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## Review Article

MARC HERTOUGH, *Nobody's Law: Legal Consciousness and Legal Alienation in Everyday Life*. London: Palgrave Macmillan, 2018, pp. 215, ISBN 978-1-137-60396-8, £49.99 (hbk)

## Introduction<sup>i</sup>

In her 2005 essay 'After Legal Consciousness', reviewing the field of legal consciousness research, Susan Silbey proposed that "it might be time to move on" from its study (Silbey 2005: 323). The field, she felt, had lost its way and had drifted too far from its original underlying purpose.

This was a striking suggestion, not least because, only seven years previously, Silbey had produced one of the most empirically and theoretically rich studies of legal consciousness to date (Ewick and Silbey, 1998). Yet, despite Silbey's stature in the field,<sup>ii</sup> and the care with which she made her case, her advice has been roundly rejected. An examination of the literature from 2006 onwards reveals that, if anything, socio-legal scholarship on legal consciousness has gathered pace.

The body of work has certainly expanded notably along the dimensions of space and time. Legal consciousness research, having previously focused mainly on the USA (e.g., Sarat, 1990; Nielsen, 2000; Merry 1990, Engel & Munger, 2003) and the UK (e.g., Cooper, 1995; Cowan, 2004), has since been undertaken in a diverse set of new countries, including Australia (Richards, 2015), Bolivia (Ellison, 2017), Bulgaria (Kurkchiyan, 2011; Hertogh & Kurkchiyan, 2016), Canada (Ranasinghe, 2010), China (e.g., Gallagher, 2006; Gallagher & Yang, 2011), Egypt (Kulk & de Hart, 2013), Malaysia (Moustafa, 2013), Norway (Kurkchiyan, 2011); Poland (Kurkchiyan, 2011; Hertogh & Kurkchiyan, 2016), Thailand (Engel & Engel, 2010), Uganda, (Sandvick, 2009), and the Ukraine (Kubal, 2015). It has also looked beyond the contemporary to include historical enquiry, examining legal consciousness in medieval India (Davis & Nemec, 2016) and mid-twentieth century Romania (Serban, 2014).

Moreover, researchers are undertaking legal consciousness work in relation to an increasingly eclectic set of issues: from abortion (Wilson, 2011), to begging

(Ranasinghe, 2010), to cock fighting (Young, 2014), to conservation (Pieraccini and Cardwell, 2016), to fat acceptance (Kirkland, 2008), to housing occupation (Cowan *et al*, 2018), to indigeneity (McMillan, 2011), to medicine (Halliday *et al*, 2014; Picton-Howell, 2018); to migration (Abrego, 2008 & 2011; Gehring, 2013; Schwenken, 2013), to ombudsmen (Gill & Creutzfeldt, 2017), to sexualities (Oswald & Kuvalanka, 2008; Harding, 2011; Knauer, 2012; Hull, 2016), to sex work (Boittin, 2013), to the sharing economy (Morgan and Kuch, 2016).

The socio-legal community is not, it seems, for moving on. Why might this be so? How might we explain the enduring appeal of legal consciousness despite the latter-day scepticism of perhaps its most influential researcher?

The answer, it is suggested, is because Silbey's disquiet about legal consciousness research having lost its sense of the social and structural character of law (on which more later) was based on a history of the research agenda that was partial. Her argument only had purchase from the perspective of one particular theoretical orientation within socio-legal studies: that of critical legal theory. The contention of this essay is that the research agenda and the methodological perspectives surrounding legal consciousness have always been more catholic than Silbey argued for. The concept, as we shall see, has proved useful for a number of the core concerns and traditions of the law & society movement (Engel 1995), unfettered to the core project of critical legal theory.

Most legal consciousness scholars, then, in continuing to employ the concept to pursue the basic research questions of the law & society movement, have simply overlooked Silbey's scepticism because of its failure to connect with their own concerns. Others, however, have explicitly rejected the critical theoretical premise underpinning both Silbey's original legal consciousness project and her subsequent call to move on. Such is the approach taken by Marc Hertogh in his recent book, the subject of this review essay. In rejecting Silbey's critical convictions, Hertogh proposes an alternative "secular" approach to legal consciousness, one he believes is not blinkered by what he sees as critical theory's quasi-religious faith in the hegemonic force of the liberal state's legal system.

We shall critically examine Hertogh's claims in due course. But first, we must substantiate the claim that Silbey has offered only one narrative in a more complex set of stories about socio-legal engagement with the notion of legal consciousness.

## Four Approaches to Legal Consciousness Research

The argument of this section is that legal consciousness has been a meaningful concept for a broad range of socio-legal researchers from the diverse intellectual backgrounds that together constitute the law and society field. This suggestion is illustrated by identifying at least four broad approaches to socio-legal research for which the concept of legal consciousness has been important: (1) a critical approach; (2) an interpretive approach; (3) a comparative cultural approach; and (4) a law-in-action approach.

