Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office

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Two very different pictures of mass legal consciousness[1] have wide currency in contemporary legal scholarship. The first is one of public cynicism, of instrumentalism without conviction, of citizens both litigious and, at the same time, alienated from the legal system.[2] This image of mass legal consciousness informs many accounts of the so-called "litigation explosion"[3] and suggests that legal institutions are no longer accorded sufficient legitimacy and respect. It is deployed to identify and respond to the alleged erosion of public confidence in legal institutions.

The second view of mass legal consciousness presents a picture of a loyal and trusting public, deeply attached to law and legal institutions, taken in by law's manners, myths, and legitimating narratives. This portrait is rooted in the Tocquevillian assertion that Americans understand their social relationships and their social problems through the lenses of law: To resolve "their daily controversies," they "borrow . . . the ideas and even the language peculiar to judicial proceedings."[4] Tocqueville believed that the pervasiveness of the language of law in the activities of everyday life reflected and reinforced widespread allegiance to legal insti-

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1. Legal consciousness "includes all the ideas about the nature, function and operation of law held by anyone in society at a given time." Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 34 STAN. L. REV. 575, 592 (1984).

2. *See* Glazer, *Toward An Imperial Judiciary*, 41 PUB. INTEREST 105 (1975); Ehrlich, *Legal Pollution*, N.Y. TIMES MAGAZINE, Feb. 8, 1976, at 17–29.

3. Auerbach, *A Plague of Lawyers*, HARPER'S, Oct. 1976, at 37; *see also* Manning, *Hyperlexis: Our National Disease*, 71 NW. U.L. REV. 767 (1977).

4. A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 357 (F. Bowen ed. 1876).

tutions.[5] Today, a similar portrait of unquestioning public respect for the rules and institutions of law underlies most critical scholarship.[6]

Specifically, critical scholarship has identified three characteristics of mass legal consciousness which help explain the hegemony of law. First, Americans are said to regard their legal institutions as legitimate and, therefore, to acquiesce in the social order which those institutions help maintain.[7] Second, the legitimacy of law is said to be a product of "mystification," an illusory picture which law constructs of itself. Americans are alleged to subscribe to myths about law produced and disseminated by legal officials, the foremost being that law is neutral, objective, and governed by rules. The third characteristic of mass legal consciousness is said to be the pervasive belief in the inevitability and immutability of existing legal arrangements.[8] By unearthing these three elements, critics hope to undermine what they see as excessive public respect for, and belief in, the existing legal order.

In both pictures of mass legal consciousness lawyers are recognized as important intermediaries between clients and the legal system;[9] many more people see lawyers than have direct contact with formal legal institutions.[10] Much of the conversation between lawyers and their clients is educational: lawyers provide knowledge of how particular legal processes work and introduce their clients to ways the law might be used in their favor.[11] Practicing lawyers thus play an important role in shaping mass legal consciousness and in promoting or undermining the sense of legitimacy that the public attaches to legal institutions.[12]

Recognizing this importance, the organized bar has imposed a special

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5. As Tocqueville put it, "[t]he language of the law . . . becomes, in some measure, a vulgar tongue; the spirit of the law . . . gradually penetrates . . . into the bosom of society, where it descends to the lowest classes, so that at last the whole people contract the habits and tastes of the judicial magistrate." *Id.* at 358.

6. Critical scholarship on law includes a wide range of perspectives and arguments. *See, e.g.*, Silbey & Sarat, *Critical Traditions in Law and Society Reserach*, 21 LAW & SOC'Y REV. 165 (1987); Trubek & Esser, *"Critical Empiricism" in American Legal Studies: Paradox, Program or Pandora's Box*, 14 LAW & SOC. INQUIRY 3 (1989). Both of these articles argue that social science research on law can and should be critical of existing legal practices. However, for purposes of this paper, we have limited our consideration to Critical Legal Studies.

