Review of *Nobody's Law: Legal Consciousness and Legal Alienation in Everyday Life*, written by Marc Hertogh

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In this new addition to the substantial literature on legal consciousness, Marc Hertogh seeks to chart out an alternative approach to the dominant course set by Ewick and Silbey in their seminal work *The Common Place of Law*[1] and subsequently in Silbey's article 'After Legal Consciousness.'[2] Hertogh proposes a 'secular' approach to legal consciousness that contrasts in several important respects from what he refers to as the dominant 'critical' approach. The overall aim of this 'secular approach' is to understand 'why people—because of their strong criticism about the justice system—turn their back to law' (p. 6).

The crux of Hertogh's argument is as follows. Law and society scholars should not assume the salience of law in everyday life. While 'critical' legal consciousness scholars treat law's importance as a given or constant, the 'secular' approach focuses on *if* law matters and *how* it may do so. Drawing on quantitative data Hertogh contends that many Dutch citizens hold a 'sullen tolerance' of judges and the court system. Through the use of three case studies, he also seeks to demonstrate that certain groups hold their own ideas about law—a 'living law'[3] that contrasts with state law—which guides their sense of right and wrong and the actions they undertake. Hertogh claims that the divergence from and discontent with state law and the justice system signals a process of legal alienation. He then seeks to develop a framework of legal alienation by which to better understand this public dissatisfaction with law.

Chapter 1 sets out Hertogh's critiques of the 'critical' legal consciousness approach. Underpinning these is the notion of legal hegemony, which he notes refers to the dominance of law in people's lives, as it is infused into conceptual thinking and the structuring of our social actions, yet largely unnoticed and uncontested. Hertogh views the use of this concept

[1] (1998).
[2] (2005) 1 *Annual Rev. of Law and Social Sciences* 323.
[3] E. Ehrlich, *Fundamental Principles of the Sociology of Law* (1936).

by ‘critical’ scholars as deeply problematic. He claims it gives rise to an empirical flaw; that is, the mistaken starting point of the ‘critical’ scholars that law continues to retain support from the people. He also claims it also gives rise to methodological flaws. The ‘critical’ scholars’ goal of creating an account of hegemonic legality focus on *how* law dominates as opposed to *if* law dominates everyday life. Finally, he claims it gives rise to conceptual flaws as the focus of enquiry remains solely on state law, albeit outside of the state institutions in the form of legality, at the cost of missing non-state law or nonlegal or quasi legal social structures that may influence people’s thoughts and actions. Hertogh states ‘… although [Ewick and Silbey] rejected an *institutional* law-first perspective, they still maintained a *conceptual* law-first perspective, in which ‘law’ equals ‘state law’’ (p. 11).

The methodological approach taken by Hertogh to get around these limitations of the ‘critical’ approach are outlined in chapter 4. They involve four moves that further differentiate Hertogh’s work from that of Ewick and Silbey[4] and Silbey.[5] The ‘critical’ legal consciousness scholars sought to study law *in* society. Hertogh notes that this frames law as an independent variable. However, in order to also capture people’s conception of law that do not correspond with state law or the possibility that state law may have only limited salience in their life, the ‘secular’ approach also frames law as a dependent variable. Hertogh views the ‘critical’ legal consciousness scholars’ efforts to focus on the everyday life of ordinary people as having in practice narrowed to focus on more marginalised groups in society. To remedy this, the ‘secular’ approach focuses on ‘both the haves and the have-nots’ (p. 66). Hertogh adopts a constructivist grounded theory for his ‘secular’ approach and rejects the ‘critical’ approach of Ewick and Silbey which he claims forced the words of study

[4] *The Common Place of Law* (1998).
[5] (2005) 1 *Annual Rev. of Law and Social Sciences* 323.

participants to fit pre-given theoretical perspectives. Finally, Hertogh embraces a mixed-methods approach in contrast to the dominant qualitative approach of the 'critical' school.

At times the tone of Hertogh's critique verges on the polemic as he opts for unsubtle interpretations of Ewick and Silbey's and Silbey's work. For example, he frames the problematic in this work—that despite its many injustices the law still appears to have widespread support—into the question of people 'turning' to the law: 'why do people (still) turn to law?' (p. 8). This seems to be a step further than what is actually claimed by the 'critical' approach. Or, in his analysis of quantitative data from the Netherlands of those who criticise the justice system he concludes that these surveys challenge Ewick and Silbey's suggestion that a 'resistant consciousness of law' is strongly associated with 'race, gender and class' (cited on p. 161) on the basis that his own data: 'do *not* indicate that people with a migration background are more critical about the law than people with a native Dutch background', 'do *not* clearly indicate that women are more critical than men'; and 'do *not* show that people with a lower income are more critical about the justice system than those with a higher income' [italics in original] (p. 161). No mention is made of differences in the actual variables used or the particularities of each country context that may render comparison of the variables problematic.

