Competing Narratives in a Judicial Retention Election: Feminism versus Judicial Independence

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Feminists' opposition to a state trial judge in a retention election provided an opportunity to explore important issues about legal consciousness and differences between negative and affirmative resistance. Three questions about legal consciousness and resistance are addressed: What effect does an encounter with an allegedly bad judge have on people's legal consciousness? Under what circumstances will people engage in negative or affirmative resistance against a legal encounter they perceive as unjust? What instrumental effects on institutional practices and what constitutive effects on legal consciousness can such resistance have? The article draws on narrative analysis to explore the conditions for transformation of legal consciousness and mobilization of political action in a judicial retention election.

Storytelling pervades the legal process, as much scholarship has observed (e.g., Brooks & Gewirtz 1996). Despite the traditional view of law as a "logico-scientific" form of discourse that makes truth claims falsifiable through logic (Bruner 1986:11), the legal fact-finding process is clearly based on narrative forms of discourse. Parties and witnesses give testimony, and truth arises from assessing the verisimilitude of the stories.

Another way in which storytelling enters the legal system is in the processes for selecting and retaining judges. Stories about competence and character are told the public or the appointing authority. For example, the Senate confirmation hearings for Clarence Thomas could be viewed as a contest between the stories of Thomas as a sexual harasser and Thomas as an up-by-the-bootstraps, self-made man. After his appointment an African American feminist complained that Anita Hill's story fell on deaf ears because black women have no story that resonates with the American public as much as Thomas's narrative of a "high-tech lynching" (Crenshaw 1992).

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Law & Society Review, Volume 33, Number 1 (1999)

Elections, including those for judgeships, can be seen as stories told to voters. One argument for partisan over nonpartisan election of judges is that the former invokes a story that voters can relate to (namely, Democrats versus Republicans) and therefore generates more voter interest than the latter (Dubois 1986). In uncontested retention elections judges in theory run on the story of their records, but in reality there is usually no story at all and the voters know virtually nothing about the judge (Hall & Aspin 1987).[1] In recent years the occasional exceptions tend to be ideologically charged retention elections in which organized interest groups challenge judges because they made the "wrong" decisions on hot-button issues such as capital punishment in California (Wold & Culver 1987) and abortion in Florida (Webster 1995:36–37). Here the challengers' story is typically about the bad, "activist" judge imposing his or her views on the public.

This article tells the story of a retention election that became a two-sided story when a grassroots group of women organized a challenge to a state trial court judge. In the summer of 1994 complaints suddenly burst on the public scene about a judge who had served for seven years and seemed to have at least an average, if not better, career on the bench to that point. His opponents charged the judge with prejudging issues and displaying bias on the basis of gender, religion, and sexual orientation. In response to these charges, organized support emerged for him that emphasized the importance of judicial independence. In the election the judge narrowly retained his seat with 50.4% of the vote.

This relatively rare challenge to a judge in a retention election provides the opportunity to examine important issues about legal consciousness. Legal consciousness, as Michael McCann (1994:7) defines it, is "the ongoing, dynamic process of constructing one's understanding of, and relationship to, the social world through use of legal conventions and discourses." Legal consciousness is revealed in and shaped by the conventions and discourses occurring in courtrooms, judicial opinions, everyday talk about rights and other legal topics, and also in judicial elections.

In the constitutive theory of law, consciousness is constituted by broad cultural ideas, or ideologies, mediated by experience. Ideologies describe, explain, and justify social practices. In justifying social practices, ideologies are embedded in certain arrangements of power. Legal ideology, in particular, invokes the power of the state in support of one's claims. "Legal ideology provides a set of symbols, primarily the notion of legal rights, through which experience is interpreted and which point to particular

[1] This appears to be no less true in other forms of judicial elections (Klots 1955; Johnson et al.1978; Adamany & Dubois 1976; McKnight et al. 1978; Griffin & Horan 1979; Lovrich & Sheldon 1983; but see Lovrich, Pierce, & Sheldon 1989).

courses of action, such as going to court with grievances" (Merry 1985:63).

To the extent that the relations of power that law supports appear to be natural and just, even when they are not, law is said to be hegemonic. Hegemony is the state in which certain ideas or arrangements, "being presumptively shared, are not normally the subject of explication or argument" and thus silence people by putting challenges "beyond the limits of the rational and the credible" (Comaroff & Comaroff 1991:23). Because the legal concepts of substantive and procedural rights have such appeal to subordinated people, even when the rights are not actually experienced, law is capable of producing "acquiescence to power" (Merry 1990:7; see also Williams 1977:108; Kairys 1982; Kennedy 1982; Gordon 1984; Trubek 1984).

The hegemony of law is incomplete, however, because sometimes people's experiences lead them to question the equating of law with justice. Experiences inconsistent with expectations of rights may generate acts of resistance. Because law, like most language, is "open textured" or amenable to different interpretations, people can disagree over its meaning in a given context. Law then becomes an arena of ideological contest, as people use the open-textured language of rights to assert claims to better treatment, sometimes successfully. Resistance may consist of invoking the elements of the ideology that promise more than is being delivered, namely one's rights; rejecting the ideology altogether; and/or overtly challenging it.

Patricia Ewick and Susan Silbey's (1995) terminology of "subversive stories" and "hegemonic tales" links legal consciousness with the practice of storytelling. Quoting Comaroff and Comaroff (1991:23), they identify as hegemonic those tales that "come to be taken-for-granted as the natural and received shape of the world" (Ewick & Silbey 1995:212 n. 10). As "narratives that emplot the connections between the particular and the general by locating the individual within social organization" (ibid., p. 220), subversive stories are a form of resistance.

Subversive stories are also those "which defy and at times politically transform" (ibid., p. 217), but a crucial question is at *what* times does defiance lead to political transformation. As Michael McCann and Tracey March (1995:228) ask: when is resistance confined to "inconsequential everyday acts" and when does it develop into "more consequential, collective political struggles"? McCann and March (p. 230) suggest a distinction between negative and affirmative resistance, the former involving "an unwillingness to accept the terms of the dominant order; its manifestations are . . . refusals, evasions, dodges, and deceits . . . ". Affirmative resistance, in contrast, "entails efforts by subaltern groups either to renegotiate the terms of dominant power rela-

tions or to construct anew separate, alternative forms of practical activity."

Our story involves both types of resistance, but the affirmative resistance is particularly significant. Rarely do unhappy individual litigants organize to challenge a judge via the mechanism of retention elections, but this case, we argue, is an example of "overt, direct, sustained 'political' action for change by members of subordinate groups" (McCann & March 1995:230). The story provides the opportunity to address three questions about legal consciousness and resistance:

> What effect does an encounter with an allegedly bad judge have on people's legal consciousness? In other words, how does one story about the judiciary get replaced by another?
>
> Under what circumstances will people engage in negative or affirmative resistance against a legal encounter they perceive as unjust; in other words, when is a new story used to mobilize organized opposition?
>
> What instrumental effects on institutional practices and what constitutive effects on legal consciousness can such resistance have?

Prior studies of legal consciousness have focused largely on disputing and litigation (e.g., Ewick & Silbey 1995; Merry 1990; Sarat & Felstiner 1986; Sarat 1990) and/or on social movements (M. McCann 1994; Silverstein 1996). This article applies this perspective to the subject of participation in judicial elections. Elections for judges are an institutionalized opportunity to demonstrate resistance against legal incumbents, although relatively few people take advantage of it. We suggest that the women's narratives about the judge's behavior and their efforts to tell these stories to the public in the context of the retention election constitute a subversive story challenging the hegemonic tale of judicial independence and impartiality.

Most empirical research on judicial retention elections has involved analysis of some combination of election data (e.g., Hall & Aspin 1987; Luskin et al. 1994; Volcansek 1982; Shaw 1992), surveys (Aspin & Hall 1994), and public sources such as newspaper reports (Wold & Culver 1987). To election data and newspaper accounts we add intensive interviews with individuals involved in the challenge to the judge. Semistructured interviewing is particularly appropriate for studies of consciousness because of its ability to "explore[s] people's views of reality" (Reinharz & Davidman 1992:18), in this case their perception of the judiciary and, for those who had been a party in a case before the judge, how that experience affected their perception. Some of the women's subversive stories were explicitly feminist, and intensive interviewing is especially used in feminist research because "learning from women is an antidote to centuries of ignoring wo-

men's ideas altogether or having men speak for women" (ibid., p. 19).

We held interviews ranging from one to two and a half hours in the spring of 1997 with nine individuals, including eight involved in various facets of the efforts to oppose the judge and one employed by the state courts. Seven were women. Two were men: an attorney and a journalist. We met eight in their homes or offices and interviewed one, who had left the state, by telephone. All the interviews were tape-recorded except for the one done by telephone. Five interviews we both attended, and four only one of us did. As women within at most a decade of the same age as the interviewees, we were able to establish good rapport with the women who had been litigants before the judge, who were generally eager to tell their stories. Before we recount the story of that challenge, however, we discuss the theory and practice of judicial retention elections and how they are implicated in a hegemonic tale.

Judicial Retention Elections in Theory and Practice

Various methods of staffing the judiciary invoke different mixes of two discourses: judicial independence and public accountability. The discourse of judicial independence suggests that judging involves making decisions on the basis of law without consideration of what outcome would be more politically popular. In contrast, the discourse of public accountability suggests judges are public officials making decisions with major consequences for people's lives, who should have to be responsible for those decisions.

Obviously, both of these views of judging are true to some extent, and judicial retention elections are often said to be designed to balance the competing values of independence and accountability (Hall & Aspin 1987; Webster 1995; Handberg 1994). In fact, however, the originator of the idea of retention elections was much more committed to the value of independence than accountability. Albert Kales, the Director of Research for the American Judicature Society, published a book in 1914 that proposed a "nonpartisan court plan" to select judges on the basis of professional merit. Essentially, judges would be nominated and selected by sitting judges, but "[t]o placate the Progressives' desire to retain some measure of popular control, he introduced . . . tenure by noncompetitive election, known today as the retention election" (Carbon & Berkson 1980:3). One of retention elections' principal purposes was "to ensure that judges would be retained for lengthy terms of tenure" (ibid., p. 6). Many proponents of the commission plan "would have preferred good behavior tenure [the federal model] in lieu of reten-

tion elections. They perceived retention as a 'sop' to those committed to electoral control over the judiciary" (ibid., p. 8).

Indeed, studies of retention elections in practice show that judges are very rarely defeated. Carbon and Berkson (p. 24) examined all judicial retention elections in the years 1972, 1974, 1976, and 1978 and found that 24 of 1,499 judges on state ballots, or 1.6%, were not retained.[2] Similarly, Hall and Aspin's study (1987) of retention elections for major trial court judges in even-numbered years between 1964 and 1984 found that only 22 judges, or slightly more than 1% of those judges seeking retention, were defeated.[3] Furthermore, 11 of the defeated judges were from Illinois, which is the only state that requires judges to have a 60% rather than 50% affirmative vote to be retained. Ten of those 11 would have been retained in any other state. Finally, a study of "virtually" all judicial retention elections in the United States between 1980 and 1990 found only 34 judges, or 1.3%, were defeated (Luskin et al. 1994).

