

The Courts in American Public Culture

Susan S. Silbey

Abstract: In American public imagination, courts are powerful but also impotent. They are guardians of citizens' rights but also agents of corporate wealth; simultaneously the least dangerous branch and the ultimate arbiters of fairness and justice. After recounting the social science literature on the mixed reception of courts in American public culture, this essay explains how the contradictory embrace of courts and law by Americans is not a weakness or flaw, nor a mark of confusion or naïveté. Rather, Americans' paradoxical interpretations of courts and judges sustain rather than undermine our legal institutions. These opposing accounts are a source of institutional durability and power because they combine the historical and widespread aspirations for the rule of law with a pragmatic recognition of the limits of institutional practice; these sundry accounts balance an appreciation for the discipline of legal reasoning with desires for responsive, humane judgment.

SUSAN S. SILBEY is the Leon and Anne Goldberg Professor of Humanities, Anthropology, and Sociology and Professor of Behavioral and Policy Sciences at the Sloan School of Management at the Massachusetts Institute of Technology. She is the author of *The Common Place of Law: Stories from Everyday Life* (with Patricia Ewick, 1998). Her recent publications include "J. Locke, op. cit.: Invocations of Law on Snowy Streets," in *Journal of Comparative Law* (2010); "The Sociological Citizen: Pragmatic and Relational Regulation in Law and Organizations," in *Regulation & Governance* (2011); and "Organizational Challenges to Regulatory Enforcement and Compliance," in *Annals of the American Academy of Political and Social Science* (2013).

What is the place of courts in American public culture? History provides us with two dominant – and contradictory – claims. First, we have Alexander Hamilton's famous defense of the Supreme Court's constitutional authority in Federalist No. 78. Because courts had power over neither purse (as does Congress) nor sword (as does the President), he assumed the court would be the weakest of the three branches in the new republic. Possessing "neither force nor will," the judicial branch, according to Hamilton, "will always be the least dangerous to the political rights of the Constitution because it will be least in a capacity to annoy or injure them." On the other hand, forty years later, Alexis de Tocqueville provided us with an opposing, though equally famous claim: that Supreme Court Justices are "all-powerful guardians" whose authority is both "enormous" and essential for holding the union together and maintaining the federal government's supremacy. Rather than possessing the least capacity of the three branches of government to threaten the constitutional balance of power, the Supreme Court is in some ways the most powerful: "the Constitution would be a dead letter ... without the justices' cooperation." The jus-

© 2014 by the American Academy of Arts & Sciences
doi:10.1162/DAED_a_00295

tices' power is so great, de Tocqueville argued, that if "the Supreme Court is ever composed of imprudent men or bad citizens, the Union may be plunged into anarchy or Civil War."¹ If Hamilton expected the Court's power to be limited by its minimal resources, de Tocqueville expected a more direct popular check on the Court's power. In the final analysis, he wrote, the Court "is clothed in the authority of public opinion." But what is the public's opinion of the courts and law more generally?

The relationship between the authority and legitimacy of courts in an aspirationally democratic republic has occupied philosophers, legal scholars, and social scientists for a very long while, not only during the founding and early years of the U.S. Constitution. In order to help illuminate this relationship, sociologist Patricia Ewick and I conducted extensive research on the place of law in the everyday life of Americans for nearly a decade during the 1990s. We gathered stories from over four hundred people, and in so doing found a variety of commonly circulating, yet inconsistent conceptions of law and courts.² In the American public imagination, courts are powerful but also impotent. They are guardians of citizens' rights but also agents of corporate wealth; simultaneously the least dangerous branch and the ultimate arbiters of fairness and justice. To Americans, "all judges are political – except when they are not."³ How can this be? And do these contradictory understandings sustain or undermine the legitimacy of law and courts?

Our research provided an answer, showing how aspirational ideals and acceptance of imperfect realities combine to form a resilient public embrace of the rule of law. If courts were understood only in terms of idealized conceptions, and if all judges were expected to be always objective, wise, and fully informed, the legitimacy and authority of law would be all the more frag-

ile. For example, the abundant empirical evidence that courts are not always fair or impartial – that O.J. Simpson can get a better defense than Jane Q. Citizen, or that giant Microsoft can create a more secure market position than upstart Netscape – would only highlight the courts' failure to live up to these idealized aspirations, and support for the courts and law could easily evaporate.

But idealized promises are not the only story of law that circulates in popular culture. Americans recognize and acknowledge the practical exigencies of institutionalized legal processes. They know that some judges do not read all the documents, that some lawyers are not well prepared or fail to show up in court, and that the "haves" often come out ahead.⁴ This cynicism can actually inoculate Americans against disillusionment from encounters with the real world of the law that might otherwise delegitimize it in their minds. The Janus-faced understanding of law in American culture – as both an ideal and an imperfect reality – ensures that delegitimizing and potentially negative encounters with the law do not diminish Americans' belief in courts as guardians of the public good. The articulated cynicism about the justness of judges and the fairness of courts is counterbalanced by a good measure of confidence in the ability of courts and judges to provide principled and responsive decisions in the majority of cases. In short, people in the United States are willing to place their trust in the long-run rule of law.

Notably, most dispute resolution and problem-solving activity are pursued in the shadows of law, outside the purview of official legal agents and often without formal invocation of legal doctrine or recourse to courts. Our research showed that when confronted with a problem – which we defined for respondents in our study as "something that was not as you thought it should be" – most people (31 percent) do

Susan S.
Silbey

nothing or solve the problem by themselves, an equal number (31 percent) confront the other party, and the remaining 28 percent turn to third parties; only half of those individuals (so 14 percent of all respondents) turn to legal actors or agencies.⁵ Furthermore, even when people hire an attorney and file suit, very few legal matters – less than 3 percent – actually go to trial; of all criminal and civil cases decided, less than 5 percent reach appeal. This is true for criminal law, regulatory administration, and civil litigation. The cases at trial and appeal represent the minuscule top of a giant pyramid of legal engagements.