However, I think that other critiques have merit. It is a helpful to continually interrogate starting assumptions, such as whether there really is a widespread acceptance of law or at least the assumed acceptance of law by the 'haves' (as opposed to the 'have nots') in society. Relatedly, it is important that law and society scholars do consider the salience of law vis-à-vis other social structures or forces and other conceptions of law. This includes being careful how to interpret the relative influence of law with respect to these other factors at play. In

Hertogh's case study examples he seeks to demonstrate that instead of legal acceptance there is a sense of alienation of the law from three non-marginalised groups, notably a school director, contractors in the construction industry, and public officials working in a marginalised neighbourhood in the Netherlands. This alienation is demonstrated with respect to specific issues in each case.

I think that the substantive content of each of these case study examples is important and that they reveal some complexities (or difficulties) with legal consciousness scholarship. Hertogh's case studies relate to issues that represent particular fissures in many European (and, to an extent, other Western) states today—equality, migration and the European Union. For example, the school director in charge of a school with high levels of students and teachers with migrant backgrounds found it difficult to accept a ruling by the Dutch Equal Treatment Commission that a female Muslim teacher is able to refuse to shake hands with men despite being asked to do so as part of her job. The school director considered that teachers should act as role models for the students and shaking hands with other students and staff—something taught to students in order to prepare them for the labour market—will help realise equal treatment for those students when at the school and beyond. In contrast, the Equal Treatment Commission focused on equality in the contractual relationship between the employer and employee and found that the school director could not require the teacher to shake hands. The contractors in the Dutch construction industry failed for many years to adhere (and perhaps still do reject) the antitrust laws set out by the EU in the early 1990s. These contractors had, since at least the 1950s, engaged in pre-contract consultations between the various construction companies in which companies agreed which company would win the contract based on price and then compensated the other companies for the costs of preparing their bids. The Dutch government approved of such practices. Upon hearing of the

rules imposed by the EU, the first reaction of the Dutch government was to try and block the change. When this failed it was slow to introduce new laws to comply with the EU requirements.

These examples demonstrate a rejection of state law by certain groups. However, it is notable that they related to very particular issues. I am not necessarily convinced that the actors involved are alienated from law more broadly. The school director initially sought out the ruling from the Equal Treatment Commission. The construction contractors felt particularly hurt by the EU laws because they knew the practices they engaged in were once legitimate by their own government. They did not want to change their practices just because of a new rule 'imposed on them from 'Brussels'' (p. 123). While Hertogh claims that alienation from law 'is a process' (p. 153), I do wonder whether the actors in these case study examples feel so strongly about other less contentious aspects of state law. Do they still, in principle, agree with other laws and attempt to abide by them? If we return to Ewick and Silbey's analysis of legal hegemony, we see that they touch on rather more mundane issues, such as neighbourhood problems or consumer affairs. More than this, though, they see the continued and uncontested power of law in the everyday unnoticed aspects of life they view to be infused with law. Mezey,[6] whose work Hertogh builds upon, observes that by locating legality wherever legal concepts or rules are vaguely embedded radically reconceptualises what law is, potentially rendering it meaningless. Levine and Mellema,[7] again whose work Hertogh draws upon, extend this point by noting that holding such a broad definition of legality 'may obscure the importance of other nonlegal or quasi-legal social structures that operate in a person's life and consciousness.' This raises the issue of how analyses of legal

[6] 'Out of the Ordinary: Law, Power, Culture, and the Commonplace' (2001) 26 *Law & Social Inquiry* 145.
[7] 'Strategizing the Street: How Law Matters in the Lives of Women in the Street-Level Drug Economy' (2001) 26 *Law & Social Inquiry* 169, 174.

consciousness should deal with particular features of law (which may reveal feelings of discontent—especially when through an encounter with the law) in contrast to a more general influence of law? Adherents to both the 'critical' and 'secular' legal consciousness approaches recognise that any one individual can hold different forms of legal consciousness and that the particular content of law is relevant here. Indeed, legal consciousness doesn't relate to individuals but rather reveals schemas of meaning and interaction in relation to legality.[8] However, it is hard to know how to compare these studies—those focusing on more particular (and contentious) areas of law and others on law's more general influence—or to at least understand how they may usefully relate to each other.

