Conformity, Contestation, and Resistance: An Account of Legal Consciousness

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> Our sense of being a person can come from being drawn into a wider social unit; our sense of selfhood can arise through the little ways in which we resist the pull. Our status is backed by the solid buildings of the world, while our sense of personal identity often resides in the cracks.[1]

> [T]here is no single locus of great Refusal, no soul of revolt, source of all rebellions, or pure law of the revolutionary. Instead there is a plurality of resistances, each of them a special case: . . . resistances . . . are distributed in irregular fashion: the points, knots, or focuses of resistance are spread over time and space in varying densities, . . . inflaming certain points of the body, certain moments in life, certain types of behavior. . . . Just as the network of power relations ends by forming a dense web that passes through apparatuses and institutions, without being exactly localized in them, so too the swarm of points of resistance traverses social stratifications and individual unities.[2]

I. Introduction

This paper[3] begins with a story of one woman's experience of law. We then locate Millie Simpson's story as one among many that we are collecting as part of an effort to describe variations in legal consciousness, ways in which ordinary people - rather than legal professionals - understand and make sense of law. We suggest that this everyday understanding is a vital aspect of the life and power of law. Millie Simpson's story is then revisited and interpreted as a part of what James

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1. Erving Goffman, Asylums 320 (1961).
2. Michel Foucault, The History of Sexuality 95-96 (1980).
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Scott calls the "hidden transcript,"[4] activities and understandings shielded from public view in situations and practices of domination. These hidden transcripts contain forms of resistance that are "something like the hidden rites of vengeance with which the persecuted have a dark vent for their rage."[5] In our project, we pursue not only masked resistances to power and domination but also unarticulated, taken-for-granted acts and agreements that enact power while constituting normal social interaction. In particular, we seek the representations of law within these hidden transcripts. We do not see the law as something outside of social life, acting on or being acted upon; rather we are attempting to find the threads of law and legality within the tapestry of ordinary lives and everyday events.

II. MILLIE SIMPSON

For close to nine years, Millie Simpson[6] drove each weekday from her apartment in the South Ward section of Newark to the Richards' ten room, stone-faced colonial in suburban Short Hills where she worked as a domestic housekeeper. Although Millie could not afford a new model vehicle, nor reliable service, an automobile was nonetheless essential for traveling the ten miles to and from work. It was, in addition, necessary for the work she performed for the Richards family—picking up groceries, dry cleaning, and, in recent years, transporting Bob Richards' elderly parents around town, to the supermarket, to the hairdresser and to the barber shop. During these nine years, Millie had owned several, perhaps a half dozen, older, gas guzzling, American-made cars. The age and poor condition of the autos, accidents, and theft accounted for the frequent turnover in Millie's cars. There were several times during these nine years when Millie was without an automobile. She would then take a train from Newark, or have a friend drive her to the Richards' home and then use one of the family cars to do the household errands. Some years back, because Millie had difficulty finding an affordable car, the Richards gave her one of their ready to be discarded vehicles.

In late October 1989, Millie arrived at work by the Erie Lackawana railroad, cleaned the house, and left a note for Carol Richards saying that she could not drive and would be unable to do errands for a while. Carol Richards and Millie had found that notes left on the kitchen table proved to be the most reliable means of communication between them. Personal or telephone conversations were rare. Carol left for work before Millie arrived in the morning, and returned home after Millie

4. JAMES C. SCOTT, DOMINATION AND THE ARTS OF RESISTANCE: HIDDEN TRANSCRIPTS 202 (1990).

5. GEORGE ELIOT, DANIEL DERONDA (1896), *quoted in* SCOTT, *supra* note 4, at 1.

6. The names of the characters have been changed to protect their identity; the names of the locations, neighborhoods and cities are real.

left; they never got into the habit of telephoning because Millie's number was often changed and the service sometimes disconnected. Millie spoke regularly, however, with the younger Richards child, Judy, a teenage girl who was often at home in the afternoons. This is the story, as Millie told it to Judy, then Carol Richards, and to each subsequent inquirer, including ourselves.

Several months earlier, for a period of two to three weeks, Millie had parked her 1984 Mercury in front of her apartment building and had a friend drive her to and from work. She was short of cash and did not have the money to pay her insurance; she needed time to collect the cash and did not want to use the car while it was uninsured. Early one morning, the police arrived and served her with summonses for leaving the scene of an accident and having an uninsured vehicle. Millie was incredulous and explained that she had not been using the car because it was uninsured. The summonses were delivered nonetheless. When the police left, Millie was troubled that the police would not investigate her claims. She began making inquiries herself and found that her son's friend, who had been staying with her, had taken the keys to the car without her permission, and had driven her car into a car parked behind it. He then went for a ride and returned the car before the police arrived or Millie noticed that it had been missing. The car had been returned to the same spot that Millie had left it, but with a new dent in its rear.

Millie appeared in court on the day noted on the summonses. The judge asked her whether she wished to plead guilty; she replied no, she was not guilty. Millie thought the judge was surprised; he asked whether her car was insured and whether she had left the scene of an accident. She admitted that the car had not been insured, but stated that she had not been driving it and therefore was not involved in nor did she leave any accident. Her car had been used without permission by her son's friend and the young man had been in an accident. According to Millie, the judge said that he would mark her plea "not guilty because she was not driving the car" and that he would set another date for a hearing. Here there is some disagreement between Millie's account and the official record which indicates that Millie did plead guilty. The judge also asked whether she wanted a public defender and, after filling out some papers in another office in the courthouse, she was assigned a lawyer. A few weeks later, having never heard from her public defender, Millie appeared in court, once again without an attorney. The judge had a packet of papers in front of him, which Millie believed contained the information she had reported during her first appearance. As a result, Millie did not explain on this second appearance, as she had at the first, what had happened to her car. Without any discussion, she claims, the judge found her guilty, told her that her license was being suspended for a year, that she would have to

pay $300 in fines, and that she must serve fifteen hours of community service. The public defender showed up at this point, Millie says, after the judge finished with her.