Nonetheless, the empirical evidence suggests that Americans do turn to law to handle many of the routine as well as extraordinary affairs of their daily lives, and American culture is filled with signs of law. 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 whether 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, and these very same cultural objects individually display their claims to copyright. This pervasiveness of law – its semiotic profusion in visual and discursive culture – is not a new phenomenon. As de Tocqueville also observed, in America, all issues eventually become legal matters. As Stephen Yeazell writes in his contribution to this volume, Americans have been bringing their problems to court for nearly two hundred years.⁶ Although rates of litigation vary from state to state, and the premises of cases as well as arguments grounding the disputes have changed over time,⁷ court dockets have remained relatively constant, and the public (with its diverse interpretations of legal culture)

continues to rely on courts to manage all sorts of struggles.⁸

The principal burden of this essay, then, is to explain how the contradictory embrace of courts and law by Americans is not a weakness or flaw in the public culture, nor a mark of confusion or naïveté. Rather, the public's contradictory interpretations of courts is the foundation of its allegiance to and confidence in the rule of law. Opposite accounts are a source of institutional durability and power because they combine universal aspirations for the rule of law (so actively voiced in armed struggles around the world today) with pragmatic recognition of the limits of institutional practice; they balance an appreciation for the discipline of legal reasoning with desire for responsive, humane judgment. First, I ask what evidence political scientists and public opinion experts have collected about the public's interpretations of courts. Second, I consider how courts have responded to the jumble of public perceptions with public relations campaigns aimed at "teaching" citizens about how the judiciary "really" functions. I argue that these PR efforts are born from anxiety about the threat posed by conflicting public beliefs. As understandable as this anxiety may be, I conclude this essay by explaining how the public's paradoxical image of the law actually works to sustain, rather than undermine, the authority of our courts. Although the courts' muscular efforts at public outreach are laudable in many ways, these efforts are rooted in a misunderstanding of how judicial legitimacy is developed and maintained.

Public opinion polls on the judiciary regularly report strong confidence in the courts, alongside slightly weaker expressions of direct approval. The judiciary is viewed more positively and accorded greater respect than other branches of the U.S. government. Public opinion surveys regularly

describe a deep reservoir of goodwill and diffuse support for the courts, especially the U.S. Supreme Court, which is “an especially well regarded institution.”⁹ Time and again, “polls show that Americans have more confidence in the Court than either the president or the Congress. . . . Most Americans think that [the Court] is exercising about the right amount of political power, and more often than not they believe that the Court is doing a good job.”¹⁰ For example, a 2007 study¹¹ found that 66 percent of Americans trust the Supreme Court “a great deal” or “a fair amount” to operate in the best interests of the American people.¹² In addition, the study reported that 60 percent of the respondents also trusted their state courts to operate in the best interests of the American people.¹³ In comparison, 32 percent of the survey respondents trusted the president to operate in the best interests of the people, and more recently, a scant 11 percent of the American population voiced approval for the way Congress does its job.¹⁴

If we take a longer view, data collected between 1973 and 2011 also repeatedly show the American public’s reliable and strong support for the courts. During these forty years, 77–100 percent of those polled by Gallup (with a median of 87 percent) reported some or a great deal of confidence in the courts. Surveys conducted by Harris Interactive (from 1966 to 2011) and by the National Opinion Research Center (NORC) at the University of Chicago (from 1973 to 2011) produced comparably strong positive results: 73–90 percent of those surveyed (with medians of 86 and 85 percent, respectively) reported some or great confidence in the courts. And from 1973 to 2011, no more than 26 percent of those polled by Gallup, NBS/*Wall Street Journal*, AP/Roper, and CBS/*New York Times* ever claimed to have little or no confidence in the Court.¹⁵

However, a recent poll offers a different story, and in so doing illustrates the crucial

distinction social scientists make between *approval* and *system support*, as well as the limitations of using polling data to fully understand public interpretations and appreciation of courts. That survey, conducted in July 2013, suggests an almost all-time low in approval for the Court, with 43 percent of the respondents saying that they “approved of the way the Supreme Court is handling its job,” down 3 percent from September 2012.¹⁶ Slightly more Americans (46 percent) disapprove of the Court than approve, which has happened only one other time since Gallup first asked this question in 2000. Yet even with this decline, the Court remains far more highly esteemed than any other branch of the federal government (Congress’s aforementioned 11 percent approval rating being the most glaring example).¹⁷

Some observers interpreted these poll results as an indication of the fragility of public support for the legal system, but these data are better understood as an illustration of the need to augment polling with more and different data if we are to use it as an indicator of public culture. The key to the results is an important shift in the wording of the question that some commentators failed to notice. The July 2013 Gallup poll asked respondents, “Do you approve or disapprove of the way the Supreme Court is doing its job?” while the forty years of polling prior to 2013 had asked the public to indicate “how much confidence [they had]” in the Court.¹⁸ The distinction between confidence in the Court and approval of the way it is doing its job is fundamental for social scientists. Without further conversation with respondents, we cannot know whether they understood “confidence” to be a reflection of deeper, longer-term commitment and “approval” to be more specific, time-dependent, and responsive to particular cases and decisions.