A helpful way of sketching out the differences between these approaches is to analyse the scholarship according to some basic methodological questions: Why should we study legal consciousness? What is meant by legal consciousness? (What is the ‘legal’? And what do we mean by ‘consciousness’?) Whose legal consciousness is being explored? How should we study it? By asking these ‘why’, ‘what’, ‘who’ and ‘how’ questions, we can more easily see the catholicity of the legal consciousness research agenda, and the particularity of Silbey’s account of it.

Before embarking on the analysis, however, let me offer an important caveat: the sketch of these approaches should be interpreted lightly. I am not suggesting, for example, that there is no overlap or dialogue between them. Rather, they are presented in the manner of Weberian ideal types – “exaggerated or one-sided depictions that emphasise particular aspects of what is obviously a richer and more complicated reality”, as Kronman puts it (1983: 7). The sketch is thus intended merely as an analytical device, a way of illustrating diversity within the heritage of the law and society field, and, in light of this, of explaining why legal consciousness has proved to be such a popular and enduring research concept. Accordingly, I do not suggest that all individual projects or researchers can be easily pigeonholed into one of the four approaches (though I do make reference to published projects to illustrate particular points).

### A CRITICAL APPROACH

#### *Why study legal consciousness?*

According to Silbey, the principal motivation of a critical focus on legal consciousness has been to solve the puzzle of state law’s hegemonic force, a puzzle that has emerged

from a long line of enquiry regarding law, domination and ideology, one that ultimately can be traced back to the work of Marx. As Hunt noted,

One of the most distinctive derivations from modern Marxism which characterizes critical legal theory has been the shift of focus from economic relations to the focus upon political and cultural relations. Central to this concern is ideology, conceived as a mechanism which forms the consciousness of agents. Underlying this preoccupation with ideology is a concern with the question: how is it that those who are systematically disadvantaged by the existing order nevertheless accept the legitimacy of the institutions and values which perpetuate their subordination? (1986: 11)

For earlier critical legal theorists, legal consciousness was the story which the legal profession, particularly the courts, told about law (Hunt, 1986) – a story of justice and equality under law that failed to match reality but which, in the telling, nonetheless caused or permitted society to be largely blind to law's failures and its role in the subordination of the working class (Trubek, 1984; Munger and Seron, 1984).

However, within this critical tradition, legal consciousness operated as a theoretical tool, largely in the absence of empirical enquiry. The dynamics of the relationship between the story of law promulgated by the legal profession and the legal consciousness of ordinary people were under-explored. The mechanisms for the faithful reception by society of the false story of law – the hegemonic process – were not fully worked through. Society's legal consciousness was argued to be either the product of a psychological coping mechanism – a form of denial prompted by the need to deal with the contradictions between rhetoric and reality (Trubek, 1984: 607) – or it was presumed to be internalised without question by society, a kind of 'transmission belt' model of legal hegemony (Trubek, 1984: 613). Thus the notion of law possessing such hegemonic power operated more as a theoretical postulate than as an empirical puzzle within critical theory (Trubek, 1984; Sarat and Kearns, 1995). It was this empirical hole in the theory of hegemony that law and society scholars, including Silbey, identified and responded to through empirical enquiry (Munger and Seron, 1984).

Silbey, with her colleague Ewick (Ewick and Silbey, 1998), has offered the most theoretically and empirically rich solution to the puzzle. They proposed a now very familiar scheme of three cultural narratives of legality – three separate characterisations of law in society which are drawn upon and reproduced in a routine fashion in our commonplace lives: (1) before the law; (2) with the law; (3) against the

law. Rejecting both the notion of hegemony as denial and the ‘transmission belt’ model of hegemony, they suggested that law draws its hegemonic power from the existence of competing and oppositional cultural narratives about law’s character. Law gains the consent of society as a result of the interplay between two of their three common narratives of legality. The fact that these opposing narratives may be invoked in different settings and at different times permits legality to maintain its position of domination and to retain the faith of its subordinates despite its failures.

The forms of consciousness we call ‘before the law’ and ‘with the law’... [w]hile ostensibly expressing vastly different and contradictory images of legality, together... constitute a hegemonic conception of law. At any moment, the law is both a reified transcendent realm, and yet a game... Challenges to legality for being only a game, or a gimmick, can be repulsed by invoking legality’s transcendent reified character. Similarly, dismissals of law for being irrelevant to daily life can be answered by invoking its gamelike purposes. Through these forms of consciousness (and the opposition between them), legality can be an uncontested and unrecognized power that sustains everyday life. (1998: 231)

### ***What is ‘legal’ ‘consciousness’?***

Within a critical approach to the study of legal consciousness, the sense of ‘legal’ has usually referred to legality in general, as opposed to specific legal provisions or a specific set of laws. And despite the fact that the puzzle of hegemony is ultimately tethered to state law and the false promise of its institutions, critical legal consciousness scholarship is generally pluralistic in terms of what counts as ‘legality’, and so focuses on people’s perceptions of both state law and non-state law (e.g., Harding, 2011).<sup>iii</sup> The focus on perceptions of ‘law’ that stand apart from and above the state are particularly important, it has been suggested, for the understanding of counter-hegemonic struggle (Halliday & Morgan, 2013).

