Legal culture and cultures of legality

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Culture is a hotly debated and contested construct, evidenced by the existence and content of this handbook. The importation of this term into legal scholarship is fraught with unfortunate confusion. The meaning of the word "culture" alone is unstable, theoretically and empirically; adding "legal" to "culture" only exacerbates the conceptual tumult. Some confusion derives from intermingling two meanings of culture. One meaning names a particular world of beliefs and practices associated with a specific group. The second meaning is analytic rather than empirical, referring to the outcome of social analysis—an abstracted *system* of symbols and meanings, both the product and context of social action. In the former use, referring to the distinctive customs, opinions, and practices of a particular group or society, the term is often used in the plural, as in the legal cultures of Japan and China, or in reference to African or Latin cultures. In the latter analytic sense, the word is used in the singular, as in legal culture, or the culture of academia.

Since the cultural turn of the 1980s, use of the word culture has proliferated so much that the historic confusion has infested scholarship in almost every field of inquiry where it is invoked. In addition to the thousands of journal articles, one can find hundreds of books with "law" and "culture" or "legal culture" in the title. Some of these call for cultural study of law as if it had not been going on for decades; others entitle collections of diverse essays under a general rubric of law and culture; yet others do treat culture as a serious theoretical concept (e.g. Benton 2002; Bracey 2006; Rosen 2006). The unprecedented and rapidly proliferating use of the concept has unfortunately exacerbated the traditionally unruly discourse. In this essay, I hope to offer helpful clarification, distinguish alternative uses, and provide a short lexicon to some of the concepts of legal culture's progeny in legal scholarship—legal ideology, legal consciousness, legality, and cultures of legality.

A concise conceptualization

Contemporary cultural analyses have moved beyond conceptions of culture as either everything humanly produced or as only what calls itself culture (e.g. arts, music, theater,

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fashion, literature, religion, media, and education) to conceive of culture as a system of symbols and meanings and their associated social practices. In its most effective and theoretically plausible uses, the concept of culture is invoked (1) to recognize signs and performances, meanings, and actions as inseparable; yet (2) "*to disentangle, for the purpose of analysis* [only], the semiotic influences on action from the other sorts of influences—demographic, geographical, biological, technological, economic, and so on—that they are necessarily mixed with in any concrete sequence of behavior" (Sewell 2005: 160, emphasis added). (3) Although formal organizational attributes and human interactions share symbolic and cognitive resources, many cultural resources are discrete, local, and intended for specific purposes. Nonetheless, (4) it is possible to observe general patterns so that we are able to speak of a culture, or cultural system, at specified scales and levels of social organization. "System and practice are complementary concepts: each presupposes the other" (Sewell 2005: 164), although the constituent practices are neither uniform, logical, static, nor autonomous. (5) As a collection of semiotic resources deployed in interactions (Swidler 1986), "culture is not a power, something to which social events, behaviors, institutions, or processes can be causally attributed; it is a context, something within which [events, behaviors, institutions, and processes] can be intelligibly—that is, thickly—described" (Geertz 1973: 14). (6) Variation and conflict concerning the meaning and use of these symbols and resources are likely and expected because at its core culture "is an intricate system of claims about how to understand the world and act on it" (Perin 2005: xii; cf. Silbey 2009).

Genesis of the term legal culture

Despite often abstruse debate, many scholars find the concept of culture particularly useful when they want to focus on aspects of legal action that are not confined to official legal texts, roles, performances, or offices. Lawrence Friedman (1975) is credited with introducing the concept as a means of emphasizing the fact that law was best understood and described as a system, a product of social forces, and itself a conduit of those same forces. Friedman was a founding father of American (socio-legal) law and society scholarship and as such was intent on making explicit the unofficial, and what otherwise would have been thought of as non-legal, behaviors as nonetheless important for shaping what is more conventionally understood as legal. Although law can be defined as "a set of rules or norms, written or unwritten, about right and wrong behavior, duties, and rights" (Friedman 1975: 2), according to Friedman this conventional notion attributed too much independence and efficacy to the law on the books and acknowledged too little the power and predictability of what is often called the law in action. To advance a social scientific study of law in action, Friedman adopted the model of a system—a set of structures that processes inputs (demands and resources) from an environment to which it sends its outputs (functions) in an ongoing recursive feedback loop. He identified three central components of the legal system: (1) the social and legal forces that, in some way, press in and make "the law," the inputs; (2) the law itself—structures and rules that process inputs; and (3) the impact of law on behavior in the outside world, the outputs or functions of the system. "Where the law comes from and what it accomplishes—the first and third terms—are essentially the *social* study of law" (Friedman 1975: 3, emphasis added).

