

NEW DIRECTIONS IN LAW & EDUCATION REFORM RESEARCH

Abstract

*Extensive law and education reform scholarship demonstrates the persistent gap between law in the books and law in action, and the myriad ways that public education falls short of the equity ideals contained in landmark litigation, such as *Lau v. Nichols*, and historic legislation, such as the Individual with Disabilities Education Act. This paper provides a review and critique of this literature and suggests that to achieve a more comprehensive understanding of the role of law in education reform, we must attend to the full range of legal activities surrounding schools, the normative and cognitive influences of law, and the impact of law on embedded organizational actors.*

Keywords: School Reform, Law/Legal, Equity

Purpose & Introduction

Extensive law and education reform scholarship demonstrates the persistent gap between law in the books and law in action, and the myriad ways that public education falls short of the equity ideals contained in landmark litigation, such as *Lau v. Nichols*, and historic legislation, such as the Individual with Disabilities Education Act. This body of literature is interested in understanding how litigation and legislation that produces legally enforceable rights impacts the educational outcomes of culturally, linguistically, and physically diverse students. Scholars that contribute to this body of work include lawyers, advocates, education policy scholars, education historians, political scientists, legal scholars, law and organizations theorists, and others.

Yet, the vast majority of this scholarship focuses on court-centered analyses, rational-actor assumptions about human behavior, and the regulatory import of law. Moreover, most law and education reform scholars ignore the complex, and often

contradictory, institutional pressures that face public schools and districts. As a result, law and education reform scholarship risks overstating some, and understating other impacts of law on schools, and tells us little about the complex processes that unfold to produce the persisting gap between law's intent and substantive educational practices. Just as this research produces incomplete explanations of the problem, it points to incomplete solutions.

In contrast, rich lines of research in law and organizations and legal consciousness provide more nuanced lenses through which to view the impact of law and litigation on education reform. I argue that a productive marriage of macro-social and micro-social perspectives permit us to study how educators and policymakers make meaning of legal compliance within an embedded social context and how the embedded social context is shaped by both the law's normative and cognitive influences as well as competing organizational pressures. The purpose of this paper is to provide a systematic review of existing law and education reform scholarship and to propose new theoretical approaches to the study of law's impact on classrooms, schools, and school districts.

Methods & Perspectives

In Part I, I provide a systematic literature review of law and education reform scholarship. Then, through a law and society lens, I argue that while this body of literature is far from cohesive, much of it shares some common characteristics that risk limiting its analytical scope. First, this body of literature focuses on published legal opinions and formal legal actors, and ignores the considerable legal activity that occurs before, after, and beyond the purview of courts (Silbey, 2005). Second, much of law and

education reform scholarship assumes a rational actor model for human behavior and thus preoccupies itself with the regulatory role of law. Absent from this analysis are the ways in which routine and the desire to adhere to socially constructed values and expectations shape human action (Powell & DiMaggio, 1991). Finally, law and education reform scholarship largely ignores the complex social and organizational context of public education. This scholarship fails to recognize that a particular law or legal mandate is experienced in schools and districts as just one of many competing and conflicting demands (Labaree, 1997; Rowan & Miskel, 1999). Thus, this scholarship often isolates legal compliance from its social and organizational context, and frames problematic responses to law too narrowly as noncompliance. As a result, law and education reform research provides a useful but incomplete picture of the ways in which law impacts substantive educational practices.

In Part II, I introduce neo-institutional theory in the law and organizations literature as a useful lens to understanding the impact of law on education reform. I argue that the more traditional macro-social theories in law and organizations help us to understand the impact of law on the formal structures of schools, school districts, and the field of education more broadly. These macro-social theories help explain the creation, proliferation, and persistence of similar organizational structures across schools and school districts, that despite their prevalence, fail to meet the needs they were produced for. However, these macro-social theories are less useful in explaining variation in implementation or change. For example, these theories fail to explain the dual nature of special education in high wealth versus low wealth school districts (see Ong-Dean, 2009),

or the import of school leadership on reform efforts. The macro-social neo-institutional theories fail to address the role of human agency, the influence of power differentials among actors, and the possibility for change (Powell & DiMaggio, 1991; Sewell, 1992). Micro-social theories that examine the relationship between structure and agency help fill this gap (Sewell, 1992). While more recent scholarship in law and organizations has begun to examine micro-social processes (Fuller et al., 2000), I draw on a more robust body of literature on legal consciousness to illuminate the role of organizational actors, and power differentials, in producing variations in implementation and change.

New Directions (Synopsis of Part II)

Public schools are a complex organizational form. Thus, law and organizations research provides a natural and useful starting point for understanding law and education reform. Modern law and organizations theorists draw considerably from neo-institutionalism, which began as a macro-social theory to explain the environment's impact on organizations and organizational fields. I argue that this macro-social perspective helps explain the creation and persistence of similar organizational structures across schools and school districts.

Macro-Social Theory: Neo-Institutionalism in Law & Organizations

This arm of neo-institutional theory posits that organizations conform to the regulatory, normative, and cognitive dimensions of their institutional environment because they seek legitimacy as a means of survival (Scott, 2001). By appearing to adhere to laws, align to normative values of right and wrong, and adopt socially accepted structures, vocabulary, definitions, and categories, organizations signal acceptability,

credibility, and legitimacy (Edelman, Abraham, & Erlanger, 1992; Meyer & Rowan, 1977). Consequently, institutional theory predicts the organizational attempts at gaining legitimacy result in the isomorphism of symbolic compliance structures (Dobbin, Sutton, Meyer, & R. Scott, 1993; Edelman, Uggen, & Erlanger, 1999).