Upon hearing Millie's story from their daughter and filling in details about the whereabouts of the car, the involvement of Millie's son's friend, Millie's actions and responsibility, and the lack of involvement of the public defender, Bob and Carol Richards decided to have an attorney see if anything could be done for Millie. Bob Richards referred the matter to the law firm that was counsel to his company. A litigator for the firm met with Millie. After investigating the status of the case in the court records and discovering that the record indicated that Millie had plead guilty, attorney David Stone filed a motion to have the case reopened and to withdraw the plea. Stone then appeared before the court, on the record, and testified that Millie Simpson had appeared in court a few weeks prior, without a lawyer, and although she had stated that she understood what was going on, she, in fact, did not recognize the seriousness of the charges nor the implications of being found guilty. Stone also spoke with the prosecutor's office who said that they would take no position and would be willing to reopen the case if the judge would do so.

Four to five weeks later, Stone and Millie again appeared before Judge Tyler, the same judge who had found Millie guilty, and with whom Stone had met to reopen the case. At this final appearance, attorney Stone presented the facts, the same facts that Millie had been reporting from the outset—that someone had taken the car, had been in an accident and had left the scene, but it was not Millie Simpson. No witnesses were called, no corroborating evidence was offered, and Millie was not asked to testify. The court found her not guilty and dismissed the charges. She was repaid that amount of the fine that had already been paid and her license was reinstated.[7]

III. Studying Legal Consciousness

Millie Simpson is one of 440 people we have interviewed in New Jersey as part of a study of the varieties of legal consciousness. The term "legal consciousness" is used by social scientists to refer to the ways in which people make sense of law and legal institutions, that is, the understandings which give meaning to people's experiences and actions.[8] In particular, we are attempting to map the intersections of

7. It is worth mentioning that Stone had served as a prosecutor in this same court for several years before entering private practice and was well acquainted with Judge Tyler. Stone believes that the previous relationship with Judge Tyler helped in the smooth process and disposition of the appeal. Nonetheless, he believes the outcome would have been the same no matter who Millie's lawyer was, as long as she *had* a lawyer.

8. In Max Weber, The Theory of Social and Economic Organization 101-

race and class with conceptions of law and legal institutions.[9] In this instance, Millie Simpson is an African-American woman, supplementing her $18,000 a year income as a domestic with several part-time jobs. Her employers, the Richards, are white. Bob Richards owns a nationwide service company that he built and Carol Richards is a health professional academic and administrator. Their combined income exceeds $350,000 per year. Some of the people we interview have appeared in minor criminal courts as did Millie, others in civil courts for

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02 (1947), Weber identifies "the subjective meaning-complex of action" as the object of sociology. He describes the subjective interpretation of action as an effort to understand human behavior in terms of "the concepts of collective entities." *Id.* at 102. These concepts are found, he writes, "both in common sense and in juristic and other technical forms of thought. . . ." *Id.* What is significant to Weber, moreover, is the dual character of action/consciousness in which thoughts or concepts "have a meaning in the minds of individual persons, partly as of something actually existing, partly as something with normative authority." *Id.* For Weber, ideas are real and powerful. Actors orient themselves to each other and to collective entities in terms of these ideas, concepts or consciousness. Weber suggests, for example, that "the 'existence' of a modern state . . . consists in the fact that the action of various individuals is oriented to the belief that it exists or should exist. . . ." *Id.* More recently, Roger Cotterrell, in *The Sociology of Law,* also claimed that the "[s]ociological study of law is "centrally concerned with the influence of ideas of action" but particularly with "ideas expressed in legal doctrine or presupposed by it." ROGER COTTERRELL, THE SOCIOLOGY OF LAW 120-21 (1984). But, he continues, sociology cannot treat those legal ideas as given but "must seek to understand their origins in social practices and . . . 'common sense.' " *Id.* at 121. *See* Susan S. Silbey, *Loyalty and Betrayal: Cotterrell's Discovery and Reproduction of Legal Ideology,* 16 LAW & SOC. INQ. 809 (1991) (analysis and critique of Cotterrell's work).

9. For the most part, empirical studies of legal consciousness have been studies of white working and middle class citizens. *See* CAROL J. GREENHOUSE, PRAYING FOR JUSTICE (1986); SALLY ENGLE MERRY, GETTING JUSTICE AND GETTING EVEN (1990); David M. Engel, *Cases, Conflict and Accommodation: Patterns of Legal Interaction in an American Community,* 1983 AM. B. FOUND. RES. J. 803; David M. Engel, *The Oven Bird's Son: Insiders, Outsiders, and Personal Injuries in an American Community,* 18 LAW & SOC'Y REV. 551 (1984); Sally Engle Merry & Susan S. Silbey, *What Do Plaintiffs Want: Reexamining the Concept of Dispute,* 9 JUST. SYS. J. 151 (1984); Barbara Yngvesson, *Making Law at the Doorway: The Clerk, The Court, and the Construction of Community in a New England Town,* 22 LAW & SOC'Y REV. 409 (1988). Although some of the studies of legal consciousness have focused on issues which are of salience to citizens of color (*see, e.g.*, KRISTIN BUMILLER, THE CIVIL RIGHTS SOCIETY (1988); Austin Sarat, *". . . The Law All Over": Power, Resistance and The Legal Consciousness of the Welfare Poor,* 2 YALE J. L. & HUMAN. 343 (1990)), they have seldom made systematic comparison across racial and ethnic groups. *See also,* LAWRENCE M. FRIEDMAN, TOTAL JUSTICE (1985); TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990); Lucie White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G,* 39 BUFF. L. REV. 1 (1990).

In the larger project from which this paper comes, we are better able to map the relationships between race, class and consciousness than we can in a reading of one case. According to our preliminary analysis of the completed interviews (440), we have approximated well the racial composition of four New Jersey counties: one primarily white, one with the largest concentration of hispanic persons, and two racially mixed counties (37% non-white, 20% non-white).

major cases, divorce proceedings, small claims, or as jurors. Other respondents in this research, however, have never appeared as a party, witness or juror in court. Court appearance or formal legal experience is not irrelevant in shaping legal consciousness, but neither is it necessary. We are interested in describing the varieties of legal consciousness of citizens whether or not they have had formal experience with those institutions.