7. Gordon, *New Developments in Legal Theory*, in POLITICS OF LAW 281 (D. Kairys ed. 1982).

8. *See, e.g.*, Gabel, *Reification in Legal Reasoning*, 3 RES. ON L. & SOC. 25 (1980).

9. The notion of lawyer as intermediary is explored by Talcott Parsons in *A Sociologist Looks at the Legal Profession*, ESSAYS IN SOCIOLOGICAL THEORY (1954).

10. Miller & Sarat, *Grievances, Claims and Disputes: Assessing the Adversary Society*, 15 LAW & SOC'Y REV. 525, 542-43 (1980-81).

11. Sarat & Felstiner, *Law and Strategy in the Divorce Lawyer's Office*, 20 LAW & SOC'Y REV. 93 (1986).

12. *See, e.g.*, Brandeis, *The Opportunity in Law*, in BUSINESS—A PROFESSION (1933). Survey research suggests that exposure to a wide variety of legal actors and institutions, including lawyers, plays a powerful role in shaping perceptions of, and attitudes toward, law. Citizens tend to revise views held prior to such contact and to generalize from contacts with particular parts of the legal system in making judgments about the whole. Merry, *Concepts of Law and Justice Among Working-Class Americans*, 9 LEGAL STUD. F. 59, 68-69 (1985); Sarat, *Studying American Legal Culture*, 11 LAW & SOC'Y REV. 427, 441 (1977).

ethical obligation on lawyers to respect, and encourage respect for, law and existing legal arrangements.[13] Moreover, the defense of these arrangements is considered essential in maintaining the authority of the legal profession itself.[14] In this sense, ethical obligation and professional self-interest are mutually reinforcing. While critics also see a tight fit between existing legal arrangements and the status of professionalism, they encourage lawyers to challenge existing arrangements and reject traditional modes of professionalism and professional legitimation.[15]

This article focuses on the role of lawyers in the legitimation of legal institutions. It also considers the relationship between lawyers' legitimation activities and the maintenance of professional authority. In essence, it seeks to reshape the scholarly image of mass legal consciousness by offering an empirical perspective, based on a sustained analysis of actual lawyer/client contacts. That analysis suggests that lawyers do not, in fact, defend the legal order. Clients are introduced to a chaotic "anti-system" in which they cannot rely on the technical proficiency, or good faith, of judges and rival lawyers and which they have no hope of understanding on their own. Lawyer cynicism and pessimism about legal actors and processes is a means through which they seek to control clients and maintain professional authority.

I. Legitimation and Professionalism: A Debate About the Lawyer's Role

A. *The Organized Bar and the Traditional View*

The role of lawyers in informing citizens about the legal process, and in shaping perceptions and building respect for it, has been an important, complex, and controversial issue in legal ethics. Lawyers were tradition-

13. The American Bar Association's Canons of Professional Ethics, Model Code of Professional Responsibility, and Model Rules of Professional Conduct each contain language suggesting that lawyers should help organize and maintain public support for and confidence in the legal system.

Canon 1 of the 1908 Canons of Professional Ethics stated that "[i]t is the duty of the lawyer to maintain towards the Courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance." The Model Code of Professional Responsibility notes that "[w]hile a lawyer as a citizen has a right to criticize [adjudicatory officials] publicly, he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system" (footnotes omitted). The 1983 Model Rules of Professional Conduct is less direct in asserting the professional obligation of lawyers to speak and act so as to maintain public confidence in the legal system, but the Preamble reminds lawyers that they "should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials." The Model Rules contain provisions restricting attorney speech which "will have a substantial likelihood of materially prejudicing an adjudicative proceeding," Model Rules of Professional Conduct Rule 3.6 (1983), and which the lawyer "knows to be false" in regard to a judge or other "public legal officer." *Id.*, Rule 8.2.

14. *See* Simon, *Visions of Practice in Legal Thought*, 36 Stan. L. Rev. 469 (1984).