Occasional high-profile races in which judges are challenged on ideological grounds prompt discussion of whether retention elections adequately protect judicial independence. The most famous example is the defeat of California Supreme Court Chief Justice Rose Bird and two colleagues in 1986 (Culver & Wold 1986; Southern California Law Review 1988). Public debate focused on the justices' votes in death penalty cases, but the opposition forces also received contributions from oil and gas, agribusiness, auto dealership, and real estate interests (Wold & Culver 1987). In 1990 and 1992 Florida Supreme Court justices fended off organized challenges that focused primarily on abortion and secondarily on criminal justice issues (Handberg 1994:133; see also University of Miami Law Review 1994; Webster 1995). In 1996, a Tennessee Supreme Court justice was unseated in a campaign focusing on criminal justice issues (Bright 1997). Such instances are troubling and do raise important questions, but they are still the exceptions. These cases overshadow the more general question of how good a job judicial retention elections do in identifying and eliminating judges who may be "bad" judges for a variety of reasons.

According to the original theory of retention elections, it is not a problem that few judges are defeated at election because the care with which they are selected ensures that judges on the bench will be good judges. Retention elections were, as noted, merely an add-on to a vision of selecting judges on the basis of professional merit. Albert Kales's original plan would have had judges selected by a state's chief justice from among candidates

[2] The number of states with retention elections increased from 11 to 17 during the period.

[3] The number of states covered by this study increased from 3 to 10 over these years.

recommended by a council made up of other judges (Carbon & Berkson 1980:3).

As actually implemented, however, the nomination and selection process changed. California, which in 1934 became the first state to adopt retention elections, fills vacancies by gubernatorial appointment, with confirmation by a Commission on Qualifications consisting of the attorney general, the chief justice of the supreme court, and a presiding justice of the courts of appeal (Webster 1995:29). Missouri adopted retention elections in 1940, accompanied by a selection process consisting of gubernatorial appointment from a list of three candidates nominated by a commission that included a combination of lawyers selected by the bar and laypersons selected by the governor, with a judge as chair (ibid., p. 30). This has become the most common form of merit selection, but many variations exist. The most dramatic deviation from Kales's original vision occurs in Illinois and Pennsylvania, where judges stand for retention elections after being initially selected on partisan ballots (Luskin et al. 1994:318).

Even in the more typical Missouri Plan states, politics sometimes enters into judicial nomination and selection (Watson & Downing 1969). Obviously, if the process of initial selection does not ensure the quality of candidates, a procedure that provides virtual certainty of those judges retaining their seats is more questionable. As Carbon and Berkson note: "None of those who developed the plan . . . ever suggested that retention elections be adopted in the absence of a commission which recommends candidates on the basis of professional merit" (1980:8).

But what is "professional merit"? What is a "good judge"? Hardly anyone today would try to argue for William Blackstone's idea that judging involves merely searching the body of law for the correct legal rule to apply to a given fact situation. Albert Kales's preference for having judges selected by other judges, however, suggests that technical competence is a primary criterion and cannot be well assessed by those without that technical competence themselves. More often today good judges are defined in terms of what they are not. Judicial decisions should be impartial, in other words "unbiased" and "based on the legal merits of the controversy, not personal favor, whim, or other prejudicial influences" (Handberg 1994:129).

Our concern focuses on the relationship between the independence provided by retention elections and the qualities we seek in judges. In one sense, independence can and should be linked with those qualities. Judith Resnik (1988) argues that judicial independence properly refers to independence from the sovereigns that employ judges—either appointing officials or the broader electorate (p. 1882). "[W]e hope for judges who are independent, [who] aspire to an impartiality that pays no attention to the government as litigant" (p. 1884) or presumably to parties

who might have other types of social or economic power. Resnik (p. 1885) continues:

> In addition to seeking judges who are impartial and independent, we hope our judges will not prejudge lawsuits . . . Prejudgment is suspect in the context of a system that assumes an increase in information over time and designates specific points in time when the act of judging becomes legitimate. Prejudgment is also suspect in the context of fear of unequal access to the person of the judge. The idealized moment of trial provides a scene of equality.

Although we support a concept of merit that includes the qualities of independence, impartiality, and lack of prejudgment as Resnik describes them, we perceive that these values are sometimes conflated. Arguments for judicial independence can potentially become a hegemonic tale when institutionalized independence is linked with merit defined in terms of impartiality and lack of prejudgment. Surely it is right to shield judges who decide impartially and not on the basis of their biases or self-interest from retaliation by ideologues, disgruntled losers, and powerful members of the community. To this purpose a tale of judicial impartiality and independence develops. The tale begins with judges being chosen for their professional merit, who then make their decisions impartially and courageously, and ends with the judges serving long and productive careers, developing ever greater expertise and wisdom, because they have been given independence and insulated from excessive accountability.

The validity of the story, however, depends on merit selection working and the judges having the good qualities attributed to them. *The danger is in the potential reversal of the logic: rather than giving judges independence because they are impartial and deserve to be shielded from inappropriate pressures, judges are thought to need independence because it will make them impartial.* Admittedly, judges are human and the prospects of losing one's job may give pause to most mortals, but independence will not make someone impartial who is not inclined to be so in the first place.

Appellate courts, of course, provide another mechanism besides retention elections to check trial judges, but appeals are costly and often slow. Moreover, appellate review scrutinizes judges' interpretations of facts only rarely and even less often their management of their courtrooms and actions taken in chambers. Even if appellate review does provide some protection from bad judges if invoked, such judges presumably should not be on the bench at all. Selection and retention mechanisms designed to ensure independence, however, make judges difficult to challenge, even when they lack the desired qualities of character.

Judicial tenure for good behavior, endorsed by the federal constitution and a handful of states, creates the most extreme

condition of judicial independence, but with rates of defeat between 1 and 2%, retention election systems run a close second. The absence of an opposing candidate means there is no built-in mechanism for raising a judge's record. Those who are familiar with a judge's record, such as some individual attorneys or court employees, have strong disincentives to oppose a sitting judge publicly (Mullinax 1973–74:32–33). For these reasons, occasions when subversive stories arise to challenge the hegemonic tale of judicial impartiality and independence are rare, but here is the story of one time it did happen.

A Grassroots Challenge

In February 1987, Utah's Republican Governor Norman H. Bangerter appointed Owen Bishop (a pseudonym) to the state's general jurisdiction trial bench, the District Court, for the Third Judicial District, which includes Salt Lake County and two less populous adjacent counties, Summit and Tooele.[4] Judge Bishop had worked in both public and private practice of law prior to his appointment to the Court. While on the bench, he served as a member of the Supreme Court Advisory Committee on Criminal Procedure and was elected by his peers to the Judicial Council and the Board of District Court Judges (Utah Judicial Council 1992). According to a court staff member, he seemed to be a "rising star" on the district court. For his first retention election in 1990, not only did the Judicial Council certify him to stand for retention based on a satisfactory performance evaluation, but he also received the highest retention rate of any Third District judge in that election.[5]

Nevertheless, by the summer of 1993 informal networking via a loosely organized telephone tree had begun in Summit County among women who were unhappy with Judge Bishop's decisions in their divorce and custody cases. There was, however, no public

[4] At the time of Judge Bishop's selection, Utah's judicial selection process included constitutionally established nominating commissions. Each commission had seven members: four lay citizens appointed by the Governor, two lawyers appointed by the State Bar, and the Chief Justice of the Supreme Court (or his/her designee from the Supreme Court) as commission chair. Since 1994 the composition of the commissions and the number of names submitted to the governor have changed slightly, but the remainder of the process is unchanged. After interviewing candidates, the commissioners submit names to the Governor for consideration. The Governor selects one name from the list and, following hearings, the Utah Senate may confirm or reject the Governor's nomination (Gacnik 1992:K-1). Trial judges of courts of record initially stand for retention after three years on the bench and, if retained, begin serving full six-year terms between elections.

[5] The Judicial Council was established by the Utah Constitution as a policymaking body for the judicial branch of government. It is required by statute and its own rules to evaluate the performance of all judges. As a result of the evaluation, the Judicial Council certifies whether the judge is qualified for retention election. A survey of lawyers who have appeared before the judge is a major component of the evaluation (Utah Lieutenant Governor 1996:42–43).

expression of discontent with his performance until the late spring of 1994. At that time an April 1993 ruling of Judge Bishop's in a custody battle became public and caused substantial controversy. In this case, the mother, Alana Lewis (a pseudonym), had secured employment in Oregon and proposed to move there with her three daughters. The father petitioned for physical custody of the children, citing the joint custody agreement. Judge Bishop ruled that the mother could not take her children out of the county, because they would not receive a proper religious upbringing in the other state (Repanshek 1994).

As she later recounted it, Ms. Lewis's initial reaction to the ruling was emotional devastation and paralysis. Eventually, however, she followed the advice of her mother and contacted the American Civil Liberties Union (ACLU) in hopes they would help her overturn Judge Bishop's decision. The ACLU first responded that they did not take any custody cases, which was a further blow to her confidence in the system. During this time a woman whose case had also been heard by Judge Bishop called Ms. Lewis to relate her bad experience, and an acquaintance recommended she attend a National Organization for Women (NOW) meeting for some support, but Ms. Lewis told them, "No, I'm not up for anything like that."

Several months later, after she had finally gotten a transcript of the hearing, she decided to write the ACLU again and included several pages of the transcript. After a couple of weeks she received a form letter from the ACLU indicating that they received her letter and, as she paraphrased it, "They would call me, don't call them." With little hope that she would receive any help, she tried to get on with her life. Shortly thereafter, however, she found four urgent messages on her answering machine from an ACLU attorney. Before she could return the call, the ACLU attorney called again. The ACLU attorney told her that she was shocked by the transcript pages and needed to know if the case was "still alive" because she felt that important issues were at stake with her case. Ms. Lewis's attorney had filed for an appeal, and the ACLU submitted a brief.

The ACLU involvement stimulated press attention. The area's largest circulation newspaper, the *Salt Lake Tribune*, ran a front-page article on Judge Bishop's ruling (Repanshek 1994). One of the television stations also ran the story, and several radio stations interviewed Ms. Lewis.

When her story broke, the acquaintance who had earlier suggested she go to a NOW meeting invited her again to attend a Summit County NOW meeting where they were to discuss Judge Bishop. At that meeting Ms. Lewis met Margaret Case (a pseudonym), another woman who had felt mistreated by Judge Bishop in her divorce case. Ms. Case and Ms. Lewis agreed to speak at a

public meeting sponsored by the Salt Lake City Chapter of NOW, where other women who felt they had been badly treated by Judge Bishop would also share their experiences.

This meeting, held mid-August, was covered by *Salt Lake Tribune* columnists Paul Rolly and Joann Jacobsen-Wells. In a column titled "Fighting Back," Rolly and Wells reported:

> The Salt Lake Chapter of the National Organization for Women (NOW) is demanding an unprecedented investigation of Third District Court Judge [Owen Bishop], launching "an educational campaign" about what they claim is [Bishop's] unfair treatment of women . . . Some 50 people attended and shared negative experiences about the seven-year jurist. Another 20 women have contacted leaders of an anti-[Bishop] movement about his unfair treatment of them. We, too, have received numerous calls.

