TALK OF LAW:
CONTESTED AND CONVENTIONAL LEGALITY

Susan S. Silbey*

Introduction
From February 8, 2006 to February 11, 2006, the Boston Globe carried numerous articles, editorials, and letters about a six-year-old boy in the Brockton, Massachusetts public schools who had been suspended from kindergarten for three days for sexually harassing another child in his classroom. The young boy had put his hand in the elastic of his classmate’s pants, touching the skin on her back. After the principal reported the incident, the school superintendent forwarded the case to the Plymouth County district attorney’s office. The prosecutors refused to bring charges, however, because the Commonwealth’s juvenile criminal laws do not apply to children under seven.1

The story was quickly picked up by the Associated Press and reported in news outlets across the continent, including the Wall Street Journal, the New York Daily News, the Ottawa Citizen, and the Calgary Herald. The story erupted in the news media nine days after the suspension had taken place because the mother, Berthena Dorinivil, refused to allow her son to return to school. Mrs. Dorinivil requested that her son be moved to another elementary school in the district, because she feared that “he would be treated differently” at his old school and would be “stigmatized by the incident.”2

Within two days of the news blitz, and twelve days after the suspension, the Brockton School Department apologized for suspending the

* Professor of Sociology and Anthropology, Massachusetts Institute of Technology. I am particularly grateful for the extensive research support from Ayn Caviechi as well as critical suggestions by the participants in the Twelfth Annual Clifford Symposium and the editors of the DePaul Law Review. The conception of a multipliated legality derives from a ten-year collaboration with Patricia Ewick appearing in The Common Place of Law: Stories from Everyday Life. For a more recent article, see Susan S. Silbey, After Legal Consciousness, 1 ANN. REV. L. & SOC. SCI. 323 (2005). Errors and misjudgments that remain are the product of my own limitations.


boy. The next day, his “parents hired a lawyer to investigate the
school system’s handling of the matter.” More than two weeks after
the suspension, the story continued to generate activity in local
and national media across the political spectrum—from TalkLeft: The
Politics of Crime to World Christian News to the Massachusetts GOP
News. On March 8, one month after the story first made the news, “a
Brockton Superior Court judge ordered the city to provide the par-
ents of the boy ‘immediate access’ to his school records.” During the
six weeks following the boy’s suspension, the school system had
provided the parents with “only the boy’s health record and report
card.” After the court ordered the release of school documents, Mrs.
Dorinivil reportedly stated that, at the time of the suspension, her six-
year-old had been “told to sign a paper on which the principal had
written an account of the incident.”

The school system has transferred the boy to another school, where
he is reportedly happy. It also began revising its system of reporting
student conduct to better address inappropriate touching among
young children; it would presumably no longer be labeled as sexual
harassment. In addition, legislators at the state capitol discussed the
case during debate on a bill that would require sex education for chil-
dren as young as pre-kindergarten. “This incident is a teachable mo-
moment for everyone concerned with young children,” said Repre-
sentative Geraldine Creedon, a member of the Massachusetts
Education Committee. The outcome of the legislative discussion is
not yet clear, nor is it clear whether the family will file suit against the
school system.

This story illustrates the deeply layered and textured meaning of the
rule of law in popular culture and understanding. Rather than a sim-
ple or singular phenomenon—a book that can be placed on a shelf to
be consulted when needed—the rule of law actually lives in the myri-
ad practices and contradictory aspirations of a people. Neither enti-
tirely a set of disinterested rules and rational procedures for confining
arbitrary power, nor merely a terrain of unregulated, agonistic en-
gagement, the rule of law is an ambivalent, paradoxical phenomena
that is a commonplace feature of everyday life in the United States.
Its ambiguous, knotty constitution sustains, rather than undermines,
its durability and its power to shape social relations.

In a recent essay rethinking Professor Robert Cover’s Nomos and
Narrative, Professor Judith Resnik echoes this understanding of the
rule of law when she claims that the nation’s citizens “live law’s mean-
ing.” Although “in general, judges pronounce the meaning of law,”
she writes, they “do not have to enact those meanings by themselves
engaging in the activity that they require—by living the law that they
make.”

