
Common Knowledge and Ideological Critique: The Significance of Knowing That the “Haves” Come Out Ahead

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In 1974, Marc Galanter published a paper entitled “Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change” in which he analyzed the limits of a legal system, such as that of the United States, to achieve redistributive outcomes. He traced the limits to features of the U.S. legal system’s “basic architecture.” The specific features to which he referred were a series of structural dualisms or institutional contradictions that permitted symbolic claims to universalism, public authority, and equality to coexist with particularism, private power, and inequality.

Emerging out of these contradictions, Galanter described a complex structure of social action in which repeat players engage in the litigation game very differently from one-shot players, or those “who have only occasional recourse to the courts” (Galanter 1974:97). Repeat players initiate the play, enjoy economies of scale, develop facilitative informal relations, have access to client specialized legal representation, play the odds in their repetitive engagements, and with regard to the rules of the game, play for rule changes as much, or perhaps more than, for immediate gains.

Although Galanter pointed out that the repeat players are not necessarily the “haves” of the world (nor are the one shotters always the “have nots”), there is considerable overlap among these statuses. Thus, by establishing that the “haves” do come out ahead and specifying wherein lies their legal advantage, Galanter drew a blueprint of the gap between law on the books and law in action, a gap that many have been exploring, mapping, and questioning ever since.

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In this piece, we examine a question provoked by Galanter's original paper: To what extent and with what consequence are the contradictions or dualisms characteristic of our legal system perceived and understood by citizens (the repeat players, the one shotters and, we would like to include for this analysis, the no shotters). That Galanter used a vernacular phrase in the title to his paper suggests that he recognized that the perception that "haves' come out ahead" was common knowledge. Assuming that this perception is common, here we consider the *significance of this knowing for believing*. In other words, what roles do popular understandings of why "the 'haves' come out ahead" play in sustaining or challenging the legitimacy, power, and durability of law?

Scholarly analyses of common understandings and popular consciousness often invoke the notion of ideology as a way of describing the capacity of ideas to effect action, specifically the ways in which ideas contribute to or embed arrangements of power (Silbey 1998). Although the idea of ideology as false consciousness has largely been abandoned by social scientists because such uses seemed to denigrate the lived experience of citizen subjects while valorizing expert or professional accounts, the concept often retains an element of concealment. For instance, understandings of ideology that attribute to it the capacity to naturalize that which is socially constructed exemplify such concealment (sometimes referred to as reification) (Hunt 1985; Cotterrell [1984] 1995; Scott 1990; Thompson 1990; Eagleton, 1991). In studies of legal phenomenon, this conceptualization of ideology emerges out of a constitutive perspective, a theory of law that deftly avoids invoking any foundational truth that can be contrasted with the ideology. From this constitutive perspective, ideology inheres in the *process* of concealment—that is, a claim that "this is the way things are and must be"—rather than in the *content* of that which is concealed, not perceived, nor understood (for example, some scientific truth). Such uses of the concept of ideology imagine, then, the possibility of deception without truth.

Presumably, ideologies lose their ability to define and organize social life when people start to question the inevitability of "the way things are" and come to recognize the interests that operate to construct such a vision of truth and reality. What prompts these ideological penetrations is a source of continuing debate, but essential to all successful challenges is a collective, widespread rejection of the version of reality offered by the ideology such that it no longer holds sway. At this point, an ideology loses its capacity to conceal much of anything.

With this thought in mind, we can now restate the question provoked by Galanter's claim that the "'haves' come out ahead." If it is true that most people (nonprofessional subjects of the law)

“know” that the law does not provide equal justice for all, that money and experience advantage some, that the playing field is not level and the game is fixed, can we meaningfully talk about law as ideology anymore? In our discussion, we take up this question and related ones. First, we describe exactly how people think about and act in relation to the law (what we elsewhere call “legal consciousness”).¹ Second, we consider the significance of this legal consciousness for the ideology of liberal legalism.

Legal Consciousness of Ordinary Americans

We have been collecting stories of people’s experiences of law to track how people think and act in relation to the law. Over a period of 3 years, we interviewed approximately 430 persons randomly selected from four counties in New Jersey, counties that represented the variation in the racial and economic composition of the state. The sample included millionaire venture capitalists, lawyers, real estate brokers, hairdressers, homemakers, and welfare recipients. In the context of a lengthy, largely open-ended interview, we asked about their daily lives, problems or events that they experienced and defined as problematic, and how they reacted to these events.

