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The Double Life of Reason and Law

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INTRODUCTION

To some aficionados, jazz performance is appreciated for its undeliberated, direct expression of musical discipline and emotion. The jazz musician offers very personal ideas and emotions while drawing on shared resources, collective values, and heightened empathy. In constructing this amalgam, jazz is distinguished by its spontaneous invention, "erasures or changes are impossible."[1] Thus, for example, the now classical rendition of Miles Davis's signature tune, *So What*, was memorialized on the recording, *Kind of Blue*, as it was invented and played for the very first time.[2] In this fusion of musical theory, personality, and community, the improvising jazz musician practices a very particular discipline that simultaneously constrains the form of expression but nonetheless encourages an "idea to express itself . . . in such a direct way that deliberation cannot interfere . . . ."[3]

Of course, group improvisation creates special challenges. Aside from the weighty technical problem of producing simultaneously and spontaneously "*collective coherent thinking*, there is the very human, even social need for sympathy from all members to bend for the common result . . . . As the painter needs his framework of [canvas, brush, and paint], the improving musical group needs its framework in time."[4] Davis provided the framework for this improvisation only hours before the recording sessions that produced *Kind of Blue*, arriving at the studio with only sketches of what the group would play.[5] Thus, approximately nine and a half minutes of *So What* are developed from a simple structure of "sixteen measures of one scale, eight of another and eight more

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1. Bill Evans explains in the liner notes to the original release of *Kind of Blue* that these 1959 performances, including the now classical rendition of *So What*, are "something close to pure spontaneity . . . . The group had never played these pieces prior to the recordings and . . . without exception the first complete performance of each was a 'take.'" Bill Evans, *liner notes*, *on* KIND OF BLUE, (Columbia Records 1959). The recording begins with Miles Davis's signature tune, *So What*, performed by Davis on trumpet, accompanied by Julian Cannonball Adderly on alto sax, John Coltrane on tenor sax, Bill Evans on piano, Paul Chambers on bass, and James Cobb on drums. *Id.*

2. MILES DAVIS, *So What*, *on* KIND OF BLUE (Columbia Records 1959).

3. Evans, *supra* note 1.

4. *Id.* (emphasis added).

5. *Id.*

of the first, following a piano and bass introduction in free rhythmic style."[6] Davis's sketches "are exquisite in their simplicity and yet contain all that is necessary to stimulate performance" by each player of his particular interpretation and elaboration, his own undeliberated expression, and yet enable the performers to offer their personal locutions "with reference to the primary conception."[7]

This treasure of American jazz, *So What*, seems a fitting response to Schlag's elegant and well reasoned argument. We would like to consider this musical performance as a form of an engaged elaboration of Schlag's ironic discipline, his no exit linguistic architecture. His argument has anticipated and absorbed the countermoves by its capacious sweep and condemnation of enchanted rationality in its myriad forms. Each possibility—denying premises, challenging evidence, unpacking logic, or deploying alternative logics—merely confirms his argument of enchantment. Thus, if we were to do something more than offer passive assent, we felt compelled to respond without deploying the conventional forms of rationality that he suggests are mystical masks of raw, brutal power.

By offering this jazz interlude, we are not suggesting that music is not itself a highly rationalized enterprise. Quite the contrary. Indeed, Max Weber built his analysis of the progressive rationalization of western society, in part, on a history of musical scales, equalization of scale intervals, and systematization of tonality. Although American jazz is a notable sidebar and possible counterpoint to the history of increasing professionalization and rationalization of music, it is nonetheless a highly disciplined activity, as Evans suggests and as any performer or lover of jazz knows. It has a logic—a system of scales, changes, transpositions—that must be mastered and honed to an extraordinary degree to enable composition in the moment of performance when "erasures or changes are impossible," as Evans says.[8] As rational and systematic as music is, or jazz particularly, it is not the law's rationality, system, or logic. Yes, there are questions and responses in jazz performance, and yes, it can be analyzed mathematically, and it has been. But musical theory is a different form of rationality than the Aristotlean syllogism that grounds law's rational aspirations. More importantly for this argument, the jazz idiom exemplifies the possibilities of invention, spontaneity, and emotional connection that enchanted reason seems to deny. Thus, we suggest by this musical preface that jazz might serve as a model of a way out of Schlag's rhetorical prison, and as pointer to the

