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Law, Litigation, and the Politics of Social Movements

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This essay offers a historically grounded theoretical overview of scholarship on the many ways that law at once constrains, shapes, and provides resources for struggles by social movements. The article begins by recognizing the relative chasm between scholarship on law and on social movements until around the 1970s, both in the US and beyond. I then outline three different scholarly approaches to the study of law and social movements that have developed in the last half century: 1) judicial impact studies; 2) critical legal studies; and 3) legal mobilization analyses. The approaches differ according to competing understandings of law itself, including between a focus on law authorized by official state institutions and law as cultural norms « in » society, as well as variable conceptions of social power and assessments of effects or impacts from legal action by movements. The overview extends further to a variety of secondary, more specialized areas of inquiry related to law and social movements, including interest group litigation, cause lawyering, movement use of legal tactics to generate media coverage, and the politics of counter-mobilization or backlash. Finally, the essay concludes by recognizing a variety of new directions in recent scholarsship, including especially more systematic comparative cross national and global analysis, often extending beyond liberal rule-of-law traditions to authoritarian contexts. Like the keynote conference address on which the article is based, the focus of the essay is on theorization that structures scholarly research questions and design, although many examples of empirical research are noted to illustrate the key themes, concepts, and intellectual frameworks.

Introduction

§1 I was honored to be an invited keynote speaker at the Brussels international and interdisciplinary symposium on « The Use of Law by Social Movements and Civil Society » in March of 2018 and, now, to be included in this special issue. The conference was very exciting. It is extremely gratifying to see the continuing expansion of sociolegal studies about, and participation in, struggles for expanded egalitarian, inclusionary rights and social justice policies. I very strongly endorse engaged scholarship on political struggles for basic human rights and social justice, and I was edified to see that common commitment in the conference agenda and presentations.

§2 This essay, derived from my conference presentation, will attempt the almost impossible task of providing a brief overview of contemporary research on law and social movements. At the start, I offer several self-critical caveats.

§3 First, while I write and teach about social movements around the globe in comparative perspective, my practical experience and scholarly grounding is undeniably anchored in the United States. My essay will reflect these biases and constraints of knowledge and vision.

§4 Second, I acknowledge that scholarly study of law (and law and society) and of social movements each still remain poorly interconnected. These traditions are like two spinning wheels, it has been said, that rarely engage one another directly; social movement theorists historically have ignored or downplayed law, at least as sociolegal scholars theorize the complex dimensions of law, and legal scholars often view political struggle from below as marginal to their focus on official law, legal actors, and legal constructions[1]. Even when scholars in each camp address common subjects, moreover, they have tended to talk past each other. I was pleased to find that most of the papers at the 2018 conference suggest that claim is overstated, or at least no longer true. That said, this essay will begin by problematizing the relationship in several ways, including not least the arguable implosion of the concept of “social movement” itself.

§5 Third, I make no effort to provide a comprehensive bibliography of relevant work in the field, including inclusion of many papers presented at the conference. My review is more about core ideas that have evolved than specific authors and their scholarly products. I strongly advise readers to consult the wide range of papers presented at the conference as both important texts and bibliographic sources for accessing the bourgeoning studies of law and social movements, which space does not permit attention here. Finally, putting the previous caveats together, I note that my short review privileges my own particular conceptual framework for negotiating the uncertain conflicted legacy of subjects at stake, while still attempting to address alternatives and their relative merits. I hope that

such a selective bias makes the essay more rather than less worthwhile for many readers, especially in comparative cross-national and global perspective.

The Complicated Legacy of Scholarship on Law and on Social Movements

Social Movements: An Elusive and Volatile Subject

§6 Intellectual inquiry about how law both impedes and facilitates contentious political struggle for social justice goes back centuries. It was a central issue for theorists of the modern state, such as Hobbes, Locke, and Rousseau, through the nineteenth century great European social theorists Marx, Tocqueville, Weber, and on through Foucault. The very emergence of what we now recognize as social movements was expressed through mostly class-based proletarian and petty bourgeois activism, often interrelated with religious commitments, in England and Europe with the rise of the modern racial/religious capitalist systems in the 18th Century. Labor and socialist movements were the prototypical social movements of the nineteenth through early twentieth centuries, in both Europe and the US.

§7 A wide array of more diverse types of social movements proliferated around the globe following World War II, though, when the now familiar concept developed increasing resonance and value among intellectuals and activists. That said, no single definition of the term “social movement” evolved, and the term’s meaning itself is highly contested. Charles Tilly’s pithy definition is as useful as any. A social movement is

“a sustained series of interactions between power holders and persons successfully

claiming to speak on behalf of a constituency lacking formal representation,

in the course of which those persons make publicly visible demands

for changes in the distribution or exercise of power, and back those demands

with public demonstrations of support”[2].