Resnik, like Cover, focuses primarily on the jurisgenerative work of
the few centuries-old communities that have “sustained remarkably
distinct legal regimes across time, place, and enormous” socio-political
and economic changes. Resnik and Cover argue that these “communi-
ities are instructive because they show[ ] that the creation of endur-
ing legal meaning require[s] action, not just words.” Members of
these communities do not merely pronounce law, as judges do, they
exemplify the process of “living their law.” Judges, and most citi-
zens, are “able to state their understanding of law without facing tests
of their commitment to the principles they elaborated.” But Mem-
nonites, devout Muslims and Jews, or the orthodox Baptists Professor
Carol Greenhouse wrote about in Praying for Justice, are not always
able to do so. When conflicts arise between the law of the state and
the core beliefs of these communities, members are forced “either to

6. Id.
7. Id.
8. Id.
9. Id.
11. Id. (internal quotation marks omitted).
12. See generally PHILIP SELZNICK, LAW, SOCIETY, AND INDUSTRIAL JUSTICE (1969); PHILIP
SELZNICK, SOCIOLOGY AND NATURAL LAW, 6 NAT. L. FORUM 84 (1961).
16. Id. at 19.
17. Id. at 29.
18. Id.
19. Id. (quoting Cover, supra note 14, at 49).
20. Id.
21. CAROL J. GREENHOUSE, PRAYING FOR JUSTICE: FAITH, ORDER, AND COMMUNITY IN AN
AMERICAN TOWN (1966).
reaffirm or to abandon a set of core beliefs and, if reaffirming, either to suffer persecution or to migrate."22

Cover feared—and history may yet prove him right—that “[t]he universalist virtues that we have come to identify with modern liberalism, the broad principles of our law,” procedural justice, and due process considerations, would turn out to be “system-maintaining ‘weak’ forces.”23 Liberal relativism and procedural justice would eventually, he predicted, erode commitments to the rule of law.24 The strong forces supporting a durable rule of law derive not from easily asserted-to rules of procedure, but from more deeply sedimented habits, conventions, and ways of being in the world.

How do Americans live their law? When Americans talk about law, what are they referring to? What does the rule of law mean to ordinary Americans? In their classic account of how to study the “law-stuff of a culture,” Professors Karl Llewellyn and E. Adamson Hoebel25 laid out three investigatory paths to mapping “legal culture” or “legal consciousness.”26 The first path was ideological and traced the extant rules of social control for channeling and controlling behavior.27 In this path, the scholar tries to map the official, formal norms of a society, those rules of right behavior which individuals—as distinct from the official organs of the community—no longer retain authority to define. This is the traditional task of the legal academic. The second path of legal inquiry “explore[d] the patterns according to which behavior actually occurs.”28 This became the standard model of law and society research for several generations.29 Finally, Llewellyn and Hoebel urged a third path that looks at “instances of hitch, dispute, grievance, [and] trouble;” it inquires “what the trouble was and what was done about it.”30 This Article follows the third path, although it is obvious that in any complete investigation of legal culture the three paths are intertwined:

[It] is rare in a . . . group or society that the “norms” which are felt or known as the proper ones to control behavior are not made in the image of at least some of the actually prevalent behavior; and it is rare, on the other hand, that [the norms] do not to some extent become active in their turn and aid in patterning behavior further.31

Norms build up over time with amazing emotional and material power, often attaching moral meanings to what may have originally been accident or convenience. Llewellyn and Hoebel explain that instances of hitch and trouble, as both moments of deviation and as grounds for repair, lay bare a community’s norms.32 What was latent is made manifest, and what appeared consensual is the subject of open, explicit contest. By following what, in a different register, Cover and Resnik call jurisprudential conflicts,33 we may be able to trace the threads of legality that compose the rule of law.

Following the models of trouble cases and jurisprudential conflicts, this Article revisits the case of the six-year-old suspended for sexual harassment. Part II traces the lines of interpretation that emerged in the public media to identify the diverse conceptions of law circulating in American society. Part III analyzes how, as an ensemble rather than discrete distinguishable threads, this collection of legal narratives works to constitute a hegemonic legal consciousness, or what we might call the rule of law. Part IV concludes with a different “trouble” case that has also occupied the press in Massachusetts and elsewhere: the local convention ofreserving—with milk crates, chairs, or other physical objects—shoveled-out parking spots on public streets. In this movement from the six-year-old sexual harasser to the claims of property on public streets, I hope to show the variety of ways in which legality and the rule of law are performed in American culture, and the difference between contested, ideological law and conventional, hegemonic law.