Without locating the poll responses within a theoretical framework specifying

Susan S.
Silbey

the concepts within hypothesized relationships, we cannot know what any particular indicator signifies, however reliable and repeatable the results may be. According to political scientist David Easton, political systems rely on both diffuse and specific support for their immediate resilience and viability, as well as long-term durability. Specific support refers to the populace's assessment, often instrumental or ideologically valenced,¹⁹ of the actions and performances of a particular government or set of political elites.²⁰ In this canonical framing, diffuse support names a deep-seated set of orientations toward politics and the operation of the political system that is relatively impervious to specific officeholder changes; diffuse support expresses the public's tacit commitments to the political system as a whole, rather than a particular set of officeholders or government elites. Political scientist Mitchell Seligson locates diffuse support along "a continuum which runs from allegiance at the positive end to alienation at the negative end."²¹ Political scientist Jack Citrin and his colleagues have described this continuum of diffuse support as follows:

To be politically alienated is to feel a relatively enduring sense of estrangement from existing political institutions, values and leaders. At the far end of the continuum, the politically alienated feel themselves outsiders, gripped in an alien political order; they would welcome fundamental changes in the ongoing regime. By contrast, the politically allegiant [supportive] feel themselves an integral part of the political system; they belong to it psychologically as well as legally. Allegiant [supportive] citizens evaluate the system positively, see it as morally worthy, and believe it has a legitimate claim to their loyalty.²²

Clearly, then, expressions of support for the courts, as for any of our political institu-

tions, are part of the complex tapestry we call the public culture, with positive and negative interpretations addressing immediate particular actions of government officials as well as various forms of identification with the nation-state. Public opinion polls conducted by academic, journalistic, and commercial organizations tap the range of the public's interpretations of the courts with varying probes in the wording of the questions. It is up to political scientists, however, to make sense of the data, debating the significance of different measures while working to substantiate competing theories of the role of the judiciary and of the constitutional order.

If one set of data supports a generally positive valence and makes the 2013 poll seem aberrational, ample competing evidence points toward public skepticism and critique of courts. Recent judgments, as well as public opinion polls, have prompted a growing litany of dire predictions that the legitimacy of the courts in American society and government are under attack and seriously threatened. In a 2008 *Dædalus* essay, communication scholars Kathleen Hall Jamieson and Bruce W. Hardy worried that among the consistent indicators of diffuse support for the courts, there are disturbing suggestions of longer-term hazards that could undermine "public willingness to protect the prerogatives of judges and the courts"; further, they argue that public ignorance combined with partisan elections of judges threatens courts' legitimacy. In the same volume of *Dædalus*, entitled "On Judicial Independence," Massachusetts Chief Justice Margaret Marshall describes in greater detail

[A] convergence of potent developments... exerting significant pressure on our form of government: attacks by politicians and others on the constitutional role of our courts to be free from political interference, the mas-

sive influx of special interest money into judicial selection and retention procedures, and the loosening of ethical constraints on what judicial candidates may and may not say about cases likely to come before them.²⁴

The peril is real and especially consequential, Chief Justice Marshall suggests, if we consider that 95 percent of all U.S. litigation takes place in state courts. In 2008, 93 million cases were tried in state courts, and in 2005, 28 percent of the Supreme Court's cases originated at the state level.²⁵

Doubtless, judges are concerned – as they should be – with public perceptions of their independence and legitimacy. Judges further worry that the public is uninformed or misinformed, and that public opinion is thus based on misperceptions. The sources are myriad, built right into the foundation of the judiciary itself. Judge John M. Walker, Jr., U.S. Appeals Court, Second Circuit, has suggested that confirmation hearings for Supreme Court Justices are themselves sources of misinformation about the judicial role, overemphasizing the judges' individual discretion while ignoring the extensive institutional and doctrinal constraints that confine judges' role performances.²⁶ Circuit judge Joanne F. Alper agrees that citizens remain "uninformed about the role of the judge as an impartial arbiter with the responsibility of enforcing the laws."²⁷ "Caught in the middle of a highly politicized and emotional atmosphere"²⁸ sustained by sensationalist media and self-interested politicians, courts have stepped into the breach to communicate with the public directly with both informal and formal public information campaigns.²⁹ These education efforts on the part of the bench are conducted through lobbying organizations (such as Justice at Stake) as well as federal, state, and private entities supporting the work of courts (such as the Federal Judi-

cial Center and the National Center for State Courts).³⁰ Susan S. Silbey

But the purported crisis of the courts relies on a misunderstanding of how public acceptance of the judiciary is actually developed and sustained in American culture. To the extent that the judiciary and affiliated organizations misconceive public culture, their outreach programs, laudable as they are, may nonetheless be equally flawed. First, we need to acknowledge that claims of courts in crisis are endemic in American history, with periods of anti-court sentiment coming and going in generational intervals. Legal scholar Charles Geyh has described the process whereby these public image crises occur:

Typically, cycles begin with courts that decide one or more cases in ways that anger politically powerful segments of the public or their elected representatives. Those factions incite some combination of legislators, governors, presidents, the media or votes to excoriate allegedly rogue judges and threaten them and their courts with a variety of retaliatory actions that may include impeachment, budget cuts, curtailment of subject matter jurisdiction, changes in methods of judicial selection, disestablishment of judicial offices, judicial discipline, court packing, or defeat at the ballot box. Court defenders then mobilize to oppose the anti-court crusade.³²

To the extent that these cycles respond to unfavorable decisions, one might reasonably claim that the current threats to the courts' independence and integrity are self-inflicted wounds³³ born of the Supreme Court decisions in *Bush v. Gore*, *Citizens United v. Federal Election Commission*, and *Republican Party of Minnesota v. White*, which follow three decades of active mobilization against *Roe v. Wade*.³⁴ With a 5–4 decision in *Bush v. Gore*, the Court ended the recount of Florida's votes in the 2000 Presidential election, giving the election to George W. Bush.³⁵ In this case, the Justices'

doctrinal arguments were at odds with dominant precedents, previous opinions of the Justices in the majority, and the actual popular vote. In *Citizens United*, the Court expanded the legal fiction of the corporation, transforming it from a device to encourage economic investment while limiting investor liability to the sanctification of citizenship with constitutionally protected participation in the political system.³⁶ Although corporations are fictive legal persons existing only by virtue of paper agreements, the Court ruled that these “persons” have the same First Amendment protection of free speech as do human beings; as such, Congress cannot restrict corporate participation in elections through financial contributions, publications, and advertising. The Justices did not say that corporations could vote, however. *Citizens United* may have been prefigured by the Court’s earlier ruling in *Republican Party of Minnesota v. White*, where the Justices, in a 5–4 vote, struck down a provision of the Minnesota judicial code of ethics that prohibited candidates for election to judicial office from announcing their views on potentially controversial issues or matters that might come before the courts as a violation of the First Amendment’s protection of free speech.³⁷ In other words, because the majority of the Court uses an absolutist conception of speech that disregards the significance of different speakers’ ontological position, capacities, and modes of speech, they have made decisions that fertilize the ground for increasing politicization of the judiciary and financial influence in judicial elections. Anxious observers claim that these recent decisions threaten to transform judges into ordinary politicians and thus herald the suppression of independent courts.