§8 One problem is that this definition does not clearly demarcate social movements from interest groups, trade union organizations, minority political parties, protesting mobs, terrorist cells, and other forms of collective action. Indeed, one challenge of studying social movements is that in practice they rarely are manifest in a singular organizational form. Most movements develop through dynamic, volatile coalitions of multiple groups of actors that each vary in degree of formal organization, proximity to state institutions, and connections to orthodox political forms like parties, unions, interest groups, and the like. The very common problem of invoking the term “social movement” thus is to reify volatile, contingent relationships, practices, and aspirations among diverse actors as bounded, stable

entities. Frustrations over defining social movements by their organizational forms – which tend to be variable, complex, contingent – have led some scholars to abandon or deemphasize the label itself. I must admit that much of my own recent research on political contestation "from below" has tended in this direction, even though I still build on the analytical theorizing developed by scholars of social movements.

§9 Scholars have been more successful in developing clarity by focusing on what social movements aspire to achieve, whom and whose interests they claim to represent, and the various tactics and relational repertoires that they enact. Several points tend toward consensus among scholars and activists.

§10 First, social movements generally aspire to more fundamental types and degrees of change in social practices and institutional relations than do interest groups. Movements often develop out of and through instrumental action for specific policy reform goals, but they tend to develop broader, more radical aspirational visions regarding collective or structural transformation. Sometimes the clarity of these broader visions fades due to the diversity of participants in a movement or the salience of radical aspiration wanes with focus and success on specific issues, or out of sheer exhaustion and resignation. But visions often linger to be revitalized once again. For example, the US civil rights movement was initiated by efforts to reduce violence against and economic opportunities for African Americans; many early leaders associated with socialists and the cause of socialism. For a variety of reasons – the preferences of philanthropic funders, opportunities and constraints of conservative state legal institutions, the ascendance of lawyers as leaders, *etc*. – the movement shifted its demands toward public desegregation, especially in schools and then in commercial life and employment. Frustrations with limited changes at stake in that agenda led many activists back toward a focus on material redistribution and transformation in the late 1960s, reviving earlier socialist critiques of capitalism and imperialism as well as racism. Changes in conditions, experiences, actors, and ideas went hand in hand, but in some ways the later movement returned closer to its root radical aspirations, at least for a period. Whereas most organizations are driven by imperatives of sustaining a place in the ruling order (a $$<<$$ seat at the table $$>>$$), most social movement histories reflect a mix of reformist goals and quasi-revolutionary dreams that seek to upset and reconstruct that order. This is why it makes sense, I think, to include traditional organizations in studies of social movement struggles sometimes, as when I often distinguish between $$<<$$ social movement unions $$>>$$ seeking broad goals of social justice and more narrowly focused business or interest group unions.

§11 A second feature of most social movements is reliance on a wide range of tactics. These tactics may include conventional political advocacy and leverage like lobbying and alliance with elites. But social movements are far more prone to rely

on communicative strategies of information disclosure and mass/social media campaigns as well as disruptive symbolic or expressive tactics such as protests, marches, strikes, and the like that upset ongoing social practices. Movements tend to engage in "contentious" politics[3]. One of the surprising findings of much research is that litigation and other seemingly conventional legal tactics sometimes can be fused with such disruptive forms of political expression. Legal tactics sometimes serve to disorder as well as to uphold order[4]. Litigation can provide a form of, or forum for, rebellion[5] as well as a lethal weapon in social conflict[6]. But, as we shall see, movement reliance on legal tactics varies widely with circumstance.

§12 Third, social movements often enlist a wide array of activists and supporters. Although movements may be driven by middle class (bourgeois) leaders and find alliance among elites and powerful organizations, the core base population of most social movements tends to be "the nonpowerful, the nonwealthy and the nonfamous"[7]. This holds, moreover, for reactionary and right-wing as well as Left-oriented, progressive movements. It is significant to recognize in this regard that the very concept and attention by scholars in the decades following World War II focused on the latter egalitarian – especially antiracist, antipatriarchal, anticapitalist, antiimperialist, anticolonial – causes. This owes in part to the weakening of traditional forces of "white supremacy" in racial capitalist and colonial regimes ushered in by WWII[8]. Anti-colonial independence movements and anti-apartheid movements thus proliferated, posing substantial challenges to former racial and class hierarchies and promoting political reconstruction. It would be a mistake, in my view, to identify these movements as non-class related and primarily oriented toward identity "recognition" rather than "redistribution" and material transformation. Most movements involved both dimensions, although material redistribution proved more difficult and more greatly resisted by dominant groups. These initial race-based movements in turn catalyzed other egalitarian and social justice movements—by women, gays and lesbians, people with disabilities, indigenous groups, the poor, immigrants, *etc*.—some of which elevated intersectional class interests.