6. *Id.*
7. *Id.*
8. *Id.*

alternative moral and aesthetic values he often celebrates. If jazz illustrates an opening in what otherwise appears to be a seamless facade of unyielding rationality, unyielding in its ideological hegemony, not because it suffices or fails to run out, jazz improvisation may also suggest a path of reconciliation.

Schlag lays out his critique of American legal thought by deploying two organizing metaphors: law as central command and law as the big tent. In the first, reason is distinguished from and transcends all other forms of belief, understanding, or ways of knowing, and we would add, ways of being. In the second, big tent version, reason is inclusive, rather than exclusive, and accommodates a much wider range of matters, materials, sources, modes of thinking "as reasoned aspects of the enterprise of law."[9] In a sense, perhaps, we might have given away the game, bowed to Schlag's rhetorical edifice, by deploying the jazz metaphor. If jazz can help us understand the life and power of the law, as we are suggesting, then we must work with a much more capacious conception of law than the exclusionary law as central command would allow. And, in this expansionary move, we have located ourselves on one side of Schlag's binary divide and enacted the recuperation he ardently challenges.[10] Nonetheless, we want to suggest that we begin with a more commodious and experientially grounded conception of law than the positivist central command. If we move away from the professional legal terrain as the whole of law, or even just the most powerful and important aspects of law, and instead pay attention to forms of experience and legal action that are more common (although less authoritative), we can illustrate the power of Schlag's argument. We show how the tensions expressed in legal reasoning (between logic and experience,

9. PIERRE SCHLAG, THE ENCHANTMENT OF REASON 27 (1998).

10. Schlag, acknowledges this point in footnote thirteen of chapter one:

> In table 1, "reason" can be read as the key categorical dyad. That, of course, is not entirely apt since such an understanding, in effect, already enshrines a "central command" view of reason; in such an understanding, reason is already represented as regulating the content of the other dyads. The table, however, could be read more holistically with the central command/big tent dyad circulating with other dyads in the big tent. On this latter understanding, one would understand the central command/big tent dyad as occurring recursively within the other dyads, just as all the other dyads are occurring recursively within all the others.

Id. at 147. The research we will describe below makes a similar point, but is undeveloped in this paper. *See generally* PATRICIA EWICK & SUSAN S. SILBEY, THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE (1998). That is, a set of oppositions that characterize alternative narratives of legality, produced by analyzing the stories people tell about law, are recursively reproduced between narratives and within each narrative. The people with whom we spoke enacted the dialectical structure of legality, a structure composed of both ideals and practices, normative aspirations and grounded understandings of social relations. This internally contradictory quality of legality was evident in the oppositions between the schema of legal consciousness, before and with the law, as well as within the dimensions of normativity, constraint, and capacity.

between law as a closed, self-referential system and law as a social instrument) are repeated outside of the professional terrain. More importantly, if we look beyond an elitist conception of law in terms of professionally monopolized discourse, we may be able to reconcile these binary tensions without recuperating, and thus enchanting, reason.