From a macro-sociological perspective, the contemporary challenges to judicial status derive from cultural and institutional sources no different than those propel-

ling the disrupting of traditions of congressional courtesy and increasing polarization of American politics more generally. These sources include transformations in the most common forms of communication; advances in the sciences and technologies of political participation, including campaign polling, financing, mobilization of single interest groups, gerrymandering, and professional lobbying; and marked shifts in the demographic and class composition of the nation’s population. We are living in a period of profound ideological and communicative mobilization. Claims that these institutional changes are undermining confidence in courts should be tested.

In his work *Electing Judges: The Surprising Effects of Campaigning on Judicial Legitimacy*, political scientist James Gibson has undertaken to do just that: test predictions of a constitutional crisis in the making.³⁸ Exploring the influence of campaign activities on citizens’ perceptions of fairness and impartiality of judges, Gibson refutes the predictions that electoral campaigning is undermining public support for the courts. However, the results once again present a picture of heterogeneous public expectations.³⁹ For example, for some respondents, judicial candidates taking positions on policy issues causes little harm to the legitimacy of courts; likewise with attack ads, so long as the attack is motivated by a policy disagreement rather than by personal qualities or identity. Gibson suggests that in the view of approximately 20 percent of the population, the courts are already just like other political institutions, and thus campaigning, advertising, and fundraising have little influence on these citizens’ assessments of the courts. A larger portion of the population, however, perceives courts as insulated – or believes they should be insulated – from electoral politics and moneyed interests, as fundamentally different from other political institutions;

thus, blatant electoral activities by judges diminish the legitimacy of the judiciary in the eyes of this group. More interesting, perhaps, are the particular preferences of the vast majority of the population. For example, 72.9 percent of those surveyed expect a good justice to “protect people without power,” over 70 percent say that “judges should follow the law,” 46.5 percent believe a good justice should “represent the majority of citizens,” and 43.7 percent say that a good justice should “give my ideology a voice.” Once again, the public culture displays a rich mix of legal and political views about courts, which therefore raises the larger question of “how a politicized judiciary continues to be accepted as an authoritative legal arbiter.”⁴⁰

Americans’ paradoxical stance on law and courts is the subject of *The Common Place of Law: Stories from Everyday Life*, which I coauthored with Patricia Ewick when, some years ago, we set out to understand how the law and its agents were understood and interpreted by ordinary American citizens.⁴¹ However, unlike many of the polls surveying the public mood about courts with preset multiple-choice answers for standardized probes, we engaged in lengthy conversations with ordinary people about the circumstances of their everyday lives. Through these conversations, we worked to access the representations and interpretations of law and courts that circulate spontaneously among citizens. To hear the ways in which citizens talked about law (including courts, judges, lawyers, and police), we asked a random sample of people in one eastern state to tell us about problems they experienced in their lives and what they did about them.⁴² We listened for the moments when they invoked the law and legal categories to make sense of events, and the moments when they pursued other non-legal means of accommodation or redress. We were as

interested in the silences – the times when law could have been a possible and appropriate response but was not mentioned – as we were in the times when law was mentioned, appropriately or not.

The situations we asked about were intentionally varied and comprehensive, intended to create rather than foreclose opportunities for respondents to report diverse experiences and interpretations. We sought their unvarnished and unscripted interpretations and did not want to assume an understanding of the place of law or courts in their lives, but rather discover it as it emerged in the stories they told us. The list of probes included the sorts of events for which it is not unusual for people to seek a legal remedy (such as vandalism, property disputes, and work-related accidents). It also included situations that seem less obviously connected to traditional legal categories. Although many of the situations we asked about do not always (or even often) culminate in a legal case (for example, medical care or curricular issues in school), they all are situations in which people *can* assert a legal right, entitlement, or status, and, if they so choose, generate cases that appear on the dockets of state or federal local courts. Many people have experienced such situations, although most do not treat them as legal matters.⁴³ If our interviewees claimed to have experienced a problem, we asked how they responded to the situation, what actions they took, and which alternatives they considered but did not pursue. We did not ask explicitly about formal legal actions or agents until the very end of the interview. We waited to see whether, where, and how the law and its agents (such as courts, lawyers, police, and government officials) would emerge in our respondents’ accounts.

The interview was specifically designed to document the symbols, meanings, and associated social practices of American

Susan S. Silbey

legal culture by accessing citizens' interpretations of law and legal actors. Rather than collecting public opinions via preformulated (albeit normalized) scales, the study treats culture as inseparable from signs, symbols and performances, exchanged and circulating meanings and actions. In the words of political scientist and historian William H. Sewell, our study isolates "the meaningful aspect of human action out of the flow of concrete interactions . . . [by disentangling], for the purpose of analysis, the semiotic influences on action from the other sorts of influences – demographic, geographical, biological, technological, economic, and so on – that they are necessarily mixed with in any concrete sequence of behavior."⁴⁴ Culture is not only a system of communicative signals but a "repertoire" of "strategies of action," a collection of tools for the performance of social action. In our understanding of the place of courts in the public sphere, culture is never a coherent, logical, or autonomous system, but is rather a diverse collection of semiotic resources that are deployed daily in the performance of action. Therefore, in our research, variation in the meaning of symbols and resources and conflict concerning their use were expected.