15. *Id.*; *see also* Gabel & Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. Rev. L. & Soc. Change 369 (1982–83); Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 Wis. L. Rev. 29.

ally subject to disciplinary proceedings for making derogatory comments about courts, judges, and other lawyers.[16] Recently, however, there has been a relaxation in the official strictures, giving lawyers more leeway in what they may appropriately say about the legal order and its various agents and officials. Disciplinary rule has, with some exceptions, become professional admonition.[17]

In the past, the clearest restriction on attorney remarks involved public statements made in the course of ongoing litigation; such statements could result in contempt of court.[18] However, the bar disciplinary apparatus has also been mobilized to sanction lawyers for unfavorable characterizations made in the press,[19] in the course of campaigns for judicial or other public offices,[20] in pleadings and briefs,[21] and even in private correspondence between lawyers and judges.[22]

Some scholars believe that despite occasional disciplinary proceedings against those who criticize legal processes or officials, lawyers generally

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16. *See infra* notes 19–22; *see also* Annotation, *Attorney's Criticism of Judicial Acts as Grounds of Disciplinary Action*, 12 A.L.R. 3d 1408 (1967).

17. *See supra* note 13.

18. *See* cases cited in Annotation, *supra* note 16, at 1418–27.

19. *See* State v. Nelson, 210 Kan. 637, 504 P.2d 211 (1972); Justices of the Appellate Div. v. Erdmann, 39 A.D. 2d 233, 333 N.Y.S. 2d 863 (1972), *rev'd*, 301 N.E.2d 426, 33 N.Y. 2d 559, 347 N.Y.S.2d 441 (1973).

20. *See, e.g.*, Nebraska State Bar Ass'n v. Michaelis, 210 Neb. 545, 316 N.W.2d 46 (1982).

21. In papers filed in a federal district court, the defendant's attorney stated that:

> the state trial judge avoided the performance of his sworn duty. To repeat a time worn phrase—you cannot get justice in a state court where the judge is a product of the prosecutorial system which aided dramatically in elevating him to the bench. A product of that system who works close (sic) with the Sheriffs and who must depend on political support and re-election to the bench is not going to do justice.

His reprimand was upheld, by a county court, in *In re* Shimek, 284 So. 2d 686 (Fla. 1973).

22. *See In re* Chapak, 66 F. Supp. 265 (E.D.N.Y. 1946). In 1985, the United States Supreme Court overturned a disciplinary sanction which had been imposed on the basis of remarks and criticisms contained in a letter written by an attorney to the secretary of a district court judge. *See In re* Snyder, 472 U.S. 634 (1985).

Courts asked to enforce or review such disciplinary efforts have recognized, in dicta, the potential conflict between first amendment guarantees and bar disciplinary codes. *In re* Sawyer, 360 U.S. 622 (1959). Partly as a result of this conflict, courts have reached widely divergent results in trying to decide whether to impose sanctions where attorneys have made public criticisms of judges. For cases where sanctions were imposed or upheld, see Eisenberg v. Boardman, 302 F. Supp. 1360 (W.D. Wis. 1969) (attorney circulated statement designed to humiliate judge); *In re* Lacy, 283 N.W.2d 250, 251 (S.D. 1979) (attorney quoted in press as saying "state courts were incompetent and sometimes downright crooked"); *In re* Raggio, 87 Nev. 369, 487 P.2d 499 (1970) (attorney wrote magazine article criticizing judges in intemperate terms); *see also In re* Friedland, 268 Ind. 536, 376 N.E.2d 1126 (1978) (attorney suspended for referring to paternity hearing as "ordeal," "travesty," and "the biggest farce I've ever seen"); *In re* Paulsrude, 311 Minn. 303, 248 N.W.2d 747 (1979) (attorney disbarred for in-court remarks, which included calling judge a "horse's ass" after an adverse ruling and labelling the proceedings a "kangaroo court"). For cases not disciplining attorneys for criticizing judges, see, e.g., State v. Nelson, 210 Kan. 637, 504 P.2d 211 (1972) (no discipline imposed where attorney made only general accusations and was speaking as losing party in litigation); Justices of Appellate Div. v. Erdmann, 33 N.Y.2d 559, 301 N.E.2d 426, 347 N.Y.S.2d 441 (1973) (attorney not subject to discipline even though he called appellate judges "whores who become madams," and claimed that the only way to become a judge was "to be in politics or to buy it"); State Bar v. Semann, 508 S.W.2d 429 (Tex. Civ. App. 1974) (no discipline imposed against attorney who wrote letters to newspapers critical of judge's qualifications to hold office).

