

When Is Law in Action?

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In response to Pamela Foohey, *When Faith Falls Short: Bankruptcy Decisions of Churches*, 76 OHIO ST. L.J. 1319 (2015).

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I. INTRODUCTION

Sociolegal scholars long ago noted a difference between the “law in the books” and the “law in action.”¹ The difference is paralleled in two distinct understandings of how law should be properly understood. The first holds that law is, one way or another, the rules. For example, law may be what we have enacted through legislation or executive order (formal rules). Or, law may be the rules that are logically or analytically emergent from legal decisions (e.g., ‘discovering’ the law through the case method). Or, law may be a deeper, immutable truth that we can discover and which our enactments approximate but may not quite always match (e.g., natural law). The second understanding of how law should be properly understood is interested in “law in action,” in what actually happens with legal phenomena. Sometimes this work compares what actually happens to the “law in the books” and explores how well or poorly the two correspond;² at other times this work simply explores what happens as a way of understanding what law is. A robust body of work in the law-in-action tradition focuses on the mobilization of law, asking when and how social actors of different sorts—for example, people, families, formal organizations, social movements—turn to law to get something done.³

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¹ See, e.g., Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 12–15 (1910).

² The sociolegal literature has a long history of “gap studies” that compare law’s operation to its aspirations. See Jon B. Gould & Scott Barclay, *Mind the Gap: The Place of Gap Studies in Sociolegal Scholarship*, 8 ANN. REV. L. & SOC. SCI. 323, 324 (2012).

³ See, e.g., Rebecca L. Sandefur, *Access to Civil Justice and Race, Class, and Gender Inequality*, 34 ANN. REV. SOC. 339, 341 (2008).

II. CHURCH BANKRUPTCY AS LAW IN ACTION

Pamela Foohey's study of churches' decisions to file bankruptcy⁴ is firmly in the law-in-action tradition. Through review of bankruptcy filings and interviews with pastors and attorneys, Professor Foohey explores how churches' financial problems come to be seen and acted on as legal problems potentially amenable to the remedy of chapter 11 bankruptcy⁵. She explores when and how churches come to mobilize law.

The study is fascinating in itself, and its striking findings also have implications beyond it, to other populations of organizations. Churches that file for chapter 11 are mostly small, independent Christian congregations.⁶ They are organizations with small staffs, where decision-making authority is invested in a small number of people—often one person, the founder of the organization. They do not have in-house counsel to advise them. In this respect, they resemble many of the nation's millions of small businesses⁷ and small, independent nonprofit community organizations.⁸ Given these similarities, we can expect that some of what Professor Foohey shows us happening with these religious organizations will generalize to other kinds of organizations as well.

Perhaps most notably, these small independent organizations turn out to act a lot like people.⁹ For example, like people, these churches' decisions about bankruptcy are affected by a range of factors independent of their objective financial situation.¹⁰ One of these is the influence of members of their social networks, who may shape their behavior in a range of ways.¹¹ Associates can provide information about new ways to think about and act on money problems, information about how to take those actions, and information about what the benefits might be of doing so.¹² Associates may also provide

⁴Pamela Foohey, *When Faith Falls Short: Bankruptcy Decisions of Churches*, 76 OHIO ST. L.J. 1319 (2015).

⁵*Id.* at 1323–24.

⁶*Id.* at 1323.

⁷In 2010, the U.S. Small Business Administration counted 27.9 million small businesses, with an average number of employees of around four. SBA OFFICE OF ADVOCACY, FREQUENTLY ASKED QUESTIONS 1, 2 fig.3 (Sept. 2012), https://www.sba.gov/sites/default/files/FAQ_Sept_2012.pdf [<https://perma.cc/VA7C-CPNC>].

⁸The Urban Institute counts “[a]pproximately 1.41 million nonprofits,” about 30% of whom reported total expenses of less than \$100,000 in a year. BRICE S. MCKEEVER, URBAN INST., *THE NONPROFIT SECTOR IN BRIEF 2015*, at 1, 4 (Oct. 2015), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/2000497-The-Nonprofit-Sector-in-Brief-2015-Public-Charities-Giving-and-Volunteering.pdf> [<https://perma.cc/X46B-UP8S>].

⁹Foohey, *supra* note 4, at 1323–24.

¹⁰*Id.* at 1345.

¹¹*Id.* at 1350–52.