Although the cultural system of signs may not be as coherent, logical, or autonomous as historically posited, this does not mean that it lacks systematicity – that is, networks of referential associations. It is possible to observe patterns in the signs and practices so that we are able to speak of a "culture" or "cultural system" at specified scales and levels of social organization. (For example, citizens express approval of judges making public statements about policy opinions in states where there are judicial elections; they express disapproval for judges voicing political opinions in states where judges are appointed.) As a system of semiotic resources deployed in transactions, "culture is not a power,

something to which social events, behaviors, institutions, or processes can be causally attributed; it is a context, something within which [events, behaviors, institutions, and processes] can be intelligibly – that is, thickly – described."⁴⁵

Our 430 respondents described more than 5,900 events. From these thousands of stories, we were able to construct three accounts that encompass the range of cultural materials with which Americans experience and talk about law and courts. Drawing upon different cultural images – for example, a bureaucracy, a game, and pragmatic coping strategies such as "making do" – each account describes a familiar way of acting and thinking, and associates it with the law. The three stories each represent different normative bases for legal authority, different constraints on legal action, different sources of legal agency, and different locations of law in time and space.

In the first narrative, the law is remote, impartial and objective, something to be invoked for solemn and collective purposes that transcend the messiness and partiality of individual lives. Although it is enacted by legal functionaries, it is often described as standing apart from the words or deeds of particular persons. Borrowing from Kafka's parable, we call this first story *before the law*. The law is here described as a formally ordered, rational, and hierarchical system of rules and procedures operating in carefully delimited times and spaces. Respondents conceived of legality as something relatively impervious to individual action, a separate, discontinuous, distinctive yet authoritative sphere. In this account the law appears as sacred, in the Durkheimian sense of the word, meaning that it is set apart from the routines of daily life. People describe the normative grounds for invoking law in terms of general, public needs and obligations. Thus, as one woman explained her refusal to take legal action when injured in an automobile accident, "I

learned when I was young, in my family, that you handle these things yourself.” She contrasted this unwillingness to sue when injured to her energy in pursuing a complaint against a supermarket chain when she tripped on a smashed banana. In the latter incident, others beside herself were threatened with injury: “Older folks, children, anyone could have been badly injured.” Because legality is characterized by its universal, objective norms, it is constrained by both the rules that seek objectivity in decision-making and those that enable action through chains of coordinated responsibility at a distance from the decisions of any particular individual. In the words of another respondent, the courts can “handle the problems of ordinary people fairly well.” “Judges are generally honest in dealing with each case,” he added; they are predictable. “Courts are expensive,” he continued, “but not so much that one would not sue if truly necessary.” “You see,” he explained, “I was afraid at one point when I first started going to court. I was nervous about it. . . . It was a new experience, you know, so I was a little nervous. Court is always looked upon as this force.” But with experience, this social worker-turned-private detective explained to us, one discovers that “[i]t’s a place you go to get justice. It is for you to get justice.” Emphasizing a sense of the justice system’s layered hierarchical organization, he added that courts are at least “a good place to start.”

Not only do these respondents consider the law’s agents to be objective, but they also consider the objectivity of law’s substance – what the law should or should not do – when deciding whether to engage it. Citizens 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, a middle aged mother of two teenage boys living in suburban New Jersey readily rejected the idea, claiming, “I don’t use my police that way.” On 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 other experiences she told us about, it becomes clear that the two statements are less oppositional than interdependent. In point of fact, this woman takes ownership of the police precisely because they do not attend to the messiness of everyday neighborhood conflicts.

Many people expressed this lack of connection between law and ordinary life. For these individuals, encountering the law in the course of their lives – whether it involved being stopped by a police officer, being audited by the IRS, or serving on a jury – represented a disruption. Furthermore, in deciding whether to mobilize the law, people often thought of it as rupturing normal relationships, routine practices, and comfortable identities. When asked what action he had taken in response to what he described as the deterioration of his neighborhood, one man 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 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. Similarly, a female minister and licensed practical nurse living in Camden, New Jersey, explained to us the conditions under which she would, as she said, “bother” the police about a neighborhood

Susan S.
Silbey

conflict: “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 gunshots 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 she gave as a reason for bothering the police, it was the collective nature of the harm it posed.

In a second account we call *with the law*, legality is understood to be a game of skill, resource, and negotiation wherein persons can seek their own interests in a competition with others. In this rendering, law appears as an arena for strategic interactions, sometimes engaged playfully and sometimes seriously, but always simultaneously alongside and within everyday life. Describing a world of legitimate competition, respondents are less likely to reference the law’s objectivity or power and more likely to refer to the power of the individual to successfully deploy and engage the law. When articulating this understanding of the judicial system, people were wise to the fact that “the haves come out ahead”; that resources, experience, and skill matter in who wins this law game. As one of our respondents explained with some defiance, “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.”

Cynicism is expressed in the view that the law is an arena for pursuing self-interest, in which deceit and manipulation prevail. Opponents could lie, bluff, or manufacture a story, and 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.” Importantly, this statement and others like it are not intended as 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.

Virtually all of our respondents agreed that in this game of skill, resources, manipulation, and deceit, the most crucial resource one can mobilize is a lawyer. No matter how competent these respondents are and no matter how much experience or knowledge they might have of the law, they acknowledge their amateur status relative to lawyers. Lawyers represent the professional players in the game of law. A contractor told us that because he did not hire a lawyer, he was unable to defend himself in criminal court against charges of illegal dumping, which he vehemently denied. At the time of our interview, he acknowledged 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.” His initial 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,” but not at the dump. “When this lawyer [the prosecutor] asked me, ‘Is that your truck?’ I said ‘Yeah.’ And they said, ‘Okay.’ 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.”