§13 Other factors in the post-WWII context contributed both to social movements and to scholarly interest in them. These movements developed furthest within regimes that were at least ostensibly semi-democratic and committed to liberal rule of law principles as well as with developing mass media technologies internally and linked to global audiences. Indeed, the commitment to quasi-liberal rule of law and constitutional foundations of governance was one of the primary constitutive features of post-WWII politics. The much noted "judicialization of politics" around the globe was both product and cause of these developments. These developments of more robust legal organization provided modest discursive resources (e.g., "rights") and institutional support for much social movement activity. Similarly, just as global events – the weakening of white supremacy by

WWII, the Cold War, expansion of global capitalism – catalyzed a variety of egalitarian movements, so did global NGO actors, alliances, and audiences become more involved in and critical to social movements. Social movement scholars today almost invariably study these global dimensions of even localized social movements. The proliferation of human rights conventions and advocates also provided new resources for movement development and scholarly attention. Finally, the increased interaction of scholars around the world in the globalizing era facilitated greater exchanges of ideas, approaches, and understandings. The US-based *Law and Society Association* by the 1990s was highly international in membership, annual meeting participation, and scholarly commitments.

§14 At the same time, however, the forces of entrenched empire fought back within most nation states and globally, especially starting in the 1970s. Revanchist leaders struggled to take back power, conservative populist (especially white supremacist and anti-immigrant) movements arose, and imperial global capitalist forces promoted conservative and neoliberal, pro-market, anti-statist, anti-egalitarian agendas that neutralized or dwarfed egalitarian movements. And those various forms of "backlash" movements also have been an increasing focus of social movement scholarship in recent decades. Indeed, most studies of egalitarian social movements have come to underline the dynamics of "counter mobilization" by opposing reactionary movement identifying with dominant groups or corporate institutions.

The Equally Elusive, Contested Understandings of Law and Legal Practice

§15 Legal scholars in the US and beyond began to address social movement politics in real time in the post-WWII era, but not until the 1970s did sociolegal scholars and law professors begin to draw on the burgeoning analytical models of social movement theory. A core wing of sociolegal, or law and society, empirical research grew around various mergers of social movement theory and legal theory. Not only did legal scholars pick and choose various elements of social science to incorporate into analytical research, but they were no less settled, and arguably often unrefined or unclear, in the understandings of "law" that they advanced for study of contentious social movement politics.

§16 The bulk of study integrating social science, political theory, and legal analysis emanated from the US and focused to some extent on the long US civil rights movement, followed by movements by poor people, women, gays and lesbians, Asian and Mexican Americans, undocumented immigrants, environmentalists, and consumers, among others. Concurrently, scholars around the world were beginning to analyze social movements closer to home, often drawing on different mixes of critical social theory and social scientific methods. It seems fair to

summarize that law-stuff was less central to most of the research outside the US, but the increasing salience of human rights discourse, human rights conventions, and rights-based movements paralleling US movements generated increasing attention from law scholars and to law by movement scholars.

§17 At least four general fault lines divided the effort to join legal and social movement theory, especially within the US.

§18 First, scholarly analysis diverges in specifying *what is meant by "law"* itself. What is law, and where do we find it? Where do we look to find law in practice?

§19 Second, and related, scholars diverged about whether the proper focus should be on official law in state and transnational institutions, or a focus on social movement activity, activists, and struggles with or against law? This gave rise to the split in "top down" *vs* "bottom up studies, " although most studies tend to be at least a bit of both at the same time; the difference is generally a matter of starting point and emphasis.

§20 Third, to what degree is socio-political *context* a focus of study? How is "power" conceptualized? Law is a form of power, but how is it imagined as a reflection of broader power relations, as an independent causal force, or as complexly constitutive of social relations in which law is just one of many factors? To what extent are deep structures in social relations – capitalism, racism, patriarchy, sexuality, colonialism – analyzed as either separate modes of power or variables or an integral part of the legally constituted socio-political body politic? Again, how do we identify and assess law in relation to broader contextual factors and relations?

§21 Finally, how do we assess the effects of legal claiming and practice by social movements? How much and how does or does not law matter? Are the effects of litigation limited to judicial impact or to broader "radiating effects" manifest in multiple political arenas? Again, do we identify law as a discrete, insular causal force? If so, which direction does law's causal influence run, from state institutions "down" on society or up from social actors? Is law an independent or dependent variable? Or is law embedded as a constitutive force that at once reflects and produces power, irreducible to the positivist logic of linear causality? These different forms of theorizing are important. In general, court-centered positivist models of legal "effects" find law to be relatively weak, while constructivist approaches take a more complex and contingent approach that revel in mixed results, paradoxes, and ironies. Law matters, but in complex ways… yielding conclusions that often are unsatisfying to more positivist (legal or social science) analysts.

§22 The remainder of this essay will review a variety of general frameworks that

combine in different ways interrelated elements of these epistemologies of empirical analysis and assessment regarding the workings of law in social movement contestation. The combination of assumptions at work in each approach shapes not only the contours of study – who, what, how – but also the assessments of significance.