II. CONTESTED LEGALITY

The following reactions are pulled from the news accounts of the Brockton incident. They display Americans’ complex appreciation and enactment of the rule of law.

31. Id.

32. Id.

33. Resnik, supra note 15, at 25 n.37. Resnik mentions that Cover is more often cited for the terms “jurisgenerative” and “jurispathic” than “jurisprudential.” Resnik more often uses the term jurisgenerative in her interpretation of Cover’s work, see id. at 26, 28, 34, 40, 42, 47, 48, 53 (referring to Cover, supra note 14).

23. Id. at 30 (alteration in original) (quoting Cover, supra note 14, at 12).
27. Llewellyn & Hoebel, supra note 25, at 20–21.
28. Id. at 21.
A. “Educators Overreact, but Charge Deserved Attention.”

Start with the school administrators. Why would any reasonable adult report a six-year-old who puts his hands in another child’s waistband—touching only skin on the back—for suspension, let alone criminal prosecution? According to the school officials, the law demanded their action; they were following legal mandates. “This was done right by the book,” said Cynthia McNally, a district spokesperson with whom I spoke and whose comments were reported in the media, it “was thoroughly investigated.” It’s a situation within the parameters of sexual harassment, and we’re dealing with it within the parameters,” she said. The Brockton School System has a six-step process for reporting and investigating sexual harassment allegations. The policy requires a written account of the alleged harassment submitted by the accuser and a meeting between the alleged harasser and a principal or other school administrator. The Brockton School System was acting in accord with the mandate of the Massachusetts Department of Education, which requires every school to develop a nondiscrimination policy that covers harassment and bullying. In Davis v. Monroe County Board of Education, the Supreme Court assigned responsibility and financial liability to school systems that fail to take action against harassment. Although many school systems adopted policies on harassment prior to 1999, nearly every system in the nation adopted these policies after Davis. The Boston Globe noted that “[c]ities and towns are liable if their school departments fail to take action against incidents of sexual harassment.”

35. Ranalli & Mishra, supra note 2 (internal quotation marks omitted).
36. Id. (alterations in original) (internal quotation marks omitted).
38. Id.
41. Editorial, Brockton Overreaction, BOSTON GLOBE, Feb. 11, 2006, at A10; see also Douglas E. Abrams & Sarah H. Ramsey, Children and the Law: Doctrine, Policy, and Practice 291 (2d ed. 2003) (“Over time other professionals, such as teachers and social workers, also became ‘mandated reporters.’”); Alexa Irene Pearson, Eulogies, Effigies, and Erroneous Interpretations: Comparing Missouri’s Child Protection System to Federal Law, 69 Mo. L. Rev. 589, 591–92 (2004) (“Although the federal legislation provides some standards for defining and reporting abuse, state laws vary. States differ as to who is required to report... suspicions of child abuse or neglect.” (citation omitted)).

43. Id.
44. Id.
45. Id. (internal quotation marks omitted).
47. Papadopoulos & Downing, supra note 9 (internal quotation marks omitted).
48. Papadopoulos, supra note 46 (internal quotation marks omitted).
49. Papadopoulos & Downing, supra note 9 (internal quotation marks omitted).
50. Jan, supra note 3 (alteration in original) (internal quotation marks omitted).
responses to the proscribed conduct. Both the officials involved and some critics invoked this sense of law as a set of shared aspirations and recipes for action.

Child-to-child harassment is part of a serious “pandemic of sexual violence” in elementary and secondary schools, according to Nan Stein, senior research scientist at the Center for Research on Women. Stein was one of the leaders of the movement to create the offense of peer sexual harassment; she was also one of the experts quoted liberally in the media coverage of the case. Since the 1970s, she has “constructed and disseminated the narratives about peer harassment that were taken up by the media, schools, and eventually courts.” From this perspective of peer sexual harassment as a social problem, the law has responded appropriately by mandating locally enacted antiharassment policies to control the injuries regularly inflicted on school children. Officials must now take it seriously: “School systems, businesses, churches and other institutions—if they know what’s good for them—don’t brush off allegations of harassment.” Stein added in an interview, however, that zero tolerance is not the right approach. Officials must follow rules once enacted, but within reason. In this case, Brockton failed to follow its own definition.