Schlag is not wrong, he is just too much the law professor. Although he explores the tensions between the exclusive and inclusive conceptions of law, he has, in formulating both positions, nonetheless fixed his compass too narrowly on professionalized law. He has insufficiently emphasized an insight that he himself makes distinguishing the life world from the formalized rational systems that are increasingly colonizing the life world. People live in the quotidian, everyday life world of commonplace, taken-for-granted transactions. They experience constraints of various forms; they usually know where and when they are free and when they are not. They go about their activities more or less thinking about what they do. Sometimes people act unconsciously, borrowing habits and invoking instrumentalities whose origins and rationales they cannot identify. In these instances, they are perhaps less aware of the limits on freedom and sources of constraint. Sometimes, however, actors invent new behaviors for themselves, adapt old modes to new problems, transpose a familiar action to a new purpose with a new consequence and meaning. Most people recognize the power of rational systems—in markets, in bureaucracies of all sorts, and in law. They experience the power of organized instrumentalities, with reliable sequences between action and outcome. Most people, most of the time, place their trust in the systems that govern their daily lives—that the water coming from the tap is not poison, that cars will stop at red lights, that money placed in the bank will be available for withdrawal. When those systems fail—when the pilot is no longer in control of the plane—we become aware of how much of our lives we have ceded to systems we neither control, nor often understand. Ordinary people recognize these logics and rationalities, and they experience them—air traffic control, banking, and the law as another of those systems—as both liberating and imprisoning. While their own actions and trust may contribute to the entrenchment and expansion of expert rational systems, ordinary people are not necessarily enchanted by them.

Were there more time and space—the usual excuse—we would want to explore reason generally as a kind of social process rather than as a reified thing, looking at the variable enactment of different kinds of reason in everyday life and in systems of authority and control. Here, however, we will talk about the social processes of law specifically: How law is experienced as both reason and not reason, how rationaliza-

tion is a particularly professional product, and how rationalized, enchanted law is pragmatically compromised and resisted. Rather than the enchantment of reason, this paper will emphasize how the dialectical relationship between enchantment and disenchantment sustains the rule of law. Thus, if we might reformulate Holmes in light of the work of Miles Davis, Cannonball Adderly, John Coltrane, and company, we would—with appropriate modesty—suggest that Holmes did not have it quite right. We use data from our research on the place of law in everyday lives of Americans to show how the life of the law, and especially the power of law, derives from the fact that it is both logic *and* experience.

To make this argument, we first suggest the terrain of law that needs to be explored in order to understand how it works and why it is powerful. Here we distinguish the law in everyday life from the law professor's law. Then we provide a taste of how the law is experienced in the everyday lives of Americans. We illustrate the opposing conceptions of law and reason that Americans invoke in making sense of the power of law. Finally, we show how this experience of law, in terms of multiple stories or narratives of legality (some enchanted, some quite mundane), sustains rather than erodes the power of law.

LAW AND LEGALITY IN EVERYDAY LIFE

American society is filled with signs of legal culture. Every package of food, piece of clothing, and electrical appliance contains a label warning us about its dangers, instructing us about its uses, and telling us to whom we can complain if something goes wrong. Every time we park a car, dry-clean clothing, or leave an umbrella in a cloakroom, we are informed about limited liabilities for loss. Newspapers, television, novels, plays, magazines, and movies are saturated with legal images, while these very same cultural objects individually display their claims to copyright. This pervasiveness of law—its semiotic, visual, discursive profusion—is not a new phenomenon. This is, after all, a nation governed by the longest lived democratic constitution in history, a nation of more lawyers and more litigation than perhaps any other. But if the law seems to dominate public and private life in America, the public reception of law is nonetheless ambivalent. Americans may have a romance with law, as some might say, but they are not mystified nor enchanted by it. Like many romances, there are intense but contradictory feelings about the object of one's affection.