Because we were interested in how people encountered and constructed legality² in their daily lives, the interview was deliberately designed to capture a picture of the legality that might be unmoored from formal legal settings. Consequently, for some of the people with whom we spoke, the law in a formal sense was conspicuously absent. They reported no experience with courts, police, written laws, or regulations. In Galanter’s scheme, we might refer to these people as the no shotters. For others, experience in formal legal settings and with authorities and legal agents was a frequent, ongoing feature of their lives and relationships. Most of the people with whom we spoke fell somewhere in between, having had some legal experience.

From the nearly 10,000 pages of transcribed interviews, we were able to identify three overarching stories of law, accounts of law that seemed to reoccur in the individuals’ stories and accounts of legality. These metastories of law are more than simply summaries of what individuals said; they are, we argue, the common cultural materials, the interpretive frames that represent

¹ We use the term *consciousness* to denote more than subjective experiences, ideas, or attitudes. We use the term *consciousness* to denote ways of participating in the processes of social construction. Thus, legal consciousness names the fact and forms of “participation in the process of constructing legality” as a structure of social action (Ewick & Silbey 1998:45, 224–26).

² Legality is understood as an emergent structure of social action that manifests itself in diverse places, including but not limited to formal institutional settings. Legality operates as an interpretive framework and a set of resources with which the social world (including that part known as the law) is constituted.

and shape how people experience legality. People draw upon these frames in constructing and interpreting their own experiences and accounts of law. Each describes a familiar way of acting and thinking with respect to the law. Each frame or schema draws upon different cultural images to construct a picture of how the law works. Each invokes a different set of normative claims, justifications, and values to express how the law ought to function. Each attributes different capacities and identifies different constraints on legal action. Finally, each story locates legality differently in time and space.

Before the Law

In one story, “before the law” (borrowing from Kafka’s parable), legality is imagined and treated as an objective realm of disinterested action, removed and distant from the lives of individuals. In this story, the law is majestic, operating by known and fixed rules in carefully delimited spaces. Here, legality is envisioned and enacted as if it were a separate sphere from ordinary social life: discontinuous and distinctive yet authoritative and predictable. The law is described as a formally ordered, rational, and hierarchical system of known rules and procedures. Respondents conceive of legality as something relatively fixed and impervious to individual action.

This version of legality is, of course, law’s own story of its grandeur, something that transcends by its history and processes the persons and conflicts of the moment, offering objective rather than subjective judgment. In this account, the law is defined by its impartiality. Needless to say, in this rendering of law, the “haves” are no more likely to come out ahead than the “have nots.”

One of our respondents, a woman we call Rita Michaels, provides several examples of this conception of legality and how it is articulated in thought and action. Rita is a middle-aged, white, divorced woman working as an office manager and supporting two sons in college. She lives in a meticulously neat and well-maintained home in a relatively affluent town. She had been married for 17 years, during which time her husband had been chronically unemployed, eventually refusing to work at all. Her decision to get a divorce, she said, was difficult and painful. According to Rita, none of her friends, neighbors, or family members, who were Roman Catholic, supported her decision to divorce.

The neighborhood was a very nice neighborhood, people knew me from when my kids were little, knew my husband, but no one really, no one knows what goes on inside someone’s house. So, when I was divorced, or when I was in the process of doing this, a couple of my neighbors really were very upset. And my

husband went and told these people that I was this terrible person and that I was throwing him out. (Rita Michaels)

Later in the interview, Mrs. Michaels said:

the neighbors, their acceptance of the fact that I was going to do this terrible thing, that I was this terrible person, um. . . . And I don't know, I think that maybe was the most painful.

In contrast, she told us:

The divorce was a rather pleasant experience, believe it or not . . . the court experience, what it felt like to go to the courtroom and face the judge or whomever. I don't mean that it was pleasant, I just think that I was pleasantly surprised because the judge had evidently read all the whatever they have, before time, . . . it was evident that he had done his homework. . . . I don't think I was in that court more than, I would say maybe 45 minutes and he awarded me the divorce. He said that there was no reason for me to have to live under these conditions. . . . It left me with a good feeling. That I did do the right thing, and that he thought it was right also. Funny, I remember his exact words because it left a lasting impression.