This attention to legal consciousness derives from our interest in understanding the power of law and its role in social relations. In daily life, the term "law" denotes a great variety of phenomena. It may include the work of the United States Supreme Court, as well as the trial and appellate courts of the federal and state governments. It may also refer to the work of other legal professionals, legislators, law enforcement officers, agents, and inspectors. For many, the law beckons images of parking tickets, age restrictions for drinking, criminal enterprise, voting regulations, and taxes. Embedded within these diverse images, there is a persistent understanding of law as an instrument or tool,[10] an available device for arranging social affairs in a manner that can transcend the present and better predict the future.[11] Being an available device, the law may serve a multiplicity of functions from routine social control and dispute settlement to specific programs of social

10. Susan S. Silbey & Egon Bittner, *The Availability of Law*, 4 LAW & POL'Y Q. 399 (1982).

11. *See, e.g.*, Abraham Chayes, *Modern Corporations*, *in* THE CORPORATION IN MODERN SOCIETY 31, 32 (Edward S. Mason ed., 1959); *cf.* CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (1981). These authors emphasize the cooperative creation of mutual obligation through law. However, the capacity of legal forms to bind the future relies on its ability to call forth the organized force of the state. For discussions of the relationships between law and the use of force in social groups, see American Banana Co. v. United Fruit Co., 213 U.S. 347, 356-57 (1909) (Holmes, J.); MAX WEBER, MAX WEBER ON LAW IN ECONOMY AND SOCIETY (Max Rheinstein ed., 1966); MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY (Gunther Roth & Claus Wittich eds. & Ephraim Fischoff trans., 1968); 2 OLIVER WENDELL HOLMES ET AL., HOLMES-POLLOCK LETTERS 212 (Mark DeWolfe Howe ed., 1941). There is a rich body of literature distinguishing the concept of law as a body of rules *guaranteed* by force from the concept of law as a body of rules *about* force. *See* KARL OLIVECRONA, LAW AS FACT (1971); HANS KELSEN, GENERAL THEORY OF LAW AND STATE (Anders Wedberg trans., 1990); ALF ROSS, ON LAW AND JUSTICE (1959). *See also*, H.L.A. HART, THE CONCEPT OF LAW (1990) (view that force or coercion is a means for the realization of law rather than an essential feature of the concept of law itself). If law is not a body of rules guaranteed by force but a body of rules about force or rules that regulate coercion, as has been argued by Kelsen, Olivecrone, and Ross, a simplicity and elegance of formulation is achieved which seems to avoid recurrent problems of legal theory and raises the notion of law as the regulation of force to special status. A most concise and persuasive argument for law as a system of rules about force is found in Roberto Bobbio, *Law and Force*, 48 THE MONIST 321 (1965). For a related discussion, see Robert M. Cover, *Violence and the Word*, 95 YALE L. J. 1601 (1986).

engineering. Whatever functions and dysfunctions the law serves, however, it often reproduces norms, activities, and relationships that exist independent of law. In this sense, law is a particular re-creation, or reinstitutionalization, of social relations in a narrower, relatively discrete, and professionally managed context.[12]

We know that the uses of law come to define its content.[13] But the professional command of law, although often essential for accessing law, does not fully describe its use.[14] To know the uses of law, we need to know not only how and by whom the law is used, but also when and by whom it is not used.[15] The ways in which the law is experienced and understood by ordinary citizens as they choose to invoke the law, to avoid it, or to resist it, is an essential part of the life of the law.

Much legal scholarship, jurisprudential as well as empirical social scientific inquiries, has been less than fully satisfied with the ability of this instrumental conception of law - as an available device - to fully comprehend the place of law in society. Rather than simply offering a technique for serving and resolving particularistic demands, legal scholars as well as those who would use law as a political weapon, have more often claimed a higher purpose for law.[16] Minimally, such visions

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12. *See* Paul Bohanon, *The Differing Realms of the Law, in* THE ETHNOGRAPHY OF LAW, a special issue of 67 AMERICAN ANTHROPOLOGIST (pt. 2), 33 (1965).

13. For "canonical" statements of this position, see KARL N. LLEWELLYN, THE COMMON LAW TRADITION (1960); EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 5 (1949).

14. The professional agent is like the law itself, differentially available to consumer-citizens. Mapping the differential access to law and its professional agents is a central occupation of sociologists of law. It is important to note that the variable access to law is not simply a function of economic resources but an interaction between social class, gender, race, cultural norms, and the substantive provisions of legal doctrine. *See, e.g.*, DONALD BLACK, SOCIOLOGICAL JUSTICE (1989); MATTHEW SILBERMAN, THE CIVIL JUSTICE PROCESS (1985); DAVID TRUBEK ET AL., THE CIVIL LITIGATION PROJECT FINAL REPORT (1983); Jerome E. Carlin et al., *Civil Justice and the Poor: Issues for Sociological Research*, 1 LAW & SOC'Y REV. 9 (1966); Leon Mayhew & Albert Reiss, *The Social Organization of Legal Contacts*, 34 AM. SOC. REV. 309 (1969); Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974) [hereinafter Galanter, *Why the "Haves" Come Out Ahead*]; Marc Galanter, *Afterword: Explaining Litigation*, 9 LAW & SOC'Y REV. 347 (1975); 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*, 31 UCLA L. REV. 4 (1983); Richard E. Miller & Austin Sarat, *Grievances, Claims and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525 (1980-81).

15. *Cf.* MATTHEW A. CRENSON, THE UN-POLITICS OF AIR POLLUTION (1971); *see also* David Engel & Eric Steele, *Civil Cases and Society: Process and Order in the Civil Justice System*, 1979 AM. B. FOUND. RES. J. 295.