We can begin to map the place of law in American society by first looking at what some of us—social scientists that is—call the mobilization of law. This is often depicted as a funnel if one is describing the

criminal justice system as a sorting and processing of cases from complaint to incarceration, or a pyramid if one is describing the civil justice system as a sequence of decisions from event to injury, complaint, and litigation. These images describe the legal system—as a whole—by looking at what happens at each stage or subsystem from the precipitating events through formal legal action and ultimate appeal and review. Systematic observation has discovered that most legal activity takes place outside the purview of official legal agents and without the invocation of formal legal doctrine. Very few legal matters become cases, trials, or appeals. This is true for criminal law, regulatory administration, and civil litigation. To move from the world of all social transactions to the business of the United States Supreme Court, from the universe of possible legal matters to the stuff that dominates legal scholarship, we need to pass through at least five or six steps in the pyramid.[11]

Leaving aside the vast amount of unperceived injuries that occur, many people suffer and perceive injuries and losses which they nonetheless decide to overlook. Even when they name the event as an injury, blaming others and holding them responsible for their loss, they often do nothing more. And in those relatively few instances in which claims for remedy or redress are made, a very small percentage of exchanges leads to litigation.[12] And yet, it is with litigation, two-thirds of the way up the pyramid, that the legal profession begins to take notice, and in which the central command model of law and legal reason begins to operate.

Although almost any social interaction could, hypothetically, become a matter of contest and dispute, and although popular legal culture propagates a message that Americans are extraordinarily litigious, routinely turning disagreements into lawsuits, it turns out that few Americans pursue legal action in those circumstances in which they might have a litigable claim. In our study of 430 randomly selected residents of New Jersey,[13] respondents reported talking to a legal agent (police, government agency, or lawyer) in fourteen percent of the

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11. *See generally* Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525 (1980); *see also* William Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Claiming, and Blaming*, 15 LAW & SOC'Y REV. 631 (1980).

12. Herbert M. Kritzer et al., *To Confront or Not to Confront: Measuring Claiming Rates in Discrimination Grievances*, 25 LAW & SOC'Y REV. 875 (1991); Herbert M. Kritzer et al., *The Aftermath of Injury: Cultural Factors in Compensation Seeking in Canada and the United States*, 25 LAW & SOC'Y REV. 499, (1991); Herbert M. Kritzer, *Propensity to Sue in England and the United States: Blaming and Claiming in Tort Cases*, 18 J.L. SOC'Y 452 (1991).

13. Susan S. Silbey, Patricia Ewick, Elizabeth Schuster, & Lisa Kaunelis, *Differential Use of Courts by Minority and Non-Minority Populations in New Jersey*. Trenton, New Jersey: New Jersey Judiciary, Supreme Court Task Force on Minority Concerns, *available at* http://www.judiciary.state.nj.us/reports/minconpart1.pdf.

instances they described to us as situations that they wished had been otherwise and in which they felt aggrieved. In only three percent of the problem situations reported to us did the person consult a lawyer.

Even when people hire an attorney and then file suit, less than three percent of all civil filings in federal or state courts go to trial; of all the criminal and civil cases decided, less than five percent of those go to appeal. The cases at trial and appeal, and certainly the fewer than one to two hundred cases decided annually by the United States Supreme Court, represent the minuscule top of a giant pyramid of legal engagements. Even those few social transactions that become formal cases—cases that are sifted and winnowed, shaped and pushed, into the form of trials and appeals and thus to the top of the pyramid—are a product of informal considerations as well as anything our central command or big tent conceptions would recognize as legal rationality. In other words, the world of legal reasoning and possibly enchanted rationality is a very small part of the legal world. Most of the transactions that have the color of law are taking place outside the realm of reason's prison, as Schlag describes law.

Suggesting that the world of professional legal discourse is limited to the upper tiers of a very shallow pyramid does not, however, suggest that the law is irrelevant or absent. Indeed, we want to argue quite the opposite. We are claiming that law colonizes much of American life but that the ways in which law suffuses contemporary life are not subsumed within the conception of enchanted rationality. If we reverse the trajectory of this pyramid of legal action, we can visually conceive of the stuff of professional legal discourse in court opinions, legislation, briefs, contracts, and regulations as the very narrow tip of a more generally wide pyramid of informal legal action. The narrow top contains the products of professional legal work; these forms of law enact and celebrate by their very existence, the positive and common law, the big tent and the central command. But this is not the whole, nor most of the law that governs our lives, the law that organizes those taken for granted transactions that constitute the everyday life of Americans. Law is pervasive and powerful, not because we can easily find copies of the U.S. Reports, or the Massachusetts General Laws, or handbooks for writing one's own will or contracts. Law is pervasive and powerful because it is everywhere, even where the work of professional lawyers is relatively distant and often unseen.