act as apologists for existing legal arrangements.[23] Lawyers' activities, ethics, and understandings of appropriate professional roles are thought to reflect the legitimating assumptions of the legal system. In this view, one would expect lawyers to communicate to their clients a traditional picture of law—one that differentiates law and power, that emphasizes the determinacy of legal rules, the objectivity of legal decision-making, and the fairness of legal judgments.[24]

Such a picture would not only legitimate existing legal arrangements, but would also provide an account of, and a justification for, the professional authority with which lawyers are vested. Given this view, the authority of lawyers can be derived from both their specialized knowledge and their commitment to disinterested client service.[25] Legal problems are understood to be technical,[26] and clients on their own are assumed not to have sufficient knowledge to cope adequately with them.[27] When lawyers articulate the legitimating assumptions of law, they portray success in the legal system as dependent upon expert knowledge and the shrewd application of legal rules. What the client buys when he gets legal help is some of that expert knowledge.

B. *The Critical View*

Critical scholarship starts with the same picture embraced by the organized bar: it assumes that lawyers present and defend a traditional understanding of law when they speak to their clients.[28] Critics argue, how-

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23. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise 1870–1920*, in PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA 70, 110 (G. Geison ed. 1984). Gordon argues that "when a lawyer helps a client arrange a transaction so as to take maximum advantage of the current legal framework, he or she becomes one of the army of agents who confirm that framework by reinforcement."

24. From this perspective law is a rule system: Rules determine how law operates, how legal procedures work, and how legal decisions are made. Rules also insure that the legal process will be orderly, regular and predictable, and that legal decisions will be made impartially, fairly, and in a non-arbitrary fashion. In short, rules determine the ability of law to regulate the social order.

Reflecting these assumptions, formalist discourse portrays individual legal actors as highly constrained by a regimen of clearly articulated rules; rules matter, people do not. Discretion is, in this discourse, minimal and inconsequential. As Dicey argued, rules insure "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and exclude the existence of arbitrariness, or prerogative, or even of wide discretionary authority." A. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 202 (9th ed. 1939).

The idea that rules can and should constrain the choices made by legal decision-makers is seen in many different theories of judicial decision-making. *See, e.g.*, R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977); H. HART, THE CONCEPT OF LAW (1961). For a treatment of these themes in the context of lawyer/client relations, see A. SARAT & W. FELSTINER, LEGAL REALISM IN LAWYER-CLIENT COMMUNICATIONS 4-8 (American Bar Foundation, Working Paper No. 8723 (1987)).

25. For a general statement of the relationship between professional authority on the one hand, and specialized knowledge and professional ethics on the other, see A. CARR-SAUNDERS, PROFESSIONS: THEIR ORGANIZATION AND PLACE IN SOCIETY (1928); *see also* W. MOORE, THE PROFESSIONS (1970); E. SCHEIN, PROFESSIONAL EDUCATION: SOME NEW DIRECTIONS (1973).

26. The full implications of this position are explored by D. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? 7-28 (1974).

27. *See* Moore & Tumin, *Some Social Functions of Ignorance*, 14 AM. SOC. REV. 789 (1949).