They also reported "general allegations against [Bishop] which included ignoring the law or legal precedent to rule in favor of male litigants, intimidating women litigants and a practice of issuing temporary rather than permanent orders because they cannot be appealed." They also mentioned five specific cases in which Judge Bishop's unfairness and bias were seemingly evident (Rolly & Wells 1994a).

After this meeting and the publicity surrounding the Lewis case, the NOW office began receiving 10 to 12 calls a day from women who reported bad experiences in Judge Bishop's courtroom. Ms. Case, a highly organized woman who felt passionately that Judge Bishop was unfair, agreed to coordinate a campaign to oppose him. Wanting to have some impact on Judge Bishop's performance, NOW first tried to organize a courtroom watch. The idea was to have someone in Bishop's courtroom who would be able to report on his behavior. Because of the unpredictability of the court scheduling and the need to rely on volunteers, NOW was actually able to have very few watchers in his courtroom, although Bishop may not have realized this.

Three days after the Rolly and Wells column appeared, another controversial ruling by Judge Bishop, involving a sentencing for the point-blank killing of a gay man, bolstered the women's cause. Judge Bishop accepted a plea bargain in which the accused pled guilty to second-degree felony manslaughter. In pleading guilty to manslaughter, the accused avoided being sentenced to death or to life in prison, but was expected to be sentenced to at least 15 years in prison. Judge Bishop, however, sentenced him to no more than 6 years.[6]

[6] The accused contended that the victim had made an unwanted sexual advance, although the county attorney said it was "highly probable" the victim and the accused had engaged in consensual sex. Prosecutors took into account the accused's drug and alcohol intoxication when they agreed to reduce the charge (Hunt & McCann 1994a:C-1, C-3). In handing down his ruling, Judge Bishop made no reference to the sexuality-related issues but reportedly said, "The victim would be alive if he had not 'supplied the drugs and

The ruling, which was seen by gay and lesbian activists as evidence of bias against homosexuals, provoked almost instant reactions. The evening of the day of the ruling, Gay and Lesbian Utah Democrats (GLUD) organized a rally attended by between 100 and 200 people held on the steps of the State Capital. In what appeared to be the beginning of a coalition effort, NOW joined with GLUD in calling for the ouster of Judge Bishop. The ruling and this rally generated quite a bit of media attention. Both major newspapers and local television stations ran stories about the rally and the ruling (Hunt & McCann 1994a). The *Salt Lake Tribune* (1994) ran an editorial critical of Judge Bishop, ending with, "Whether or not Judge [Bishop] is guilty of prejudice against homosexuals, his decision at least has offended principles of justice."

In the week following this editorial, several letters to the editor were printed that came to the defense of Bishop. The President of the Utah State Bar wrote, "The criticism of Judge [Bishop] unfairly places him in the awkward position of being incapable of defending himself in an emotionally charged public forum" (Moxley 1994:A-10). An attorney argued he deserved respect because he was a problem solver not a problem maker (Paulsen 1994). Another attorney who had appeared before Judge Bishop complained that the attacks on Judge Bishop were one-sided. He wrote, "I don't know whether Judge Bishop ruled correctly in these cases that represent a few of the hundreds he must consider. I do know from experience without knowing anything about the individual cases that the stories reported are obviously simplistic, out of context and short on perspective" (Sanders 1994).

In early September 1994, the *Salt Lake Tribune* ran a front-page article asking "Is Utah Judge Unjust or Just Doing His Job?" Using extensive examples, the paper covered charges alleging Judge Bishop's gender bias, religious bias, homosexual bias, and arrogance (Hunt & McCann, 1994c).

In November *Redbook*, a national women's magazine with a circulation of 3.3 million, published an article entitled "More of America's Most Sexist Judges," prominently featuring Judge Bishop (Weller 1994). *Redbook* called him an "old-school sexist" in a lengthy and unflattering profile. This story was picked up and reported in several news outlets, including both of the area's major newspapers (S. McCann 1994).

In reaction to media reports, the Utah Administrative Office of the Courts issued a press release blasting the news media for what it called "grossly inaccurate accounts of that judge's decisions or actions." Although it did not mention the *Redbook* article

alcohol' the night of his death . . ." and "that based on his experience as a Utah Board of Pardons member, the recidivism rate for murder is lower than any other category of crime" (ibid.).

or address the most controversial decisions rendered by Judge Bishop, the press release countered specific items that had been used as examples of Judge Bishop's bias, admonishing journalists to be "more scrupulous in doing their homework." This sparked the *Tribune*'s Rolly and Wells to write a column countering, in detail, one of the examples the Administrative Office had used to defend Judge Bishop, concluding that the Administrative Office had failed to do its homework (Rolly & Wells 1994b).

This exchange of articles marked the end of the public controversy surrounding Judge Bishop until the campaign leading up to the November 1996 retention election. Newspaper coverage of Judge Bishop's decisions continued during this period, including stories reporting appellate affirmations or reversals of his decisions and two allegations of bias in cases unrelated to gender issues (Wilson 1995; Hunt 1996).

During this time the state Court of Appeals overturned two of Judge Bishop's controversial divorce and/or custody cases. In Alana Lewis's case, appellate judges said "there was no evidence [Alana Lewis] would neglect her children's religious training if she moved from Utah" (Hunt 1995). In April 1996 the Utah Court of Appeals took the unusual step of reviewing evidence and calculating its own alimony and attorney-fee award for a Salt Lake woman. As reported in the *Salt Lake Tribune*, the opinion stated, "some of [Bishop's] findings were based on speculation rather than evidence. [Bishop's] rehabilitative alimony award . . . was 'confused and indeed patently unfair'" (S. McCann 1996). More than a year after the 1996 election, a sharply divided Utah Supreme Court reversed the latter decision (Maffly 1997b).

During this period NOW attempted to keep the education campaign about Judge Bishop alive. The volunteer court watch program continued for a short time before it petered out. The NOW newsletter continued to include information about Judge Bishop. At the 1995 annual NOW state meeting, a panel was devoted to Judge Bishop, at which the commitment to seek his electoral defeat was reaffirmed (National Organization for Women 1995). NOW also recognized the only attorney in the Third Judicial District to oppose Judge Bishop publicly with one of its "Courageous Women of Action" awards in October 1995.

Margaret Case continued to coordinate informal networking. She developed a data base of people who had contacted her about problems with Judge Bishop and a support network for those who feared appearing before him or felt traumatized afterwards. With the help of several attorneys who volunteered behind the scene, she also encouraged others to prepare complaints about Bishop to the Judicial Conduct Commission, the body responsible for hearing misconduct complaints against judges. Ms. Case also wrote and distributed a newsletter, keeping

her contacts informed of these developments and others, such as appeals of Judge Bishop's decisions.

The controversy surrounding Judge Bishop highlighted weaknesses with the Judicial Conduct Commission. In late fall of 1994, the news media reported that complaints against judges filed with the Judicial Conduct Commission seemed to go nowhere. "Utahns directed more than 500 complaints, letters and phone calls to the commission between 1991 and 1993. From those contacts, the commission filed two formal charges of misconduct. And it could not provide the *Salt Lake Tribune* with the outcome" (Hunt & McCann 1994b). The Commission became the subject of controversy and considerable scrutiny. According to Margaret Case, a couple of state representatives volunteered to help get legislative review of the Judicial Conduct Commission and arranged for anti-Bishop activists to meet with the legislature's judiciary committees. In the end, the legislature increased funding for staff and investigations, changes that one newspaper dubbed "the [Owen Bishop] initiatives" (Funk 1994). The Commission hired its first full-time Executive Director in 1995.

Approximately a month before the November 1996 election in which Judge Bishop was standing for retention, the Utah Judicial Council, per statutory requirements, published the results of its judicial performance evaluation program.[7] Although the Judicial Council certified as qualified to be retained all judges who were up for retention, including Judge Bishop, he received a score below the level deemed passing on one of the 12 questions on the attorney survey portion of the evaluation: "weighs all evidence fairly and impartially before rendering a decision." He did receive a passing score on the question: "behavior is free from bias." One other Third District judge received a score below passing on three questions relating to writing, oral, and interpretive skills. All other judges up for election in the state received all passing scores.

[7] The evaluation of each judge's performance is conducted every two years regardless of whether the judge is standing for retention election. An independent survey firm conducts under contract a poll of lawyers who have appeared before each judge and asks the lawyers to anonymously evaluate the judge on several criteria, which include: integrity, knowledge and understanding of the law, ability to communicate, preparation, attentiveness, dignity and control over proceedings, skills as a manager, and punctuality. Prior to the close of a judge's term of office, the Judicial Council reviews the results of the attorney poll and other standards of performance and determines whether the judge is qualified for retention. The minimum standards for performance for a judge to be certified as qualified for retention include: minimum score of 70% on at least 75% of the questions on the attorney survey; no public sanctions by the Judicial Conduct Commission; no more than one private sanction by the Judicial Conduct Commission; no cases under advisement for more the 180 days and no more than six cases under advisement for more than 60 days (for trial court judges); at least 30 hours of legal education per year; compliance with the Code of Judicial Administration and the Code of Judicial Conduct; and self-certified physical and mental fitness for office. A judge who fails to meet one or more of these standards may appear before the Judicial Council and show cause why he or she should nevertheless be certified (Utah Lieutenant Governor 1996:42–43).

About three weeks before the election, the *Salt Lake Tribune* published the results of its own statewide survey on all the state's judges, including the federal judiciary. According to its editor, the newspaper decided to do its own survey because its leadership was not convinced that the Judicial Council survey gave the true picture of the state's judiciary. The *Tribune* also tracked the reversal rate of the trial court judges for cases that the appellate court reviewed.

The newspaper's survey asked lawyers to rate the judges on six criteria: temperament, knowledge of the law, diligence, intellect, decisionmaking, and impartiality. Judge Bishop scored in the "needs improvement" category in each area with his lowest scores coming in the impartiality and temperament categories. Moreover, "[Bishop] was the only veteran judge who had less than 50 per cent of his [appealed] cases affirmed by Utah higher courts . . . Fifty-one of [Bishop]'s 95 reviewed cases were either completely overturned or partially reversed, court records show" (Cilwick & McCann 1996).

In addition to these survey results appearing in the month before the election, NOW stepped up its opposition campaign. NOW understood that in judicial retention elections in Utah people generally voted yes, especially if the voter knew little about the judge. Therefore, they wanted to change this propensity and get people ready to vote no. As one NOW activist said, "There is an assumption that judges are good and people aren't going to vote no. So that is one of the things we're trying to do. That is why our bumper sticker said 'Vote No Judge [Bishop],' because we wanted the message to be Vote No. Don't vote yes like you always vote yes on these judges, and there is a reason to vote no on this one."