Finally, we offer an image that is in some parts of the United States almost as familiar and commonplace as deeds, contracts, bills of sale, parking garage receipts, clothing labels, and copyright imprints—the stuff of law in everyday life—but yet different. Consider a phenomenon

often observed in northern climates, on snow covered city streets: an old chair or milk crate is placed in a recently shoveled parking spot, reserving the space. Unlike contracts, copyrights, traffic signs, or bills of sale, which are standard markers of legality, this chair in the snow is not the direct and intentional product of professional legal work. Instead, we might view this chair as a residue of that formal legal practice. Rather than a piece of professionalized law, this is a sign of the law at work outside the formal institutional boundaries of law. The chair holding a shoveled out parking spot is not solely a chair in the snow; it is a sign of law as it is experienced from the bottom up and from outside of the formal spaces of legal institutions.

Moreover, we suggest that this may be the law in its most pervasive, powerful, and durable form. This chair holding a parking spot in the snow illustrates how people invoke pieces of legality to fashion solutions to ordinary everyday matters, to constitute and sometimes to refashion everyday life. Sometimes these legal invocations involve passive violation of law; sometimes it involves direct confrontation with law, and sometimes it involves action unrecognized by law. In this example, the chair in the shoveled out parking spot enacts legality by appropriating the formal legal idea of private property. Signaling to the neighborhood a type of ownership, the chair in the snow often elicits the same sorts of deference or respect accorded more conventional types of property. That is, the neighbors park elsewhere. Similarly, the violation or transgression of this property may lead to conflicts and disputes more commonly associated with property as it is formally defined by the legal system. It may lead to claims of trespass, informal as they may be. Without naming the concepts of constructive use or adverse possession, the chair implicitly invokes conventional justifications for property on the basis of investment and labor. The chair's presence insists on certain prerogatives against the actions of uncertain others, prerogatives and actions that city ordinances may or may not recognize or prohibit.[14] Thus, the law is absent in its formal professional sense and yet law is conceptually and morally present in organizing social relations on this city street around this particular construction of the concept of private property.[15]

14. We have recently been told that in at least one eastern city, the Board of Alderman has passed an ordinance prohibiting this practice. At the same time, they have also informed the local police that it need not be enforced. In other words, the Board of Alderman did not have any interest or desire to stop the practice, only to foreclose any future legal claims based on normative practice.

15. We usually use the term *legality* to refer to the meanings associated with law, even if the formal law or official legal agents would not approve or accept those associations. Importantly, the concept of *legality* needs to be understood as the analyst's tool, distinct from the actions, interpretations, formal and informal stuff of law as experienced and understood by social actors in

Using this conception of legality as it is experienced and deployed in everyday life, we conducted lengthy interviews, each of which lasted several hours, with over 400 people in a random sample of residents in four counties of New Jersey from 1990-1993.[16] We asked these people about the circumstances of their daily lives. We inquired about any problems, conflicts, or events that were not as they wished them to be, and how they responded to these problems. We listened in their answers for the times when they invoked the law and legal categories to make sense of these events, and the moments when they pursued other non-legal means of redress or accommodation. We were as interested in the silences—the times when law could have been a possible and appropriate response and was not mentioned—as we were in the times when law was mentioned, appropriately or not.