The meaning of ‘consciousness’ within the critical approach, however, is less straightforward. Indeed, earlier critical legal theory focused more on the *unconscious* than the conscious. As Trubek notes, the goal of such critical theory seemed to match Freudian therapeutic ambition in that the aim was to liberate people from false consciousness and to bring concealed truths about the realities of law to the surface:

Like the Freudian analyst, the Critical scholar can bring to ‘consciousness’ what is hidden by hegemonic world views... This approach assumes that social actors, like psychoanalytic patients, can be freed of the constraints of delusions once the nature of the delusion is identified. (Trubek, 1984; 608, 610)

Law and society scholars, however, have generally rejected the notion of false consciousness – both its implicit framing of people as cultural dupes (Merry, 1995), and its connotation of consciousness as being simple and unitary (Sarat, 1990). Instead, consistent with a Gramscian conception of consciousness as “complex, fragmentary and contradictory” (Hall, 2016: 167), socio-legal scholars have looked for and sought to unpack the complexities of legal consciousness in the perceptions and actions of humans as knowledgeable agents.

Nonetheless, the conception of ‘consciousness’ still requires careful examination. ‘Consciousness’ within a critical approach is more than what people are able to actually articulate. Consciousness is revealed not only in what people say, but also in what they *do* (Ewick & Silbey, 1998). Here, a distinction that Anthony Giddens draws between ‘discursive’ and ‘practical’ consciousness is helpful (Giddens, 1984):

Discursive consciousness connotes those forms of recall which the actors is able to express verbally. Practical consciousness involves recall to which the actor has access in the *durée* of action without being able to express what he or she thereby ‘knows’. (Giddens, 1984: 49)

Practical consciousness, then, is a form of tacit or background knowledge connected to what people do as purposive agents.

What agents know about what they do, and why they do it – their knowledgeability *as* agents – is largely carried in practical consciousness. (emphasis in original) (Giddens, 1984: xxiii)

Giddens’ notion of practical consciousness is a key element of his theory of ‘structuration’ which seeks to end the “phoney war” (1984: 139) between ‘macro’ and ‘micro’, structuralist and phenomenological, objectivist and subjectivist sociology. Instead, he proposes a middle path, a ‘duality of structure’, whereby social structures are invoked, and thus reproduced and sustained by agents in managing and making sense of everyday life. Accordingly,

Structure has no existence independent of the knowledge agents have about what they do in their day-to-day activity. (Giddens, 1984: 26)

This middle path between the opposing positions of sociology’s ‘phoney wars’ has proved attractive to critical legal consciousness scholars who likewise frame legality as having its basis in the routine participation of ordinary people in everyday life, through which:

actors construct, sustain, reproduce, or amend the circulating ... structures of meanings concerning law. (Silbey, 2005: 334)

The stress within the critical approach on law as a social structure means that scholars have been concerned as much – perhaps more so – with practical consciousness as with discursive consciousness; with what people do in relation to law, as with what people are capable of articulating. This has implications for how legal consciousness should be researched empirically, as we will discuss further below after a brief consideration of whose legal consciousness is the focus on enquiry within the critical approach.

### *Whose legal consciousness?*

In contrast to earlier critical theory's focus on the legal consciousness of legal officials and legal professionals, the attention of the critical law and society scholar usually falls upon the legal consciousness of ordinary people. Although Ewick and Silbey (1998) studied the legal consciousness of a cross section of the general population, there has been a particular interest in other critical studies in the legal consciousness of those who are failed by the state legal system. Ultimately, it is the consciousness of the “have-nots” (Galanter, 1974) and the “systematically disadvantaged” (Hunt, 1986) that forms the puzzle of hegemony, or animates collective counter-hegemonic struggle. So, legal consciousness scholars working in this tradition have been drawn to the working class or the welfare poor (e.g., Sarat, 1984; Merry 1990; Cowan, 2004), although other marginalised groups commonly feature too, such as migrants (e.g., Abregó, 2008, 2011), indigenous populations (e.g., Jacobs, 2010) and members of the LGBT communities (e.g., Harding 2011; Hull 2016). Likewise, in researching counter-hegemonic struggle, the focus has been on social and political activist groups (e.g., Fritzvold, 2009; Wilson 2011; Halliday & Morgan, 2013).