In contrast to family and neighbors, the judge affirmed her experience and her decision to seek a divorce. She found a validation that she had not expected. Rejected and stigmatized by her family and friends and feeling outside the moral universe they guarded, Mrs. Michaels found that the law offered an alternative moral order in which she was neither wrong, nor morally deviant.

This set of legal values, rights, and expectations, was less particular and partial than the world of her family and neighbors. Her husband had not fulfilled his obligations under these larger, more general set of norms. She was comforted that she could point to these norms as grounding and legitimacy for her action. Here, Mrs. Michaels articulated a very traditional conception and function of legal ordering: protection of the individual against local group norms, a protection that derives from legality residing outside these local norms. Whereas her neighbors lacked information ("one never knows what goes on in someone else's house") and could be swayed by the misrepresentations of her husband that she was "a terrible person," Rita perceived the judge as informed and impartial.

The impartiality that is imputed to law is not just a claim for the objectivity of the law's agents: people believe that the objectivity inheres in what the law should and should not be used for. Many respondents, including Rita Michaels, often police the boundary separating the public world of law from the private worlds of self-interest and individual action by disqualifying their lives from the realm of the legal and refusing to invoke the law.

When asked whether she would call the police in response to a neighborhood conflict, Rita readily rejected the idea, claiming,

“I don’t use my police that way.” At one level, her statement seems contradictory: expressing both identification (my police) and distance (her refusal to call the police). Yet when we unpack her meaning, putting it in the context of her other experiences, it becomes clear that the two meanings expressed are less oppositional than interdependent. In point of fact, Rita Michaels identifies with the police precisely because they do not attend to the messiness of everyday neighborhood conflicts.

Many people expressed the lack of connection between law and ordinary life. For these persons, encountering the law in the course of their lives—whether it involved being stopped by a police officer, being audited by the Internal Revenue Service, or serving on a jury—represented a disruption. Furthermore, in deciding whether to mobilize the law, people often thought about it as “breaking frame,” that is, rupturing normal relationships, practices, and identities. When asked what action he had taken in response to what he described as the deterioration of this neighborhood, Don Lowe disavowed the possibility of doing anything out of the ordinary.

I’m not a person who goes down and pickets or creates a disturbance like that. I’m a normal taxpaying person, I work, come home, pay my bills, pay my taxes, and you know, try to keep a low profile.

For people like Rita Michaels and Don Lowe who understand the law in this way, a decision to mobilize or use legal forms often is preceded by the crucial interpretive move of framing a situation in terms of some public, or at least general set of interests.

Claudia Greer, a black minister and licensed practical nurse living in Camden, New Jersey, explained the conditions under which she would “bother” the police,

I might go to the police, but then again I might not. If they were destructive or fighting, or you know, then I might. I’d call the police . . . if there are gun shots or something like that, then, ’cause everybody’s threatened then.

Notably, in this statement, it was not only the severity of the action (the gunshots) that Claudia Greer gave as a reason for bothering the police, but it was the collective nature of the harm it posed that justified her decision to turn to the law.

For some people, refusing to use the law, even if it requires accepting injury or harm, is an indication of moral strength and independence. Sophia Silva criticized a friend of hers, Joanne, for suing a neighbor after that neighbor had run over Joanne’s child. Sophia Silva’s criticism of Joanne’s action is drawn implicitly as she describes her own parents’ response to a similar situation years before:

I hope you don’t have to interview Joanne, but my friend Joanne, but my friend Joanne’s daughter was on a bicycle and a neighbor was coming out of her driveway and the child was

knocked down, and they sued the driver. . . . And I myself would not. . . . I remember as a child sitting on the pavement, and I was run over by the car of the people next door. Now you have to remember that my parents had no money, this was Depression time, and my father was bringing home five dollars a week. . . . And the car backed over my leg, and my parents refused any medical help. To this day I have a limp.

Later in her interview, Mrs. Silva told us that she had, in fact, sued a grocery store in her town after she had slipped on a piece of fruit. In explaining her decision to sue, she said, "I did sue, because it would be hard to think of some senior citizen slipping on that." The sincerity of Sophia Silva's altruistic motive is not, of course, the issue. What is important is the perception that such a casting is necessary. Through such a vocabulary of motive, the law is constructed and apprehended as impartial, standing above and outside the truck of everyday life and mundane motive.