16. For a strong version of a higher or natural law perspective, see LEO STRAUSS, NATURAL RIGHT AND HISTORY (1953); *cf.* Philip Selznick, *Natural Law and Sociology*, 6 NAT. L.F. 84 (1961); HADLEY ARKES, FIRST THINGS (1986). Even where claims of moral ordering are absent or weak, much jurisprudence argues for a rational ordering that is not merely an instrumental regulation. *See, e.g.*, JOHN

conceive of the law as a form of normative ordering: in other words, the framework of obligations and responsibilities attached to citizenship. In this view, we talk about a "legal" system because, as Llewellyn wrote nearly a half century ago, law makes us "go around in more or less clear ways."[17] Even though the law makes provision for its violations as an essential element, the law is more often obeyed than breached. In our research we are trying to see how the law makes us go around in more or less clear ways, and what those ways are. We seek access to the meaning of law in the lives of ordinary citizens - the ways in which commonplace transactions and relationships come to assume or not to assume a legal character, and the ways in which the shape of everyday life is informed by law. Studies of legal culture and consciousness attempt to address these questions about the place and meaning of law in the lives of ordinary citizens.

A. *Consciousness as Attitude*

Some scholars conceptualize consciousness as the ideas and attitudes of individuals which determine the form and texture of social life. In brief, this conception of consciousness suggests that social groups of all sizes and types (families, peer groups, work groups, corporations, communities, legal institutions, and societies) emerge out of the aggregated actions of individuals. The classical liberal tradition in political and legal theory employs this conception of consciousness. According to this approach, "political society is . . . an association of self-determining individuals who concert their wills and collect their power in the state for mutually self-interested ends."[18] Here, consciousness consists of both reason and desire. However, according to liberal ideology, desire, which remains unexamined and unexplained, "is the moving, active, or primary part of the self . . . . What distinguishes men from one another is not that they understand the world differently, but that they

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RAWLS, A THEORY OF JUSTICE (1971); LON FULLER, THE MORALITY OF LAW (1964); Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975).

17. KARL N. LLEWELLYN & E. ADAMSON HOEBEL, THE CHEYENNE WAY 20 (1941).

> Law has as one of its main purposes to make men go around in more or less clear ways; law does in fact to some extent make men go round in more or less clear ways. Law purposes to channel behavior in such manner as to prevent or avoid conflict; and law does in important degree so channel behavior. Without the purpose attribute, law is unthinkable; without the effect attribute, law cannot be said to "prevail" in a culture, to have "being" in it.
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> But there is more to law than intended and largely effective regulation and prevention. Law has the peculiar job of cleaning up social messes when they have been made. Law thus exists also for the event of breach of law . . . .

Id.

18. Robert Paul Wolff, *Beyond Tolerance*, *in* A CRITIQUE OF PURE TOLERANCE 5 (1965).

desire different things even when they share the same understanding of the world."[19] Here, human personality is independent of history; man can and does make history.

Following this "attitudinal" conception of legal consciousness, much post-World War II American social science attempted to document the variation in beliefs, attitudes and actions among American citizens as a means of explaining the shape of American political and legal institutions. Ironically, despite the central focus on the capacity of individual desires, beliefs, and attitudes to shape the world, the resulting research described not individual variation but deep, broad-based normative consensus. While citizens expressed persistent skepticism about the fairness of legal institutions, they appeared to be committed to both the desirability and possibility of realizing legal ideals of equal and fair treatment.[20]

Recently, Tom Tyler and Alan Lind have documented American citizens' attachment to these same ideals of fairness and due process, what is now characterized as procedural justice.[21] Tyler and Lind demonstrate that people evaluate their legal experiences in terms of the processes and forms of interaction rather than the outcomes of those interactions.[22] In other words, attitudes about the law correlate strongly with judgments about the fairness of procedures used by legal authorities rather than with whether the person won or lost in that process. People care about having neutral, honest authorities who allow them to state their views and who treat them with dignity and respect.[23] This attitudinal research suggests that if the "haves come out ahead,"[24] it is because citizens value procedure more than substance. The stratified structure of the legal system is thus sustained by a "procedural consciousness" represented in citizens' commitments to formal rather than substantive equality.

B. *Consciousness as Epiphenomenon*

At the other end of the continuum of conceptualizations of consciousness, some scholars regard consciousness as a by-product of the

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19. ROBERTO UNGER, KNOWLEDGE & POLITICS, 39-40 (1975).

20. For a review of this literature, see Austin Sarat, *Studying American Legal Culture: An Assessment of Survey Evidence*, 11 LAW & SOC'Y REV. 427 (1977).

21. E. ALAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988). *See also* JOHN W. THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975); Blair H. Sheppard, *Justice is No Simple Matter: Case for Elaborating Our Model of Procedural Fairness*, 49 J. PERSONALITY & SOC. PSYCHOL. 953 (1985); Melvin J. Lerner & Linda A. Whitehead, *Procedural Justice Viewed in the Context of Justice Motive Theory*, *in* JUSTICE AND SOCIAL INTERACTION 219 (Gerold Mikula ed., 1980).

22. TYLER, *supra* note 9.

23. *Id.* at 138.

24. Galanter, *Why the "Haves" Come Out Ahead*, *supra* note 14, at 95.

operations of social structures rather than the formative agent in shaping structures. Thus, structuralist and Marxist scholars argue that individuals are only the bearers of social relations, and consequently, social relations, not individuals, are the proper objects of analysis.