Classic Models of Sociolegal Analysis

Empirical Studies of Judicial (or Official Legal) “Impact”

§23 Some of the earliest and best-known types of studies of law and social movements are “impact, ” and especially “judicial impact”, studies. In this approach, law is equated with the decisions of judges, usually high appellate court judges. The empirical task is to measure the degree to which judicial rulings and official rules change the behavior or relationships of targeted actors. The standard of impact generally is “compliance”, which may directly or indirectly be affected by the authoritative court judgment and reasoning or administration. Both the conception of law and of effects are highly positivist, assessed in terms of linear causality[9].

§24 Perhaps the best-known study in this tradition is Gerald Rosenberg’s aptly named book, *The Hollow Hope*[10]. Rosenberg’s analytical framework specifies two models of court power and influence on a continuum, with a “constrained” court at one end and a “dynamic, ” potentially powerful court on the other. He proceeds to study a host of famous actions by the U.S. Supreme Court to measure whether they had the impacts, and secured the compliance or changes in behavior, that often were assumed. Following his title, he finds at best modest direct and indirect impact, leading him to characterize reform litigation as an empty promise and the lure of litigation like “flypaper” – enticing but debilitating – for activists. Rosenberg’s thesis has drawn a great deal of critical attention, as has his positivist methodology. Not least among the disputed issues with his approach is relative inattention to the issue of how to define the “goals” of litigation by litigants who bring cases, as the top down approach does not involve much serious attention to aspirations, strategic logics, tactical designs, and the like by movement activists. After all, sometimes the point is not to win in court, and losing can often advance causes[11].

§25 Moreover, Rosenberg reduces attention to “legal mobilization” and litigation to what courts do and say, when instead litigation can be seen as a complex process involving lots of actors signaling in lots of different venues – directly to those who cause harm or oppose change, to and through mass and social media, directly to supporters of causes, and the like. At the same time, most scholars have little difficulty in agreeing with Rosenberg’s narrow point that courts alone do have relatively little power to compel big changes, affecting a broad scope of behaviors, in a short period of time – which is his focus. The tradition of sociolegal scholarship has always taken for granted that gaps, sometimes large, exist between law on the books and law in practice, although the measure of those differences is not always viewed on a single dimension of compliance. But that assumption provides more rather than less reason to study the many types of political contestation in the

constitutive “shadows” of official law rather than deflate law’s significance[12].

§26 Other scholars have used a similar impact model and positivist methodology to produce different assessments, suggesting that movement litigation can produce greater changes in compliance practices under some circumstances. Matthew Hall’s study of the US Supreme Court is perhaps the best known of these, although it builds on work by other American scholars[13]. In recent years, other scholars have used sophisticated impact studies for research in other countries. Haglund and Stryker’s collection of studies in *Closing the Gap* presents a very intricate model of contingent factors that are hypothesized to affect the degree to which litigation effects positive social change in contexts around the globe, including Latin America and Africa[14]. Scholarship by Daniel Brinks and Cesar Rodriguez-Garavito provide positive stories of litigation-based compliance and change, although their theorization and empirical study is less narrowly positivist and linear than that of Rosenberg’s impact-based approach[15].

Critical Legal Studies (CLS)

§27 A second and very different tradition of relevant scholarship is *critical legal studies.* Critical legal theory developed among legal scholars, most of them law professors, in the United States during the 1970s to critique from the political Left the traditional formalism and legitimating “myths” that prevail in the legal academy and among legal professionals. It combined, often in unclear ways, the tradition of classical legal realism with critical continental theorizing of Marx and other critical sociological thinkers. Parallel European developments proceeded that were even more thoroughly embedded in then contemporary continental theory, including Foucault and deconstructionists.

§28 The key goals of the CLS movement were to: 1) expose the indeterminacy of supposedly impartial legal doctrines and legal decisions that sustained and masked social hierarchy; 2) to theorize about the implications of law’s inherent ideological, institutional, and instrumental biases; and 3) to “demystify” legal rituals, practices, and culture to open the ways for challenge and transformation. In these regards, CLS scholars both drew on egalitarian social movement struggles and provided intellectual alliance with them on many fronts, although most CLS scholars were deeply ensconced in academia. Their major contribution was critically deconstructing and challenging the dominant ideological dimensions of the American and European legal traditions[16].

§29 The primary limitation of CLS was that, somewhat ironically but understandably, it continued the intellectual tradition of identifying law with official case law, legal constructions, and institutions; law is what courts do and lawyers contest. As such, the intellectual movement added little to understanding the aspirational and strategic logics of “on the ground” social movement activists,

who in many ways were viewed as “outside” or “before” the law even as they appealed or were subjected to law in their quests for change. Moreover, the commitment to exposing or demonstrating law’s complicity in hegemonic hierarchies – capitalist, racial, gender, *etc*. – tended toward almost dismissive views of legal strategies and aspirations of grassroots movements. Critiques of “rights” discourse[17] and litigation tactics were very differently theorized than by Rosenberg and impact scholars, but the conclusions and overall thrust of the contributions were parallel and complementary to the latter[18]. Moreover, the lack of rigorous empirical study of law in practice, and especially law “in society, ” limited the impact on and value for sociolegal scholars. Still, for a generation of legal analysts, including me (my earliest essays were in the CLS mode), critical legal studies were highly inspirational, exciting and informative.