In our work we have tried to analyze how, from the multitude of transactions that form everyday life, some actions and meanings come to assume the unity and consistency we recognize as law. From our field

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situ. It is a name we are using to designate that which native actors, so to speak, understand as part of law whether it "really" (doctrinally or organizationally) is so associated. By recognizing legality beyond the boundaries of formal doctrine, official action, or the unofficial action of officials, we do not want, inadvertently, to collapse the distinction between law and norm. Norms "specify what actions are regarded by a set of persons as proper or correct, or improper and incorrect." JAMES S. COLEMAN, FOUNDATIONS OF SOCIAL THEORY 242 (1990). They exist "when the socially defined right to control the [specific] action is held not by the actor but by others." *Id.* at 243. As expected and approved ways of behaving, or as behavioral regularities that are experienced as obligatory, some norms carry the weight of laws, others do not. *See generally* Robert Cooter, *Law and Unified Social Theory*, 22 J.L. SOC'Y 50 (1995); Richard McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 350-51 (1997). Placing chairs in shoveled out parking spots is normative, in some cities, insofar as it is a common phenomenon that is expected and not negatively sanctioned; it is not, however, a legally sanctioned practice. Nonetheless, placing chairs in shoveled out parking spots is part of the social structure of legality because this normal practice is understandable only by invoking the concepts, terms, and traditions of law (i.e., exclusive use associated with property claims, justifications of property claims based on labor). In other words, the practice is not a legal practice that could be backed by state action, nor is it the informal actions of official legal agents. But, placing chairs in shoveled out parking spots on city streets is meaningful, i.e., interpretable by an audience, only by associating with this practice legal concepts and terms. Thus, the chair in the snow is an icon of legality because it illustrates how law lives and works *in* society, and perhaps exposes what is latent in legal experience. In this conceptualization, we mean to push the boundaries of what we study under the rubric of law; we do so, as we have said, quite self-consciously to unearth the supports for that durable institution. We are cautious, nonetheless, not to go too far. We are aware of the dangers of including all normative activity under the rubric of law. Selznick has warned us that by blurring the line between legal and non-legal institutions, legal sociologists may undermine the normative value of recognizing an analytic distinction between law and society and consequently fail to attend to their integration. PHILIP SELZNICK, LEGAL CULTURES AND THE RULE OF LAW 35-36 (1999). This integration, Selznick says, may not be fully understood but it is what Lon Fuller "had in mind when he recoiled from the phrase 'law *and* society' . . . [and] preferred the phrase 'law *in* society.'" *Id.* We take this admonition to heart. Our conceptualization of legality attends to exactly the issue Selznick identifies as central: how does law work *in* society.

16. *See generally* EWICK & SILBEY, *supra* note 10.

work, we have discovered a partial answer to this question, an answer that develops from the recognition that individual actions and accounts of actions are crafted out of more general cultural schemas. Law and legality achieve their recognizable character, despite the diversity of forms, actors, and experiences, because individual actions, and accounts of action, are crafted out of a limited array of what are generally available repertoires. Moreover, we think this analysis can help us reconcile the tensions between the central command and the big tent without enchanting reason. First the data and then the reconciliation.

FIGURE 1

CULTURAL ACCOUNTS OF LAW AND LEGALITY

	Before the Law	*With the Law*	*Against the Law*
Normativity	impartiality, objectivity	legitimate partiality, self-interest	power, "might makes right"
Constraint	organizational structure	contingency, closure	institutional visibility
Capacity	rules, formal organization	individual resources, experiences, skills	social structures (roles, rules, hierarchy)
Time/Space	separate sphere from everyday	simultaneous with everyday	colonizing time/ space of everyday life
Archetype	bureaucracy	game	"making do"

Out of the thousands of individual accounts of law we collected, with more than 5,900 events described, we were able to identify three publicly circulating narratives of law, running like a braided plait through the idiosyncratic stories and events people reported. These meta-narratives are more than summaries of what individuals said. We suggest that they are the common cultural materials, the interpretive framework that constitutes legality as a structure of social action. Each of the three meta-stories describes a familiar way of acting and thinking with respect to law. We call these, for simplicity's sake, before, with, and against the law.