Following this perspective, some scholars view both law and legal consciousness as epiphenomenal, that is, a particular economic structure produces a corresponding or appropriate legal order. The work often describes how the needs of capitalist production and reproduction mold legal behavior and consciousness. Studies focus on the production and practice of law, its accommodation to class interests, and the stratification and inequities that result.[25]

Recent research in this structuralist perspective suggests that the legal order develops in response to conflicts and inconsistencies generated by the capitalist mode of production rather than as a direct instrument of particular class interests. "To legitimize the inconsistencies and irrationalities born of the contradictions of the economy the legal order constitutes myths, creates institutions of repression and tries to harmonize exploitation with freedom, expropriation with choice, inherently unequal contractual agreements with an ideology of free will."[26] Nonetheless, even in this more complex formulation, law and legal consciousness are still products rather than producers of social relations.[27]

An alternative view within the structuralist tradition looks at legal consciousness as one of the ways in which social organizations produce the means of authorizing, sustaining and reproducing themselves. By focusing on the legitimating functions of law, research describes the ways in which law helps people see their worlds, private and public, as

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25. GABRIEL KOLKO, THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900-1916 (1963); GABRIEL KOLKO, RAILROADS AND REGULATION, 1877-1916 (1965); Peter Linebaugh, *The Tyburn Riot Against the Surgeons*, *in* ALBION'S FATAL TREE 65 (Douglas Hay et al. eds., 1975); PETER LINEBAUGH, *Karl Marx, the Theft of Wood, and Working Class Composition in* CRIME AND CAPITALISM 76 (David Greenberg ed., 1981); FRANK PEARCE, CRIMES OF THE POWERFUL: MARXISM, CRIME AND DEVIANCE (1976); Don Wallace & Drew Humphries, *Urban Crime and Capitalist Accumulation: 1950-1971*, *in* CRIME AND CAPITALISM 140 (David Greenberg ed., 1981); J. ALLEN WHITT, URBAN ELITES AND MASS TRANSPORTATION: THE DIALECTICS OF POWER (1982); Harold Barnett, *Wealth, Crime, and Capital Accumulation* 3 CONTEMP. CRISIS 171 (1979); William Chambliss, *A Sociological Analysis of the Law of Vagrancy*, 11 SOC. PROBS. 67 (1964); Sidney L. Harring, *Class Conflict and the Suppression of Tramps in Buffalo 1892-94*, 11 LAW & SOC'Y REV. 873 (1977).

26. WILLIAM CHAMBLISS & ROBERT SEIDMAN, LAW, ORDER AND POWER (2d ed. 1982).

27. Some of this literature has focused on "false consciousness," or the inability of subjects, especially members of the working-class, to perceive their true interests or recognize opposing interests. *Cf.* Alan Hunt, *The Ideology of Law: Advances and Problems in Recent Applications of the Concept of Ideology to the Analysis of Law*, 19 LAW & SOC'Y REV. 11 (1985); Isaac D. Balbus, *The Concept of Interest in Pluralist and Marxian Analysis*, POL. & SOC'Y 151 (1971).

natural rather than constituted through social interaction.[28] Balbus, for example, argues that features of liberal law, such as the highly prized claims to formal equality, serve to buttress and legitimate the inequality of the existing economic order. The formal equality instantiated in due process rights provides "a stable and apparently neutral framework from which bourgeois class interests in accumulation and profit maximization can flourish"; but due process and formal equality also help convince "the 'propertyless' that they have the legal right and, hence, the real opportunity of rising into the bourgeoisie."[29] Balbus also contends that the specific form of liberal law reproduces the essential characteristics of capitalism in what he calls the commodity form of law.[30] He suggests that, in both capitalism and liberal law, generalized mediums of signification and exchange (e.g. money, the individual, rights) are used to obscure and distort the variation within those categories. Although this approach moves us closer to examining how people think and use legal institutions, too often this work has been highly theoretical and abstract, and difficult to connect with observations of particular legal practices and institutions.

C. *Consciousness as Cultural Practice*

We have found that when we listen to the stories people tell us about events in their lives, about their neighborhoods, about buying and selling goods, about dealing with public officials in schools, local government agencies, and registries, they reveal a complexity that belies either of these conceptions. Thus, in place of either of the above conceptualizations, we conceive of consciousness as part of a reciprocal process in which the meanings given by individuals to their world, and law and legal institutions as part of that world, become repeated, patterned and stabilized, and those institutionalized structures become part of the meaning systems employed by individuals.[31] We understand consciousness to be formed within and changed by social action.[32] It is, then, "less a matter of disembodied mental attitude than a broader set of practices and repertoires,"[33] inventories that are avail-

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28. *See* Peter Gabel, *Reification in Legal Reasoning*, *in* 3 RESEARCH IN LAW AND SOCIOLOGY 25 (Steven Spitzer ed., 1980); EUGENE GENOVESE, ROLL, JORDAN, ROLL (1976); COLIN SUMNER, READING IDEOLOGIES: AN INVESTIGATION INTO THE MARXIST THEORY OF IDEOLOGY AND LAW (1979); Janet Rifkin, *Toward a Theory of Law and Patriarchy*, 3 HARV. WOMEN'S L.J. 83 (1980);.

29. ISAAC D. BALBUS, THE DIALECTICS OF LEGAL REPRESSION: BLACK REBELS BEFORE THE AMERICAN CRIMINAL COURTS 6 (1973).

30. Isaac D. Balbus, *Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law*, 11 LAW & SOC'Y REV. 571 (1977).

31. ANTHONY GIDDENS, SOCIOLOGY: A BRIEF BUT CRITICAL INTRODUCTION (1987).

32. Gordon Marshall, *Some Remarks on the Study of Working-Class Consciousness*, 12 POL. & SOC'Y 63, 288 (1983).

33. RICK FANTASIA, CULTURES OF SOLIDARITY 12 (1988).

able for empirical investigation.[34]

Conceptualized in this way, consciousness is neither fixed, stable, unitary, nor consistent. Instead, we see legal consciousness as something local, contextual, pluralistic, filled with conflict and contradiction. The ideas, interpretations, actions and ways of operating that collectively represent a person's legal consciousness may vary across time (to reflect learning and experience) or across interactions (to reflect different objects, relationships or purposes). To the extent that consciousness is emergent in social practice and forged in and around situated events and interactions (a dispute with a neighbor, a criminal case, a plumber who seemed to work few hours but charged for many), a person may express, through words or actions, a multi-faceted, contradictory, and variable consciousness.