Concerned with insuring that they comply with all PAC laws and regulations, NOW tried to establish what the rules for retention elections were. According to a NOW officer, they called the state Attorney General's office several times for guidance on what could or could not be done in this type of campaign, but could not get any definitive answers. Because they could not get a clear picture as to what was legal in retention campaigns, they deliberately kept the campaign low-key.

Tactics adopted were correspondingly inexpensive. Alana Lewis, using her own money, had 200 or so lawn signs printed with the "Vote No Judge [Bishop]" message. She distributed these signs throughout her town. On Halloween, she took her children trick-or-treating wearing a sandwich board with the "Vote No Judge [Bishop]" message. Through a mailing to its members and a Salt Lake feminist bookstore, NOW distributed more than 1,000 bumper stickers with the same message. NOW members also organized phone-tree campaigning, where members called friends and neighbors to give the "vote no" message.

They also tried to exploit free media coverage as much as possible, taking advantage of what they saw as the newspapers' and one television station's sympathies toward their cause. They held a strategically timed rally against Judge Bishop on the steps of the Third District Court building. Only about 60 people came, but the rally did get considerable news coverage just two days before the election.

Although they were criticized by some after the election for waiting until the last minute to launch their campaign, this was actually part of their strategy. They believed launching the campaign too early would give Judge Bishop time to mount a campaign of his own. They hoped that they could pull off a "No to Bishop" blitz close enough to the election to stymie a pro-Bishop effort. This strategy proved unsuccessful; a pro-Bishop campaign did emerge.

Canon 5 of the Utah Code of Judicial Administration permits a judge in a retention election to operate a campaign for office if he/she has drawn active public opposition. The judge cannot directly solicit or accept campaign funds or solicit publicly stated support, but can establish a committee of responsible persons to secure and manage the expenditure of funds for the campaign and to obtain public statements of support. To that end, within a week of the *Tribune's* poll results, an advertisement appeared in both area newspapers supporting Judge Bishop's retention. The ad included the names of approximately 100 prominent citizens, many of whom are attorneys. Judge Bishop's campaign committee raised more than $6,000, the bulk of which came from three of the largest and most influential law firms in Utah (Parkinson 1996).

Because the ad included the names of many prominent attorneys, it received considerable publicity, some of which questioned its propriety: "some of those whose names didn't appear on the list wonder whether the judge's decisions will be influenced" (Parkinson 1996). The ad generated publicity, at least some of which was unfavorable to Judge Bishop, and activists were again able to capitalize on the free publicity.

When the votes were counted, Judge Bishop retained his seat with a margin less than 1%. He received 50.43% "yes" votes and 49.57% "no" votes. In Summit County, where some of the most vocal anti-Bishop activists lived, 69.76% of the voters voted against Bishop. In Tooele County, where the least amount of campaigning occurred, 58.96% of the voters voted to retain Bishop, while in Salt Lake County, which contributed 93.7% of the total vote, the outcome was very close with 50.83% voting to retain. The judge who had scored lower on both the Judicial Council and *Salt Lake Tribune* surveys, but had no organized campaign against him, received 66% of the vote for retention. All

other Third Judicial District judges up for retention averaged a "yes" vote of 78%.

Judicial Impartiality and Independence as a Hegemonic Tale

Before examining the effects of these events on legal consciousness, we provide further specifics from the story that reveal a number of ways in which the discourse of judicial independence and impartiality can constitute a hegemonic tale. At its simplest, the tale, again, is that judges chosen through the mechanism known as merit selection are necessarily good judges (minimally, impartial ones) and therefore deserve insulation from accountability through mechanisms that protect the independence of their decisions. We suggest that this tale contains all three elements that Ewick and Silbey (1995:213–14) identify in hegemonic narratives: they are "mechanisms of social control," they "conceal the social organization of their production and plausibility," and they "colonize consciousness."

The tale of judicial independence and impartiality supports, as Resnik notes (1988:1885), "awesome powers in this society." One of these, of course, is the power to send people to jail. Speakers at the public meeting about Judge Bishop sponsored by NOW in August 1994 offered as an example of what they perceived as his abuse of power that he had sentenced a 65-year-old woman to five days in jail for contempt and had threatened other civil litigants with contempt, too.

Determining the custody of children is another awesome power. In Alana Lewis's words, "In a criminal case I'd have had all kinds of rights I didn't have in a civil case, but what I had to lose was greater than a lot of criminals have to lose. Women commit all kinds of crimes and get to keep their children, you know." Through a custody decision a judge is able to control the behavior of one or both of the parents. In Ms. Lewis's case, Judge Bishop controlled where she could live if she wanted to continue to have a close and custodial relationship with her children.

Second, hegemonic stories also have the ability to conceal the contingency of the connection between a particular person or story and the "structure of relations and institutions that made the story plausible" (Ewick & Silbey 1995:214). Several symbolic features of the judicial process cloak the possibility of judicial abuse of power. The ideal of the impartial, equitable, and independent judge is reinforced by the trappings of justice with judges clothed in long, formal, and imposing black robes, ensconced on high and impressive benches, looking down on the others in the courtroom with gavel in hand to control who speaks and who is silent.

Court procedures themselves can also buttress hegemony. A feature of the judicial process as basic as taking each case individually keeps people from discerning patterns of action and power. This is especially the case for court proceedings held in private, such as custody hearings and conferences in chambers. For Alana Lewis, the secrecy of her closed custody hearing was particularly problematic.

> So here's this judge not letting me testify . . . [saying] how appalled he is at just the human being that I am basically, how he doesn't think I have any credibility, and can't be trusted, and all this, and yelling at me and pointing across the bench, having a little tantrum at the end even if he's doing it with a stern instead of yelling voice. And who are the witnesses? There's my husband. There is his attorney, who might be the last person to complain because she's going to win this time. There's my attorney who has another case in front of him in two days, and the recorder who works for him and the bailiff who'd rather not be listening. Who's going to say anything? Who? Who's going to make a complaint in a situation like that?

Transcripts are made of such hearings, but their cost is another barrier to public scrutiny. Ms. Lewis spent between $600 and $700 to pay for the transcript of her one-day hearing. It was only the transcript, however, that mobilized the interest of the ACLU in what was otherwise a routine custody dispute. Eventually, it was the women's sharing of stories through phone calls, meetings, and formal organization that broke the isolation and enabled them to reconstruct the pattern, forge links among the cases, and produce an alternative account.

Mechanisms that conceal the contingency of judicial impartiality allow all judges to invoke the tale of judicial independence. Explicit linkages of Judge Bishop with the tale of judicial independence appeared during the preelection period. Using a subtle judicial independence theme, his supporters ran an advertisement in the days before the election headed "A Judge's Job is Making Tough Decisions." A supporter of Judge Bishop elaborated the argument in a letter to the editor: "It is not a judge's role to win popularity contests. Unlike other public officials, a judge takes an oath to make decisions without regard to public opinion . . . A judge should never make a decision with the thought in mind that deciding one way or the other will anger a powerful interest group which may later oppose his or her retention in office" (Daniels 1996).

The tale of judicial independence and impartiality colonizes consciousness to the extent that we believe what we have been taught, that the judicial system always dispenses justice fairly and equitably, applying the law to the facts presented without prejudgment. The women we interviewed anticipated being judged by an individual who would listen to both sides, carefully weigh

the facts in light of the prevailing law, and then render a decision that could be explained using sound legal reasoning. What they believe they got was a judge who came to hearings with a deeply entrenched set of values through which he rendered decisions without allowing facts to the contrary to interfere with his preconceived notions of the case. As one said, it was "such a shock . . . to feel like a victim in an area that I had my trust in so completely. I was really naive about courts and the U.S. judicial system. I really thought that justice prevailed."

In short, the tale of judicial independence and impartiality is potentially hegemonic because it wraps all judges in an aura that some may not live up to. All judges, however, exercise great power and thus have the potential to do great damage as well as good.

Effects on Legal Consciousness

In contrast to the tale of judicial impartiality and independence, the women reported that they experienced a judge who yelled at them in chambers before they had even been introduced, asked questions that suggested he had already made up his mind, refused to let them present their evidence, ruled on the spot rather than reflecting on the competing claims, and ignored appellate guidance. What then is the effect on people's legal consciousness when they encounter such a discrepancy between their personal experience and a hegemonic tale?

Part of a hegemonic tale's colonization of consciousness is that the tale seems so true that when people first encounter evidence inconsistent with it, they feel utterly powerless to oppose the tale. One woman described herself as feeling that she had gotten "the wind knocked out of me completely in that court room" and was unable to fight back. Another literally fainted in the courtroom when the judge dismissed the jury and entertained a defense motion for a directed verdict in her personal injury case after the Court of Appeals had previously ruled the liability issue should go to a jury. Others reportedly developed stress-related illnesses. One described her feelings as follows: "He's got me under his thumb; I'm afraid to breathe." Even attorneys sometimes felt powerless. Margaret Case felt that her attorney "was blown away by Judge [Bishop] because he intimidated her so badly" that she did not adequately present what little of Ms. Case's case she was allowed to present.

Although some people may remain in a state of devastation and immobilization, others may resist the hegemonic tale in various ways. One form of resistance is to develop a subversive story. Ewick and Silbey (1995:220) describe subversive stories as ones "that break the silence." They may expose the discrepancy between the general and the particular in a hegemonic story or ar-

ticulate an alternative reality. We focus especially on the story of Alana Lewis because her experience with Judge Bishop was the one that got the most media attention and grabbed the public interest. Her reactions to that experience most clearly illustrate the development of a subversive story.

Alana Lewis developed subversive stories to challenge several facets of her experience. Her stories are "rooted" in feminism, which constitutes "an encompassing cultural, material, and political world [view] that extends beyond the local," in Ewick and Silbey's terms (1995:219). In order to challenge the judiciary's hegemonic tale, she also had to fight hegemonic stories of the "good father" and the "bad mother" in custody battles. Because she had been the primary caregiver, she felt that her husband got far too much credit from the judge and from acquaintances who would approach her to comment what a "good father" he was for taking his daughters skiing and to church and joining them for lunch at school. She complained:

> Because he has lunch with his children once a week. Oh man, I'm up all night when they have a fever, you know. I cook three meals a day for them, I get them to school every day, run them to every lesson possible, and he's very committed, having lunch with them once a week. . . . You know people would say to me all the time when we were still married, "Oh I saw [her husband] skiing with your kids the other day; they were so cute. It's so sweet to see him go up there with the kids." And I'd be standing there seven months pregnant thinking about the two hours it took me to get those two little kids together and all that ski gear. And get them to his work and deliver them ready because he didn't want to go home and get them ready, he wanted to leave straight from there. Yeah, great dad.

When her husband petitioned to become the custodial parent because she was planning to move out of state, she fought what she perceived as the "bad mother" story. Ms. Lewis reports that the writer who interviewed the judge for *Redbook* magazine told her after the interview that the judge had said "that I'm a . . . a bohemian and I might run off at any moment and join an artists' commune and who knows what I'm going to do with these children. And he starts making up this story: 'She's a bohemian; she's an artist you know.'"

