FROM THE EDITOR

One of the reasons why social behavior is so much harder to understand than other phenomena is that it has meaning, both for the actor and for the observer. This is particularly true of law, which is preeminently an expression of values. A central question in the social theory of law has therefore been: what is the normative meaning of law for social actors? The answer to that question is often influenced by the values which the *theorist* attributes to the law. Isaac Balbus, in his article in this issue, denominates two extreme responses as instrumental pluralism and instrumental marxism. The first perceives law under western liberal capitalism as an ideal harmonization of the values of all citizens. The second sees that law as pure exploitation, an instrument of naked ruling class domination. All of the writers in this issue reject both extremes. The relationship—between the values of social actor or analytic observer, and legal reality—is far more complex. That complexity is often expressed as the "relative" autonomy of law, although the phrase may be more elliptical than illuminating. The recognition that law is related to, but also partly autonomous from, both economic infrastructure and normative superstructure, is obviously the beginning of analysis, not the end. Perhaps the most important contribution of the articles that follow is their determination to study those relationships empirically, rather than deducing them from ideological presuppositions, as has so often been done in the past.

But beyond this agreement on what is worth studying, there is considerable divergence. Perhaps the most fundamental difference is whether the ethical ideals of liberal capitalism can be realized in its legal system. There is a fair degree of consensus that among the most important of these ideals are equality, individuality, and community, although obviously writers can mean different things by these concepts. Indeed, Sarat's article collects a great deal of empirical evidence that Americans' most fundamental demand upon their legal system is that it treat them equally. Trubek, though fully aware of the tensions among these values, and between them and other values specific to the legal system (such as autonomy, generality), nevertheless believes that they can be realized, and that the legal system can contribute to this end. Balbus believes that they are inevitably betrayed by capitalist law, equality transformed into mere equivalence, individuality into egoistic individualism, true community of persons into the formal community of citizens.

The relationship between law and values can have behavioral significance in two ways. If citizens perceive the law as embodying

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their values they are likely to be more willing to comply with it. This willingness, which we attribute to the legitimacy of the law, is critical, because the apparatus of the state obviously can never be capable or coercing conformity in every instance. We therefore view legitimacy as part of the explanation for why citizens conform to rules that are either neutral with reference to their self-interest, or violate it. This notion of legitimacy plays a central role in Max Weber's sociology of law, which Trubek follows closely. Yet the question remains, as Macaulay insists: what is the *empirical* meaning of legitimacy? what do citizens actually know, or care, about their legal system, and how does this influence their behavior?

The papers that follow offer some interesting insights. Sarat suggests that law gains a limited legitimacy from its self-proclaimed allegiance to important social values, but very quickly loses that legitimacy as it is seen to depart from those values in practice. Furthermore, the legitimacy of law does not appear to be sufficient to induce obedience to rules that run seriously against self-interest. At most, legitimacy persuades to compliance when the behavior is neutral for the actor, and even this compliance can be seen as motivated by convenience or fear of sanctions. One reason why legitimacy is weak may be that, while allegiance to underlying social values is widespread, it is also shallow. Sarat offers numerous illustrations: people affirm the abstract right of free speech, but deny that right to those with whom they disagree strongly; they claim to believe in fair trials, but readily countenance the abrogation of the rights of particular accused. Interestingly, Kurczewski and Frieske describe parallels in socialist societies, where loyalty to the "plan" does not always extend to carrying out its details. This double vision is consistent with Sarat's discovery, throughout the reports of survey research, that equality, which is arguably the value most fundamental to societies that claim to be liberal democracies, means equality for oneself vis-à-vis superiors, not the right of inferiors to be equal with oneself. Furthermore, Sarat also finds that respect for the law is related to a mythic view of the legal system, a popular belief in a mechanical jurisprudence that closely resembles Weber's ideal type of logically formal rationality. Given all of this, it is not surprising, as Macaulay reminds us, that the legitimacy of the law is most strongly espoused by lawyers, among all other groups in society. Conformity to law is at least convenient for lawyers, and usually in their self-interest. Furthermore, lawyers spend most of their time urging *others* to conform to law. For the elite of the bar the value of equality does not induce envy, and thus a sense of injustice, since there are few above them in wealth, status, or power. And lawyers have been the most vigorous propagators of

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the mythic view of law, although of course they do not believe it themselves. There appears to be a good deal of support for Balbus's conclusion that what passes for legitimacy is in fact mystification, selectively adopted and proclaimed by those whose interests it serves, perhaps deceiving others, but not seriously affecting behavior.