Although legal consciousness may be, according to this perspective, emergent, complex, and moving, nonetheless, it has shape and pattern. The possible variations in legal consciousness are situationally and organizationally circumscribed. Rather than talking about meaning as an individualized process, we emphasize that there are, within any situation or setting, only a limited number of available interpretations for assigning meaning to things and events. Similarly, access to and experience within the situations from which interpretations emerge is differentially available. Here, attention to consciousness emphasizes its collective construction and the constraints operating in any particular setting or community, as well as the subject's work in making interpretations and affixing meanings.

Millie Simpson's story, as she told it to us, and as we learned more about it by interviewing her employers and the attorney who represented Millie on her appeal, illustrates the complex and varied character of legal consciousness. Millie's story also illustrates the power of institutionalized authority and the constraints and opportunities such authority presents for the construction of legal consciousness. Over the course of months, engaged in different sorts of interactions and with various players, Millie at times went around more or less clear ways, as directed by the law. At times, however, she by-passed these paths. Millie brought to the court certain dispositions, practical involvements, and particularistic relationships, all of which appear in her narrative and are necessary to understand the events as Millie experienced them. Embedded in Millie's account are stories of acquiescence, resistance, and contestation.

According to Michel de Certeau, everyday practices typically occur within "the space of the other,"[35] that is, the places, rules, vocabularies, taxonomies and discourses of institutions. These everyday practices

34. Ann Swidler, *Culture in Action: Symbols and Strategies*, 51 AM. SOC. REV. 273 (1986); PIERRE BOURDIEU, AN OUTLINE OF A THEORY OF PRACTICE (1977).

35. MICHEL DE CERTEAU, THE PRACTICE OF EVERYDAY LIFE 37 (1984).

can be thought of as tactical insofar as they are maneuvers within a terrain organized and imposed by a "foreign power."[36] By contrast to tactics, strategic practices, such as those of courts and law, lay claim to an autonomous place of their own, a "propre." Deprived of such a place, tactical practices are commensurately disadvantaged. A tactic

> does not, therefore, have the options of planning general strategy and viewing the adversary as a whole within a district, visible, and objectifiable space. It operates in isolated actions, blow by blow. It takes advantage of "opportunities" and depends upon them, being without any base where it could stockpile its winnings, build up its own position, and plan raids. What it wins, it cannot keep. . . . It must vigilantly make use of the cracks . . . in the surveillance of proprietary powers. It poaches in them. It creates surprises in them. . . . It is a guileful ruse.[37]

Despite being opportunistic and transient, tactical engagements with such institutional powers are a critical, albeit often neglected, element of consciousness. As Erving Goffman observed, "[o]ur sense of being a person can come from being drawn into a wider social unit; our sense of selfhood . . . [however,] arise[s] through the little ways in which we resist the pull. Our status is backed by the solid buildings of the world, while our sense of personal identity often resides in the cracks."[38] It is out of the play of strategy and tactic, of power and resistance, that Millie's legal consciousness emerges.

IV. Millie Simpson Revisited

As Millie described her experience to us, we were first struck by the ways in which she accepted the interpretations and conformed to the instructions of each of the legal actors with whom she interacted. Although knowing she was not guilty of driving an uninsured vehicle or leaving the scene of an accident, she dutifully fulfilled the obligations imposed by the summonses, accepting her legal guilt, immediately taking responsibility for the penalties the court imposed, and arranging to pay her fine and to fulfill her community service.

Millie's interventions during her first appearance conformed to the script offered by the court. When asked, she denied leaving the scene of the accident and explained herself to the judge:

> Then, I go to court and the judge asks me do I plead guilty? I am not guilty. Then he says to me "your car without insurance?" My car didn't have no insurance on it so I said "I plead guilty." So I was explaining to him what happened but he finds out that I wasn't driving the car. . . . So then he said, after I explained it to him, he tells me, um, he said "Okay, um, I can't put down guilty because you weren't driving the car," right? So he said "I'll put down not guilty and make another date

36. *Id.*
37. *Id.*
38. Goffman, *supra* note 1, at 320.

for you to come back."[39]

Millie assumed the judge had been persuaded by her story when he seemed to record her explanation, appointed a public defender and set a date for a second hearing. Her participation in this first court appearance was verbal and timely, but it was, she thought, transformed and emboldened by writing into something else. She believed her account had entered and become part of the court's institutional territory. Paper, colonizing space, after all, concretizes and makes both visible and intransient the fleeting and temporal interventions. By occupying paper Millie believed that she could enter the realm of strategic power. Her case, as she properly understood it, was spatialized and rendered visual: recorded, filed and placed on a docket. She believed that this physical rendering of her story would provoke the judge's memory when he read "the paper." "When you go to court," she said, "they remember you, you know, you haven't been gone that long. I wasn't gone that long, you know, a lot will remember you because they read the *paper*."

An outsider, inexperienced in the ways of the "propre," Millie assumed her second appearance would be continuous with her first. Thus, when she returned to the court, she thought there was no need to repeat herself by introducing the same details about not driving the car or not leaving the scene, which were revealed in her first court appearance. "I didn't tell the story because he, he, had the paper there in front of him, I assumed. . . , I assumed that he knew what the deal was."

In fact, rather than the continuity provided by shared interaction and memory, Millie's interactions within the court, being embodied by "the paper" in physical rather than temporal space, were transformed into two distinct and unconnected points: court appearance one and court appearance two. The rules, taxonomies and operating procedures of the court flattened and froze time into these separate occasions. The spatialized modes of knowledge abstracted the actors from their continuing interactions and arranged them in static impersonal roles, moments, and performances. The court drama—the meanings and interpretations of both the events and Millie's legal identity—derived from her position in, or more appropriately her juxtaposition to, impersonal standards, forms and records, rather than the context and experience of on-going interactions and relationships. The human interaction that Millie believed was to be embodied in the paper was instead pre-empted by it.