With the Law

We also heard a second story of law, a story we call "with the law." Here legality is described and "played" as a game, a bounded arena in which preexisting rules can be deployed and new rules invented to serve the widest range of interests and values.

This account of law represents legality as a terrain for tactical encounters through which people marshal a variety of social resources to achieve strategic goals. Rather than existing outside of everyday life, this version of the law sees it as operating simultaneously with commonplace events and desires. In other words, the boundaries that might be seen to separate law from the everyday (a boundary so meticulously policed by the likes of Rita Michaels, Don Lowe, and Sophia Silva), is here understood to be relatively porous and fragile, as new uses and applications of law emerge. In this second story, respondents expressed less concern about the legitimacy of legal procedures or the universal values that underwrite legality. Instead, they talked about the value of self-interest and the effectiveness of legal rules and forms for achieving their desires.

These accounts of law describe a world of legitimate competition. Less likely to reference the law's power, they often refer to the power of self and other to successfully deploy and engage the law. They explicitly likened the law to a game, a gimmick, like a chess tournament, in short as an arena for marshaling ones' resources and demonstrating one's skill in pursuit of competitive self-interest. In articulating this understanding of the law, people were wise to the "haves" coming out ahead, that resources, experience, and skill matter in who wins this law game.

One man, Ray Johnson, recounted a dispute he had with his landlord about his lease. Mr. Johnson described his landlord as a skilled and experienced player in this game of rights, entitlements, and interests. Yet, despite the landlord's skill and reputation, Ray Johnson was prepared for the engagement, he told us.

This guy was a leading man in the community, and he had ties in City Hall, he used to get people evicted out of here in a week. They didn't know any better. He'd intimidate them. He'd do whatever he did with City Hall, and they'd get the paperwork pushed through, and they'd be gone. So he went into his little song and dance about what he was going to do and so on and so forth. And I said, "Yeah, well, no matter how you look at it, if you want me to persuade you that I have a right to this apartment, we can have that discussion. According to the lease here you cannot cancel the lease. You have to give me the option to renew. Says so right here! You do not have the option not to let me renew." We talked about it. Well, I had no fear that it wasn't [going to work out]. He couldn't evict me!

The right to the apartment to which Raymond Johnson alluded was not a right he saw as grounded in legal principle, natural law, or abstract theories of justice. It was a right that he deduced from the rules of the game, the writing on the lease and the city statutes. Later in the interview, Mr. Johnson declared, somewhat defiantly: "There is no justice. You either win or you lose. As long as you can accomplish your objectives, you win. I'm not concerned about justice."

Mr. Johnson's cynicism was also expressed in the view that not only was the law an arena for pursuing self-interest, but that deceit and manipulation would prevail. Opponents could be expected to lie, bluff, or manufacture a story; smart and wily players should be prepared for that. One respondent stated simply,

I learned you need proper representation because people tend to tell lies when they go to court.

What is significant about this statement and others like it is that it is not a general assessment of human nature and the propensity to lie. The pointed reference to lying "when they go to court" suggests that the tendency to lie is linked to a particular place and time where deceit is expected and permitted.

In this game of skill, resources, manipulation, and deceit, virtually all our respondents agreed that the most crucially consequential resource one can mobilize in a legal encounter is a lawyer. No matter how competent the individual, no matter how much experience or knowledge a citizen might acquire, he or she occupies an amateur status in relation to lawyers. Lawyers represent, then, the professional players in the game of law.

John Collier believed that his failure to hire a lawyer was decisive in his inability to defend himself against charges of illegal dumping. John vehemently denied the charges and appeared in

criminal court without a lawyer. At the time of our interview, he admitted that “he should’ve had a lawyer,” but at the time of the incident, he did not think that it was necessary “because I didn’t feel I was guilty of a crime.” John Collier’s original belief that lawyers are necessary only for the guilty was undermined by his experience in court.

They had pictures of my truck with everything in it. When this lawyer [the prosecutor] asked me, “Is that your truck?” I said “Yeah.” And they said “OK.” And they got me. I should never have admitted that that truck was mine. If I had had a lawyer they would really have no evidence. You know, lawyers are much smarter than the average person. So they sucked me into it.