§30 The initial cohort of CLS scholars were mostly white males at mostly elite American (and European) law schools, where they became quite controversial among the old guard establishment. But they also were controversial with those who identified with persons, interests, and causes largely overlooked by the guys – feminists, racial minorities, women of color, eventually LGBTQ specialists, and others. Much as feminism emerged from the white male-dominated New Left in campus politics, so did networks of Left feminist critical legal theorists and critical race theorists, both in the U.S. and in Europe, counter critically about what was left out of male critical perspectives, although the styles and intellectual groundings varied once again. Feminists mostly contributed to critiques of law’s complicity in constituting patriarchal exclusion from public life and hierarchy throughout social and political life. Many feminist legal scholars were embedded in progressive and radical movements, and this engagement was influential. Perhaps most famously, Catharine MacKinnon’s work contributed to the case law and movement to challenge sexual harassment, especially at work. Drucilla Cornell and Martha Fineman developed important theorizations of gender and subjectivity critical of the liberal “autonomous subject, ” while political theorist Wendy Brown offered incisive critiques of liberal rights[19]. Whatever the contributions to legal theory, however, most feminists also offered only limited insights about social movement activism, subjectivity, strategies, and impacts.

§31 Critical race theory (CRT) built on critical legal theory but differed in important ways. Much critical race theory again focused on critical engagement with official case law and liberal legal theory, including especially anti-discrimination law but also free/hate speech and torts. But much of CRT used the standpoint of historical and personal “storytelling” by people of color – initially African Americans and then Latinos – as a foundation for analyzing the abstractions of law that evolved out of a history of white supremacy and beyond the racial break of the post-war era. Patricia Williams’ *The Alchemy of Race and Rights* proved highly influential and enduring[20]. Moreover, prominent CRT scholars – especially Derrick Bell, Kimberlé Crenshaw, Richard Delgado, and Mari

Matsuda – did offer sustained critical study and analysis regarding the long civil rights struggle and the complexities of legal engagement by egalitarian movements. Latino CRT scholars, including Ian Haney Lopez and Tara Yosso, extended both the critical sensibility and experiential/historical method to move beyond the white/black color line. Critical race theory's methodology generated critics among empirical sociolegal scholars but generally found greater influence among empirical scholars, and CRT itself has begun in recent years to integrate more rigorous social science and expand attention to material/class dimensions of racial hierarchy and struggle. These connections had earlier been made by select scholars in Europe, including perhaps most importantly British sociologist and activist Stuart Hall and his colleagues committed to post-Gramscian critical cultural theory, although they were distant from the legal academy and less directly oriented to law.

Legal Mobilization Studies

§32 A third general approach often is labelled "legal mobilization" studies. The classic definition of legal mobilization was provided long ago by Frances Kahn Zemans: "The law is…. mobilized when a desire or want is translated into a demand as an assertion of rights"[21] or other legal entitlement. Legal mobilization analysts tend to focus on how people think and behave when they make claims of legal entitlement and status, especially when claiming rights leads to disputes with other parties. One topic of interest for some scholars in this tradition explores why people sometimes do and other times do not act when their perceived rights are violated. At one level, the approach envisions law as a strategic resource available for instrumental "use" by social actors to advance their interests and causes[22]. Zemans characterizes legal mobilization as a form of "democratic participation". Legal mobilization studies that focus on legal claimants and users thus are often identified as "bottom up" in empirical orientation, as opposed to "top down" approaches, although most studies actually integrate elements of both; the difference in emphasis is often palpable, though.

§33 In line with this last comment, many versions of legal mobilization theory instead or also portray law as a *constitutive* force that structures: first, the institutional and ideological context of instrumental action; and, second, the intersubjective cognitive maps of "legal consciousness" through which people imagine, aspire, calculate, and make sense of that institutional context in which they are embedded[23]. Thus, Zemans writes, "perceptions of desires, wants, and interests are themselves strongly influenced by the nature and content of legal norms and evolving social definitions of the circumstances in which the law is appropriately invoked"[24]. In this perspective, people are at once legal subjects constructed and restrained by law, and to some limited degree also situated agents who contest and reshape legal meaning in practical interaction. As such, the approach draws on understandings of law and power that are not confined to

positivist models of linear causality.