52. Short, supra note 40, at 42.

53. The actual history of the law on harassment is not as strong as the voices in Brockton seem to suggest. Legal construction of this heretofore normal, if undesired, behavior was transformed through a series of cases. Following Franklin v. Gwinnett County Public Schools, in which the Supreme Court held that schools could be sued for monetary damages if they ignored sexual harassment, many states began requiring schools to create sexual harassment policies. 503 U.S. 60 (1992). However, Franklin was a case of adult school employees harassing a minor student; the analogy to peer harassment was not entirely clear. Short, supra note 40, at 38. Although Davis ruled that “a private damages action may lie against the school board in cases of student-on-student harassment,” the Court, over the vociferous dissent of four Justices, set a high bar so that this action would apply “only where the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities.” Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 633 (1999). The difference must be “so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.” Id. Despite the Court’s rather strong language, many states, Massachusetts included, required all school systems to prohibit sexual harassment. The school systems could design their own complaint and sanctioning policies to comply with this high standard. Justice Kennedy’s dissent predicted, however, that “[a]fter today, Johnny will find that the routine problems of adolescence are to be resolved by invoking a federal right to demand assignment to a desk two rows away.” Id., at 686 (Kennedy, J. dissenting).

54. Hancock, supra note 34 (“[A]t least those in charge took the incident seriously . . . . [A]t least folks were paying attention. And that’s a good thing.”).


Some observers thought the Brockton school department’s actions were necessary; others saw them as an unfortunate overreaction and a misinterpretation of a serious social problem and reasonable public law. Some members of the public, however, saw this as just another instance of the overwhelming power of “loony liberal[s]” who pray “at the altars of political correctness.” “Not even childhood is safe from excessive incriminations of the politically correct kind” whose “invasion into our lives is appalling,” according to the student newspapers.


57. Telephone Interview with Nan Stein, supra note 55.

58. Derek Rose, No Kiddin’? Boy, 6, in Sex Flap, DAILY NEWS (N.Y.), Feb. 10, 2006, at 15 (quoting Christopher Murray about a six-year-old not having the capacity to be sexually gratified).

59. Telephone Interview with Nan Stein, supra note 55.

60. See, e.g., Editorial, 6-Year-Old Predator?, supra note 56.

61. Id.

62. Papadopoulos, supra note 46.


64. Don’t Shake Hands with Brockton School Principal Diane Gosselin, supra note 4.

65. Editorial, It’s Tough Being a Boy, supra note 63.
per at the University of Texas at Arlington. Feminists, the argument goes, undermine classrooms and families and emasculate boys with their zero tolerance politics. This voice was not prominent on news pages in the Boston Globe, but it did appear in letters to the editors in Boston newspapers and elsewhere, as well as on weblogs. In addition, the Brockton superintendent of schools had reportedly been receiving “hate mail from all over the country,” perhaps from those who saw him as part of this conspiracy of feminist political correctness.

Again, two themes emerge in the interpretations that saw the incident as part of a national political struggle. First, the law has become a tool of feminists preoccupied with gender and sexuality. Second, sexual harassment laws have become an uncontrollable weapon that can be used to harass good people, as well as undermine important policies and rights. Officious bureaucrats and litigious citizens are different sides of the same unfortunate power struggle. According to these interpretations, the Brockton story is more about power than law.

Gender and sexuality play several roles in the stories. Some perceived the incident as the logical outcome of the power of feminists to colonize and reinterpret ordinary social relations through their harping about gender inequality. See what they have wrought! These responses were not entirely wrong. Many of these harassment policies were adopted with the advice and support of professional education managers and organizations spurred by an organized campaign that had been ongoing since the 1970s.