Another respondent echoed the view that lawyers are skilled at manipulation and trickery. Andrew Eberly reported:

Somebody came by to write a report. They asked me how far was I away from the accident. And, I said, “Well, I don’t know how far I was, I wasn’t too far from here to there.” He said, “I have to have a number.” So I said, “Well, twelve feet, if you have to have a number, about twelve feet.” Went to court and the attorney asked me how far I was from the accident and I said, “Anywhere from ten to fifteen feet.” He says, “Well, under sworn affidavit you said you were twelve feet.” I said “To me that sounds the same. Twelve feet is the same as ten to fifteen.” That’s the kind of situation that you run up against in trials. The attorneys play games with the minds of people.

In this understanding of the law, it is an open arena for the legitimate pursuit of interest, but it is also one fraught with pitfalls. Lawyers lie in ambush or simply outmaneuver you. Opponents have connections to City Hall and the like. And your own naiveté—a naiveté that simply fails to understand that the law is a game—can undermine one’s chances of winning. Still, although some are discouraged from engaging in the play, others find a ludic pleasure in the encounters. Alan Fox, one of the few attorneys we interviewed, grew up in an upper-middle-class community where he still lived. Mr. Fox made numerous references throughout the interview to his friends, some of whom he has known since childhood. He mentioned to us that if any of his friends could benefit from an uncomplicated litigation, he initiates it for them for no fee. In one particular instance, Alan Fox mentioned the property reassessments about to be undertaken by the town.

So I thought what I would do, in a magnanimous gesture, is I would file an appeal for everybody in my poker game. Just do them all at the same time.

Thus, to Alan Fox the law is a gift he can bestow upon others. Deploying the law in this way provides opportunities to achieve personal objectives, not the least of which is displaying his attachment to his friends. In fact, Alan Fox plays law as he plays poker.

He said, "Because people who are really my friends, I couldn't do enough for them." Besides, Alan Fox told us, "It's fun."

Up Against the Law

Finally, we heard a third cultural narrative in people's accounts of law, one we call up against the law. In this narrative, law is presented as a product of unequal power. Rather than objective and fair, legality is understood to be arbitrary and capricious. Unwilling to stand before the law, and without the resources to play with the law, people often act against the law, employing ruses, tricks, and subterfuges to evade or appropriate law's power.

People revealed their sense of being up against the law as being unable to either maintain the law's distance from their everyday lives and unable to play by its rules. Bess Sherman is a black, elderly woman who had had difficulty obtaining medical treatment for what turned out to be breast cancer. After months of doctors' appointments and applications she finally obtained Supplemental Security Income (SSI). Recounting the experience, she told us:

I know if I had money or had been familiar, I probably would have gotten on it earlier, like the system is now. That's what they have to do. If people want to get on [SSI], and they know themselves that they are sick, they go to this lawyer, Shelly Silverberg. . . . People say "Well, why don't you go to a lawyer, Bess? Why don't you go to Shelly Silverberg?" Bess can't go, because Bess don't have no money.

Thus, being without resources, Ms. Sherman understood that she had little or no choice but to submit to the round of appointments, forms, diagnoses, and hearings. Finding themselves in such a position of powerlessness, people often described to us their attempts at "making do," using what the situation momentarily and unpredictably makes available—materially and discursively—to fashion solutions they would not be able to achieve within conventionally recognized schema and resources. Foot-dragging, omissions, ploys, small deceptions, humor, and making scenes are typical forms of resistance for those up against the law.

Recognizing themselves as the "have nots" facing some more legally, economically, or socially endowed opponent, people use what they can to get what they need. The feints, tricks, and opportunistic ploys are rarely illegal. Most often, resistance of this sort does not transgress the rules as much as it evades them. It does not challenge power as much as it stuns it.

After repeated calls to the police about problems in his neighborhood were ignored, Jesus Cortez called again pretending to be a woman. He finally succeeded in mobilizing the police. Aida Marks, on the advice of her family doctor, tried unsuccess-

fully to get her son transferred to another hospital after he had been shot. When the nurse mistakenly handed Mrs. Marks her son's case records, she saw an opportunity. Knowing that the transfer nor surgery could not occur without the records, she acted.