Macro-social neo-institutional theories also explain that while organizations face significant pressure to conform to their institutional environment, the requirements for doing so often conflict with one another or with the organizations' daily work (Edelman, 1992; Meyer & Rowan, 1977). To survive, organizations create formal symbolic structures that signal compliance but decouple their actual work activities from their formal structures so that each is buffered from the uncertainties and conflicts of the other. Consequently, symbolic compliance may lead to a proliferation of costly, yet, ineffective formal structures that give the appearance of lawfulness, while simultaneously masking illegality (Edelman, 1992; Edelman & Suchman, 1997; Krawiec, 2003).

These macro neo-institutional theories suggest that to understand the impact of law on schools, we must look beyond symbolic structures and measures of compliance, and study the informal, day-to-day activities in schools. While these macro-level neo-institutional theories help us to understand the creation and proliferation of similar formal structures that seem not to meet the needs they were produced for, these theories are not as helpful in explaining the role of human agency, the influence of power, organizational homogeneity, and the possibility for change (Powell & DiMaggio, 1991; Sewell, 1992). Micro-social theories that examine the relationship between structure and agency help fill this gap (Sewell, 1992; Silbey, 2005; Vaughan, 1998).

Micro-Social Theories: Legal Consciousness

Micro-social theories that examine the relationship between structure and agency suggest a dynamic process in which macro-social structures shape micro-social processes that, in turn, maintain or transform macro-social structures. Law and Society scholars that attend to this intersection of structure and agency have described it as “legal consciousness” (Albiston, 2006; Ewick & Silbey, 1998; Hoffmann, 2003; Silbey, 2005), and “law in everyday life” (Engel & Munger, 1996). It has also been called “legal reading” (Fuller, Edelman, & Matusik, 2000) in the Law and Organizations literature.

These terms describe similar phenomena, namely, how individuals make meaning of their world by drawing on legal discourse, and how individuals make meaning of law by drawing on their social context. In addition, scholars in this field recognize that legal meaning-making influences whether, and how, individuals mobilize the law. I argue that the study of legal consciousness makes several contributions to the neo-institutional theory in organizations literature. Legal consciousness helps explain, among others, the presence of organizational homogeneity and uneven implementation and the role of individual agency in creating change. Through the lens of legal consciousness, law and education reform scholarship can explain how law impacts substantive educational practices and under what conditions the desired changes occur.

Organizational Homogeneity & Uneven Implementation

Legal consciousness helps to explain organizational homogeneity and uneven implementation. Macro neo-institutional theories, such as the isomorphism of compliance structures, predict much more homogeneity than we in fact see (Delmas & Toffel, 2008).

Scholars who apply micro-social theories to the study of law and organizations contend that that organizations construct the meaning of law through its own social processes (e.g., Fuller et al., 2000). On one hand, organizations are influenced by a multitude of complex, and often conflicting, regulatory, normative, and cultural institutions that emerge from within and without the organization (Albiston, 2005; Heimer, 1999; Vaughan, 1998). On the other, researchers find that which institutional pressures organizational actors attend to, and how, is shaped by internal pressures, such as existing organizational structures (Fuller et al., 2000; Hoffman, 2003), relative strength of organizational subunits (Delmas & Toffel, 2008), organizational culture (Hoffman, 2003; Vaughan, 1998), and leadership (Konrad & Linnehan, 1995). Thus, legal consciousness may take a variety of forms across organizations and influence the social construction of legal compliance. The attention to legal consciousness can explain uneven implementation, and how law produces substantive change in one organization, and only symbolic compliance in another.

Role of Individual Agency and Change

Scholars of legal consciousness recognize that while individual agency is culturally and historically constrained by structure - the schemas and resources available to the agent - structure is also shaped by individual agency (Ewick & Silbey, 1998; Sewell, 1992). The study of legal consciousness recognizes that humans have the ability to pick and choose between different schemas to explain and direct individual and collective action (Albiston, 2005; Ewick & Silbey, 1998; Sewell, 1992). These social constructions become patterned, stabilized and institutionalized. These institutionalized

understandings, routines, and practices have material consequences and act to constrain and enable future meaning-making. Powell and DiMaggio (1991) succinctly note that institutions not only constitute the rules and the field of the game that organizational actors play, they are also products of human action. Legal consciousness literature suggests that the legal consciousness of all human actors, whether implementers, boundary-spanners, or targets of the law, matter for the social construction, reproduction, and transformation of law.

Conclusion & Implications

Since the historic Supreme Court decision in *Brown v. Board of Education*, educational equity advocates have looked to the courts as a vehicle for educational reform (Tyack & Benavot, 1985). Today, schools are subject to a myriad of laws that dictate who and how they serve. A law and society critique of this body of law and education reform literature suggests that to achieve a more comprehensive understanding of the role of law in education reform, we must attend to the full range of legal activities surrounding schools, the normative and cognitive influences of law, and the impact of law on embedded organizational actors. Neo-institutional theory in law and organizations, coupled with legal consciousness, provides such a lens. Utilizing such theories requires a significant shift away from large-scale quantitative research on appellate case law, towards in-depth qualitative research in schools and classrooms. Without such a view, law and education reform scholarship risks overstating the impact of law by examining only formal symbolic measures of compliance, or understating the impact of law by ignoring the ways in which laws and legal actions change mental

scripts, schemas, and informal practices. Moreover, it fails to explain the mechanisms that separate law in action from its idealized mandates, and provides little insight for how to improve the use of law as a vehicle for educational reform.

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