The problem of the perception of women in custody battles is not confined to this judge. Since there is no outside inspection of child custody proceedings, as discussed above, and most people adhere to the belief that judges acts fairly, impartially and independently, Ms. Lewis feels that lurking beneath the surface when a judge makes a ruling like the one in her case is people's suspicion that there has to be something more, perhaps something sinister, that prompted the ruling. Many people have known of cases where on the surface a ruling or court order had

seemed to be unfair, only to later find out that the person involved had some serious fault that prompted the decision. Ms. Lewis confronted this problem directly more than three years after the judge's ruling when in the period immediately before the election one of his supporters said in a radio interview that she had lost her appeal when she had actually won it and, as she recalled it, the interviewee said "the way I understand it she was very irresponsible with these children, and her character was in dispute."

Given this plausible narrative, it was difficult for Alana Lewis to have people believe her alternative story. She could not prove in any definitive way her view that his decision was based upon his religious convictions and values, nor could she prove that the ruling was not due to some personal failing on her part that had not been made public, but she tried to take back her power by challenging the story of judicial impartiality with one of unfairness. Whereas the newspaper ad supporting the judge described him as "tough," she describes him as "mean" and "malicious." Once her situation began to receive publicity, her subversive story then allowed other women's stories to be told and inflict more chinks in the armor of the hegemonic tale.

Not only the clients but the attorneys for cases with Judge Bishop also reacted to the discrepancy they perceived between his conduct and the tale of judicial impartiality and independence. One male attorney who was willing to be interviewed confidentially described the judge very harshly. In a case the lawyer had before him, "Judge [Bishop] became extremely authoritarian, arbitrary, aloof and very difficult. He clearly favored the male side. Clearly to the extent that I almost think he is in fact a misogynist. It pretty much verified what rulings I saw by him in other cases; he votes against women and for men."

Despite such perceptions, attorneys typically attempted to explain away or circumvent the judge, but expressed continuing trust in the judiciary in general. According to Alana Lewis, when she asked her attorney if they could get a new judge after the bad first experience in his chambers, the attorney said it was not possible, but added: "Oh, he's always like that with women; don't worry about it, we've got a good strong case." After the hearing culminating in the custody ruling, her attorney reportedly walked out of the courtroom and immediately said, "Before we talk, I just want to apologize for what happened in there. That's not the way our legal system works." At other times attorneys reportedly tell women that if one's case is assigned to Judge Bishop, the best one can do is set it up for an appeal, where, they imply, one can still expect to get justice.

Unlike the attorneys, the women's experiences with Judge Bishop transformed their consciousness from naïve acceptance of the hegemonic tale of judicial impartiality and independence

to profound skepticism about the judiciary. Although their subsequent activities targeted Judge Bishop more than the judiciary as a whole, they did not explicitly affirm an underlying faith in the judiciary, as the attorneys did. Without the ongoing interaction with it and the professional socialization to buttress their faith that the attorneys had, the activists' consciousness was more affected.

Constitutive theory suggests that as the women told their stories, initially to each other and later to the public, their change in consciousness would strengthen. Indeed, we see Alana Lewis and Margaret Case telling their stories to a wider audience, mobilizing politically, and attempting to organize others to do so as well. The activists moved beyond negative to affirmative resistance and engaged in collective legal mobilization (McCann & March 1995:221). Their challenge to Judge Bishop thus gives us an opportunity to explore the questions of when people go beyond negative to affirmative resistance and the interaction of meaning and praxis.

Conditions of Resistance

Although Ewick and Silbey do not address the distinction between affirmative and negative resistance, their discussion (1995:220) of conditions likely to generate counter-hegemonic narratives is a helpful starting point for analyzing the conditions that facilitated the more extensive resistance in our story. We also draw on legal mobilization theory, which emphasizes contextual factors such as available "resources" and "opportunities" (M. McCann 1994:135), and on other political science literature to identify further conditions associated with the move from negative to affirmative resistance. In addition, we apply the conditions to the attorneys as well as the activists to explain the attorneys' lack of resistance.

Hegemonic tales do not always generate oppositional subversive stories, and they certainly do not always generate the type of organized political action that occurred in this situation. Ewick and Silbey identify three characteristics of narrators that may facilitate the rise of counter-hegemonic tales: narrators who (1) are socially marginal, because their "lives and experiences are least likely to find expression" in the hegemonic story; (2) understand the hegemonic story sufficiently to know its rules and perceive its often concealed agenda; and (3) are rooted in an institution that creates "both a common opportunity to narrate and a common content to the narrative, thus revealing the collective organization of personal life" (1995:221). All three of these were present in our story. Although Ewick and Silbey describe these conditions as characteristics of narrators, the conditions include significant contextual elements, and we find that the characteristics of

the narrators and the context interact to influence the degree and type of resistance that occurs.

Almost all of those who contacted Alana Lewis or Margaret Case because they, too, felt mistreated by Judge Bishop were women. The judiciary has traditionally been a male-dominated institution in which women are marginal. Some scholars, such as Resnik (1988), argue that the standards of impartiality embodied in the judicial hegemonic tale are inconsistent with the lives and experiences of women. More tangible examples come from "gender and justice task forces" established during the 1980s in several states, including Utah, which documented many examples of gender bias against female attorneys, court personnel, and women litigants in rape, domestic violence, and child support cases (Schafran 1987:287; Clyde 1990; Utah Gender Fairness Committee 1996).

Of course, not all women are equally marginal. The activists who spearheaded the opposition to Judge Bishop were white and middle class. While neither Alana Lewis nor Margaret Case had completed college, the former was clearly socioeconomically upper middle class and the latter had a history of political activism on local issues. That such women are more likely than more marginal people not only to tell subversive stories but also to engage in affirmative resistance is consistent with political science research that finds political participation and a sense of political efficacy positively related to socioeconomic status (Beck & Jennings 1982; Milbrath & Goel 1977; Verba & Nie 1972; Brady, Verba, & Schlozman 1995; Verba et al. 1993). Upper socioeconomic status and the skills commonly associated with it enable people to access "political resources," in the terminology of legal mobilization theory.

As Ewick and Silbey note in their later work (1998:238), "marginality alone is not sufficient for challenging the hegemonically constituted world." To tell a subversive story, narrators must also meet the second condition, perceiving the rules and the agenda of the hegemonic tale, or "recognizing the world as socially constructed" (ibid.). People with the legal consciousness to perceive the socially constructed nature of reality are more likely to perceive opportunities to challenge power that oppresses them (ibid., p. 239).

We suggest a distinction between two different types of opportunities that people may or may not perceive. This distinction is associated with two aspects of legal consciousness identified by McCann and March (1995): "a broad understanding of law as a whole 'system'" and "a familiarity with, and working knowledge of, particular legal conventions" (p. 215). The broader aspect of legal consciousness is necessary to recognize what we term an "ideological opportunity." This is the type of political opportunity McCann emphasizes in his 1994 study of pay equity cam-

paigns, when he describes the "vulnerability of official discourses and [compensation] practices" that rendered them "susceptible to challenges on new egalitarian legal rights grounds" (p. 135) because of the contradictions between the ideology and actual experience.

The narrower, "knowing the rules" aspect of legal consciousness is associated with a second type of political opportunity, which we term an "instrumental opportunity." This involves recognizing the likely absence of overt opposition to resistance. Our case study illustrates both aspects of legal consciousness and both types of opportunity.

The women challenging Judge Bishop demonstrated the broader form of legal consciousness through their feminist interpretation of their experiences and, in the instance of Margaret Case, through a rudimentary theory about "crooks" in the judiciary and the political system generally. The relationship between broader legal consciousness and ideological opportunity are evident in Alana Lewis's attempt to call the ACLU for help after Judge Bishop's ruling because she recognized its inconsistency with the ideology of separation of church and state.

The importance of the narrower aspect of legal consciousness that sees instrumental opportunities is evident both when it is absent and when it is present. Misunderstanding the mechanics of the judicial process and feeling totally defeated after the hearing in which the judge ruled she would lose custody if she moved, Alana Lewis initially told her attorney that she could not appeal. Not realizing an appeal would go to different judges instead of returning to Judge Bishop, she felt could not survive another hearing. At that point lack of understanding immobilized her from even telling a subversive story, much less taking the more explicit political action she did later.

Understanding specific rules may also provide contextual information about whether there is an instrumental opportunity to move beyond negative resistance to more overt, affirmative resistance. The rules for assigning judges to cases were particularly important in this story because they created different contexts for resistance. It is probably no coincidence that Judge Bishop had heard the cases of the two women who became the principal activists against him in Summit rather than Salt Lake County. The Third District assigns judges to the two smaller counties adjoining Salt Lake County for just six months at a time. At the end of the six months judges pass cases in progress on to the next judge assigned there. Thus, the Summit County women knew when Judge Bishop would no longer be a threat to them even if their cases had not reached final disposition. In contrast, women in Salt Lake County whose cases were assigned to Judge Bishop would stay with him for the duration of the case, unless they could successfully petition to have him removed. Thus, these

rules kept some women from speaking out because they knew they would have to come back before the judge.

One of the most striking features of the resistance to Judge Bishop is that it came almost entirely from lay activists and not from lawyers. Although a number of attorneys were privately critical of Judge Bishop, only one attorney, a woman, spoke out publicly against him. A few others offered behind-the-scenes assistance, some going to great lengths to remain anonymous, such as the person who dropped off a package of relevant legal cases on Alana Lewis's doorstop before dawn one morning.

The attorneys' failure to speak out against Judge Bishop demonstrates the importance of social marginality, legal consciousness, and instrumental opportunities in supporting resistance. Most experienced lawyers probably perceive the socially constructed nature of the legal system and certainly are familiar with particular legal conventions, but their consciousness still interpreted Judge Bishop as an exception. This may be due in part to their broader exposure to the legal system, but may also relate to their lack of social marginality. Their "lives and experiences" generally do "find expression" in the legal system (Ewick & Silbey 1995:221).

Even the attorneys who were willing to criticize Judge Bishop perceived limited instrumental opportunities to oppose him publicly because of contextual constraints (Mullinax 1973–74: 32–33). Some lawyers reportedly told the activists that they could not speak out because doing so would jeopardize all their clients. Attorneys are central members of the courtroom "work group" and thus must maintain good working relations with judges (Jacob 1983:414). In this instance "one-shotters" may come out ahead of "repeat players" because the former "does not anticipate continued dealings with his opponent . . . [and] can do his damnedest without fear of reprisal next time around" (Galanter 1974:99 n. 10). In fact, the one attorney who did speak out against Judge Bishop subsequently left the community, citing her public opposition to him as one of the reasons she decided to leave.

Some activists accepted this explanation for the lawyers' silence, but others were unpersuaded and were critical of lawyers for their lack of courage. They may have perceived that lawyers also are not as personally affected by judges' rulings and thus may have less incentive to act.