I had that big bag from Avon with me and this silly old nurse up there . . . she gave me all of Ronald's records so I pushed them down into my bag. . . . They couldn't find those records, they was having fits!

Refusing to leave retail stores, sitting in guidance counselor's offices, calling the president of a company, and stopping police officers for speeding are all examples of the disturbances and reversals of power that people enacted to escape the law's costs or lighten its burden. Recognizing the futility of demanding a right (to service, protection, attention, or respect), people found other ways of achieving their ends. Notably such efforts to resist the power of law are rarely cynical; more often, people undertake these violations of convention and, sometimes, law with a strong sense of justice and right.

The Ideological Effects of Contradiction

What we found, then, woven through the stories of 430 people were radically different, even contradictory images of law, how it works, and how it ought to work. There was pervasive "ideological penetration" in that people routinely articulated that the law was not about justice, but that it was fixed to advantage the wealthy, big complex organizations, and even quintessential repeat players: the criminal. This penetration, however, was not complete in that it was counterpoised by articulations of law as embodying the highest ideals of justice and fairness. In short, the law appears to people as both sacred and profane, God and gimmick, interested and disinterested, here and not here. At times, legality emerged as a formal, fair, impartial, and transcendent arbiter of disputes where "haves" and "have nots" stand equally before the law. Legality was also described as a commonplace, available arena where self-interest prevailed, and having it (money, resources, experience, and determination) made all the difference. Finally, legality was apprehended as a terrain of power, where might makes right; here it is not even a question of losing the game, but of not even being able to play.

If we focus in particular on the first two stories of law ("before" and "with" the law), it appears that we found an opposition in people's consciousness of legality that corresponds to the contradiction Galanter described in terms of the law's structure or architecture: a series of dualisms limiting the achievement of equal justice under law. What complicates this picture is that fact that these different stories of law were expressed by

nearly everyone in the sample. The varied images of legality did not, in other words, neatly correspond to persons, with some being “before” the law and others “with” the law. Individuals, almost without exception, expressed more than one of these cultural narratives.

In fact, we found that one person would articulate these contradictory views, not just at different points in the interview, about different matters or experiences, but within a single account or utterance. For example, the statement that the law is “just a gimmick” (and its variants) seems to acknowledge legality as a game (perhaps even one that is “fixed” to benefit the wealthy and powerful). At the same time, through the inclusion of “just” and the tone of disgust and disappointment with which this phrase is typically uttered, the individual expresses an aspiration that law be otherwise.

This finding—commonly expressed alternative and opposing stories of law—brings us back to the question we posed at the beginning of this paper: What is the ideological significance of knowing that the “haves” come out ahead? Is legality rendered imperfect, flawed, and vulnerable because it is understood to be a game as well as transcendent, a realm of power as well as a realm of disinterested decisionmaking? Does an awareness of the structural contradictions of law—knowing, despite formal assurances of equality before the law, that the “haves” really do come out ahead—lead to critique and disillusionment?

In answering these questions, we suggest precisely the opposite, arguing that the multiple and contradictory meanings of legality protect it from—rather than expose it to—radical critique. For too many years, sociolegal scholars have interpreted the gap between the law on the books and the law in action as a problem, an imperfection in the fabric of legality, something to be repaired. Rather than a flaw, or something to be explained away, we need to think about how the apparent oppositions and contradictions—the so-called gap—might actually operate ideologically to define and sustain legality as a durable and powerful social institution.

As we suggested in the introduction, although there is still much that is contested about the nature and meaning of ideology, there is considerable consensus over what it is not. Few contemporary scholars would claim that ideology is a grand set of ideas that in its seamless coherence precludes all competing ideas. It is not, in other words, a single giant schema that determines how and what people think. In fact, the most promising reformulations of ideology do not posit it as a body of abstracted ideas at all (neither static, nor coherent, nor otherwise). Rather, ideology is a complex process “by which meaning is produced, challenged, reproduced, transformed” (Barrett 1980:97). Construed as a process, ideology shapes social life, not because it pre-

vents thinking (by programming or controlling people's thoughts), but because it actually invites thinking. Ideology derives from and reflects back upon shared experiences, particularly those of power; it is inextricably tied to practical consciousness.