Despite the vehemence of the claims, they were considerably muted in comparison to what had erupted in 1996, when a ten-year-old in Lexington, North Carolina was suspended for kissing a young girl in school. At that time, the major media were mobilized, with TV news and public affairs programming carrying interviews with proponents of various positions in organized debates. The theme of this political interpretation was the same in 1996 as it was in 2006:

70. Telephone interview with Nan Stein, supra note 55; see also Dvorak Uncensored, http://www.dvorak.org/blog/?p=4183 (Feb. 9, 2006, 02:02 EST) (depicting a cartoon of Jack and Jill).
71. Rose, supra note 38 (internal quotation marks omitted).
73. Id. (“If a male child told a teacher that a female child touched him, it would be passed off; but because it was a female student, it gets investigated.”).
74. See, e.g., Rose, supra note 58.
75. Ranalli & Mishra, supra note 2.
76. Id.
77. E.g., Editorial, Allow Room for Innocence, CALGARY HERALD, Feb. 11, 2006, at A28; Posting of Joel Mark to http://www.worldmagblog.com/blog/archives/022494.html (Feb. 9, 2006, 08:22 EST) (“Our culture protects and celebrates lewd and egregious forms of sexual chaos of all sorts in public, in print, in movies, on TV, in debate, in Super Bowl commercials, on cable, in internet, and on and on. We put real perverts on parade and are outraged if they are called perverts.”).
incident was a result of the power of feminist groups to colonize the law. In this second rendering, however, the incident was a consequence of the power of the media to suffuse our lives with sexuality. In both cases, it was about power. Indeed, Mrs. Dorinivil seemed to experience it as a matter of unjust power. No one contacted her about the incident, she reported, until “she was instructed to pick her son up from school.”78 “When I got there, they had all this paperwork in front of them,” she said, “They said they had already called the district attorney and school police.”79 From Mrs. Dorinivil’s perspective, the heavy arm of the law had fallen on her unannounced: “I was shocked. I was crying. I was out of control because I [saw] that this [was] not fair.”80 She was unable to explain to her son what was happening: “He doesn’t even know what that word ‘sexual’ is. I don’t see how I’m going to explain it to him . . . . I can’t. He’s just too young for that.”81

This religious, attentive, stay-at-home mother was incapacitated by the combined power of the school officials, the threat of the police, the referral to the district attorney, and in the critics’ accounts, the power of feminists and the media. Managing to keep the media at bay, she was unable to keep the law from her doorstep. In this situation, she did what a lot of people do under the circumstances: she found a way of resisting the bureaucratic procedures by following them literally.82 Following the demand to remove her son from school, she did not let him return. The school expected that the child would of course return following the three-day suspension. By insisting that the boy be moved to another school to avoid stigmatization, she required the school to fully embrace its own interpretation that the case was serious enough to warrant suspension and referral to the district attorney. Further, by picking up on the school’s literal use of policy, she directly challenged the school administration’s prerogative to determine a child’s placement.

Mrs. Dorinivil’s resistance exposed to public view the power institutionalized in the school bureaucracy—a routinized, compliant authority that conventional procedures did not seem to restrain or moderate. Whether it was an example, as some commentators claimed, of “cover your ass bureaucrats”83 trying to hide behind badly drawn policies, or genuine concern about harm to the little girl, they sacrificed another child. His stay-at-home mother had the time, it seems, to resist. Her resistance was unexpected and almost inconceivable, thus prompting the scandal. Had this happened in Newton, Wellesley, Weston, or Lexington—communities with considerably more affluent and professional populations than the blue collar, primarily black population of Brockton—the young boy’s family would have arrived at the school with lawyer in tow. The case would have been resolved on the spot without public notice, and it is unlikely that the child would have been suspended or assigned to another classroom.

C. “Boy’s Parents Hire Lawyer”84

A third line of interpretation involves the more familiar scenario in which a litigant retains counsel to regain rights threatened by another—the bread and butter of legal practice. In this account, we focus on the fact that once the story broke in the news, the Dorinivils did hire an attorney. “I want to stand to defend my rights,” Mrs. Dorinivil said.85 Because she hired an attorney, she was able to secure her child’s transfer to another school, receive an apology from the school system, and instigate a review of the school’s policy that led to formal changes. A month after the original incident, again with the help of her attorney, Mrs. Dorinivil obtained court-ordered access to her son’s full school record and all of the investigations of the incident to find out what actually happened.86 This legal engagement proved once again that we no longer live in “the nonlitigious days of Dick and Jane.”87 If the law is not seen as an absolute command as in the first interpretation, nor as a matter of brute political power as in the second set of interpretations, then in this third line of analysis, litigation is at least an option. There is room for maneuvering, engagement, and discretion all along the way. Viewed as a tactical resource, the law need not be invoked categorically.