For Millie, the spatialization of her story in the form of paper also endowed it with authority. For nine years, Millie had received written

39. The quoted statements are taken from transcripts of interviews conducted for the project conducted by Susan S. Silbey & Patricia Ewick, entitled: Varieties of Legal Consciousness: The Place of Law in the Lives of Ordinary Americans (1991) (unpublished transcript on file with Susan S. Silbey and Patricia Ewick).

instructions from her employer: what groceries to buy, what rooms to clean, whom to pick up. All of her duties as a housekeeper were recorded daily in notes left on the kitchen table. These instructions gave shape, content, and direction to Millie's day. Arriving every morning, she simply had to do what the paper said. The same was true, she assumed, for the judge. Millie described events juxtaposed, statements made, even actions observed, in a world conspicuously absent human agency or will. Millie's perception of the court and the judge mirrored her own experience of the world: a space in which things happen to people rather than one in which people do things. Even the judge, in Millie's words, "just had to read the paper and do what it said." Continuity, cause and effect are absent. This is not, however, because Millie recognized no moral realm, no structural whole, nor because she was oblivious to agency. For Millie, the central ordering principle was so obvious, so necessary, so present as not to require articulation. For Millie, the order of things, the power of the state, the comfort and ease with which white folks negotiated these matters was simply there; it did not need to be stated. For Millie, things simply happened within this terrain; they did not need to be explained.

During our interviews with Millie, she expressed skepticism for the first time when telling about her second court appearance: "Some of them probably don't even read the paper, they just read what they need to read to find out why you there. . . . That second judge, he acted like he didn't know why I was even back there, you know." Here, Millie recognized the limits of the paper to order and organize human interaction, as well as the opportunities these limits afforded for human agency. Millie entered the terrain of the court frightened and confused, she said, momentarily spotlighted by the "foreign" but powerful order. She hoped to exit quickly; she left, she said, disappointed, but somewhat more experienced in the ways of the "propre."

Embedded in Millie's account of conformity and acquiescence, is also a story of resistance. Millie's resignation and submission before the law was belied by a tactical maneuver of the sort de Certeau describes. In telling us about arranging for her community service, required as one of the three penalties for conviction on the two charges, Millie paused, laughed, and informed us, conspiratorially, that she had suggested to the court officer that she work at a church where she had, for a number of years, been doing volunteer work. "I do it anyway. (small laugh) I do it anyway, you see? So it wasn't no problem, you know, so he signed the paper and said it would be all right for me, you know, to work, but I do it anyway."

By suggesting this work as fulfillment of her legal obligation to perform community service, Millie successfully insinuated her life into the space of the law and, in doing so, reversed for a moment the trajectory of power. She combined heterogeneous elements of her biography—

churchgoer, volunteer, defendant—to create and seize an opportunity to enter the space of the law, making it "habitable."[40] Moreover, her victory was more than momentary. As Millie took the trouble to note, "he signed the paper." Thus, with her ruse, she succeeded, where earlier she had failed, to infiltrate the dominant text.

In the transcript of our interview with Millie, there is a second, distinctive moment of laughter and pleasure. Millie described to us how she caught the law out; she discovered one of those institutional vulnerabilities, those cracks that Goffman describes.[41] When she was leaving the court, arranging the payment schedule for her fines and her community service, Millie was not asked to turn in her license. She left the court, license in hand. She concluded that although she had been convicted, they had forgotten to enact this penalty. Since she had the license, she believed that she could still drive, but, she told us, she chose not to. Millie enacted her vision of being a good woman and a good citizen, even though the court had decided otherwise.

In both of these instances, Millie submitted to the law's authority and accepted the burden it imposed, but did so without having to bear its full weight. She deflected the law's power, without challenging it. She "escaped" it, without leaving it.

But Millie's story does not end with her tactical resistance to the court's apparent victory. Millie returned to the court several weeks later, this time with a local attorney experienced in both formal and local legal strategies. Now, armored by the Richards' assistance, Millie returned to contest the court within its own terms, within the space of the law. Part of this challenge involved redefining and recharacterizing the persons and events Millie had previously related in her terms. Stories were transformed into testimony, a borrowing without permission became a theft, and a tardy public defender became a conviction without benefit of counsel. Millie's account of how her son's friend had taken her car without permission was transformed by attorney Stone into testimony before the court about an automobile theft. A misunderstanding becomes a crime. Millie is identified, not as a mother whose house guest misunderstood her hospitality but as a victim of crime. The fact that the public defender had shown up late for Millie's trial was no longer just a mix up and bad timing but, in the appeal to the court, became evidence of a failure of due process and grounds for a new trial.

These interventions relied upon and mobilized carefully crafted legal constructions to achieve specific instrumental objectives. Less concerned with moral rectitude, biography, identity or sensibility, Millie's contestation is now articulated explicitly within the discursive space of the law. It is a public engagement and official victory, rather

40. DE CERTEAU, *supra* note 35, at xxi.
41. GOFFMAN, *supra* note 1, at 320.

than the private pleasures of her resistance. Although clearly more consequential than her previous tactics of resistance, Millie seemed mystified by and almost indifferent to the contest waged on her behalf:

> I met him there and waited for them to call me and ah, they called me and we went up, you know, to the table. And I don't even know what the judge said, I couldn't even understand what he was saying. And the lawyer told me, he said "okay," he said "that's it, it's all over." I was right there and I don't even know . . . I didn't even know what he was talking about.

For the Richards, and for many of those who more routinely contest within the space of the law, the legal engagement is enacted with a sense of routine and entitlement, perhaps merely one of a variety of experiences used to establish social position, defend personhood and construct identity. Millie's contestation relied, in the end, on her access to the Richards' experiential and financial resources. Acting as her patrons, Bob and Carol Richards extended the reach of their routinized and strategic participation in a market of segmented, functional, and commodified transactions to include Millie.

Thus, relying on her subordinate position in one realm, Millie was able to escape her subordination in another. That Millie was able to successfully contest the law makes hers an atypical story. The contest was premised upon her particularistic relationship with a relatively powerful employer. For most of those without power or position, the only alternative to conformity is resistance: poaching, appropriation, or silence.