### *How should it be researched?*

As noted above, law and society scholars have generally been sceptical of simple answers to the puzzle of legal hegemony and a simple model of consciousness. Consequently, work which draws on this tradition usually looks for more complex and contradictory phenomena, relying on intensive qualitative research methods to obtain rich and nuanced data about people's perceptions and ideas about law. Moreover, given the critical interest in people's ‘practical consciousness’ of legality – the sustenance and reproduction of legality as a social structure – researchers in this



tradition sometimes avoid the direct questioning about law in their research interviews. Rather than artificially introduce law into the research conversation, the preferred method is to wait and see how background ideas about law emerge naturally and structure discussions about everyday life (e.g, Ewick & Silbey, 1998: 26).

## AN INTERPRETIVE APPROACH

### *Why should we study legal consciousness?*

The second approach to legal consciousness falls within an interpretive tradition of the social sciences. The methodological orientation that unites such work across the disciplines of sociology, anthropology, law, and political science, ultimately derives from the emphasis Max Weber placed on seeking “an interpretive understanding of social action ... insofar as the acting individual attaches a subjective meaning to his behaviour” (Weber, 1987: 4).

An interpretive orientation can be applied to questions emerging from critical legal theory, of course, as we saw above. However, what separates the interpretive from the critical approach within this ideal typology is that, unlike the critical approach, the interpretive approach is not centrally concerned with domination and the social structures that, although reproduced and sustained in people’s routine action, have, in one sense, an existence beyond those people. Rather, at its most basic level, interpretive research is motivated by the simple desire to understand how ordinary people’s behaviour responds to their subjective perceptions of law. Thus, research is generally focused on the individuals who are the subjects of the research: how do these particular individuals perceive law, and what significance do those perceptions have for their behaviour?

The research agenda of the interpretive approach is an open one and has been applied to an eclectic set of sub-topics. Nonetheless, we can observe in it a major preoccupation of the law and society movement: the significance of legal consciousness for disputing behaviour (or its lack) in relation to problematic events. Typical research questions would concern whether, how, and why people ‘mobilise’ the law (or fail to) in relation to problems they face in everyday life (e.g., Erie, 2012; Schwenken 2013; Ellison, 2017).

### ***What is ‘legal’ ‘consciousness’?***

Consistent with the open research agenda of this tradition, the ‘legal’ in legal consciousness is interpreted broadly. At times, it refers to legality in general (e.g., Hernandez 2010; Ranasinghe, 2010); at other times the research focus is on how one’s research subjects interpret particular aspects of state law, such as in relation to criminal justice (Farmer *et al*, 2015), discrimination (Hirsh & Lyons, 2010), privacy (Lageson, 2017), or property (Cowan *et al*, 2018). However, given the methodological commitment to researching the meaning of social action from the perspective of one’s particular research subjects, there is often a corresponding desire to honour those research subjects’ conceptions of ‘law’ and their potential to range well beyond formal state law.<sup>iv</sup> Accordingly, this commonly involves the embrace of legal pluralism as part of the research agenda.

As regards the meaning of ‘consciousness’ within the interpretive approach, the stress is on discursive consciousness and its significance for social action. In this way, research focuses both on what research subjects say about law, as well as what they do. But the methodological significance of this must be contrasted with the critical approach. As we saw above, within a critical approach the focus on what people do in relation to law is important for revealing their practical consciousness – what they cannot say – and, thereby, the character of legality as a social structure. However, within the interpretive approach it is what people *can* say that reveals the subjective meaning that they attach to what they do. ‘Doing’ – social action – is the ultimate research concern; ‘saying’ – discursive consciousness – is the window onto the subjective meaning of that social action.

### ***Whose legal consciousness?***

Like the critical approach, research within the interpretive tradition is concerned with the legal consciousness of lay people and not legal professionals.<sup>v</sup> However, by way of contrast with the critical approach, it is not generally pre-occupied with the working class, or the welfare poor, or other disadvantaged groups. Instead, research in the interpretive tradition might focus on actors that we would not necessarily associate with being dominated or disadvantaged, such as, for example, college students (Farmer *et al*, 2015) or courtroom participants (Ng, 2009). Indeed, some studies set out to focus on the legal consciousness of powerful actors in specific social settings, such as business owners in relation to the regulation of public space (Ranasinghe 2010) or tax lawyers (Cornut-St Pierre, 2019).

### ***How should we research it?***

The interest in the subjective meaning attached to social action usually leads researchers towards qualitative research methods, most often qualitative interviews (e.g., Hernandez, 2010; Schwenken 2013), though observational and participatory approaches can be particularly revealing (e.g., Gallagher, 2006; Erie, 2012).

## **A COMPARATIVE CULTURAL APPROACH**

### ***Why should we study legal consciousness?***

The third tradition of socio-legal research revolves around the idea of legal culture and employs the method of comparison in order to gain a better understanding of it. The analytical promise of comparison is that the observation of difference can de-familiarise and reveal the contingency of various taken-for-granted aspects of a particular legal culture. Legal consciousness has thus come to operate as a key aspect of the enquiry (Hertogh and Kurkchiyan, 2016), one that captures the core research interest in cultural beliefs and ideas around law.