¹²Michelle M. Miller, *Social Networks and Personal Bankruptcy*, 12 J. EMPIRICAL LEGAL STUD. 289, 290 (2015).

referrals to people who can provide information or assistance. They can also make taking action seem less shocking, deviant, or unimaginable. One barrier to taking the actions that would mobilize law is the stigma of bankruptcy.¹³ Associates' experience with the process may reduce one's own feeling of stigma. Professor Foohey observes a pattern of bankruptcy filings that is strongly suggestive of social network effects, with "many of the organizations that sought to reorganize [through bankruptcy] located relatively near to each other."¹⁴ Just as personal bankruptcies appear to cluster within social networks,¹⁵ so do the bankruptcies of small, independent churches and perhaps other kinds of small independent organizations.

Another similarity between these organizations' decisions and the decisions of private individuals is the role of emotions such as shame and of sources of norms that act as alternatives to law's norms, such as religious beliefs. Professor Foohey's informants explain that "from a spiritual standpoint [bankruptcy] is a no-no"¹⁶: law may permit it, but their religious beliefs discourage it in powerful ways. Pastors also worry that their actions will lead to a fall in their social standing, not only in the broader community, but also within their own congregations.¹⁷ When seeking information and advice about what to do about their organizations' financial distress, they search "quietly, selectively approaching" trusted others.¹⁸ Their close identification with their churches means that they "experience[] their churches' downfalls as personal failings."¹⁹

Finally, similar to what we learn from studies of people's experiences with justiciable events, much of the action in the life history of these churches' money problems comes before the church ever gets to a formal legal organization or to a lawyer. The churches try doing nothing, hoping that they can ride the trouble out.²⁰ They try self-help through fundraisers or negotiating with creditors personally.²¹ When they do come to see their money problems as legal problems and mobilize law, it is often because they are pushed to do so by outside forces, such as legal actions or threats of legal actions by

¹³Robert I. Sutton & Anita L. Callahan, *The Stigma of Bankruptcy: Spoiled Organizational Image and Its Management*, 30 ACAD. MGMT. J. 405, 406 (1987); Deborah Thorne & Leon Anderson, *Managing the Stigma of Personal Bankruptcy*, 39 SOC. FOCUS 77, 79 (2006).

¹⁴Foohey, *supra* note 4, at 1336.

¹⁵HERBERT JACOB, DEBTORS IN COURT: THE CONSUMPTION OF GOVERNMENT SERVICES 8-9 (1969); Miller, *supra* note 12, at 307.

¹⁶Foohey, *supra* note 4, at 1352 (quoting the leader of a central California religious organization describing his experience about the organization's chapter 11 bankruptcy in a telephone interview with the author).

¹⁷*Id.* at 1352-53.

¹⁸*Id.* at 1349.

¹⁹*Id.* at 1348.

²⁰*Id.* at 1345-46.

²¹*Id.* at 1347.

creditors.²² In sum, these organizations act a lot like people, and we might expect that other kinds of small independent organizations behave similarly.

III. INSTITUTIONAL ARRANGEMENTS: REVEALING WHERE THE LAW IS (AND IS NOT) IN ACTION

Professor Foohey's work opens up a new window onto how small organizations think about and decide to mobilize law. The research also opens up a space to consider the range of moments when law is in action—even, perhaps, when it has not been mobilized by someone to enforce a right or seek a remedy. Put differently, how might law be acting even before it is mobilized?

I would like to propose just a few ways law “acts”; they are hardly exhaustive. What ties them together is a conceptualization of civil justice as a social institution, with specific institutional arrangements including specific patterns of practices of staffing that institution.²³ When we imagine alternative institutional arrangements—different ways of doing the same social work—it gives us some analytical leverage for thinking about how law may be acting right now in the status quo.

One of these institutional arrangements is complexity.²⁴ For example, what if the law governing some problem, like not being able to pay the bills, were less complicated? Lower complexity might make it easier for nonlawyers to identify the legal aspects of their own situations and understand the different elements of possible legal actions. It might reduce the chance that people were “mistaken about certain of the important details”²⁵ of that law and how it applied to their situations. It might make it easier for nonlawyers to give each other accurate advice in the social networks that we know people rely on when they face justiciable problems. For the case of bankruptcy, how would a simpler code affect the rates at which and conditions under which small organizations might file? Certainly the *content* of the code, the possibilities and incentives that law creates for different actions, would likely affect filing. Indeed, pushing individuals away from chapter 7 bankruptcy and toward chapter 13 bankruptcy was one purpose of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.²⁶ But complexity itself may inspire inaction or encourage delaying it.

Setting aside the complexity of the substantive law, we could also consider basic aspects of the process of using it. What if the steps in taking some legal

²² Foohey, *supra* note 4, at 1348.