§34 Much sociolegal research focuses on legal mobilization by individuals, but other scholars focus on mobilization by groups or movements to effect broad social change. E. P. Thompson's classic *Whigs and Hunters* made practices of legal rights "claiming and counterclaiming" the theme of his study of class conflict between landed wealthy and rural poor in early Eighteenth Century England[25]. Many scholars have analyzed histories of rights claiming by workers and union activists in various parts of the world through a similar lens of social movement and legal theory. Stuart Scheingold's classic study *The Politics of Rights* perhaps most famously discussed the politics of rights-based movement struggles – the US civil rights movement, but women's, poor people's, and environmental movements as well – in terms of political and legal mobilization[26]. Virtually all scholars in this tradition follow Scheingold in underlining that litigation alone rarely achieves substantial social change, and that legal mobilization need not even involve filing lawsuits, much less going to court. Unlike Rosenberg, legal mobilization scholars recognize that litigation involves many different actors and institutions, and legal rights advocacy takes place in many sites and through many forms of action across state and society as well as transnationally. Rights-based social movement activism commonly engages conventional and social media advocacy, demonstrations, protests, electoral campaigns, and other political maneuvers, both with and without litigation in the mix. This shift in identification of where legal advocacy takes place made alignment with social movement theory highly productive.

§35 Most scholars in this tradition also build on the "constructivist" or "interpretive" focus on legal meaning making central to Scheingold's analysis. The constructivist analytical framework recognizes that legal norms, practices, and discourses are – like all language practices – relatively indeterminate, polyvalent, malleable, and contestable. Law by its very nature is manifest in social conventions that are variously constructed and disputed over time, in different terrains of society, state, and beyond. In some times and places, the possibilities for creative legal construction and contestation by ordinary individuals and subaltern groups are relatively open. Generally, though, official law enforced by nation states is highly constrained by the inherited structures and ongoing actions of dominant social, economic, and political actors. In most historical moments, legal representatives of those groups with the greatest social, economic, and political power severely delimit the range of acceptable constructions and enforcement of legal meanings, generally to sustain the status quo and dismiss or "kill" off the rival claims and visions of other groups[27]. In Marc Galanter's famous terms, the "haves tend to come out ahead" in routine legal interaction and mobilization practice[28]. The variable degrees of openness to, and constraints on, contestation define the dynamically paradoxical character of law's hegemonic power in practice[29].

§36 But official law and legal arbiters do not kill off rivals only symbolically or epistemically. My more recent scholarship has underlined that law's words authorize physical coercion and violence by both state and social actors[30]. Law "plays a critical cultural role in defining meanings and relationships, but it does so in the context of state power and violence, " argues Sally Engle Merry. "The power of law to transform sociocultural systems is two-sided: it depends both on the direct imposition of sanctions, and on the production of cultural meanings in an authoritative arena"[31]. While legal meaning construction often permits a wide range of discursive possibilities among contending groups, the exercise of law's violence to enforce official meanings tends to reduce significantly the repertoire of defiant claims and actions realistically available to those aspiring to challenge or change official law. This capacity to exercise institutionalized power in the form of physical coercion and material incentives or penalties is manifest in both domestic national and international spheres, including in forms of both colonial and post-colonial rule.

§37 The recognition of the unequal power relations in which legal conventions are contested and selectively enforced has led most legal mobilization theorists to emphasize analysis of the contingent features of social and political contexts in which legal disputing occurs. While the focus of legal mobilization theory on disputing underlines agency and instrumental contestation among actors, attention to structural factors of institutional and ideological power[32] is considered essential to how we understand and assess how law works or matters. Legal mobilization scholars thus draw on critical legal theory, critical social theory, and social science institutionalism to analyze the configurations of power relations at once facilitating and constraining legal mobilization by marginalized or subaltern groups.

§38 Elements of social movement theory also have been integrated into such studies. One set of factors is often referred to as components of shifting *opportunity structures*, which refers to the relative vulnerability or stability of the overall hierarchical power structure; the key factor is the degree to which inherited structural arrangements are open or closed to challenge and change. Commonplace factors that increase vulnerability of dominant groups and their hold on official law include relative economic volatility or crisis, international military and diplomatic instability or war, rapid internal changes in population demographics or cultural trends, and "emergencies" of all types. When status quo hierarchical arrangements are especially vulnerable, dominant groups may find that their interests "converge" with those of traditionally less powerful groups and causes, thus leading the former to concede basic changes in legal and political arrangements[33]. A second set of factors focus on critical analysis of the *organizational resources* that social movements can draw on – money, lawyers, associational bonds, leaders, elite allies, support from other movements, *etc*. – relative to dominant groups whom movements contest. Again, most scholars recognize and develop research to show how and why the haves usually but not

always come out ahead in struggles involving social movements.