Many of the teachers, principals, and school officials contacted by the media described alternatives that the Brockton schools could have pursued. Joan Vodoklys, principal of the McCarthy Elementary school in Framingham, Massachusetts, suggested that “[i]nstead of suspension . . . she would have first contacted the parents, and then would have asked a social worker or counselor to speak with the boy.

84. Jan, supra note 3.
85. Id. (internal quotation marks omitted).
86. Papadopoulos, supra note 5.
87. Editorial, Sex at 6?, supra note 69.
about his intentions.”88 “Giving the boy (and maybe the girl if she started it) some ‘time-out’ in the classroom might have been enough,” as some reports have suggested.89 A New York City school official said that the department does deal with sexual harassment by youngsters, but a typical punishment would not involve suspension: “It does happen, kids get curious,” but “[u]sually, the kids get put into counseling.”90 The Boston Herald suggested that “a stern lecture and a meeting between the teacher, the principal and the boy’s parents” were all that was necessary, “not a three-day suspension, a referral of ‘evidence’ to the DA and a permanent mark on [that] little boy’s reputation.”91 The Tulsa World suggested that “a quiet talk with the boy and maybe a report to the parents would have been sufficient.”92 “Rather than be suspended or branded a potential criminal,” one letter to the Boston Globe recommended, “the child should have been corrected and counseled as to what constitutes inappropriate touching.”93 A letter to the editor noted, “[A] competent elementary school teacher could have, and should have, handled the little incident in the classroom. They are just kids. Bravo to the mother for bringing it all public.”94 The principal in another Brockton school said, “Nine times out of 10 it’s about sitting down with them, talking with them, telling them about respecting each other’s personal body. . . . And nine times out of 10, you will never see that child again.”95 The general consensus was clear that “talking to this child was all that was needed”—by the teacher, the parents, or perhaps a professional counselor.96

Believing themselves constrained by the federal and state laws, and finding that “sexual harassment” was the only applicable category listed on official forms, the Brockton School suspended the six-year-old. Without legal representation, Mrs. Dorinivil was unable to influence or persuade the school to act otherwise; she was unable to mobilize a review process. With legal representation, however, and certainly with media coverage, the legal mandate became considerably less rigid. Alternatives were considered and negotiations ensued. The school system became less confident of its own action, reconsidered its legal obligations, reinterpreted the legal mandate, and finally apologized to the Dorinivil family. Just as importantly, the system formally changed its policy, as well as the forms for referring incidents of abuse between children to higher authorities. With this apology and the policy revision, the school officials demonstrated their discretionary, rather than mandatory, authority. Rather than a fixed, inviolate set of commands, the school system’s response to Mrs. Dorinivil’s attorney evinced an understanding of public policy as malleable, adaptable, and the product of engagement.

III. LOCATING THE RULE OF LAW IN CONVENTIONAL (HEGEMONIC) LEGALITY

Thus far I have displayed at least three interpretations of law that circulated in public discourse in response to the Brockton case. None of these accounts—whether the conception of law as (1) a set of procedures and rules of play that offer accessible and participatory decisionmaking, (2) a transcendent good that defers as it both confines and embodies coercive force, or (3) a tool of power that subordinates as it promises justice—is able to sustain, by itself, the pervasive deference to law that saturates American society. Let me be clear that I am not disagreeing with colleagues who locate deference to law in procedures or in conceptions of rights and legitimacy. But by themselves, they are not sufficient. A true description of how law lives and survives as a taken-for-granted set of practices is needed to encompass this deeper understanding.