### ***What is 'legal' 'consciousness'?***

The 'legal' within this tradition of legal consciousness research usually refers to legality in general, rather than to particular legal rules or provisions. So, for example, the topic of interest might be people's attitudes towards courts or the legal system (Fukurai, 2007), people's perceptions of law's role in maintaining social order (Kurkchiyan, 2011), or people's willingness to use the legal system to solve their problems (Shinohara and Uggen, 2009). Although the enquiry often focuses on attitudes towards the formal state legal system, it can also relate simply to people's cognitive images of law, and thus embrace a sense of legal pluralism (Hertogh & Kurkchiyan, 2016).

The conception of 'consciousness' draws on a Durkheimian tradition of framing culture as a social fact. Indeed, the notion of a 'collective legal consciousness', thus connecting to Durkheim's concept of the *conscience collective*, has been suggested in order to capture this sense of a set of beliefs and attitudes that exists positively, above and beyond the individual. As Kurkchiyan puts it:

societies construct a sense of social order that is specific to them. As a necessary part of that broad process, they develop a collective legal

consciousness. That consciousness provides them with distinct interpretations of the meanings, the content, and the roles of law in the lives of the people (2011: 390).

### ***Whose legal consciousness?***

As the quotation from Kurkchiyan above suggests, the unit of analysis within this tradition of legal consciousness research is often the society, usually delimited by national jurisdictional boundaries, although key groups of societal members, such as, for example, jurors (Fukurai, 2007), may be isolated for analytical purposes. Ultimately, in such research, it is societies as a whole, and their characteristic consciousness around law that are being compared with others.

Increasingly, however, the comparative exercise is also being conducted at a sub-societal level, examining cultural groups within jurisdictional boundaries. Here, the focus may be on the significance of ethnicity, gender or religious identity to the formation of meanings around law and legality (e.g., Blackstone et al, 2009; Hirsh & Lyons, 2010; Moustafa, 2013).

### ***How should we study it?***

The common method of enquiry within this approach to legal consciousness research is the large ‘n’ survey, given its capacity to elicit, through the discursive responses of the sample respondents, an image of the collective perceptions of, and attitudes towards law within a given society or cultural group.

## **A LAW IN ACTION APPROACH**

Whereas the first three approaches to legal consciousness research emerged from the social sciences and can be linked – in some ways at least – to the classical sociological theorists, the fourth approach is more of a Law School enterprise, one that owes its energy to Pound’s original distinction between law in books and law in action (Pound, 1910).

### ***Why should we study legal consciousness?***

The impetus to study legal consciousness here comes from the desire to understand the social reality of law – law as it is implemented, as opposed to law as it was written. The legal consciousness of those charged with implementation can matter for law’s translation from books to action.

Legal scholars have long been interested in the empirical realities of the implementation of law. Some of this work, often known as ‘gap studies’, has been policy focused, driven by a concern to narrow the gap between law in books and law in action (Bankowski and Nelken, 1981; Gould and Barclay, 2012). Other work has been less concerned with reform, and driven more by a curiosity about the factors that influence legal implementation (Kagan, 1995), or with the ambition of portraying the limited reach of formal legality (e.g., Halliday, 2004).

Legal consciousness has recently come to be regarded as offering something to this research agenda in light of the conviction that the legal consciousness of those who implement the law in books is likely to be significant to the law that is delivered on the ground.

### *What is ‘legal’ ‘consciousness’?*

The ‘legal’ in legal consciousness here, rather than denoting legality in general, most often refers to specific provisions or aspects of positive state law. The enquiry usually revolves around the implementation of a particular legal scheme.

As regards ‘consciousness’, we can make a link back here to the interpretive approach. In similar fashion, the enquiry focuses on discursive consciousness and the subjective meanings attached to law in the implementation process. In part, this can relate to legal knowledge and particular legal interpretations adopted in the course of implementation work. However, more often the research enquiry is concerned with individuals’ attitudes and orientations towards the law, and the significance of legal knowledge and values to implementation.

### *Whose legal consciousness?*

As mentioned above, it is the legal consciousness of key actors in the implementation process that is of interest within this approach. Often, such actors are public functionaries, such as tribunal members (Richardson, 2015), public health officials (Jacobs, 2007), or public hospital doctors (Picton-Howell, 2018), with responsibility for implementing a legal scheme, or for delivering public services within key legal parameters. However, actors in the private sector, such as workplace supervisors (Munkres, 2008), can be equally significant to aspects of law in action, such as discrimination law.

### *How should we study legal consciousness?*

In theory at least, the research methods capable of application to the study of legal consciousness within this approach are as broad as the social sciences themselves. In practice, however – thus far, at least – qualitative methods, particularly the qualitative interview, have been used.