Defined as a form of sense making that embeds power, ideology has to be lived, worked out, and worked on. It has to be invoked and applied and challenged. People have to use it to make sense of their lives. It is only through that sense making that people produce not only those lives but the specific structures and contests for power within which they live. The internal contradictions, oppositions, and gaps are not weaknesses in the ideological cloth. On the contrary, an ideology is sustainable only through such internal contradictions insofar as they become the basis for the invocations, reworkings, applications, and transpositions through which ideologies are enacted in everyday life.

Taken together, these apparent contradictions permit individuals wide latitude in interpreting social phenomena and personal experience in ways that are consistent with prevailing ideologies of legality. Challenges to legality for being only a game, or a gimmick (the realist account "with the law") can be rebutted by invoking legality's reified, transcendent purposes (the idealist account of "before the law"). Similarly, dismissals of law for being irrelevant to ordinary people and mundane matters, housed in leather tomes and marble halls outside the truck of everyday life, can be answered by invoking its gamelike character and routinized availability.

Fitzpatrick (1992) traces what he calls law's mythic power to these same contradictions. Myths create figures that mediate diverse planes or sites in opposition. Heroes and monsters straddle the chaos and order. These mythological heroes and monster are themselves complex beings with one parent human and the other divine. According to Levi-Strauss (1968:22):

Thus, Gilgamesh of Mesopotamian myth was two-thirds divine and one-third human. The Church is of this earth but also Christ's mystical body. All mediating figures must retain something of that duality, namely an ambiguous and equivocal character.

To appreciate how legality's power is sustained by its ability to mediate diverse normative aspirations, and how this mediation is achieved through the opposing stories before and with the law, it is useful to consider a hypothetical situation of ideological consistency and purity. An insistence that the law be just, impartial, and objective (an insistence unalloyed by the cynical expectation that it is also a game of manipulation and advantage) would easily be rejected in the face of abundant empirical evidence that law is not entirely fair, just, impartial, or omniscient. To the extent that

consent and support were premised on the unfailing enactment and realization of these ideals, they would soon crumble.

In fact, the ideological effect achieved through the images of before and with the law is a rather typical one: a general ahistorical truth is constructed alongside, but as essentially incommensurate to, particular and material practices. Indeed, we suggest that this contradiction may characterize and account for the durability of all social institutions (Ewick & Silbey 1995).

For instance, in his analysis of contests over the meaning and cultural boundaries of science, Gieryn discovered a diverse and contradictory list of qualities and characteristics used to define science and distinguish it from nonscience. The same contestant in a particular battle over what constitutes true science would depict it variously as “practically useful but useless; quantitative and qualitative, . . . finite and infinite (in terms of what can be known scientifically), politically and ethically engaged and detached; driven by theory and data” (Gieryn 1999:21). Although the particular contradictions that characterize science are different from those that we found characterize legality, they similarly juxtapose two very different realms of action: that which is transcendent and detached with that which is mundane and interested.

We are persuaded that these ideological contradictions help sustain institutional authority and power when we further consider institutions that have experienced relative decline, for instance, the role of religion as a central institution in twentieth-century American life. The process known as secularization generally refers to a cultural shift that relegates religion and concern with supernatural matters to fewer and more circumscribed aspects of social life than had been the case in earlier historical periods. Weber traces the roots of twentieth-century secularization to the Protestant reformation and the rise of capitalism. Prior to this shift, daily life was saturated by religious meaning. Saints’ days and feasts punctuated the calendar. Religion provided the moral compass for everyone. With modernization, religious observance became temporally and spatially circumscribed. The new spirit of capitalism appropriated the asceticism religion had dictated. The institutional authority religion had possessed shifted to the state. Notably, for the present argument, religion lost its central organizing and defining role not because it became profaned, associated with commerce and politics, but exactly the reverse. Religion and religious observance were increasingly set apart, specifically and contractually in the constitution and foundational documents of the liberal state. By being “set apart” (in time and space and in terms of social interactions), it became merely and wholly sacred. The occasional priest or rabbi joke notwithstanding, religion lost most of its articula-

tion in the routines of daily life, and with that, it lost its institutional and ideological authority.³

The apparent incomparability of two of the stories we heard preserves the ideological contradictions by concealing the social organization that connects the general ideal of objective disinterested decisionmaking in “before the law” to the material practices represented in the story we called “with the law,” including the inequality of access, the mediating role of lawyers, and the gamesmanship. The conjunction of the two stories—the contradiction itself—mediates the incomplete, flawed, practical, and mundane world with the normative legitimacy and consent that all social institutions require. Thus, legality becomes a place where processes are fair, decisions are reasoned, and the rules are known beforehand at the same time as it is a place where justice is only partially achieved, if it is at all, where public defenders do not show up, where sick old women cannot get disability benefits, where judges act irrationally and with prejudice, and where the “haves” come out ahead.