§39 One inclination of much legal mobilization theory borrowed from social movement theory is to underline that movement mobilization is a dynamic process that can be understood in different phases or stages, and that legal mobilization can play different roles in each phase. My own study of rights mobilization around gender-based wage equity[34] analyzed the overall decentralized national movement and specific local manifestations in terms of four stages of movement action: 1) initial organizing and rights claiming, which was catalyzed by federal and, in many instances, local litigation; 2) political leveraging for changes in rules of policies, including legal mobilization; 3) politics of implementation and enforcement, struggling to turn legal leverage into social change; and 4) the legacy of ongoing impacts and ripples of indirect effects, including catalysis of new movement struggles.

§40 On the general issue of impact from legal mobilization – understood far more broadly than the direct impact of courts or even litigation processes – scholars vary widely. However, it seems fair to summarize that most legal scholars share the view that official law constrains the options for challenge and offers at best modest resources for transformation. The key is the capacities of movements to mobilize extra-legal resources both to leverage legal change and to turn that into social transformation. The US civil rights movement in the 1950s-60s is an example of this mixed legacy. While it took hundreds of years of struggle, legal triumph over the explicitly discriminatory practices that marked the Jim Crow era (and earlier during slavery) was an undeniable advance for civil rights and social justice. But law still bore the influence of dominant racial, class, and gender hierarchies, so that new civil rights were invested with little capacity to challenge the substantial material inequality that was produced by centuries of economic, social, and political disenfranchisement. Moreover, “repressive law” targeting racial, class, gendered, immigrant and other subaltern populations remained despite the appearance of greater due process and facial neutrality. This is evident in US housing policy, carceral state practices, the *crimmigration* system, and private employment practices. This was no less true for the women’s rights movement in the US, where the movement remained elite dominated and limited in commitment to working class and poor women. Movements for poor people never even managed to gain much legal standing; poor people remained second class citizens largely shut out of opportunities for most legal mobilization tactics.

§41 Legal mobilization and other sociolegal scholars have offered a wide range of subtle, theoretically astute observations about how to assess the effects of legal contestations, especially the paradoxes of “winning” and “losing.” For one thing, legal settlements often signal advances that are overlooked in studies focusing on the impact of victories in courts, but settling also discounts the potential long-term impact of changing case law or policy doctrine[35]. Conversely, as noted earlier,

losing in court sometimes can catalyze social movement activism, public support, or elite policy change, so that losing can be counted as an advance or "win"[36]. And yet other scholars downplay focus on short term advances and setbacks, opting instead to address long historical trajectories of struggle, often embracing Gramsci's conception of "trench warfare"[37]. Again, many of my examples have drawn on US experiences, but dozens of studies have employed legal mobilization frameworks to study rights-based contestation in virtually all parts of the world.

Secondary Thematic Branches on the Legal Mobilization Trunk

§42 The legal mobilization tradition of scholarship on social movements and social justice activism has generated a variety of secondary thematic topics receiving great attention. I mention these briefly with just some representative examples.

§43 Interest Group Reform Litigation. Many scholars use the legal mobilization approach to study organized efforts of reform litigation. Such studies focus more on lawyers and political representatives and their interactions with the state or formal legal system rather than on grassroots of social movement activity. Such studies often draw on social movement theory, but they are interested more in policy change in official law as well as the capacity of organized litigation campaigns to reshape legal rules, judicial priorities, and representational mechanisms in civil society. Classic examples of this modest variation are Cichowski's study of women's rights and environmental litigation before the European Court of Justice[38] and Charles Epp's comparative studies demonstrating how legal "support structures" contributed to "rights revolutions" in common law countries in the late Twentieth Century[39].

§44 Cause Lawyering. Stuart Scheingold concluded his 1974 book *The Politics of Rights,* with several chapters discussing the problems and limits of lawyers in legal mobilization politics[40]. Scheingold and Austin Sarat then teamed up to organize a host of mostly younger scholars to work on the *Cause lawyering project*, producing many edited volumes and a co-authored monography[41]. Many dozens of articles resulted and many studies continue today. This scholarship generally takes seriously the constraints that training, professionalization, and experience place on lawyers for social movements, but the roles and activities of cause lawyers vary widely with organizational, legal, and political context as well as different types of causes and movements.

§45 Mass Media, Law, and Social Movements. Drawing heavily on social movement theory, many legal mobilization scholars give much attention to how mass media is mobilized to give attention to movement causes, through both direct protest actions and litigation. Indeed, one of the most important uses of litigation is to

draw attention from mass and social media[42]. However, Leachman importantly found that conventional media reporters tend to give greater attention to movement lawyers than to grassroots activists, thus giving lawyers greater power to shape substantive and strategic agendas in movements[43]. Likewise, conservative business interests and dominant social groups often use the media very effectively to stigmatize less powerful people, their causes, their lawyers, and their tactics, including litigation[44].