Each of these understandings draws on a different cultural schema or image (a bureaucracy, a game, or just making do). Each invokes different normative claims, justifications, and values for when law is used or when it is not, because it is objective, because it is partial,

because it is arbitrary. Each expresses different explanations for the capacities and constraints on legal action; they suggest the sources of action/agency as well as the limits. Finally, each meta-narrative locates legality differently in time and space, positioning the speaker differently in relation to law and legality (as a supplicant, player, or resister). These dimensions—what we are calling normativity, constraint, capacity, and time and space of law—have proved a useful way to identify the consistencies and variations among the stories of law.

In one story, "before the law" (borrowing from Kafka's parable[17]), legality is imagined and treated as an objective realm of disinterested action. Operating by known and fixed rules in carefully delimited spaces, the law is described as a formally ordered, rational, and hierarchical system of known rules and procedures. Respondents conceived of legality as something relatively fixed and impervious to individual action, a separate sphere from ordinary social life: discontinuous, distinctive, yet authoritative and predictable. In this account the law appears as sacred, in the Durkheimian sense of the word sacred, meaning "set apart" from the routines of daily life. This is the image of formal rationality, the central command model.

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 pre-existing 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 tactical or 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 this second story, people talked about the value of self-interest and the effectiveness of legal rules for achieving their desires. In contrast to the sacred face of legality, this is the profane law, the stuff of lawyer jokes and television movies.

Finally, we heard a third schema in people's accounts of 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 in terms of being unable to maintain the law's distance from their everyday lives and unable to play by its rules.

17. FRANZ KAFKA, THE TRIAL (Breon Mitchell trans., 1992).

THE DOUBLE LIFE OF LAW: ENCHANTMENT AND DISENCHANTMENT

Having just described these stories in distinction to one another, they can best be understood as they are connected to one another. Indeed, rather than see these various stories of law as three different, or even opposed, understandings, we need to appreciate how apparent contradictions and oppositions are connected.

We should say, first, that the particular interpretive schema and resources that constitute legality and are expressed in these stories are not, for the most part, exclusively legal. Legality shares schema, images, and cultural resources with other social structures. The intersection between legality and other social structures provides legality with supplemental meanings and resources that do not derive from legal practices alone but can nevertheless be appropriated for diverse legal projects and strategies.

Many aspects of the game, as a cultural schema, appear in various institutional spheres. Notions of competition, winning, teamwork, "rules of the game," and "level playing fields," are an important part of capitalism (playing the market), education (graduating first in one's class), and even courtship ("all's fair in love and war"). Similarly, the idea of a transcendent, non-human, and autonomous source of power finds expression in religion (supernatural being, God), the economy (the invisible hand of the market), and courtship (true love). This overlap in interpretative schema among various structures and within different institutions is what Sewell calls "transposibility";[18] it is a source of change but it is also a source of constraint and structural durability.

Second, we emphasize that the forms of schema do not neatly correspond to actors. In other words, some people cannot be said to be "before" the law and others "against" the law. Moreover, these alternative images are not simply the consequence of our analysis. The oppositions were expressed by people in their accounts of a single incident, or even in a particular phrase. Thus one of our respondents claimed emphatically, "I most of the time leave justice up to God. But I know my rights too." The often repeated statement that "the law is just a gimmick" acknowledges the story of law as game at the same time as the word "just" voices an aspiration that law be otherwise; not a game.