V. Conclusion

Millie Simpson's story reveals the multiple and contingent character of legal consciousness. Forged out of the play of choice and constraint, Millie's legal consciousness reflected both the institutionalized strategies practiced by the court and her tactical resistances. Millie Simpson's race, class and gender, expressed in the specific elements of her biography, shaped her experience within the court and enabled the particular forms of her consciousness. Her conformity, including her faith in and deference to the paper, echoed her experiences as a domestic where she daily received and followed written instructions. Her tactical evasions relied on her membership in a church and her history of volunteering. Her contest was conditioned by her dependent relationship to her more experienced and wealthy employers.

Emphasizing Millie's conformity, her tale can be read as an illustration of the hegemonic power of law. Millie's story revealed her submissiveness and deference to the overwhelming power of institutionalized processes of the law. Upon entering the court, Millie believed in the process. She followed its rules and deferred to its procedures. She never missed nor came late to a court date. The system seemed to work as she had heard about it from friends with whom she spoke. They had

talked about the long waits, the high bench behind which the judge sat, how the court was filled with lots of people milling around while the defendants sat in rows in the back of the room, and how the police had a space that seemed to be their place in the court. It was a regular courtroom, she commented to us; it looked like it did on television. This was how things were supposed to be. She recognized it and went along.

But Millie's experience is not merely one of conformity; she also engaged the legal terrain and contested its rules. Here, Millie refused to accept the law's determination and mobilized extra-legal resources to successfully challenge it. Millie Simpson won her appeal, in spite of, not because of due process protections. Legal processes may have vindicated Millie, but her vindication did not depend on her status as a citizen and the universal rights that status supposedly guarantees. Rather, Millie's vindication depended upon her participation in an approximation to that feudal order that liberal law historically opposed. Carol Richards commented to us that this was "the typical story of American racism. To get justice, the poor black woman needs a rich white lady." In this telling, the story ends with Millie's reinscription in a system of domination from which the law provides no exit.

From another perspective, Millie Simpson's story is neither one of total subordination, nor contest. It is also a story of resistance. Foucault used the word "esquiver," a fencing term meaning to dodge or feint, to describe forms of resistance such as Millie's. These tactics are a sort of anti-discipline, which, like the disciplinary power they oppose, are dispersed and invisibly distributed throughout everyday life. Successful dodges, ruses, and feints such as these rarely leave a structural imprint. Neither the law nor the sentencing practices of New Jersey were changed or challenged by Millie's evasive tactics. Still, they were not inconsequential. For with the successful dodge, the sword too misses its mark and it, too, leaves no imprint. For a moment, through fortuity and guile, power, from Millie's point of view, was rendered impotent. Millie took immense pleasure in the ruse she played on the court. While she was relatively disengaged in the legal contest orchestrated by attorney Stone, Millie Simpson was triumphant in her private victory won within the cracks of the institution.

The fact that tactical resistances, such as Millie Simpson's, are momentary and impermanent victories of the powerless, contingent upon opportunities presented, rather than created, means that they are often dismissed as trivial, having little, if any, political significance. Yet, to dismiss tactical resistance on the basis of political insignificance is to transform a series of empirical questions about the relationships between resistance and social change into a theoretical assumption. As Milovanovic and Thomas have observed in relation to the often futile exercises of jail house lawyers, "[p]recisely when an act becomes transformed from mundane practice to rebellious praxis is an empirical

question, and the effects of an act may not be visible until some future date."[42] To examine that empirical question necessitates acknowledging the often unseen and unrecognized practices of the weak against the strong. Resistance, to the extent that it constitutes forms of consciousness, ways of operating and making do, may prefigure more formidable and strategic challenges to power. Through everyday practical engagements with power, individuals identify the cracks and vulnerabilities of institutions such as the law. A consciousness of these openings may be a necessary, if not sufficient, precursor of political resistance.[43]

Each of these readings of Millie Simpson's story is part of the project of describing social relations of power. Rather than a sentimental celebration of weakness, serious attention to tactics of resistance, the basis of conformity, and the mobilization of contestation affords a fuller description of power. The forms of Millie's consciousness emerged from the institutional power against which they operated; the stories of conformity, contest, and resistance expose the techniques of power. Regardless of their political significance, these "hidden transcripts," these "tales of the unrecognized,"[44] stand as important in their own right. They remind us that "our practical daily activity contains an understanding of the world—subjugated perhaps, but present."[45] The discernible variations in legal consciousness represent the ambivalent and shifting experiences and understandings of men and women as they move through legal institutions and other arrangements of power. As Millie's story illustrates, the moments of resistance are often the most memorable parts of the journey. To ignore Millie's tactics because they are momentary and private is to reinscribe the relations of power they oppose. To overlook these interventions is to deny their meaning within Millie Simpson's particular biography and her relationships with the law, church, and employer. To dismiss these momentary feints and ruses is to deny the dimensions of Millie's identity forged in the cracks of the law.

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42. Dragan Milovanovic & Jim Thomas, *Overcoming the Absurd: Prisoner Litigation as Primitive Rebellion*, 26 SOC. PROBS. 48, 57 (1989).

43. James Scott suggests that:

> paying close attention to political acts that are disguised or offstage helps us to map a realm of possible dissent. Here, I believe, we will typically find the social and normative basis for practical forms of resistance (for example, what masters called shirking, theft, and flight by slaves) as well as the values that might, if conditions permitted, sustain more dramatic forms of rebellion. The point is that neither everyday forms of resistance nor the occasional insurrection can be understood without reference to the sequestered social sites at which such resistance can be nurtured and given meaning.

SCOTT, *supra* note 4, at 20.

44. DE CERTEAU, *supra* note 35, at 68.

45. Nancy Hartsock, *Foucault on Power: A Theory for Women?*, *in* FEMINISM/POSTMODERNISM 172 (Linda J. Nicholson ed., 1990).

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