By obscuring the connections between the particular and the general, firsthand evidence and lived experience of ordinary people (experiences that might potentially contradict that general truth and the legitimacy it underwrites) are excluded as exceptional, idiosyncratic, or irrelevant. As a consequence, the power and privilege that attach to legal processes are preserved through what appears to be or is asserted to be the irreconcilability or irrelevance of the particular—local and experiential—to the general, universal, or transcendent norm of disinterested, objective judicial decisionmaking.

Don Lowe, one of our respondents, told us, for instance, that the process of jury selection was manipulated and stacked, as he put it. Jurors were selected according to their demographic characteristics. By carefully selecting jurors on the basis of their gender, race, and social class, according to Mr. Lowe, unscrupulous lawyers could manipulate outcomes, thus subverting justice. Yet after a lengthy and impassioned indictment of this practice, Mr. Lowe concluded by stating that “justice prevails” and “the system works.”

In their study of small claims courts, Conley and O’Barr (1990) found the same pattern of critique (of the particular event) and commitment (to the system). The litigants they interviewed reported surprise and frustration with the way their claims were transformed and interpreted in the process of litigation, often rendering them unrecognizable. Despite their frustra-

³ The sacred, according to Emile Durkheim, is not based on a belief in supernatural entities, which others had used as a definition of religion. The central dichotomy in preliterate cultures was to be understood as separating those things, times, places, persons, animals, birds, stones, trees, rivers, mountains, plants, or liquids that were set apart (sacred) from routine (profane) uses in everyday life” (Bocock 1996:273).

tions and disappointment, however, litigants rarely blamed the system or condemned the law as unfair. Instead, they tended to blame either themselves for not being prepared or “the particular judge who heard their case” (ibid., p. 96).

How are we to interpret this abiding faith and commitment to a system that is, in people’s own experience, unfair or worse? Is it merely an instance of naiveté or illogic? The frequency with which this sort of interpretation is made suggests that it is neither of these. For Don Lowe, as for many of our respondents, the law—the reified, transcendent law—is only partially or incompletely represented in the observable material world. Only partially represented in everyday life, legality cannot be completely assessed or dismissed on the basis of that material or mundane reality. In part, then, the power and durability of law derive from it not being understood as common and observable.

We reiterate, however, that law’s power is only in part derived from its status as transcendent and ideal. Were it located only in the rarefied plane of abstraction and ideal, only in leather tomes and marble halls, somewhere other than the everyday life, it would risk irrelevance. A parallel but opposite effect from transcendence must be achieved for legality to become and remain an enduring social form. At the same time that legality is represented and treated as outside of everyday life, as the before the law story suggests, it must also be located securely within the realm of the everyday and the commonplace. Thus, it is precisely because law is both god and gimmick, sacred and profane, objective, disinterested, and a terrain of legitimate partiality that it persists and endures. It is precisely because people believe that there is equality under law but also understand that sometimes the “haves” come out ahead that legality is sustained as a powerful structure of social action.

In an important sense, then, we have moved beyond conventional distinctions between ideals and practices, law on the books and law in action. These distinctions enforce false dichotomies. Legality is composed of multiple images and stories, each emplotting a particular relationship between ideals and practices, revealing their mutual interdependence. Because legality has this internal complexity—among and within the schema—it effectively universalizes legality. Any particular experience or account can fit within the diversity of the whole. Rather than simply an idealized set of ambitions and hopes, a fragile bulwark in the face of human variation, agency, and interest, legality is observed as both the ideal (and indeed several different ideals) as well as a space of powerful action. The persistently perceived gap is a space, not a vacuum; it is, in short, one source of the law’s hegemonic power.

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