Friedman chose the phrase legal culture to name the subject of this social study of law, the "social forces ... constantly at work on the law," "those parts of general

culture—customs, opinions, ways of doing and thinking—that bend social forces toward or away from the law" (1975: 15). As an analytic term, legal culture emphasized the role of taken-for-granted and tacit actions that operated on and within the interactions of the legal system and its environment. As a descriptive term, it identified a number of related phenomena—public knowledge of and attitudes toward the legal system as well as patterns of citizen behavior with respect to the legal system. These included judgments about the law's fairness, legitimacy, and utility. To the extent that patterns of attitudes and behaviors are discernible within a population and vary from one group or state to another, it was possible, Friedman said, to speak of the legal culture(s) of groups, organizations, or states (1975: 194). As an example of variations within legal cultures, Friedman distinguished the internal legal culture of professionals working in the system from the external legal culture of citizens interacting with the system. As the "ideas, values, expectations, and attitudes toward law and legal institutions, which some public or some part of the public holds," legal culture was meant to name a range of phenomena that would be, in principle, measurable (Friedman 1997: 34). Although Friedman never elaborately theorized the concept of legal culture even as he reformulated it several times in different texts, he remained convinced that the concept was useful as a way of "lining up a range of phenomena into one very general category" (1997: 33).

Confusions and debates

Following the concept's introduction, researchers began using it in a range of empirical projects, including studies of children's knowledge of and attitudes to law (Tapp and Kohlberg 1971; Tapp and Levine 1974), rights consciousness among Americans (Scheingold 1974), the practices of criminal courts (Nardulli *et al.* 1988; Kritzer and Zemans 1993), comparative analysis of different groups and nation-states (Kidder and Hostetler 1990; Tanase 1990; Hamilton and Sanders 1992; Bierbrauer 1994; Barzilai 1997; Gibson and Gouws 1997; Gibson and Caldeira 1997; French 1998; Chanock 2001). For those who attempt to measure variations in legal cultures, the indicators include such diverse phenomena as litigation rates and institutional infrastructures (Blankenburg 1994, 1997) or crime rates (Kawashima 1963).

Predictably, given the historic confusion surrounding the term, debates have arisen among researchers who have attempted to use the concept in empirical projects (Nelken 1997a, 1997b). The most persistent divide and heated dispute seem to align with the distinction named earlier, between those who use culture as an analytic concept within a more developed theory of social relations and those who view legal culture as concrete, measurable phenomena. Those who attempted to use the concept as a focus for comparative research moved quickly toward measurement and a more limited concept. For some of these researchers, when the concept of legal culture is used with insufficient specificity the distinction between all of culture and legal culture is unclear, and what constitutes the legal seems unspecified (Blankenburg 1994, 1997). Some researchers insist that legal culture is that which is produced and studied most effectively among professional legal actors, while others insist that such a narrow definition belies the theoretical utility of the concept of legal culture as a way of mapping the connections between law and everyday life—exactly the analytically conceived feedback loop that Friedman posited in his notion of a legal system.

Cotterrell has produced one of the most sustained critiques of the concept (1997, 2006). He insists that "everything about law's institutions and conceptual character needs to be understood in relation to the social conditions which have given rise to it. In this sense law is indeed an expression of culture" (Cotterrell 1992 [1984]: 26). Nonetheless, Cotterrell is unwilling to accept a concept of legal culture if it is indistinguishable from other forms of social control or normative ordering. Somewhere between a "thoroughgoing legal pluralism" (Cotterrell 1992 [1984]: 42) in which "law can be distinguished from other social norms only in vague terms" and a too narrow, too simple conception of state law, Cotterrell seeks a middle ground that recognizes the cultural influences on and from law but yet retains a recognition of the distinctiveness of legal forms and doctrines.