What we found, then, woven through the stories of these hundreds of people, were radically different, even contradictory images of law, of how it works, and how it ought to work. There was pervasive ideological penetration in that people routinely articulated that the law was not

18. William Sewell, *A Theory of Structure: Duality, Agency, and Transformation*, 98 AM. J. SOC. 1, 8 (1993).

entirely determined by reason, nor did it offer justice, that it was fixed to advantage wealthy, big complex organizations, and even quintessential repeat players: the criminals. But this penetration was not complete in that it was counterpoised by articulations of law as appropriately and often embodying the highest ideals of justice and fairness. This finding—commonly expressed alternative and opposing stories of law—brings us back to Schlag's tensions and the enchantment of reason. How can we say that law suffers from the enchantment of reason if people are plainly aware of its contradictions, if its ideological facade has been penetrated? Alternatively, does an awareness of the structural contradictions of law—knowing that despite formal assurances of equality before the law, that the "haves" really do come out ahead—lead to disabling critique and disillusionment? 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 decision making? Must we succumb to enchantment in order to make sense of these tensions in legality?

In answering these questions, we would like to suggest precisely the opposite, arguing that the multiple and contradictory meanings of legality protect it from—rather than expose it to—radical critique. The multiple images of legality, specifically the story before the law (as a transcendent, objective realm of disinterested, formally organized action) and the story with the law—a game played by skillful and resourceful, perhaps manipulative players—constitute a hegemonic legality (or the cultural force of law). Together, the first two stories of law constitute legality as both ideal and practice. At any moment, the law is both a reified transcendent realm of objective decision making and yet a game.

Peter Fitzpatrick 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 monsters are themselves complex beings with one parent human and the other divine. "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."[19]

To appreciate how legality's power is sustained by its ability to mediate these diverse normative aspirations, and how this mediation is achieved through the opposing stories before and with the law, it is use-

19. PETER FITZPATRICK, THE MYTHOLOGY OF MODERN LAW LONDON 26 (1992).

ful to consider the 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, nor omniscient. To the extent that legitimacy, consent, or support were premised upon the unfailing enactment and realization of these ideals, it would soon crumble.

In fact, the ideological effect achieved through the multiple stories is a rather typical one: a general ahistorical truth is constructed alongside, but as essentially incommensurate to, particular and material practices. The apparent incomparability of the first two stories we described preserves the ideological contradictions by concealing the social organization that connects the general ideal of objective disinterested decision-making in "before the law" to the material practices represented in the story we call "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 don't show up, sick old women can't get disability benefits, judges act irrationally and with prejudice, and where the "haves" come out ahead.

By obscuring the connections between the particular and the general, first-hand 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 attaches 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 decision-making.

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 unreasoned nor inexperienced. 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 derives from it by being (to a degree) enchanted and not common or observable.

But, and this is an important "but," the amendment we wish to offer to Schlag is that this enchantment is also not the whole of law. To reiterate, 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, only in the work of professionals—lawyers and judges—somewhere other than in the everyday world, it would risk irrelevance.

We are suggesting that a parallel but opposite effect must also be achieved for legality to become and remain an enduring social form—to be both logic and experience—to have its improvisational life, as jazz, and thus to exercise the power that so troubles Schlag. At the same time that legality is represented and treated as outside of everyday life—in the world of reason and formal organization as the before the law story suggests—it must also be located securely within the realm of the everyday, of self-interest, and the commonplace.

Thus, it is precisely because law is both god and gimmick, sacred and profane, 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,[20] 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, reason or enchantment. These distinctions, as Schlag suggests, 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 heterogeneity among and within the cultural 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 gaps between law on the books and law in action, between reason and emotion, are exactly the spaces of improvisation, of legal jazz. They are not ephemeral, nor without consequence. Each moment of invention lays down the sediment of legality. Just as the jazz musician draws from her collection of favorite licks, people

20. *See generally* Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

invent and construct legality by drawing from a repertoire or tool-kit[21] of cultural signs and resources. The familiarity of the practice solidifies at the very instance it also destabilizes centuries of property law. By spontaneous invention in everyday life, as people multiply the uses, forms, and resistances to law, they constitute legality's hegemonic power.

21. Ann Swidler, *Culture in Action: Symbols and Strategies*, 51 AM. SOC. REV. 273 (1986).