The account of legality as game-playing is not entirely independent from the notion of the objective, disinterested, and rule-constrained system of the first narrative. Rather, the second story emphasizes the room for personal agency and intervention in the system. A third conception, however, acknowledges both the first two accounts of law and denies their entirety as an account of law and courts. In this third narrative, law is presented as a product of unequal power. Rather than objective and fair, law is understood to be arbitrary and

capricious. Unwilling to stand before the law and without the resources to “play” its game, people often experience themselves as *up against the law*. Here, citizens describe the law as an arbitrary power against which they feel impotent. The courts pretend to offer justice but are unavailable; judges promise principled decisions but respond primarily to the powerful.

People revealed their sense of being up against the law, and unable to play by its rules. Bess, an elderly black woman, had had difficulty obtaining medical treatment for what turned out to be breast cancer. After months of doctor’s appointments and applications she finally obtained Social Security Insurance. 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, Bess understood that she had little or no choice but to submit to the lengthy 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 schemata and resources. For example, one respondent reported lying about her age to a hospital in order to receive emergency room treatment. Because she was only seventeen at the time, the first hospital she visited would not treat her without her parents’ permission. Although she had been living independently for two years, having had no

contact with her abusive parents, she realized that to the hospital’s understanding of its legal obligations, she was a dependent minor. Since she couldn’t change her family situation in order to conform to hospital rules, she went to a different hospital and changed her age, matter-of-factly telling them she was eighteen. An elderly Hispanic man living in a run-down and dangerous area of Newark told us that his calls to the police for help with neighborhood vandals were repeatedly ignored. Finally, he decided to change his voice to sound like that of a woman when calling. When he mimicked a woman, he told us, he got a “quick response.”

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. Small deceits, omissions, foot-dragging, humor, and making scenes are typical forms of resistance for those up against the law.⁴⁶ These feints, tricks, and opportunistic ploys are rarely illegal. Most often, resistance of this sort does not so much transgress the rules as evade them. While the three stories woven through citizens’ accounts can be analytically distinguished from each other, they cannot be separated in practice, as each constitutes and enables the others.

How do these thicker accounts of law, developed from thousands of stories, relate to the anxieties that drive the judicial PR blitz? At their core, these are not three separate narratives of law or courts. They are a cultural ensemble, circulating signs and symbols that play off each other. Together, the accounts create a durable structure of support and allegiance because they simultaneously provide the potential for variation and change as well as consistency.⁴⁷ Given the more than five thousand stories collected from more than four hundred people, *The Common Place of Law* em-

Susan S. Silbey

pirically demonstrates the connection between individual expressions and interpretations of the courts and judges and the collective, macro institutions of law by revealing the common templates that appear in and across the stories.

The American public's commitment to the rule of law is actually strengthened by the oppositions that exist within and among the multiple representations: ideals and practices, normative aspirations and grounded understandings of practical action, god and gimmick, sacred and profane. For instance, challenges to courts' legitimacy for being only a political game can be rebutted by invoking their universal, transcendent purposes. Similarly, criticisms of judges for being remote, isolated, and irrelevant to ordinary people and mundane matters – occupying a rarified realm of abstract reasoning – can be countered by references to the accessibility of lawyers and game-like availability of legal processes. Simply stated, support for courts and the rule of law is much weaker and more vulnerable where it is more homogeneously or singularly conceived. If the public's interpretations were ideologically consistent, trimmed of their complexities and contradictions, support would be quite fragile. If the public were to see the court as solely god or entirely gimmick, this conception would eventually self-destruct in the face of the plurality and diversity of actually experienced phenomena. If the only thing people knew about the law, whether through experience or commonly circulating stories, was its profane face of crafty lawyers and outrageous tort cases, it would be difficult to sustain the support necessary for legal authority.⁴⁸ Conversely, a law unleavened by familiarity and the cynicism it breeds would in time become irrelevant.

Thus, we come full circle to our original alternative accounts of the role of courts in American society. Rather than eschewing one or the other, seeking ideological con-

sistency or cultural homogeneity, we conclude by celebrating the diversity of American public culture. It provides a durable and powerful commitment to law and courts. Although the dual depictions of law and courts as godlike (remote, transcendent, objective, and magisterial) and game-like (rule-bound, self-interested, and resource-dependent) seem to challenge one another, they are complementary. However, the judiciaries' campaigns to purify the public's assessment of law and courts fail to recognize the leavening that realism provides for idealism, and they misconceive the constitution of the public culture, ultimately weakening rather than strengthening the public's embrace of and commitment to the law and courts. Each thread of the complex tapestry of public assessment emphasizes different normative values and provides a different account of the social organization of law; together they cover the range of conventional experiences of legality. Any particular experience can find expression within the heterogeneity of the whole. The law and its agents are rendered neither irrelevant to everyday life (by virtue of being remote) nor subsumed by it (because of their familiarity). Rather, the courts become a common, inescapable, and reliable feature of American life.

ENDNOTES

Author's Note: This essay has benefited from the insightful comments of the editors, Linda Greenhouse and Judith Resnik, as well as from generous readings and critique by Tom Burke, Keith Bybee, and Austin Sarat. Of course, any mistakes are entirely my own.