Just as social marginality and consciousness of the legal system are related to the move from negative to affirmative resistance, so also is the role of organizations, the most clearly contextual of Ewick and Silbey's three characteristics and an important political resource in legal mobilization theory. Consistent with Ewick and Silbey's expectation, the women telling subversive stories had important assistance from three organizations or institu-

tions that provided either "opportunity to narrate" or "content to the narrative" (1995:221). Although organizations sometimes can change the content and distort people's stories, such changes as occurred here were modest and seemed to help the development of collective political mobilization.

The first organization involved was the American Civil Liberties Union (ACLU). The ACLU was important legally because it filed a brief on appeal that contributed to reversing the judge's interpretation of "religious compatibility" as a factor in custody decisions (255 Utah Adv. Rep. 61 1994). To some extent, the ACLU did change Ms. Lewis's story because it cast the story in terms of civil liberties rather than feminism. Charges of religious bias resonate strongly with some parts of the public in Utah, however, and Ms. Lewis firmly believes that only after the ACLU took her case and what Judge Bishop had actually ruled was widely reported in the newspaper could her story be heard. "Getting it into the newspapers and getting the ACLU was the first time I got credibility even on a hometown level, let alone a legal level."

The second important institution was the media. Occasionally they had their own interest in the story, such as the Oregon newspaper that reportedly took an interest because the judge had seemed to impugn the state as godless. The media did not, however, significantly affect the content of the narrative, and they were vitally important in providing opportunities to tell it. In addition to the *Redbook* magazine article, the wire services picked up the story and *USA Today* ran a short article, according to Ms. Lewis. Ms. Lewis got calls from *60 Minutes* and *NBC Dateline*, but they did not ultimately run stories, in Ms. Lewis's view, because the topics of custody and religion were too controversial.

The local media were particularly important in mobilizing public attention early in the story and as the retention election neared. During the latter half of 1994 the *Salt Lake Tribune* and one local television station reported the story frequently and in depth, and the other daily paper and several radio and television stations gave it some coverage. Two *Tribune* reporters won awards from the local Society for Professional Journalists chapter for their coverage of the story (Evans 1995). In the month before the election in November 1996, the *Tribune* again gave the judiciary major coverage with its own bar survey rating judges and its study of appellate reversal rates. The *Tribune* leadership attributes its decision to spend $30,000 on these to their general perception of the growing political power of judges and suspicion of the court system's own performance evaluation process as much as to Judge Bishop specifically. The paper also did not directly editorialize against Judge Bishop, but ran one shortly before the election emphasizing the importance of the elections and naming Judge Bishop and the other judge with a below-average record (Salt Lake Tribune 1996).

The organization that was most associated with the content of the subversive story was the local chapters of the National Organization for Women (NOW). Feminism, with its message of politicizing the personal, "reveal[s] the collective organization of personal life," in Ewick and Silbey's phrase. For the women who were most actively involved in the public campaign against Bishop, gender was a central issue.[8] To them, Bishop was not "tough"; he was sexist. The one attorney who publicly spoke out against Bishop described the issue in somewhat more analytical but still gendered terms. She saw him (and other judges) as bored and impatient with domestic cases, viewing them as repetitious and trivial. Sexism thus became an alternative narrative to the tale of judicial impartiality and independence.

In addition to reinforcing feminism as a narrative frame, NOW also provided organizational resources. The initial networking among women who were angry with the judge soon moved into the Summit County NOW chapter. When Ms. Lewis's story broke into the media, the Salt Lake chapter sponsored the August 1994 public meeting at which eight women told stories about experiences with Judge Bishop. The organization vowed to get rid of the judge and used its membership network to try to recruit court watchers and to keep the issue alive until the election two years later. As the election approached, NOW provided its expertise in political strategy and modest financial resources to get out the word about Judge Bishop. Thus, the women reacting to their experiences with Judge Bishop were able to connect with a larger group of women with prior associational linkages, which McCann and March argue greatly helps people to move from negative to affirmative resistance (1995:230–31).

To some extent it was the collapse of such associational linkages that inhibited the development of a strong coalition with Salt Lake's homosexual community to oppose Judge Bishop. Judge Bishop's light sentence for the killer of the gay man in the autumn of 1994 allowed gays and lesbians, too, to tell a subversive story of prejudice and discrimination in the administration of justice. Prior to the ruling, no specific occasion had forced the general public to consider whether gays and lesbians were treated equitably and fairly in court. The protests of gays and lesbians that they were viewed as marginal citizens who could be ignored or thrown away had no resonance with the general public. Bishop's sentence, however, was inconsistent with the widely held belief that a punishment should fit the crime, increasing the

[8] Not all the people who felt mistreated by Judge Bishop told their stories in gendered terms. A woman whose personal injury suit was twice reinstated on appeal after being dismissed by Bishop said: "I felt like gender wasn't really part of it. My feeling was that, that he has an extraordinary ego and that no one knows the law better than [Bishop] and if you don't believe him, just ask him." Despite this difference in perspective, she did join the feminist activists in a meeting with the press shortly before the election.

plausibility of an alternative story of homophobic bias to rival the tale of impartial and independent justice.

Nevertheless, NOW and the Gay and Lesbian Utah Democrats (GLUD) were unable to build upon the cooperation shown in the one successful rally protesting the sentencing. According to one lesbian activist, GLUD's leadership was predominantly male and insufficiently concerned with the more general charges against Judge Bishop: "they were sort of, not the old-style misogynist gay man but sort of a new-style misogynist gay man, which is that they give lip service to feminism, they understand it, or they cognitively understand it, they can describe it, they can tell you how it all fits together but then when it comes to their actions." Moreover, GLUD suffered other internal problems that led to its disbanding and the absence of an organized voice for the gay and lesbian community during part of the period when NOW was working to sustain opposition to Judge Bishop.[9]

In short, the women who opposed Judge Bishop possessed the characteristics that Ewick and Silbey identify with the narrators of subversive stories, and they were situated in a context with the opportunities and resources that facilitated moving beyond negative to affirmative resistance. Although they were socially marginal vis-à-vis the judiciary, they were sufficiently nonmarginal to have the resources to engage in collective political action. Their legal consciousness was sufficiently complex to perceive both ideological and instrumental opportunities for resistance, and they were able to tap into the support of organizations experienced in the political arena.

Effects of the Subversive Story

Thus, conditions were favorable for the rise of not only subversive stories challenging the hegemonic tale of judicial impartiality and independence but also affirmative resistance and political mobilization. Whether these efforts have much lasting importance, however, depends on their effect (McCann & March 1995:221). To examine these effects, we adopt the perspective Helena Silverstein (1995:12–14) calls "instrumental constitutivism," which concerns both tangible changes arising directly or indirectly from strategic choices and also how these choices "are implicated in the construction of meaning." Law's constitutive power to shape consciousness facilitates and at the same time is strengthened by instrumental political activity. Instrumental and constitutive dimensions of social practice interact and influence each other.

[9] A new organization supporting the interests of lesbians and gays, the Utah Human Rights Coalition, was created in 1995 and did participate in the election-eve rally against Judge Bishop.

The activists' efforts opposing Judge Bishop have had both instrumental and constitutive effects, though evidence for the former is clearer than for the latter. The instrumental effects are largely indirect ones. Evaluated by their most explicit, public goal, the activists working against him failed, because he retained his seat for another six years. If one looks at the indirect effects of their activities, however, they do not look like such a failure. Their efforts at least contributed to, if not wholly brought about, two important institutional reforms.

First, they brought the need for changes in the Judicial Conduct Commission to the attention of the public and the legislature. During the 1995 session the legislature mandated and funded a strengthening of its role (S. McCann 1995). The longtime, part-time director, who had dismissed Alana Lewis's complaint without even interviewing her, retired and was replaced by a full-time director with prior experience in a different professional licensing and disciplinary agency. Ms. Lewis reinstated her complaint and others continued to pursue theirs. Margaret Case was quite optimistic about this route. She said of the new administrator: "He's changed things a lot. He has put a little fear of poor performance in the minds of judges . . . I think he's heading in the right direction." She went so far as to say she was not sorry Bishop won reelection "because actually had Judge [Bishop] lost we wouldn't have had a chance to get rid of him using the [Judicial Conduct Commission] processes that we're trying to use now."[10]

The public complaints against Judge Bishop appear to have contributed to a second reform—the expansion of the court system's own judicial performance evaluation system. At the request of the Judicial Council, the 1995 legislature funded an expansion of the evaluation process to gather information about judges' performance from other court users, such as jurors and court personnel, as well as attorneys. The local press referred to the changes in the evaluation process and the Conduct Commission collectively as the "[Owen Bishop] initiatives" (Funk 1994:B-1).

Beyond these institutional changes, we believe there is evidence the activists' efforts had constitutive effects as well. Evidence of constitutive effects usually consists of verbal or linguistic patterns. The attention to and debate about the Bishop race reflect this sort of change in public discourse about judicial retention elections and their meaning. For example, the *Tribune* editorial preceding the 1996 election tells a tale of judicial power and potential abuse of it rather than judicial impartiality and independence: "Though judges are among Utah's most powerful

[10] These complaints have not led to Judge Bishop's removal. A reprimand recommended by the Judicial Conduct Commission in an unrelated case, however, is still pending with the Utah Supreme Court following two rulings on the constitutionality of the Conduct Commission (Maffly 1997a; Costanzo 1998; Rivera 1999).

public officials, they are largely insulated from the scrutiny necessary for democracy and justice. The system needs reform. But voters cannot afford to wait for change" (Salt Lake Tribune 1996).

Not just the public discourse but the discourse of the judiciary itself reflected some change in legal consciousness. In a press release issued immediately after the election (Administrative Office of the Courts 1996), the Chief Justice of the state Supreme Court expressed a carefully nuanced view of the results and their meaning for the balance of judicial independence and accountability.

> In the recent election, the public showed itself capable of carefully discriminating between the performance of individual judges. Having made that discrimination, they indicated that no judge should be removed from office. And, although reading meaning into vote tallies is fraught with danger, they may have also sent a message to those judges who received fewer votes than their peers that there is room for improvement in their performance. I have every reason to believe that the judiciary as a whole, and judges individually, will take these lessons to heart and will strive to serve the people in the best traditions of the Utah judiciary.

In addition to these linguistic indications of constitutive effects from the campaign against Judge Bishop, we propose that empirical data on new voting patterns can also be evidence of constitutive change. The campaign against Judge Bishop increased voters' awareness of judicial retention elections and attracted more voters to the judicial portion of the ballot. Research on retention elections consistently notes a high rate of "roll-off," or voters who cast ballots for other races but ignore the judicial races (Hall & Aspin 1987:346–47). In comparison with the previous presidential election year, the roll-off results indicate impressive increases in interest in the judicial races, especially but not exclusively in the Bishop race.

In 1992, roll-off in Salt Lake County from the presidential race to the judicial races as a whole was 28.7%, while in 1996 roll-off was 23.0% (23.2% without the Bishop race). Isolating the Bishop race indicates an even greater increase in voter interest. About 81% of those voting for president in 1996 voted in the Bishop race (19% roll-off), which is a 33.8% decrease in roll-off in judicial voting from 1992. Summit County, a smaller community and home to the initial anti-Bishop activity, showed an even less significant roll-off, only 15% from the presidential race to the Bishop race. These increases in voting in judicial races imply a greater public awareness of the importance of the retention elections.