To some extent, these socio-legal debates reproduce controversies plaguing the concept of culture generally. The most important issues are less empirical than theoretical. The measurement problems decried by those studying national legal cultures derive from the theoretical questions. How is legal culture evident and measurable and yet diffuse and abstract? What is the relative importance of causal explanation as against description and interpretive understanding? How central is formal legal doctrine in understanding participation in, support for, and consequences of law?

Constitutive theories of legal culture

The cultural turn that swept across the humanities and social sciences in the 1980s brought some clarification to the analytic concept, if not entirely for those seeking precise quantifiable measurement. In the interdisciplinary community of law and society scholars, psychologists, anthropologists, sociologists, historians, geographers, and law professors spoke across traditional divides, even if they often spoke from and retreated back to their disciplines. They worked in the crosshairs of different disciplinary lenses, tacking back and forth, and producing—I think much before it happened in most of the disciplines—a new set of theories and methods, exemplifying some of the most important insights that would eventually emerge in most social science fields. What was that insight? That the "site" of social action matters to the meaning and organization of that action, whether that site was legal, scientific, or organizational. There was a turn away from large-scale theory development and abstract modeling to more situated, contextualized analyses of sites of social action. Researchers were finding ways to bridge the epistemological and theoretical paradigms that had both fueled their knowledge production and simultaneously created deep chasms between and within disciplines. The emergence of cultural analysis signaled an effort to synthesize behavioral and structural as well as micro and macro perspectives.

In socio-legal scholarship the cultural turn had three components. First, it abandoned a "law-first" paradigm of research (Sarat and Kearns 1993). Rather than beginning with legal rules and materials to trace how policies or purposes are achieved or not, scholars turned to ordinary daily life to find, if they were there, the traces of law within. They were as interested in the absences and silences where law could have been and was not as they were interested in the explicit signs of positive law. Law and society had already moved beyond what Friedman (1985: 29) had identified as lawyer's law ("of interest to legal practitioners and theorists") to legal acts ("the processes of administrative governance, police behavior") and legal behavior (the unofficial work of legal professionals).

Cultural analysis added a new focus on the unofficial, non-professional actors—citizens, legal laymen—as they take account of, anticipate, imagine, or fail to imagine legal acts and ideas. It shifted empirical focus from a preoccupation with legal actors and legal materials to the everyday life-world of ordinary people.

Second, the cultural turn abandoned the predominant focus on measurable behavior that preoccupied those who wanted to compare national legal cultures and reinvigorated 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 also a set of conceptual categories and schema that help construct, compose, 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, drawing particularly from anthropology and qualitative sociology that had long been studying actors' meaning-making in other than legal 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 culture.* 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, fueling that conceptual muddle that has characterized deployment of the word culture. New theoretical materials and research methods were necessary (cf. Gordon 1984; Munger and Seron 1984). These involved more intensive study of local cultures, native texts, and interpretive hermeneutical techniques for inhabiting and representing the quotidian world to construct better accounts of how law works, or, to put it another way, how legality is an ongoing structure of social action (Ewick and Silbey 1998: 33–56). The new research efforts also involved attention to and appropriation of the venerable traditions of European social theory that had been addressing questions of consciousness, ideology, and hegemony in an effort to understand how systems of domination are not only tolerated but embraced by subordinate populations.

What became known as the constitutive perspective, or cultural turn, recaptured some of the critical tradition of law and society research that had been waning after decades of path-breaking scholarship. Focused on the everyday life of citizens, scholars also began to interrogate the ideals and principles that legal institutions announce. Even if they fail to consistently implement them, might these policy efforts and abstract principles nonetheless play important roles in everyday life and be a part 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—despite being incomplete as descriptions of how law works—might be part of the popularly shared understandings of what law is. They might serve as aspirations that help shape and mobilize support for legal institutions. They might also be part of what allowed the system to appear to be what Hannah Arendt (1972: 178) labeled a headless tyrant. In this approach, researchers reconceived the relations between legal texts and actions and the commonplace events and interpretations through which, they theorized, legality circulates.