- ¹ His prediction was confirmed in 1860, and the Supreme Court's decision in *Dred Scott v. Sandford* is often cited as an important provocation. Alexis de Toqueville, *Democracy in America*, vol. 1, chap. VIII: The Federal Constitution, part IV.
- ² Patricia Ewick and Susan S. Silbey, *The Common Place of Law: Stories From Everyday Life* (Chicago: University of Chicago Press, 1998).
- ³ Keith J. Bybee, *All Judges Are Political – Except When They Are Not* (Stanford, Calif.: Stanford University Press, 2010).
- ⁴ Patricia Ewick and Susan S. Silbey, "Common Knowledge and Ideological Critique: The Importance of Knowing Why the 'Haves' Come Out Ahead," *Law & Society Review* 33 (4) (2003): 1025 – 1042. See also Herbert M. Kritzer and Susan S. Silbey, eds., *In Litigation: Do the 'Haves' Still Come Out Ahead?* (Stanford, Calif.: Stanford University Press, 2003).
- ⁵ Susan S. Silbey, Patricia Ewick, and Elizabeth Schuster, "Differential Use of Courts by Minority and Non-Minority Populations in New Jersey," New Jersey Supreme Court Task Force on Minority Concerns (Administrative Office of the Courts of New Jersey, 1993). In our survey, 430 residents of New Jersey described to us 5,803 incidents that could have become matters of formal legal complaint. Only 14 percent of the reported problems led to legal action (calling police, contacting a lawyer, or complaining to a government agency). Even fewer led to litigation beyond the inquiry stage.
- ⁶ See Stephen C. Yeazell's essay in this volume.
- ⁷ See, for example, Lawrence Friedman, *Contract Law in America* (Madison: University of Wisconsin Press, 1965). See also Marc Galanter, "Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society," *UCLA Law Review* 31 (1) (1983): 4 – 71.
- ⁸ Sally E. Merry and Susan S. Silbey, "What Do Plaintiffs Want? Reexamining the Concept of Dispute," *Justice System Journal* 9 (2) (1984): 151 – 178.
- ⁹ Gregory A. Caldeira and Kevin T. McGuire, "What Americans Know about the Courts and Why It Matters," in *The Judicial Branch*, ed. Kermit L. Hall and Kevin T. McGuire (New York: Oxford University Press, 2005), 264.
- ¹⁰ *Ibid.*
- ¹¹ Kathleen Hall Jamieson and Bruce W. Hardy, "Will Ignorance and Partisan Election of Judges Undermine Public Trust in the Judiciary?" *Dædalus* 137 (4) (2008): 11.
- ¹² 2007 Princeton Survey Research Associates International for the Annenberg Foundation Trust at Sunnyslans, *Annenberg Public Policy Center Judicial Survey, 2007*, http://www.annenbergpublicpolicycenter.org/Downloads/20071017_JudicialSurvey/Survey_Questions_10-17-2007.pdf.
- ¹³ *Ibid.*
- ¹⁴ "Congress and the Public," Gallup, 2014, <http://www.gallup.com/poll/1600/congress-public.aspx>
- ¹⁵ Between 1981 and 2012, eighteen surveys by NBC/*Wall Street Journal*, AP/Roper, and CBS/*New York Times* report ranges between 10 and 26 percent for respondents feeling "little or no confidence," with a median of 17.5 percent.
- ¹⁶ <http://www.gallup.com/poll/163586/americans-approval-supreme-court-near-time-low.aspx>.

- ¹⁷ “Congress and the Public,” Gallup, 2014, <http://www.gallup.com/poll/1600/congress-public.aspx>
- ¹⁸ The Harris and NORC surveys asked specifically: “As far as people in charge of running the U.S. Supreme Court are concerned, would you say you have a great deal of confidence, only some confidence, or hardly any confidence at all in them?”
- ¹⁹ This is usually aligned with party affiliation.
- ²⁰ Russell Dalton, “Citizens and Democracy: Political Support in Advanced Industrial Democracies,” paper presented at the conference *Confidence in Democratic Institutions: America in Comparative Perspective*, Washington, D.C., August 1997.
- ²¹ Mitchell A. Seligson, “On the Measurement of Diffuse Support: Some Evidence from Mexico,” *Social Indicators Research* 12 (1) (1983): 1–24.
- ²² Jack Citrin, et al., “Personal and Political Sources of Political Alienation,” *British Journal of Political Science* 5 (1) (1975): 1–31. Cited in *ibid*.
- ²³ Jamieson and Hardy, “Will Ignorance and Partisan Election of Judges Undermine Public Trust in the Judiciary?”
- ²⁴ Margaret H. Marshall, “Threats to the Rule of Law: State Courts, Public Expectations and Political Attitudes,” *Daedalus* 137 (4) (2008): 123. See also Herbert M. Kritzer and John Voelker, “Familiarity Breeds Respect: How Wisconsin Citizens View Their Courts,” *Judicature* 82 (1998–1999): 64.
- ²⁵ Marshall, “Threats to the Rule of Law,” 125.
- ²⁶ John M. Walker, Jr., “Politics and the Confirmation Process: Thought on the Roberts and Alito Hearings,” in *Bench Press: The Collision of Courts, Politics, and the Media*, ed. Keith Bybee (Stanford, Calif.: Stanford University Press, 2007), 123–130.
- ²⁷ Joanne F. Alper, “Selecting the Judiciary: Who Should Be the Judge,” in *Bench Press*, ed. Bybee, 132.
- ²⁸ *Ibid*.
- ²⁹ Christopher J. Davey, “The Future of Online Legal Journalism: The Courts Speak Only Through Their Opinions?” *Information Society Journal of Law and Policy* 8 (2013): 572
- ³⁰ “Judicial Outreach Resource Network,” Justice at Stake, http://www.justiceatstake.org/resources/judicial_outreach/; and <http://www.ncsc.org/Topics/Court-Community/Public-Trust-and-Confidence/Resource-Guide.aspx>.
- ³¹ Charles Gardner Geyh, *When Courts and Congress Collide: The Struggles for Control of America’s Judicial System* (Ann Arbor: University of Michigan Press, 2008).
- ³² Charles Gardner Geyh, “Preserving Public Confidence in the Courts in an Age of Individual Rights and Public Skepticism,” in *Bench Press*, ed. Bybee, 21–51. For a discussion of the overblown campaign concerning judicial independence and Justice O’Connor using “too broad a brush in identifying what might be called ‘external’ threats to the independence of the judiciary,” see also Arthur D. Hellman, “Justice O’Connor and ‘The Threat to Judicial Independence’: The Cowgirl Who Cried Wolf?” *Arizona State Law Journal* 39 (2007): 845.
- ³³ James L. Gibson, Gregory A. Caldeira, and Lester Kenyatta Spence, “The Supreme Court and the US Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?” *British Journal of Political Science* 33 (4) (2003): 535–556; and Edwin Meese III, “Construing the Constitution,” *UC Davis Law Review* 19 (1985): 22. In *Dred Scott v. Sandford* (60 U.S. 393 [1857]) the U.S. Supreme Court, under the leadership of Chief Justice Roger B. Taney, read black Americans out of the Constitution, ostensibly in order to invalidate Congress’ attempt to limit the spread of slavery. This is often read as a self-inflicted wound helping to bring on the Civil War. See also Herbert M. Kritzer, “The Public’s Assessment of the Rehnquist Court,” *Judicature* 89 (3) (2005): 168–176; and recall de Tocqueville’s prediction above.