²³ See Arthur L. Stinchcombe, *On the Virtues of the Old Institutionalism*, 23 ANN. REV. SOC. 1, 1 (1997).

²⁴ See, e.g., Richard Zorza, *Some First Thoughts on Court Simplification: The Key to Civil Access and Justice Transformation*, 61 DRAKE L. REV. 845, 851 (2013).

²⁵ Foohey, *supra* note 4, at 1351.

²⁶ Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of 11 U.S.C.).

action were less opaque and themselves simplified? In a range of jurisdictions around the country, courts have substituted plain language, fixed choice forms for pleadings.

If a court action requires a pleading, the litigant has to figure out what law applies, what that law says, what counts as evidence and how to present her case in legal terms that court staff understand. When courts replace pleadings with plain language forms with fixed choice options, much of the legal expertise necessary to draft the pleading becomes commodified in the form.²⁷

If the steps were more obvious, would law be more often mobilized? Would it be mobilized with greater advantage to parties who are currently baffled or stymied by complexity? Some people are likely more disadvantaged by these kinds of complexity than others, so here one of law's actions might be the creation of inequality.²⁸

We could also imagine changing the way that we staff the big social institution that is law. What if new staff or differently trained staff were active in aspects of formal legal process? In a range of jurisdictions around the country, courts and other funders have created new, nonlawyer roles to assist people in navigating litigation without attorneys.²⁹ One example is the New York City Courts' Access to Justice Court Navigator Program.³⁰ In this program, volunteers, many of whom are college students, are trained to assist unrepresented litigants by providing information about the legal process the litigant is involved in, assisting litigants in organizing papers, and accompanying them when they meet with attorneys for the opposing side and with judges and other court staff.³¹ They cannot give legal advice, and they cannot represent the litigant either in negotiations or in the courtroom.³² However, they may help people feel less stressed and be better able to remember and organize their own arguments and evidence. This could have consequences for how cases turn out.

²⁷ Rebecca L. Sandefur, *What We Know and Need to Know About the Legal Needs of the Public*, S.C. L. REV. (forthcoming 2016) (manuscript at 8–9) (on file with author). See, for example, the consumer credit answer form from New York City: Written Answer: Consumer Credit Transaction, Civil Court of the City of New York, <https://www.nycourts.gov/courts/nyc/civil/forms/civgp58b.pdf> [<https://perma.cc/62J8-LC3K>].

²⁸ See generally Sandefur, *supra* note 3.

²⁹ Rebecca L. Sandefur & Thomas M. Clarke, *Designing the Competition: A Future of Roles Beyond Lawyers? The Case of the USA*, HASTINGS L.J. (forthcoming 2016) (manuscript at 1), <http://www.internationallegalaidgroup.org/images/edinburgh2015/conferencepapers/designingthecompetition.pdf> [<https://perma.cc/BE55-STY8>].

³⁰ *Access to Justice Volunteer Attorney Programs: Court Navigator Program*, NYCOURTS.GOV, https://www.nycourts.gov/attorneys/volunteer/VAP/program_descriptions.shtml#navigator [<https://perma.cc/L9KG-SLFH>] (last updated Oct. 21, 2015).

³¹ *Id.*

³² *Id.*

Jake Halpern in his book *Bad Paper* describes how third party consumer debt collection actions often rest on documentation inadequate to show that the consumer actually owes the debt demanded.³³ Observers suggest that if consumers pressed third party collectors with “the magic words,” many collection actions would be dropped. The magic words are “[p]rove your case.”³⁴ What if incorporating these new kinds of roles into the justice system makes people more likely to take simple actions, like saying the relevant “magic words,” on their own behalf?

IV. CONCLUSION

Professor Foohey’s work shows us the law in action in the lives of a group of organizations previously largely ignored in studies of financial distress. From her work, we gain new knowledge about how organizations interact with law. When we examine law as a set of concrete institutional arrangements, we begin to see leverage points for shaping how people interact with it. If law were different (for example: simpler, more accessible, more transparent), people might well think and act differently, as might the kinds of organizations that we learn from this work act a lot people. We might say that there are situations where law’s action includes the creation of its subjects’ inaction, sometimes to those subjects’ great harm or lingering disadvantage.

³³ See generally JAKE HALPERN, *BAD PAPER: CHASING DEBT FROM WALL STREET TO THE UNDERWORLD* (2014).

³⁴ *Id.* at 189 (quoting Michael Tafelski, a lawyer who worked for Georgia Legal Services, from a conversation with the author).