From the mid-1980s to the present, a steady stream of empirical literature described the mediating processes through which local practices are aggregated and

condensed into systematic institutionalized power (cf. Silbey 1992, 1998, 2005a, 2005b, 2009). Unfortunately, multiple uses of similar terms recreated the conceptual confusion that had achieved, for a while, quiescence through constitutive/cultural theories. Within the more general discourse on legal culture, however, one can find four strong threads:

1 *Legal ideology*: Without necessarily using the term legal culture, research on legal ideology explores "the power at work in and through law. Studies of law and ideology also suggest that the power associated with signs and symbols is being exercised unjustly." Thus, in studies of legal culture, "adopting and deploying the term ideology is a form of social criticism" (Silbey 1998; cf. Ewick 2006).
2 *Legal consciousness*: One can also find studies of legal consciousness, defined as participation in the construction of legality, where legality refers to the meanings, sources of authority, and cultural practices that are commonly recognized as legal, regardless of who employs them or for what ends (Ewick and Silbey 1998: 22). As with legal culture, however, we can also find many and confusing uses of the term legality, which is an English language term, meaning "that which is within the specifications and boundaries of formal law." Many law review articles use the term this way, specifically distinguishing culture and legality as two independent social phenomena, exactly what constitutive theories of legal culture are meant to overcome. Constitutive socio-legal theories treat legal culture and/or legality as a set of schema or narratives circulating in popular discourse, sustaining legal hegemony and creating, or failing to create, opportunities for resistance. Such research is not limited to the US (see Cowan 2004; Cooper 1995; Hertogh 2004; Pelisse 2004; cf. Silbey 2005a), although work focused on the discourses of law and legality in colonial and post-colonial "theatres" more often refers to the "cultures of legality ... constitutive of colonial society" (Comaroff 2001; Maurer 2004).
3 *Legalities, cultures of legality, and counter-law*: Very recent work invokes the phrase cultures of legality to identify and highlight the fetishization of popular constructions—such as legality or rule of law—that are actively and broadly mobilized for diverse political (national and international) projects. In discussions of corporate capitalism, financial transparency, globalization, state-building, as well as analyses of resistance movements, law is invoked for legitimation not simply of itself but for the specific interests or institutions being promoted. Comaroff and Comaroff (2004, 2006) ask why the discourse of law and disorder are so often conjoined, especially marking analyses of post-colonial situations. Why is law posed as the alternative of disorder? Do legal procedures and discourses offer mechanisms of commensuration (Espeland and Stevens 1998), real or otherwise, to manage what seems disordered among globally diverse norms, structures, and processes? Does legality suggest the universal availability of historically successful, although limited, transactional channels and mechanisms—so much so that legality's myriad forms and cultural instantiations can be both buried and fetishized under the universal rubric of the rule of law? Some authors, also writing from a critical position, talk about the cultures of legality through the term counter-law, emphasizing the illiberal use of law (Ericson 2007; Levi 2008). By using the phrase cultures of legality, authors call attention to the excess meanings that are being deployed for purposes and interests not limited to law or legality.

The unruly slippage in the language may derive as much from authors' normative commitments (wanting to both valorize different cultures yet identify common ground, to both relativize and normatively support) as well as from professional interests in carving distinct communities through terminological variation. Some of the linguistic variation may also indicate an attempt to differentiate studies of legal culture from research on legal attitudes and opinions that fail to theorize or attend to the aggregation or cultural system in which persons are participating (see Silbey 2005a).