As an ensemble, rather than discrete distinguishable threads, the collection of legal narratives works to constitute popular legal consciousness, or what we might call the rule of law. Any particular experience can fit within the diversity of the whole. Here, legality is understood to be both a set of ahistorical, universal principles and a set of pragmatic opportunities and strategies. It sustains itself, as hegemonic, because any singular account conceals the social organization of law by effacing the connections between the concrete particular and the transcendent general.98 It is both beyond the mess of mun-

88. Jan & Burge, supra note 42.
89. Hancock, supra note 34; accord Editorial, 6-Year-Old Predator?, supra note 56 (“School officials said a girl in the boy’s class told the teacher he had put two fingers inside the waistband of her pants. His mother said he told her he touched the girl’s blouse after she touched him.”).
90. Rose, supra note 58 (internal quotation marks omitted).
92. Editorial, Sex at 67, supra note 69.
94. Editorial, School Wrong on Boy, 6, PATRIOT LEDGER (Quincy), Feb. 18, 2006, at D4.
95. Papadopoulos & Downing, supra note 9 (internal quotation marks omitted) (quoting Frances Hoeg, the principal at Duval Elementary School).
98. Patricia Ewick & Susan S. Silbey, Common Knowledge and Ideological Critique: The Significance of Knowing That the "Haves" Come Out Ahead, in Litigation: Do the "Haves" Still Come out Ahead? 273 (Herbert M. Kritzer & Susan Silbey eds., 2003); see also Ewick & Silbey, supra note 82; Patricia Ewick & Susan S. Silbey, Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative, 29 LAW & SOC'Y REV. 197 (1995). For a more elaborate argu-
dane reality and securely located within daily affairs. To state the matter differently, legality is much weaker and more vulnerable where it is more singularly conceived. If legality were ideologically consistent, as our Platonic heritage has for so long urged, it would be quite fragile. For instance, if the only thing people knew about the law was its profane face of crafty lawyers and media-reported tort cases, it would be difficult to sustain the support necessary for legal authority. The aspiration for disinterested, procedurally regular decisionmaking serves to balance that cynical account, feeding the image of lady justice—the sacred, awesome, transcendental legality. However, a transcendent, reified law, unleavened by familiarity (and even the cynicism familiarity breeds), would in time become irrelevant. Law that becomes entirely procedural and without substance becomes legalistic.99 Either way—as solely god or as empty game—it would eventually self-destruct. Instead, legality is strengthened by the oppositions that exist within and among the narratives.

The Brockton case is both usual and unusual, banal and extraordinary. It is a very common example of what constitutes routine compliance—efforts to organize social relations in accord with legal requirements. As a relatively minor, street-level form of law enforcement, it is merely one of thousands—indeed, millions—of such actions that take place every day and constitute daily life in America. On the other hand, it is unusual in that it is an incident that moved several steps along the litigation process, from a perceived injurious event (the boy’s hand on his classmate’s back) through the stages of “naming, blaming, and claiming.”100 Although almost any social transaction could, in theory, become a matter of dispute and lead to legal claims, few in fact do.101 Even when people hire an attorney and then file suit, as Mrs. Dorinvil did, few cases actually go to trial. But Mrs. Dorinvil did get her hearing.102

When we speak of a rule of law, it is because most of legality lies submerged within the taken-for-granted expectations of mundane life. We might imagine this legality, this rule of law, as an iceberg whose mass lies beneath the articulated events of ordinary social life. Rather than contested and choreographed in the rare trial, legality “rules” everyday life because its constructions are mostly uncontested and habitual. Law’s constructions and mediations have been gradually sedimented and built up throughout the routines of daily living, just as each day of precipitation adds to the mass of the iceberg, some floating visibly above the waterline, the larger mass invisible below. Actions that become practices, habits, and then conventions help us to go through life in more or less unproblematic ways, without having to think about each step we take as we drive cars, cross streets, pay for groceries, or take our children to school. The conventions that become law are not different, helping to organize social relations, often without having to invoke, display, or wield the law’s elaborate and intricate processes—especially its ultimate, physical force.

Of course, this normative and legal sedimentation is never complete; we do not always stay within the boundaries of legally sanctioned expectations, and the reach of law is always disputed. Thus, much of the visible iceberg of legality is about what to do in the event of breach; some of those messes or matters of concern lead to litigation, and some even to trials. Importantly, however, these visible legal battles are the exceptions to the law’s more routine dominance.