28. Simon, *supra* note 14.

ever, that lawyers should not do so. Instead they want lawyers to help demystify the law and, in so doing, to undermine the legitimacy of existing legal arrangements.[29] Yet critical scholarship has, for the most part, failed to carefully examine the actual behavior of lawyers.[30] Like most legal academics, critics concentrate on interpreting legal doctrine to expose "legal formalism" as an empty legitimating myth and to indict judges as purveyors of that myth.[31] They *assume* that lawyers play a similar role.[32] While they seek to uncover complexity and contradiction in doctrine, critics act as if the legitimating messages communicated at different locations and by different actors within the legal system are consistent.

Critical scholars want lawyers to demystify and delegitimate law by exposing the inconsistency and arbitrariness of legal doctrine to their clients.[33] They want lawyers to teach clients that rules are used by legal officials as instruments to achieve personal and political purposes or as post hoc rationalizations.[34] Rights and responsibilities cannot be deduced from pre-existing rules because rules are so numerous, complicated, and ambiguous that they can accommodate almost any result. In short, critics want lawyers to help politicize mass legal consciousness.[35]

The replacement of legal formalism with a less rule-centered portrait of law is part of the effort of critical scholars to reform lawyer/client relations and to provide an alternative to traditional understandings of professionalism and professional power.[36] Critical scholars assume that undermining formalism will contribute to the reorganization and reorientation of the legal profession. Stripped of the illusion of rule determinacy, clients will demand a more active role in the management of their own legal problems; lawyers will be free to come to terms with the constitutive effects of their activities, and, finally, lawyers and clients working together can break down the artificial boundaries separating law and politics.[37] As Gabel and Harris put it, lawyers should demystify the law and help their clients to "reconceptualize the way the legal system itself is organized."[38]

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29. Gabel & Harris, *supra* note 15.

30. For an exception, see Gordon, *supra* note 23.

31. *See* Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985); Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981); Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1975).

32. Simon, *supra* note 14.

33. *Id.*; *see also* Gabel & Harris, *supra* note 15.

34. Gabel & Harris, *supra* note 15.

35. Simon, *supra* note 14.

36. *Id.*

37. *Id.*

38. Gabel & Harris, *supra* note 15, at 376.

II. The Empirical Project

A. *Methods*

Whether the assumptions of the organized bar or of the critics bear any relationship to actual legal practice is currently unknown. To develop a clear understanding of lawyers' contributions to the maintenance or critique of legal legitimacy, and to assess the implications of what lawyers actually tell their clients about the legal process for a theory of mass legal consciousness and professional authority, we conducted an observational study of lawyer/client conferences.[39] Over a period of 33 months, we observed and tape-recorded 115 lawyer/client conferences in California and in Massachusetts.[40] This effort consisted of following one side of 40 divorce cases, involving 20 different lawyers, ideally from the first lawyer/client interview until the divorce was final.

We chose to examine divorce, in part, for tactical reasons.[41] Divorce,

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39. Our interest in law talk and its consequences is part of a larger project on lawyer/client relations and the dynamics of professional authority. In addition to the analysis of law talk, we have examined the way lawyers and clients negotiate the meaning of the social relations and behavior involved in marital breakup and in the legal process of divorce. *See* Sarat & Felstiner, *Law and Social Relations: Vocabularies of Motive in Lawyer/Client Interaction*, 22 Law & Soc'y Rev. 737 (1988). In that paper we drew upon Mills' analysis of vocabularies of motive, *see* Mills, *Situated Action and Vocabularies of Motive*, 5 Am. Soc. Rev. 904 (1940), to show how lawyers and clients bring different agendas and views of the social world to their interactions. While clients are very interested in reconstructing the past and in assigning guilt and blame, lawyers generally avoid being drawn into such reconstructions. They interpret behavior in situational terms and, in so doing, limit their social commmentary by focusing on the way the divorce process works and on how it shapes the actions of divorcing spouses.