TABLE 1: Summary of the varieties of legal consciousness research

	Why?	What?	Who?	How?
<b>Critical</b>	Hegemony, counter-hegemony, structuration	Legality in general	Disadvantaged and marginalised; activists	Qualitative methods
		Practical and discursive consciousness		
<b>Interpretive</b>	Meaningful social action	Legality in general; specific legal provisions	Anyone	Qualitative methods
		Discursive consciousness		
<b>Comparative Cultural</b>	Legal cultural comparison	Legality in general	Whole societies / cultural groups	Quantitative surveys
		Collective consciousness		
<b>Law-in-Action</b>	Legal implementation	Specific legal provisions	Key implementation actors	Qualitative methods (so far)
		Discursive consciousness		

### **After Hegemony?**

The section above suggested that Silbey's call to move on has gone unheeded because legal consciousness has wide appeal as a concept across a range of approaches to law and society research, summarised in Table 1 above. Whilst precise conceptions of legal consciousness might differ according to those approaches, the concept itself has proven itself capable of wide application, attractive to many for its sense of offering something fundamental and significant to the study of law in society.

Marc Hertogh in his recent book, however, rather than simply overlooking Silbey's exhortations, addresses himself directly to the underlying premise of her critical approach, questioning the hegemonic power of state law.

There is an interesting and attractive parallel between the starting point of Hertogh's research agenda and that of the critical law and society scholars who first turned their attention to the topic of legal consciousness forty or so years ago. Just as those scholars spotted an empirical hole in the critical theory of hegemony, so

Hertogh asserts that there is an empirical hole in the critical theory of legal consciousness. In essence, Hertogh's critique begins with the plea, 'show me the data!'

Critical legal consciousness studies are based on the idea [that] the law still 'retains support among the people', despite a persistent gap between the law in the books and the law in action. However, this picture is imbalanced and inaccurate. (p. 9)

... these studies put more emphasis on *how* rather than *if* law dominates everyday life ... [S]aliency of the law is *presumed* rather than *problematicized*. (Emphasis in original, p. 11)

Accordingly, Hertogh treats the hegemonic power of state law as an empirical question rather than a puzzle. His answer to that question begins with a striking account drawn from the Dutch news media – 'Erik's Day in Court' (pp. 1- 6) – about a father's reaction to the sentencing of the car driver who had killed his child through reckless driving. Erik was present in court to hear the judge hand down a sentence of just 120 hours of community service. He erupted in anger, threw his chair at the judge, and had to be forcibly removed by security guards.

This story is used to symbolize, in a particularly arresting way, the core empirical claim of the book, which Hertogh sets out with the aid of a wide range of data: surveys, qualitative interviews, parliamentary inquiry data, and a secondary analysis of a policy evaluation study. His claim is that, far from putting their faith in state law, ordinary members of society increasingly feel alienated from it; rather than turning *towards* state law in blind faith, people are actually turning *away* from it:

These findings challenge the idea that people – despite strong criticism – still turn to law. Instead, the case studies and survey evidence in this book suggest that – because of this criticism – people move away from law... For most people ... the law is not 'all over' and law is not 'infused' into their everyday life... [S]tate law has become nobody's law. (pp. 178-9)

In light of this, Hertogh calls for a re-orientation of legal consciousness research. His book offers a roadmap for the researcher: legal alienation, he argues, as the characteristic legal consciousness of contemporary society, should be the core focus of our future research endeavours.

This is a powerful claim, one that merits a considered response. What should we make of it? The suggestion of this essay is that Hertogh's focus on legal alienation

is both welcome and important. It is trite to observe that we live in a time of significant antipathy towards government. The widespread rise of populism (Canovan, 1999; Lacey, 2019), contemporary sustained public protests such as the *gilets jaunes* in France, the election (in the USA and the Ukraine, for example) of political outsiders and newcomers, even the Brexit vote in the UK (Clarke and Newman, 2017), all suggest a growing disaffection with the traditional expertise and authority that are associated with governmental institutions. A sense of disconnection to law and the legal system must surely form part of this wider picture. So, Hertogh's advocacy for greater socio-legal engagement with, and examination of, legal alienation is timely and significant.

However, at the same time, his overall thesis is not without its vulnerabilities. There are two key issues to focus on here. Neither of these issues takes away from the importance of Hertogh's focus on legal alienation, but both are significant for our wider understanding of legal consciousness.

### ***Hegemony and Counter-Hegemony***

The first objection to Hertogh's thesis is methodological. Although his book usefully concludes that the field should focus its attention on legal alienation, the method of analysis that carries him to this conclusion is problematic, it is suggested. In short, the argument here is that Hertogh does not succeed in countering the core claim of the critical legal consciousness work, exemplified by Silbey, about the hegemonic power of state law.

Hertogh's legal alienation thesis is an empirical claim – and a very striking one at that. Yet it is open to methodological challenge. At a surface level, we might challenge him about how he interprets his data, questioning the consistency of the empirical picture he paints. For example, while in chapter 2 he interprets general public opinion survey data about the justice system to suggest that its legitimacy is contested, in chapter 8, as part of an argument about the impact of legal alienation, he presents survey data from traffic law offenders indicating that significant majorities think that one should obey the law even where one doesn't think it is right, and that disobeying the law is seldom justified.