§46 Counter-Mobilization and Backlash. Not surprisingly, a great deal of scholarship has charted the appropriation of Left-developed legal mobilization tactics by conservative business interests and social causes. In the United States, these very influential social forces have especially been tracked by scholars, mostly but not entirely on the Left. Attention to “backlash” as perhaps the most important feature of litigation tactics was generated by Gerald Rosenberg[45] and Michael Klarman[46]. Many other scholars have argued that defining backlash as more prompted by litigation than other movement tactics makes little sense, and in fact backlash can be taken as a sign that legal tactics are powerful and challenging to dominant interests[47]. Counter-mobilization often involves alternative reactionary social movements, but much also involves traditional interest groups and elites engaged in low level bureaucratic cooptation and undermining of implementation efforts.

New Directions

§47 Research on law and social movements continues to proliferate, and in the process it is expanding its applications, approaches, and appeal. In particular, legal mobilization scholars continue to thicken and refine their focus on the variable *contexts* of struggles. I conclude this very brief review essay by outlining four different areas of expanded attention and experimentation in the legal mobilization tradition.

§48 Expanding the Historical and Geographic Context. Most legal mobilization studies are designed according to the guidelines of traditional social science "case studies." As such, the time periods, geographic boundaries, numbers of actors, and core contested issues tend to be limited. There is nothing wrong with that, and in fact scores of terrific case studies have been generated. However, many scholars have expanded the geographic and temporal scope of studies, focusing on many discrete episodes of legal struggle among subaltern and dominant populations. E P Thompson's classic text *Whigs and Hunters*, after all, examined three geographically separate case studies of contestation over class rule in the Black Act in Eighteenth Century England, expanding time and space in his brilliant theorization[48]. Scholars of colonial and post-colonial politics in particular have provided models for taking this approach even further. Sally Merry's *Colonizing Hawaii* tells a big historical, multi-sited study about the role of law and lawyers – and capitalists and Christians – in transforming Hawaii into a modern socio-legal system, all setting up a series of studies about how female victims of domestic violence negotiate difficult choices about mobilizing the rights that eventually were "given" by law[49]. My own work with George Lovell on the legacy of US colonial rule in the Philippines and conscription of Filipino migrant workers in the metropole follows a similar trajectory, although the legal mobilization approach is put to work throughout[50].

§49 Deepening the Empirical Inquiry into Hierarchy and… Hegemony. A separate but often related project is to deepen the inquiry into hierarchical structures of race, class, gender, sexuality, ethnicity, religion, and the like in which struggles over rights and legal entitlements often takes place. Again, Merry and Thompson use their expanded historical scope precisely to trace developments in capitalism and other power structures in ways that clarify the changing possibilities and terms of contestation. Interest in intersectional power has grown, not least under the influence of critical race and feminist theory. My own work increasingly uses the framework of "racial (heteropatriarchal) capitalism" to make sense of immigrant workers' transnational struggles. Bernadette Atuahene deepens structural understanding of how racial hierarchy and capitalism produced white taking of land from native Blacks in South Africa and continued to pose important constraints to struggles for reparations; this issue of "takings dignity" has been

adopted by other scholars in many contexts around the world[51].

§50 Systematic Comparative Analysis. Legal mobilization analysis began in large part with studies outside of the US, although by US scholars – Laura Nader's studies of female rights claimants in Latin American communities[52], Stuart Scheingold's study of the early European Court of Justice contrasted with the United States[53]. Charles Epp's classic book *The Rights Revolution* provided a model of comparative legal mobilization focusing on "support structures"[54], while Boa Santos and Cesar Rodriguez-Garavito offered a very different mode of comparative study regarding "law and globalization from below"[55]. Katharina Heyer's superb study of how rights of people with disabilities "travel" among the US, Europe, and Japan is another valuable model[56]. Perhaps the most important recent development in this regard is Haglund and Stryker's *Closing the Gap*, which presents a very complex, elaborate, multiple variable and policy-oriented approach to comparing litigation and legal mobilization, including for socioeconomic rights, in different contexts around the global South[57]. The papers collected in this present *e-legal review* special issue will make an even more ambitious, if less theoretically uniform and coordinated, contribution to comparative cross-national study.

§51 Legal Contestation in Authoritarian Contexts. One of the most rapidly expanding and, to my mind, exciting areas of inquiry concerns studies of legal mobilization politics in authoritarian contexts. Tamir Moustafa's book on expanding (and then contracting) rights contestation in Egypt, followed by other essays, was a leader in this regard[58]. Excellent studies by Lynette Chua on LGBTQ politics in Singapore[59], Mary Gallagher on workers' rights in China[60], and Milli Lake's study of rights against gender violence in the Republic of Congo[61] – quickly became classics exploring the ironies of contestation over liberal rights in illiberal regimes. Another line of study has expanded regarding contests over liberal rights in particular zones and for particular people subjected to authoritarian or repressive rule amidst a larger liberal legal order. Studies of the Jim Crow era in the US fit this model, but also studies of gender rights, immigrants' rights, LGBTQ rights, and the like are proliferating. The value of all this is to expand comparative study not of places, but of the plural, intersecting legal orders that structure most nation states and transnational political contestation.

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