legal origin is fixed so far away in time and place that the circumstances of their invention have been long forgotten. As a result, contracts and property seem not only necessary but natural and inevitable parts of social life. This pervasiveness of law - its semiotic, visual, discursive profusion - is the daily construction of legality.

If, as we argue, legality is an emergent rather than necessary and determinate aspect of social relations, we still need to answer the theoretical question as to how the multitude of interactions that form everyday life come to assume the unity and consistency we recognize as a social structure and a durable institution. Thus, our research focused on the ways in which local, concrete actions accumulate into systemic institutions and structures (Ewick and Silbey 1998). We document situations in which local processes recursively reproduce macro social structures and institutions and, at the same time, provide openings for creativity in reshaping those structures. Diverse, sometimes deviant or resistant, and often repetitious, interactions of everyday life accumulate to produce structures with enough integrity and unity to have concrete effects back upon the very interactions out of which they emerge. Despite the diversity of actions and experiences, law and legality achieve their recognizable character because individual transactions are crafted out of a limited array of what are generally available cultural schemas. Moreover, these cultural schemas are also being constantly reproduced and recreated through local invocations and inventions.

Out of the thousands of individual accounts of law we collected, more than 5900 events were described, we identified three schemas, or publicly circulating narratives of legality, running like a braided plait through the discrete stories people told us. Each of these three understandings draws on a different cultural schema; each invokes a different justification for law; each expresses a different explanation of the capacities and limits of legal action; and finally, each of the three narratives locates legality differently in

time and space, positioning the speaker differently in relation to law and legality (as a supplicant, player, or resister).

Recently we have given more attention to the theoretical significance of the stories we were told of resistance to law. Rather than focus on the act reported, we pay attention to the fact that we were told about this act of resistance. How might the *narrative* of the act be understood in relation to theories of structure and power? Conventional analysis of individual acts of resistance usually describe them as politically impotent, incapable of producing an effective challenge to institutionalized power. Moreover, by providing temporary relief of the burdens power imposes, individual tactical resistances may make insufferable conditions tolerable and thereby inoculate power from sustained and more powerful challenges. But these conventional analyses invoke a conception of structure as relatively fixed, and as existing prior to social action rather than continually reproduced and recreated through social transactions. If we take our cultural-constitutive perspective seriously, we are theoretically compelled to rethink the significance of narratives of resistant acts. If the social world is being made (and remade) through daily social transactions, then individual acts of resistance must also be a part of the constitution of the world. We cannot reject out of hand the myriad acts of resistance that clearly leave an imprint on organizational practices. If individual acts of resistance do not overturn institutions, might they play some other role in the constitution of social relations? We reexamined the stories of resistance to law and realized that each of these stories included a recognition of how social structures work to limit opportunities to redress grievances, demand or obtain justice. The acts of resistance inverted the usual structure of relations, e.g. by leap frogging over layers of bureaucracy, by adopting a role more acceptable to legal authority, by occupying the time or space of more powerful others. To understand how these stories might contribute to the constitution of everyday life, we began exploring theories of storytelling and narrative. This, in turn, led us to theorize a distinction between subversive stories and hegemonic tales in order to develop a sociology of narrative (Ewick and Silbey 1985). In our more recent work, we extended this analysis to describe how stories of resistance, rather than the acts themselves, extend temporally and socially what might otherwise be an individual, discrete, and ephemeral transaction (Ewick and Silbey 2003).

Adopting a concept of power as a contingent outcome in a social transaction, we emphasize that both domination and its resistance draws from a common pool of socio-cultural resources, including symbolic, linguistic, organizational and material phenomena. Although acts of resistance may not cumulate to produce institutional change, they may nonetheless have consequences beyond the specific social transaction. A chief means for extending the social consequences of resistance is through the transformation of an act of resistance into a story of resistance. These stories of resistance express, as an integral part of the narrative, a recognition of being powerless in a situation of power. In addition, they express an appreciation of features of social structure (e.g. social roles, rules or norms, hierarchy, time, space) as they operate within the transaction. Based upon an appreciation of the structural conditions of power and authority, stories of resistance can become instructions about both the sources and limitations of power, providing accounts of how these familiar structural resources can be mobilized to reverse a probable trajectory of power. The stories make an implicit claim about not just the possibility but the justice and morality of resistance to authority. Because the stories are told in interaction with others, they become part of a stream of socio-cultural knowledge about how social structures work to distribute power and disadvantage.

Thus, beginning from classical social theories locating law as a central institution of modern society, through theories of the normative and cultural role of law, we moved from a study of how people understand and use law to an account of the durability and power of legal institutions, not despite but as a result of variable instantiation and contradiction. Following where the theories seem to lead us, we found ourselves moving from the sociology of law through cultural analysis to new territory in the sociology of narrative.

References

- Ewick, Patricia and Susan S. Silbey, 1995. "Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative," *Law & Society Review*, Volume 29, Number 2, pp. 197-226.
- _____. 1998. *The Common Place of Law: Stories from Everyday Life*. Chicago: University of Chicago Press.
- _____. 2003. "Narrating Social Structure: Stories of Resistance to Legal Authority," *American Journal of Sociology*, Vol 109, Number 1, (May 2003), pp1328-1372.
- Selznick, Philip, 1969. *Law, Society and Industrial Justice*. New Brunswick, NJ: Transaction Books edition, 1980.
- Sewell, William H. Jr. (1992) "A Theory of Structure: Duality, Agency and Transformation," *American Journal of Sociology*, Volume 98, Number 1 (July 1992) pp. 1-29.