Or we might query the extent to which his analysis takes account of the complexity and internal contradictions of individuals' legal consciousness. We know from qualitative research that individuals evoke contradictory images of law at



different points, sometimes even within the same sentence (Ewick & Silbey, 1998: 50-51). So, even if Hertogh can persuade us that his research subjects, in a particular moment, feel alienated from a particular aspect of state law, or from particular features of the justice system, how confident should we be about their *general* legal consciousness?

Or we might probe the detail of some of his analysis. His case study of cartels in the construction industry, for example, concerns a body of competition law with its source in the European Union. All of us in the EU live in a region of both domestic and supra-national regional legality. To what extent should we interpret disquiet with EU-originated law as alienation from domestic state legality?

However, the deeper methodological challenge for Hertogh's analysis is that it overreaches with the data. It makes too big a claim, in other words. There is a less and a more important point here. The less important point is that, although Hertogh marshals an impressive array of studies for his project, they all emanate from the Netherlands and most of them focus on particular aspects of state law – discrimination law, competition law, public law and road traffic law – rather than state law generally. But, this is not really the heart of the problem of overreach. The difficulty is not that Hertogh needs more data, but rather that – somewhat counter-intuitively – he needs to look up from his data to see what is apparent without the need for any particular dataset: neither the Netherlands, nor any other liberal society, are places where state law is nobody's law.

Perhaps the easiest way to make this point is to conduct a simple thought experiment: what would a society that is truly alienated from state law – where most people have turned their backs on it – actually look like? It would be a society that is governed through open and widespread repression, rather than largely through consent. It would be a totalitarian or authoritarian state, rather than a liberal one, where, as Krygier puts it when describing life under communism,

Law is one of an array of instruments for translating the government's ... wishes into action and maintaining social order. It will last as long and change as fast as the rulers wish, be as vague as is useful, be enforced as capriciously as the central authorities or their servants consider appropriate. (1990: 641)

If state law is nobody's law, ordinary people expect little of it – consistently and generally – except arbitrary and oppressive enforcement. The likes of Erik do not

erupt in anger. It is only people for whom state law is still fundamentally *theirs* that express such outrage, indignation and disappointment.

The better way of interpreting Hertogh's datasets, it is suggested, is to recognise that a degree of legal alienation is consistent with the general legitimacy of state law and the general assent of the people to the legal regime. The existence of legal alienation does not, in itself, challenge a claim about the hegemonic power of state law. As was noted above, a major premise of critical legal consciousness work is that consciousness is multifaceted and fragmented. Both society and individuals are complex, so we should not expect ideas and currents of thought to be uniform or unidirectional. As Stuart Hall has noted:

Hegemony is not ideological mystification. Nor is it cultural domination as total incorporation, as if all the contradictory and oppositional forces and practices simply were engulfed and disappear... (2016: 169)

Any theory of hegemony, then, must look for and take account of counter-hegemony. Indeed, such is part of Ewick and Silbey's theory of legal consciousness, an aspect that they discussed in interview:

We came by the other story – 'against the law' – by seeing the relationship between [it and the other two]. They just play off each other. And then we realized that the first two were the hegemonic... And the other ['against the law'] is about counter-hegemony. (Ewick & Silbey 2009: 225)

Hertogh's theory of legal alienation, accordingly, rather than being a refutation of legal hegemony, is better regarded an exploration of counter-hegemony. Hertogh's work, particularly his analysis of legal alienation along the dimensions of 'awareness' and 'identification' (chapter 3) is very helpful in this regard and should be placed alongside others who have argued that greater depth and nuance can be offered to Ewick and Silbey's 'against the law' narrative and its depiction of counter-hegemony. Harding (2011), for example, drawing on the work of Foucault, interrogates the notion of resistance and suggests three different forms: 'stabilising', 'moderating' and 'fracturing' resistance. Likewise, Halliday and Morgan (2013), drawing on the work of Mary Douglas, have argued that Ewick and Silbey have focused too heavily on individual acts of resistance, suggesting that greater attention can be paid to practices of counter-hegemony that are rooted in a sense of collective agency, and which involve a collective effort to alter the power structures in society.

We do not need to defeat the claim about state law's hegemonic force in order to turn our attention towards counter-hegemony. Hegemony and counter-hegemony, acquiescence and resistance, identification and alienation, co-exist in a permanent state of tension. In short, although Hertogh is absolutely right to suggest that there is much more to legal consciousness than the puzzle of hegemony, he is wrong to suggest that state law does not have hegemonic force. So, we should simply bracket off that negative part of Hertogh's thesis and focus instead on his positive contribution – his exploration of legal alienation.