To my mind, Hertogh's suggestion to draw on Ehrlich's notion of the living law,[9] examining the various layers of norms and rules that shape individual and group action, would be helpful here. While Hertogh does this to some degree, it would have been interesting to see this further expanded. Instead his focus remains predominantly on developing his analytical framework of 'legal alienation'.

It is in chapter 3 that this analytical framework is developed. Hertogh draws extensively on Seeman's 1959 survey[10] of the various uses of subjective alienation in the sociological literature. The four meanings, largely drawn from scholarship on work and politics, are then translated by Hertogh into modes of legal alienation: legal meaninglessness, legal powerlessness, legal cynicism and legal value-isolation (pp. 56-7). Hertogh views these as operating on a continuum that reflects a widening gap between internal legal culture (as performed by legal actors) and external legal culture (of the general public), with legal

[8] P. Ewick and S. S. Silbey, *The Common Place of Law* (1998), 50.
[9] *Fundamental Principles of the Sociology of Law* (1936).
[10] 'On the Meaning of Alienation' (1959) 24 *American Sociological Review* 783.

meaninglessness being the closest to the internal legal culture and moving outwards towards legal value-isolation. Hertogh then defines four normative profiles emerging from the two types of questions that typically seek to identify legal alienation: are people aware of the law and do people identify with the law. Responses to these questions can fall between four different profiles: legalists—those informed of the law and who identify with the law; loyalists—those uninformed of the law but who identify with the law; cynics—those informed of the law but who do not identify with the law; and outsiders—those uninformed of the law and who do not identify with the law. Although never specifically stated (at least as far as I can see), these normative profiles appear to represent alternative forms of legal consciousness to Ewick and Silbey's 'before the law', 'with the law' and 'against the law' (refer to Herthogh's methodological notes p. 60). However, they are little developed in the book.

Rather, most emphasis is on the four forms of legal alienation derived from Seeman's work. It is indeed helpful for Hertogh to flesh out the concept of legal alienation and I think he does, to a degree, meet his aims to 'make [the concept of legal alienation] more accessible for empirical research' (p. 50) and help us 'to better *understand* public dissatisfaction with the justice system' [italics in original] (p. 15). I would suggest, though, that Hertogh's application of the framework to his case studies and in his quantitative analysis could be more nuanced. For example, 'legal meaninglessness' seems to be interpreted as meaning having knowledge of the law. With respect to a survey undertaken on the Dutch Equal Treatment Act (ETA), Hertogh finds evidence for legal meaninglessness in the following: 'our survey indicates that most members of the general public do not understand key elements of the ETA either. Most importantly, many respondents do not understand the legal distinction between 'direct' and 'indirect' discrimination.' (p. 100). In survey data related to

the case study of construction contractors, Hertogh again finds support for legal meaninglessness as he notes 'In a recent survey—which confirms the findings of our case study—43% of all contractors indicate they are not familiar with the latest anticartel regulations' (p. 121). It is well known, and Hertogh himself recognises, that most people do not have a good understanding of the law or how it works. Does admission of this really suggest a form of alienation from the law? Similarly, in some of the analysis for 'legal cynicism' relating to equal treatment Hertogh states: 'From all respondents, some 50% are indifferent toward the ETA or do not feel that it is important to know the content of the Act (267). More than half of all respondents (58%) think that they are badly informed about the ETA, yet most of them (65) say they do *not* need more information. Similarly, almost one in two (47%) think it is not important to know how to file a complaint with the Commission (273). Likewise, two thirds (63%) are not interested in more information about the Commission.' [italics in original] (p. 101). Hertogh interprets these findings as indicating that 'most Dutchmen don't care that much about legal equality'. To me these findings speak to issues of salience about equality law in people's lives. I'm not completely convinced the reflect alienation, and in particular 'legal cynicism' which Hertogh defines as 'Feeling that the rules of the justice system are, or should be, no longer binding' (p. 57).

In sum, 'Nobody's Law' contains an array of provocative and interesting ideas. I found the presentation of these confusing at times and the depth of analysis wanting. However, I suggest the book offers much that could be useful for future research on legal consciousness and legal alienation.