4 *The structure of legality*: Finally, Ewick and Silbey (1998) describe a general pattern in legality, which they refer to as the structure of legality; they also suggest that the narrative and normative plurality characteristic of legality is apparent in other institutions and social structures (Ewick and Silbey 2002). Legal culture, or the schematic structure of legality, is a dialectic composed of general normative aspirations and particular grounded understandings of social relations. A general, ahistorical, truth (the objective rational organization of legal thought, disinterested decision-making) is constructed alongside, but as essentially incomparable to, particular and local practices (unequal quality of legal representation, the inaccessibility of bureaucratic agents, the violence of the police). The apparent incomparability of the general and the particular conceals the social organization linking the ideals of due process to diverse, uneven material practices, including unequal access and the mediating role of lawyers. Thus, legality becomes a place where processes are fair, decisions are reasoned, and the rules are known beforehand, at the same time as it is a place where justice is only partially achieved, if at all—where public defenders don't show up, sick old women cannot get disability benefits, judges act irrationally and with prejudice, and the haves come out ahead (Ewick and Silbey 1999).

Any singular account of legality, or the rule of law and the global spread of its rationality, for example, conceals the social organization of law by effacing the connections between the concrete particular and the transcendent general. Because legality has this complexity—among and within its several schema—legality can be a hegemonic structure of society, embracing the range of conventional experiences of law. Any particular experience or account can fit within the diversity of the whole. Rather than simply an idealized set of ambitions and hopes, in the face of human variation, agency, and interest, observation suggests, legality operates as both an ideal as well as a space of practical action. As a consequence, power and privilege can be preserved through what appears to be the irreconcilability of the particular and the general. Thus, this analysis of legal culture argues that instead of resting with one account, legality or legal culture should be understood in its plaited heterogeneity.

Further study of legal culture

Although one of the themes of this essay has been the unfortunate conceptual confusion that has accompanied the widespread use of the concept of legal culture, the research has been unusually generative. Promising avenues for further study have been suggested. First, a well-designed project might help to resolve continuing debates about the theoretical definition and modes of analysis of legal culture. An ambitious project of common data collection using a standard protocol developed for cultural analysis across national

sites might help to systematically map cultures of legality, resolve inconsistencies in the current literature, and advance theory on the spread, support, or resistance to the rule of law. In other words, by adopting some of the sampling strategies of large comparative projects but deploying the close observation, in-depth interviewing, and discursive analysis of cultural studies, a comparative project might produce important theoretical as well as empirical advance.

Second, Maurer (2004) suggests that some of the confusion and theoretical exhaustion apparent in studies of legal culture might be addressed by adopting a conceptual innovation from social studies of science. Through close empirical inquiry, socio-legal scholars had discovered law everywhere, not only in courtrooms, prisons, and law offices, but in hospitals, bedrooms, schoolrooms, shops, and certainly in theaters, films, novels, as well as outer space (Silbey 1997). They also noted the places where law ought to be but is not. Similarly, "in *socializing* the natural facts with which scientific inquiry contends," Maurer (2004) worries that social studies of science may have come up against the same theoretical exhaustion, discovering more and more sociality in science just as law and society scholars discovered that "the law is all over" (Sarat 1990). However, science studies have a unique insight, which legal scholars are now only beginning to pick up (Valverde 2008). Social studies of science push against theoretical exhaustion and anthropocentric accounts of scientific culture by providing analyses of the "network of human and nonhuman agents that, together, push back against" the orthodoxy of social construction, and "in the process make their own moral—as well as material—claims known" (Maurer 2004: 848). Studies of legal culture need to do the same (Latour 2004).

Third and finally, Ewick and Silbey (2002) suggest that cultural analyses might provide avenues for studying long-term institutional and social change—a central question in sociology. If we observe cultural heterogeneity and contradiction in a variety of social institutions, is it possible that competing and contradictory accounts sustain those institutions as structures of social action? Is it possible that the alternative narratives not only create a protective covering that inures institutions against more systemic challenge, but that structures actually rely upon the articulation and polyvocality of each distinct narrative in order to exist? As a corollary, might the absence of that polyvocality, or what we might call significant imbalances in the narrative constitution of social structures, create vulnerability and increase the likelihood of structural transformation? If cultural analyses show that social structures rely on the contradictory rendering of experience for both legitimation and durability over time, 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, discursive referents or schemas.

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