A comparison of law with social values can have behavioral significance in another way: law can be measured against those values, found wanting, and thus lose legitimacy. This is the "gap" problem once again, not between a specific law and the behavior it ostensibly prescribes, but between the entire legal system and the values by which it claims justification. The question is not whether such a gap exists, which is the common starting point for most such research, but rather an empirical inquiry into whether, and how, it is perceived. Where liberal theory conceives law as liberating, citizens appear to view it as coercive. Law for most people means the police, not the right to make contracts, or to express themselves freely. It is not just that this attitude seems to be universal at the early stages of a child's moral development; most people *never* get beyond that stage. Nor is their view simply erroneous. Law *is* coercive for most people, even those laws that purport to be facilitative. As Macaulay reminds us, the image of contract as an unconstrained agreement between equals is another element of the mythic view of law; the vast majority of contracts are imposed upon one party by another possessing grossly disproportionate bargaining power and legal expertise. The same appears to be true of Poland: formal contracts do not determine economic behavior, and certainly do not liberate all economic actors equally. Those who enjoy a monopoly position can dictate the behavior of others. And in situations where contract might be truly facilitative, where the parties are relatively equal and bound together by an ongoing relationship that prevents either from dictating to the other, the law is experienced as antagonistic, as a loss of control, and is scrupulously avoided. Macaulay showed this forcibly nearly fifteen years ago, in an article that has since become classic, and his conclusions are substantiated by the Polish analysis, as well as by several other case studies that Macaulay cites in his present paper.

This comparison of ideal with reality always seems to produce similar consequences. Sarat reports that whenever persons have contact with the legal system—with lawyers, judges, the police, administrative agencies, etc.—their respect for that institution declines. The common thread that runs through those experiences appears to be the betrayal of the value of equality. Other studies have shown that the experience of the law, especially of large,

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bureaucratized legal institutions, is also a betrayal of the actor's sense of individuality and community.[1]

If we shift from examining individual behavior and look at the total society, we can ask again: what are the structural consequences of the divergence between values and law? Is there simply a necessary looseness of fit among social institutions, which produces short-term movement but long-term stability, in a homeostatic fashion? Or does the gap tend to close, or to expand? Is the mystification successful, maintaining an aura of legitimacy, albeit weak? Or is the gap a fulcrum for change, an ideological resource that can be used to transform law so that it moves significantly closer to our values? This is clearly the central difference between Balbus and Trubek, as it is the central question for a social theory of law in our time. It is not clear whether the question permits an empirical answer, as opposed to an ideological choice. But the papers in this issue throw some light on it. People differ in their perceptions of the legal system, and of the gap between ideal and reality. These perceptions are related to the position of the observer in society, and in turn affect whether the observer is satisfied with the legal system or eager for change. Sarat reports that the respect an individual feels for the law is directly related to the status of that individual. And he shows that "equality" means different things to different people:

> it may be that the commitment to equal treatment, which I believe is at the center of American legal culture, really means that most Americans want to be treated as well as anyone else, but do not mind if others are treated less well than they are.

Feelings of this sort may underlie both the public resentment expressed at what is widely perceived as the excessively lenient treatment of such elite criminals as Richard Nixon, or Patricia Hearst, as well as the public complacency with harsh penalities for common criminals, or the enthusiasm for the revival of the death penalty. Finally, it is not surprising that law is perceived as facilitative by the powerful, who can manipulate it, but as coercive by the powerless, who are manipulated.

If I were to generalize from these data, which I admit are unsystematic and incomplete, I would reach these tentative conclusions. The gap between liberal ideals and social reality is differentially experienced. To the powerless, law is coercion, a denial of individuality and community, a hypocritical pretense of equality

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1. Serving on a jury confirms this generalization in two ways. The process of being summoned for jury duty, and of being excused or empanelled, repeats the experience of inequality, lack of individuality, and absence of community. But the experience of *serving* on a jury, among equals with whom one interacts as persons, and who develop a sense of community when faced with a common task, shows that those values can be attained in the law. See, e.g., Zerman (1976), Villaseñor (1976), Timothy (1974).

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blatantly betrayed by gross, patent, social inequalities. For them, comparison of ideal and reality does delegitimate law. But this does not create significant pressure for social change since their compliance with the law was never motivated by a sense of its legitimacy, but rather by an awareness of their own powerlessness in the face of overwhelming force. What is significant about their attitude toward law is their belief in a variety of legal myths that function to exaggerate this sense of powerlessness. Indeed, lawyers and legal scholars often acknowledge this function of legal myths: the *in terrorem* effect of punishment under general deterrence theory, or the insistence that it is the *law* which decides cases, an abstraction too mighty to be resisted, and not the judge, who is only a puny human.

For the powerful, law *is* liberation, a limited sense of individuality, community, and equality, which is achieved by a constricted vision that ignores everyone below them. The powerful *do* celebrate the legitimacy of law. But this celebration of legitimacy does not significantly affect their behavior, since whatever compliance with the law is not the result of threatened sanctions is either a matter of self-interest, or at least neutrality. Rather, the insistence that law is legitimate, the denial of an inevitable gap between ideal and reality, is an attempt to mask the fact that their vision is constricted. Thus what was proclaimed as legitimacy, inducing willed obedience, is reduced to rationalization by those whose behavior is self-interested, and mystification for those whose behavior is coerced. It is not clear that delegitimation would significantly alter the behavior of either group.

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