The substance of the vote as well as its size also suggests a new consciousness of judicial retention elections. Judge Bishop received a much larger percentage of "no" votes than any Utah

judge ever had. A court staff member and an anti-Bishop activist both drew from this fact very similar observations about a change in public consciousness. The court staff member said the campaign against Judge Bishop had "for many people legitimized the idea of voting against a judge to a degree that it has not been before." The anti-Bishop activist said, "I've been saying we didn't lose. We raised a lot of consciousness. I mean, they know this guy; there's some people concerned about him."

In Ewick and Silbey's terms, the activists' subversive story succeeded in challenging the hegemonic tale of judicial impartiality and independence. The legal consciousness of the voting public at least comprehended an exception to the tale of judicial independence and impartiality, but did not reject it altogether, distinguishing between Judge Bishop and the other judges on the ballot. The average retention rate for judges increased slightly between 1992 and 1996. The average retention rate in Salt Lake County for the judges on the ballot in 1992 was 76.6%, while the average for the judges, excluding Bishop, in 1996 was 77.1%. It will take another election year to tell if there has been a lasting change in the public consciousness around judicial elections, but if there has, one would expect a continuation of both the new discourse around such elections and behavioral patterns of campaigning and voting indicating greater contestation.

One might expect even higher levels of campaign activity than in 1996 because, compared with the potential in judicial retention elections (Aspin & Hall 1994), the opposition to Judge Bishop was quite a small-scale effort. Given that the rash of public complaints about Judge Bishop and NOW's pledge to work to defeat him occurred more than two years before he would be up for retention election, the preelection push to get voters to "vote no" seemed surprisingly small and late in getting off the ground. Furthermore, the money spent on the campaign was truly meager. NOW spent about $600 on its efforts to defeat Bishop while Alana Lewis, from her own pocket, purchased about $200 worth of yard signs. Beyond these very small sums, the campaign to unseat Bishop relied upon nonmonetary efforts such as word of mouth, telephone trees, and free media coverage.

We see three primary reasons for this minimalist campaign, all of which could be affected by a constitutive change in the public's understanding of retention elections. One reason seems to be that the activists did not really believe that it was possible to unseat a judge through the retention election process. The NOW leadership was aware that no judge had been rejected by Utah retention voters and that judges usually received approval at a rate of about 80%. Seeing how close they did come, however, one NOW leader expressed regret that they did not spend more money and implied they would do it differently on another occasion.

A second reason the activists cited was lack of knowledge about judicial campaign rules and restrictions. NOW, very mindful of restrictions on contributions for executive and legislative campaigns, was unclear how to proceed in funding a judicial retention campaign. They had not been involved in a judicial race before, so they had no first-hand expertise. When their inquiries to the Attorney General's office failed to clarify the rules, NOW decided to proceed cautiously and spend only a minimum amount of money. Greater awareness of the contestability of a judicial retention election may direct attention to this issue and clarify the ground rules for the future.

The third reason for the small-scale campaign was a strategic decision. Understanding that a pro-Bishop campaign committee could raise much more money, NOW leaders wanted to delay overt campaigning to leave as little time as possible for Bishop supporters to try to mount a campaign on Bishop's behalf. To this end, NOW leaders hoped to exploit and/or create free media coverage for the cause while avoiding, as much as possible, the semblance of an organized campaign. This strategy was unsuccessful, because a committee to support Judge Bishop emerged nonetheless and bought the large newspaper ads supporting him. According to press accounts, the judge's supporters raised ten times the amount of money NOW says it spent (Parkinson 1996). In the future judicial opponents might well believe they should gear up earlier.

If a constitutive change in the general understanding of judicial retention elections has indeed occurred, organized opposition and higher spending on both sides could be regular features of future elections. This will necessarily also be related, of course, to the particular judges on the ballot. By the evidence from the court's and newspaper's surveys, few judges are likely to spark the same level of opposition as Judge Bishop. Moreover, because the judge was reelected, the reluctance of attorneys to speak out may have been reinforced unless they believe the chances of defeating a judge in the future are overwhelmingly good. Initiative is more likely to come, as here, from individual citizens, the media, and nonlawyer advocacy groups.

Conclusion

In calling judicial impartiality and independence a hegemonic tale, we do not suggest that no judges are ever impartial. Some judges are as impartial as it is humanly possible to be and deserve independence. Our story suggests, however, that the tale of judicial impartiality and independence is open-textured, like many other features of the legal system. It can be used to oppress if it deters inquiry into the merits of judges, but it also articulates ideals and provides the opportunity to raise public consciousness

of discrepancies between the ideals and the reality. Like Sally Merry's disputants who do not get what they want from court but do not give up all hope of getting justice (1990) and Mari Matsuda's minorities with a "double consciousness" of law as a source both of undeserved power and privilege and of potential inclusion and empowerment (1987), these women did not abandon their whole faith in courts, but told subversive stories to point out exceptions to the tale of independence and impartiality. In Silbey's terms (1998:286–87), judicial impartiality and independence moved from hegemony to ideology.

An encounter with a judge who does not seem to live up to the tale of judicial impartiality and independence is likely to unsettle one's legal consciousness if one had previously believed the tale. The story told here suggests that a seriously negative encounter may at least initially leave litigants emotionally and psychologically unable to resist at all. Whether people are able to get out of this state and resist by telling a subversive story or by engaging in more complex forms of organized political action depends on some characteristics of the narrator and some of the context. The type of resistance people display depends on a mix of their degree of social marginality, their understanding of the hegemonic story, and the opportunities and organizational resources they have.

Social marginality is related to resistance to a negative legal encounter in complex ways. In the first place, people who are not at all socially marginal are less likely to tell subversive stories because they are probably less likely to have a negative experience in the judiciary (Galanter 1974; Smith 1991). Once one does have such an experience, however, more socially marginal people are probably less likely to have the resources to move from negative to affirmative resistance.

Beyond social marginality, the likelihood of challenging the hegemonic tale of judicial impartiality and independence is related to one's understanding of the legal system in both the broad and narrow sense. Seeing the social construction of the legal system makes one more willing to challenge it, and knowing its rules makes one more able to do so. Specific knowledge of legal rules and procedures is important for planning strategies of resistance and being aware of constraints on one's opportunities. In this instance some lawyers and clients alike were constrained from public resistance by the context of needing to appear again before the same judge, though many lawyers may also have lacked the critical consciousness needed to speak out.

The degree and type of resistance also depend on the availability of organizational support. Here feminism provided an alternative discourse and, for some, bonds of solidarity that supported a challenge to the hegemonic tales associated with divorce and the judiciary. More tangible institutional support in

the form of corroborating information and organizational resources, such as money and legal and political expertise, appeared to play a big role in moving resistance from subversive storytelling to political mobilization.

A subversive story about a judge or the judiciary, like any resistance, is important in itself for demonstrating that people are not totally under the sway of a hegemonic tale and that they retain the ability to articulate an alternative perspective (McCann & March 1995:224–28). Resistance arguably has even more importance if it changes the status quo in some way. Such changes may reflect either the direct goals of the activists or successes achieved indirectly because of publicity or side effects of the main efforts, as studies of litigation as a political strategy have shown (Handler 1978:ch. 6; Olson 1984:chs. 6–8; M. McCann 1994; Silverstein 1996:chs. 5 & 6). Here, although the activists failed to defeat the judge in the retention election, they contributed to other reforms and may have changed the public's legal consciousness with respect to judicial elections.

Retention elections, like any elections, are in theory an opportunity for people to tell competing stories about the person or persons being elected. Most of the time, however, only one story gets told: an undifferentiated tale of judicial impartiality and independence. One story of a subversive tale challenging it does not, of course, reveal anything about the frequency of the type of problem that elicited the challenge. Whether future challenges will occur depends at least in part on whether the story of judicial impartiality and independence is valid in most instances or whether the conduct attributed to Judge Bishop is more widespread.

Our story also does not necessarily imply that other methods of selecting and retaining judges are preferable. The lack of an institutionalized challenger in retention elections means, however, that challenges are likely to be infrequent. Thus, close attention to the complex combination of conditions in which a challenge does arise is worthwhile for scholars interested in legal consciousness or in judicial selection and retention.

References

Adamany, D., & P. Dubois (1976) "Electing State Judges," 3 *Wisconsin Law Rev.* 731.

Administrative Office of the Courts (1994) "Court Administrator's Office Decries Gross Inaccuracies in Complaints Lodged against Judge [Owen Bishop]," News release, 11 Nov.

——— (1996) "Press Statement: Retention Elections," 6 Nov.

Aspin, Larry T., & William K. Hall (1994) "Retention Elections and Judicial Behavior" 77 *Judicature* 306.

Beck, Paul Allen, & M. K. Jennings (1982) "Pathways to Participation," 76 *American Political Science Rev.* 94.

Brady, H. E., Sidney Orman Verba, & K. L. Schlozman (1995) "Beyond SES: A Resource Model of Political Participation," 89 *American Political Science Rev.* 271.

Bright, Stephen B. (1997) "Political Attacks on the Judiciary," 80 *Judicature* 165.

Brooks, Peter, & Paul Gewirtz, eds. (1996) *Law's Stories: Narrative and Rhetoric in the Law.* New Haven, CT: Yale Univ. Press.

Bruner, Jerome A. (1986) *Actual Minds, Possible Worlds.* Cambridge: Harvard Univ. Press.

Carbon, Susan B., & Larry Charles Berkson (1980) *Judicial Retention Elections in the United States.* Chicago: American Judicature Society.

Cilwick, Ted, & Sheila R. McCann (1996) "Utah Lawyers Have Dim View of Pair of District Judges; Two Judges Fare Poorly in Analysis," *Salt Lake Tribune,* 20 Oct., A-19.

Clyde, A. H. (1990) *Utah Task Force on Gender and Justice.* Report to the Utah Judicial Council.

Comaroff, Jean, & John Comaroff (1991) *Of Revelation and Revolution,* vol. 1. Chicago: Univ. of Chicago Press.

Costanzo, Joe (1998) "Court Axes Discipline Commission for Judges," *Deseret News,* 11 July, B-1.

Crenshaw, Kimberlé (1992) "Whose Story Is It Anyway? Feminist and Antiracist Appropriations of Anita Hill," in T. Morrison, ed., *Race-ing Justice, En-gendering Power: Essays on Anita Hill, Clarence Thomas and the Constitution of Social Reality.* New York: Pantheon Books.

Culver, John H., & John T. Wold (1986) "Rose Bird and the Politics of Judicial Accountability in California," 70 *Judicature* 81.

Daniels, Scott (1996) "Judge [Bishop] Deserves Retention," *Deseret News,* 3 Nov., AA-5.

Dubois, Philip (1986) "Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections" 40 *Southwestern Law J.* 31.

Evans, Deann (1995) "More than Awards for Journalists," *Salt Lake Tribune,* 21 May, F-2.