- 34 See *Bush v. Gore*, 531 U.S. 98 (2000); *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002); *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010); and *Roe v. Wade*, 410 U.S. 113 (1973). For more on *Roe v. Wade*, see Linda Greenhouse and Reva Siegel, eds., *Before Roe v. Wade: Voices That Shaped the Abortion Debate Before the Supreme Court's Ruling* (New York: Kaplan Publications, 2010); and Linda Greenhouse and Reva Siegel, "Before (And After) *Roe v. Wade*: New Questions about Backlash," *Yale Law Journal* 120 (2011): 2028.
- 35 *Bush v. Gore*, 531 U.S. 98 (2000).
- 36 *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), is a U.S. Supreme Court case in which the Court held that the First Amendment prohibits the government from restricting independent political campaign expenditures by corporations, associations, or labor unions. The conservative lobbying group Citizens United wanted to air a film critical of Hillary Clinton and to advertise the film during television broadcasts in apparent violation of the 2002 Bipartisan Campaign Reform Act (commonly known as the McCain–Feingold Act or BCRA). In a 5–4 decision, the Court held that portions of BCRA section 203 violated the First Amendment.
- 37 *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002; Ginsburg, J. dissenting). See also Howard Gillman, *The Votes That Counted: How the Court Decided the 2000 Presidential Election* (Chicago: University of Chicago Press, 2003).
- 38 James L. Gibson, *Electing Judges: The Surprising Effects of Campaigning on Judicial Legitimacy* (Chicago: University of Chicago Press, 2012).
- 39 A recent issue of *Judicature* (March/April 2013), with essays by leading students of judicial behavior and public opinion, debates how we should address recent experiments that have attempted to assess so-called significant threats to the legitimacy of and public trust in the judiciary.
- 40 Gibson, *Electing Judges*.
- 41 Ewick and Silbey, "Common Knowledge and Ideological Critique."
- 42 Patricia Ewick and I describe our method as follows: "The interview was designed to capture a picture of legality unmoored from official legal settings and actors. . . . We did not want our questions to imply or enforce a conventional definition of law and legality. We did not want to ask people about their legal problems or needs, since it was the respondents' own understandings and definitions of these concepts – as they might be expressed in their words, revealed in their actions, or embedded in their stories and accounts – that we wanted to hear about. How then were we to focus the interview to be able to elicit talk about these issues without projecting our own hypotheses regarding legality and its construction? Our solution to this problem was to design an unusually lengthy interview consisting of three parts distinguished from one another in terms of how focused and structured they were. In this way, we hoped to reach a large number of diverse respondents and yet create opportunities for the respondents to shape the discussion. We told respondents the interview was about community, neighborhood, work, and family issues. Given our theoretical perspective this description seemed to describe accurately our approach, while it also served the practical purpose of decoupling legality from formal institutional law. The initial part of the interview consisted of a series of questions concerning the respondent's community and neighborhood. We asked how long they had lived there; what they liked most and least about their neighborhood; and how they saw themselves in relation to their neighbors. We also inquired about the number and strength of social ties they had in the community: how many friends and family members lived nearby and how often and in what capacity they interacted with others. This turned out to be an effective way of beginning. . . . These first questions about neighborhoods, friends and family seem to have eased the transition from formal interview to open conversation because the questions were obviously non-threatening and because they allowed the respondents to name the topics and issues of interest to them. Although we were asking the questions, respondents were setting the boundaries of privacy and exposure. Interestingly,

people would often use these opening questions to initiate stories that were elaborated and enriched as the interview continued. . . . We had a script we followed, a sequence of topics and questions, but we allowed our respondents to set the pace and emphases ; we encouraged diversions. This portion of the interview was followed by a series of open-ended questions that asked respondents about a wide-range of events and practices that might have 'troubled or bothered' them at some point. If a respondent asked what we meant by trouble or bother, we defined these as '[a]nything that was not as you would have liked it to be, or thought it should be.' In presenting the topics for discussion to the respondents we avoided any allusion to these events or problems as legal or legally related, hoping instead to discover their definitions of the situations. Whenever a respondent mentioned that they had experienced a particular problem, they were asked to describe the situation in greater detail : when and how often it occurred, who was involved, how they experienced it and how they responded to it, and how, if at all, it ended." See Ewick and Silbey, *The Common Place of Law*, 24 – 26.

- ⁴³ Consistent with most studies, only 14 percent of possible legal matters were referred to a legal actor (government agency, policy, or attorney).
- ⁴⁴ William H. Sewell, "The Concept(s) of Culture," *The Logics of History* (Chicago : University of Chicago Press, 2005), 152 – 174, 160.
- ⁴⁵ Clifford Geertz, *The Interpretation of Cultures* (New York : Basic Books, 1973), 14.
- ⁴⁶ Patricia Ewick and Susan S. Silbey, "Narrating Social Structure : Stories of Resistance to Legal Authority," *American Journal of Sociology* 109 (1) (2003) : 1328 – 1372.
- ⁴⁷ Scott Barclay and Susan S. Silbey, "Understanding Regime Change : Public Opinion, Legitimacy, and Legal Consciousness," *Oxford Handbook of Law and Politics*, ed. Keith E. Whittington, R. Daniel Keleman, and Gregory A. Caldeira (New York : Oxford University Press, 2008), 663 – 678.
- ⁴⁸ Ewick and Silbey, "Narrating Social Structure."