The law is a durable and powerful human institution because it invisibly suffuses our everyday life. As we go about our daily lives, we rarely sense the presence of the law. Although law operates as a means for making things public and mediating matters of concern, most of the time it does so without fanfare, without contest, and without notice. We pay our bills because they are due; we respect our neighbors’ property because it is theirs. We drive on a particular side of the road because it is prudent; we register our motor vehicles and stop at red lights. We rarely consider the collective judgments and procedures through which we have defined “coming due,” “their property,” “prudent driving,” or why automobiles must be registered.

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102. Papadopoulos, supra note 5.
and why traffic stops at red lights. If we trace the source of these expectations and meanings to some legal institution or practice, the origin is so far away in time and place that the matters of concern and circumstances of invention have been long forgotten. As a result of this distance, sales contracts, property, and traffic rules seem to be natural and inevitable facts of life.

Legal objects, signs, forms, rules, and decisions are understood, however, to be a special kind of fact—a legal fact. Perhaps we should collapse the distance between the words “legal” and “fact,” using legal fact to emphasize the procedures of law that are the grounds for constructing facts. In other words, jurisprudence recognizes at its core that its truths are created only through its particular processes, and that the relationship between legal facts and empirical facts is approximate at best. The habits sustained by law and the interpretations of social relations underwritten by legal concepts or authorities may also function as legal facts.

As naturalized features of modern life, the signs and objects of law are omnipresent. Through historic as well as contemporary legal decisions that are no longer debated, countless matters of concern have been resolved, concretized, and objectified—built into the very structures of ordinary social relations. Every package of food, piece of clothing, and electrical appliance contains a label that warns us about its dangers, instructs us about its uses, and tells us whether (and where) we can complain if something goes wrong. Every time we park a car, dry clean our clothes, or check our coats, we are informed about limited liabilities for loss. Newspapers, television, novels, plays, magazines, and movies are saturated with legal images, while these very same objects display their claims to copyright.

Although much of the time, legal forms go unnoticed, they are imperfectly naturalized. At any moment, the stabilized, historical legal fact can reappear, perhaps becoming a matter of concern, debate, challenge, or resistance. Children attend school from ages five through sixteen in Massachusetts, as the General Laws and convention have required for the last 150 years. The fact that teachers monitor student interactions for sexual harassment and report such incidents to authorities, however, has not yet become habituated or uncontested, despite the legal mandate. Here, the visible iceberg of legality cracks and hits a passing ship. Most of the time, however, legal regulation goes without consideration or challenge.


107. Id. (internal quotation marks omitted).
fessional legal work. Instead, we might view these chairs as residue of that formal legal practice. Rather than a piece of professionalized law, this is a visual image of the law from the bottom up and from outside legal institutions. The chair in the shoveled-out parking spot signals to the neighborhood, or any passerby, a type of ownership. In claiming ownership, that chair often elicits the same sorts of deference and respect accorded more conventional types of property. Other drivers park elsewhere. Similarly, the violation or transgression of this property claim by removing the chair and parking in the spot may lead to conflicts and disputes more commonly associated with property as formally defined by the legal system—informal claims of trespass.

Without naming the doctrinal concepts of constructive or adverse possession, the person placing the chair in a clearing among mounds of snow implicitly invokes conventional and historic justifications for property on the basis of investment and labor, the same arguments that underwrote the emergence of liberal law in the seventeenth century. The heavy labor of shoveling out the mounds of snow is understood to endow the chairs’ owners with use rights in those spaces. By placing a chair in a public parking place, the formal legal idea of private property is appropriated along with many of the rights associated with it, such as exclusive use. Yet property here is construed very differently than its doctrinal sense demands or would allow. Even without registered deeds and titles, stamps and seals, the law is absent in its formal professional sense, but it is continually and morally present in organizing social relations on a city street around this particular construction of the automobile, the parking space, and private property.

The public street has its own “set of procedures, its definition of freedom and domination, its ways of bringing together those who are concerned . . . and what concerns them.” The legal facts of public space, the truth of who owns and who can use this space, for what and for how long, no longer command unremarked deference. Whether others defer to or contest the claims to the parking spots, the legal facts of property rights, the city’s services, and law enforcement now demand collective reconfirmation of their legitimacy.

The Brockton elementary schools, just as the public street with a milk crate holding dibs, become spaces of civic engagement for those concerned with children, schools, freedom, sexuality, and the law.

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