Ewick, Patricia, & Susan S. Silbey (1995) "Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative," 29 *Law & Society Rev.* 197–226.

——— (1998) *The Common Place of Law: Stories from Everyday Life.* Chicago: Univ. of Chicago Press.

Funk, Marianne (1994) "Utah Plans to Change the Way Judges are Judged," *Deseret News,* 4 Dec., B-1, B-3.

Gacnik, Rosemary, ed. (1992) *Media Guide to the Utah State Courts.* Salt Lake City: Administrative Office of the Courts.

Galanter, Marc (1974) "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change," 9 *Law & Society Rev.* 95.

Gordon, Robert W. (1984) "Critical Legal Histories," 36 *Stanford Law Rev.* 57–125.

Griffin, Kenyon N., & Michael J. Horan (1979) "Merit Retention Elections: What Influences the Voters," 63 *Judicature* 78.

Hall, William K., & Larry T. Aspin (1987) "What Twenty Years of Judicial Retention Elections Have Told Us," 70 *Judicature* 340–48.

Handberg, Roger (1994) "Judicial Accountability and Independence: Balancing Incompatibles?" 49 *Univ. of Miami Law Rev.* 127–37.

Handler, Joel F. (1978) *Social Movements and the Legal System: A Theory of Law Reform and Social Change.* New York: Academic Press.

Hunt, Stephen (1995) "Court: Divorced Mom, Kids Can Move to Oregon," *Salt Lake Tribune,* 4 Jan., D-1, D-3.

——— (1996) "Thief Who Fled Court May Get New Judge," *Salt Lake Tribune,* 1 May, B-2.

Hunt, Stephen, & Sheila R. McCann (1994a) "Killer's Sentence Too Light, Says Family of Gay Victim," *Salt Lake Tribune*, 16 Aug., C-1, C-3.

——— (1994b) "Complaints against Judges Vanish in Utah's Secret Government Recess," *Salt Lake Tribune*, 4 Sept., A-4.

——— (1994c) "Is Utah Judge Unjust or Just Doing His Job?" *Salt Lake Tribune*, 4 Sept., A-1.

Jacob, Herbert (1983) "Trial Courts in the United States: The Travails of Exploration," 17 *Law & Society Rev.* 407–25.

Johnson, Charles A., et al. (1978) "The Salience of Judicial Candidates and Elections," 59 *Social Science Quarterly* 371.

Kairys, David, ed. (1982) *The Politics of Law: A Progressive Critique.* New York: Pantheon.

Kennedy, D. (1982) "Antonio Gramsci and the Legal System," *6 ALSA Forum* 32.

Klots, A. T. (1955) "The Selection of Judges and the Short Ballot," 38 *J. of the American Judicature Society* 134.

Lovrich, Nicholas P., John C. Pierce, & Charles H. Sheldon (1989) "Citizen Knowledge and Voting in Judicial Elections," 72 *Judicature* 28–33.

Lovrich, Nicholas P., & Charles H. Sheldon (1983) "Voters in Contested, Nonpartisan Judicial Elections: A Responsible Electorate or a Problematic Public?" 36 *Western Political Q.* 241.

Luskin, Robert C., et al. (1994) "How Minority Judges Fare in Retention Elections," 77 *Judicature* 316–22.

Maffly, Brian (1997a) "Court Says Judge Violated Ethics," *Salt Lake Tribune*, 9 Oct., C-2.

——— (1997b) "High Court Orders 3rd Trial for 7-Year-Old Divorce Battle," *Salt Lake Tribune*, 31 Dec., B-1.

Matsuda, Mari J. (1987) "Looking to the Bottom: Critical Legal Studies and Reparations," 22 *Harvard Civil Rights–Civil Liberties Law Rev.* 323–99.

McCann, Michael W. (1994) *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization.* Chicago: Univ. of Chicago Press.

McCann, Michael W., & Tracey March (1995) "Law and Everyday Forms of Resistance: A Socio-Political Assessment," in A. Sarat & S. S. Silbey, eds., *Studies in Law, Politics, and Society.* Greenwich, CT: JAI Press.

McCann, Sheila R. (1994) "Magazine: Utah Jurist Is 'Sexist,' [Bishop] Refutes Charge, Calls Women Superior. Judge Denies He Is 'Sexist'," *Salt Lake Tribune*, 11 Nov., B-1.

——— (1995) "Probes of Judges' Conduct Appear to Go Nowhere," *Salt Lake Tribune*, 9 June, C-1.

——— (1996) "Court Changes Ruling by Judge [Bishop]," *Salt Lake Tribune*, 17 April, C-1.

McKnight, R. Neal, et al. (1978) "Choosing Judges: Do the Voters Know What They're Doing?" 62 *Judicature* 94.

Merry, Sally Engle (1985) "Concepts of Law and Justice among Working-Class Americans: Ideology as Culture," 9 *Legal Studies Forum* 59–71.

——— (1990) *Getting Justice and Getting Even: Legal Consciousness among Working Class Americans.* Chicago: Univ. of Chicago Press.

Milbrath, Lester W., & Madan Lal Goel (1977) *Political Participation.* Chicago: Rand McNally.

Moxley, Paul T. (1994) "Letter-to-the-Editor: Judge [Bishop] the Target of Unfair Public Criticism," *Salt Lake Tribune*, 20 Aug., A-8.

Mullinax, Otto B. (1973–74) "Judicial Revision: An Argument against the Merit Plan for Judicial Selection and Tenure," 5 *Texas Tech Law Rev.* 21.

National Organization for Women (1995) "One Woman Every Woman: Working Together," *NOW in Utah*, July/Aug., 1.

Olson, Susan M. (1984) *Clients and Lawyers: Securing the Rights of Disabled Persons.* Westport, CT: Greenwood Press.

Parkinson, C. (1996) "Attorneys Question Ad Listing Judge's Supporters," *Deseret News,* 31 Oct., B-1, B-2.

Paulsen, Lynn (1994) "Letter-to-the-Editor: Judge Deserves Respect," *Salt Lake Tribune,* 22 Aug., A-8.

Reinharz, Shulamit, & Lynn Davidman (1992) *Feminist Methods in Social Research.* New York: Oxford Univ. Press.

Repanshek, Kurt (1994) "Keep LDS Children in County, Judge Tells Divorced Mom: Judge Bars Divorced Mom from Moving, Says This Is the Place to Rear LDS Kids," *Salt Lake Tribune,* 17 May, A-1.

Resnik, Judith (1988) "On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges," 61 *Southern California Law Rev.* 1877.

Rivera, Ray (1999) "Justices Reverse Judicial-Panel Ruling," *Salt Lake Tribune,* 23 Jan., D-1.

Rolly, Paul, & JoAnn Jacobsen-Wells (1994a) "Rolly and Wells," *Salt Lake Tribune,* 12 Aug., D-1.

——— (1994b) "Rolly and Wells," *Salt Lake Tribune,* 18 Nov., B-1.

Salt Lake Tribune (1994) Our View (Editorial): "Sentence Reduces Life's Value," *Salt Lake Tribune,* 18 Aug., C-1.

——— (1996) Our View (Editorial): "Voter, Judges on Trial," *Salt Lake Tribune,* 23 Oct., A-8.

Sanders, Gregory L. (1994) "Letter-to-the-Editor: One-Sided Attacks on Judge [Owen Bishop] Are Reprehensible," *Salt Lake Tribune,,* 27 Aug., A-12.

Sarat, Austin (1990) " 'The Law Is All Over': Power, Resistance and the Legal Consciousness of the Welfare Poor," 2 *Yale J. of Law & the Humanities* 343.

Sarat, Austin, & William L. F. Felstiner (1989) "Law and Strategy in the Divorce Lawyer's Office," 20 *Law & Society Rev.* 93–134.

Schafran, Lynn Hecht (1987) "Documenting Gender Bias in the Courts: The Task Force Approach," 70 *Judicature* 280–91.

Shaw, Leander, Jr. (1992) "Florida's Judicial Merit Selection and Retention System: The Better Alternative," 20 *Florida State Univ. Law Rev.* 283–90.

Silbey, Susan S. (1998) "Ideology, Power and Justice," in B. G. Garth & A. Sarat, eds., *Justice and Power in Socio-Legal Studies.* Evanston, IL: Northwestern Univ. Press.

Silverstein, Helena (1996) *Unleashing Rights: Law, Meaning, and the Animal Rights Movement.* Ann Arbor: Univ. of Michigan Press.

Smith, Christopher E. (1991) *Courts and the Poor.* Chicago: Nelson-Hall.

Southern California Law Review (1988) "USC Symposium Judicial Election, Selection, and Accountability," 61 *Southern California Law Rev.* 1555–2073.

Trubek, David M. (1984) "Where the Action Is: Critical Legal Studies and Empiricism," 36 *Stanford Law Rev.* 575–622.

University of Miami Law Review (1994) "Selection and Retention of Judges: Is Florida's Present System Still the Best Compromise?" 49 *Univ. of Miami Law Rev.* 1–158.

Utah Judicial Council (1992) *Utah Courts Directory.* Salt Lake City: Administrative Office of the Courts.

Utah Gender Fairness Committee (1996) *Gender and Justice in Utah: A Six Year Follow-up on the Utah Task Force on Gender and Justice Report.* Report to the Utah Judicial Council. Salt Lake City: The Committee.

Utah Lieutenant Governor (1996) *Utah Voter Information Pamphlet.* Salt Lake City: Office of the Lieutenant Governor.

Verba, Sidney Orman, & N. H. Nie (1972) *Participation in America: Political Democracy and Social Equality.* New York: Harper & Row.

Verba, Sidney Orman, K. L. Schlozman, H. E. Brady, & N. H. Nie (1993) "Citizen Activity: Who Participates? What Do They Say?" 87 *American Political Science Rev.* 303.

Volcansek, M. L. (1982) "The Effects of Judicial Selection Reform: What We Know and What We Do Not," in P. L. Dubois, ed., *The Analysis of Judicial Reform.* Lexington, MA: Lexington Books.

Watson, Richard Abernathy, & Rondal G. Downing (1969) *The Politics of the Bench and the Bar: Judicial Selection under the Missouri Nonpartisan Court Plan.* New York: John Wiley & Sons.

Webster, Peter D. (1995) "Selection and Retention of Judges: Is There One 'Best' Method?" *23 Florida State Univ. Law Rev.* 1–43.

Weller, Sheila (1994) "More of America's Most Sexist Judges," *Redbook,* Dec., pp. 88–90, 120.

Williams, Raymond (1977) *Marxism and Literature.* New York: Oxford Univ. Press.

Wilson, Anne (1995) "Some See Ogden Surgeon as a Godsend . . .," *Salt Lake Tribune,* 1 Oct., A-1.

Wold, John T., & John H. Culver (1987) "The Defeat of the California Justices: The Campaign, the Election, and the Issue of Judicial Accountability," 70 *Judicature* 348.

Case

Larson v. Larson, 255 Utah Adv. Rep. 61 (1994).

Statute

Utah Code Annotated, Utah Court Rules: State and Federal Rules and Code of Judicial Administration, 1997.