### ***Legal Consciousness as a Protean Concept***

There is much to admire in Hertogh's book, not least his intellectual ambition. Like Silbey, Hertogh asks a big question and offers an answer that is intended to orient the legal consciousness field. Whereas Silbey's suggestion was to abandon ship, Hertogh urges us to change direction.

There is absolutely nothing wrong in trying to orient a field of research. Indeed, such work can be incredibly helpful and is, of course, the bread and butter of much modern scholarship, particularly when one has reached a certain seniority, having spent a great deal of time researching, reading and writing in that field. The difficulty, however, both for Hertogh and Silbey before him, is that legal consciousness is not really a field. As this essay has tried to show, it is better to think of it not as a field of research, but as a concept that has been applied widely across an eclectic range of subjects, drawing on diverse theoretical traditions, shedding light on many of the core interests of law and society scholars.

The adaptability of legal consciousness as a concept, as was argued above, has ensured its continuing – perhaps even growing – appeal to socio-legal researchers. But, moreover, it is this protean quality that prevents legal consciousness research from properly coalescing into a coherent field of enquiry. Thus, just as Silbey's call to move on went unheeded, so any call for legal consciousness research to move in a particular direction is bound to miss its mark to some extent. For sure, the call will resonate and have relevance for some, but for many it will fail to connect with the nature of their research endeavours.

## Conclusion

Marc Hertogh urges us to divert our attention away from legal hegemony towards legal alienation. This is problematic in two ways. First, even though the puzzle of hegemony may not be as puzzling as it once was, there is more work to be done on phenomenon of legal hegemony itself, it is suggested. Significantly, for example, not much progress has been made since Ewick and Silbey's seminal work (Ewick and Silbey, 1998) in our understanding of the *mechanics* of structuration as regards the power of state law in society. In essence, Ewick and Silbey argued that storytelling is the answer to that question. By routinely telling two alternative but positive stories of law ('with the law'; 'before the law'), we maintain the power of law, they suggested. But there must be more to this than storytelling. What other forms of social action might also contribute in some way to the reproduction of law's structural power – particularly social action by those who, to some extent at least, recognise the disadvantaging and oppressive capacity of law? The existing literature offers some examples: Halliday & Morgan (2013) examine the withdrawal of activists from counter-hegemonic struggle, stressing the ubiquity of state law and its reach into individual lives; Cowan (2004) focuses on the use of legal redress mechanisms by those who are most disadvantaged by state law, showing how state law, somewhat paradoxically, can be chosen to resist the oppressions of state law (see also Lazarus Black & Hirsch, 1994). Such studies offer some examples of social action – connected to, but separate from storytelling – that contribute to the reproduction of law's structural power.<sup>vi</sup> But there will be more, and the exploration of such could be a fruitful aspect of continued legal consciousness research.

Second, however, Hertogh's exhortation that we should turn away from legal hegemony misfires by virtue of the fact that to do so is unnecessary in order to achieve his main goal: the focus on legal alienation. The legal alienation thesis presents itself as a counter to the legal hegemony thesis. However, the better way to interpret Hertogh's book may be to focus more on its points of connection to the critical tradition that he rejects than on any theoretical divergence. What unites Hertogh's work with that of the critical scholars is that they all, to some extent at least, are concerned with state law's failures, disappointments and oppressions; the extent to which, and the ways in which, people feel this; and what people think and do in light of that. This is an important and very fertile line of enquiry for socio-legal scholars, particularly in the current era.

But the final point of this essay is that, although Hertogh makes an important contribution to legal consciousness research and offers a really helpful set of ideas for taking the research forward, his legal alienation thesis can only ever be one aspect of a more complex and disorganised body of work in which legal consciousness appears as a useful and malleable concept. This book certainly deserves to be read widely but, by virtue of the kaleidoscopic nature of the body of work to which it contributes, its ultimate appeal may not match the quality of its scholarship.

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<sup>ii</sup> According to *Google Scholar*, by the Spring of 2019 Ewick & Silbey (1998) had attracted more than 1750 citations.

<sup>iii</sup> In this way, I would respectfully disagree with Hertogh's suggestion (2004) that we might identify an 'American' and 'European' model of legal consciousness, with the American model being distinguished on the basis of its non-legally-plural focus on state law.

<sup>iv</sup> At this point, legal consciousness research might depart from Weber's sociology of law. Although Weber's concept of law ranged well beyond state law, it was nonetheless tied to a system of rules enforced by specialist personnel (see, e.g., Weber, 1978, 317).

<sup>v</sup> There has been a recent counter-intuitive suggestion that we might usefully move beyond the study of human actors to explore the legal consciousness of physical objects, inspired by some of the insights of Actor Network Theory (Cowan et al, 2018). On closer inspection, however, it becomes clear that the argument being made is that physical objects can be imbued with, and come to represent or symbolize, the legal consciousness of human actors. Ultimately, then, humans remain the focus of enquiry.

<sup>vi</sup> For an excellent example of such an enquiry in relation to education and post-educational work choices, see Willis (1978).