Both law talk and the negotiation of the meaning of social relations and behavior are, in our view, linked to the process of moving cases toward settlement. Contrary to some images in popular culture, the divorce lawyers we observed are overwhelmingly pro-settlement. *See* A. Sarat & W. Felstiner, Selling Settlement: Lawyers, Clients and the 'World of Deals' [hereinafter Selling Settlement] (unpublished manuscript on file with authors). By refusing to participate in blaming and fault-finding, lawyers work to defuse client anger. Indeed, they often explicitly instruct clients that their anger must be put aside if they are to reach satisfactory settlements. In this way, lawyers try to substitute rationality and economic calculation for emotionalism. Moreover, by undermining client confidence in the rationality and predictability of the legal system, lawyers try to convince clients that it is better to try to negotiate a resolution to their divorce dispute. For a discussion of the relationship among law talk, talk about social relations, and the disposition process in the context of a single case, see Sarat & Felstiner, *supra* note 11.

40. Massachusetts and California were chosen as research sites because they represent very different legal cultures and because their respective rules governing divorce are substantially different.

41. While observational research of the kind reported below has proven valuable in other areas, *see* Maynard, *The Structure of Discourse in Misdemeanor Plea Bargaining*, 18 Law & Soc'y Rev. 74 (1984); O'Barr & Conley, *Litigant Satisfaction Versus Legal Adequacy in Small Claims Narratives*, 19 Law & Soc'y Rev. 661 (1985), there have been few published reports of observational studies of lawyer/client interaction. *See* Cain, *The General Practice Lawyer and the Client: Towards a Radical Conception*, 7 Int'l J. Soc. L. 331 (1979); Hosticka, *We Don't Care About What Happened, We Only Care About What Is Going to Happen: Lawyer-Client Negotiations of Reality*, 26 Soc. Prob. 599 (1979).

There have, in fact, been no previous empirical examinations of law talk in the lawyer's office. Some have argued that such research could not be carried out. D. Rosenthal, *supra* note 26, at 179-80 (suggesting impossibility of overcoming privilege problem); Danet, Hoffman & Kermish, *Obstacles to the Study of Lawyer/Client Interaction: The Biography of a Failure*, 14 Law & Soc'y Rev. 905 (1980) (reporting failure of effort to observe lawyer/client conferences in Boston).

Because divorce is an area in which the activities of lawyers have been particularly controversial

however, is by no means typical of all areas of practice. Thus the generalizations that can be drawn from this data may be limited. Nonetheless, our findings are highly consequential, given the prevalence of divorce and the fact that it is one of the areas of most frequent contact between citizens and the legal system.[42]

B. *The Data*

Conversations between lawyers and clients are frequently about the nature, operation, and efficacy of legal institutions and the characteristics, motivation, and competence of legal actors. They range from perfunctory recitation of rules governing the divorce process to complicated explanations of particular results. While discussions of the legal system—what we call law talk—are spread throughout our sample of lawyer/client conferences, they are not spread evenly. Law talk tends to occur when prompted by significant events in the course of litigation. It is, in addition, more likely to be initiated by a client inquiry than volunteered by a lawyer. Finally, what is perhaps most striking is the relative uniformity in law talk among the many different kinds of lawyers in our sample. Differences in experience, type of practice, and degree of specialization are not associated with differences in the picture of law presented in the divorce lawyer's office.[43] Moreover, despite important differences in legal culture and the rules governing divorce, there are no significant differences in the frequency, range, or pattern of law talk in Massachusetts and California.

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and because recent reform efforts have aimed to limit the lawyer's role, we expected that research on lawyer/client interaction in divorce would encounter less resistance than in other areas of legal practice. Lay notions of research are that it is an activity intended to solve problems. It was thus crucial in securing cooperation to be able to describe a problem that lay people can understand and a way in which the proposed research can have an effect on that problem. There is such general skepticism about the American divorce process that many of the lawyers and clients that we approached immediately appreciated the relevance of the research.

The lawyer samples have two obvious biases. In both sites they involve a higher proportion of women than exists either in the bar or among divorce lawyers generally. Nevertheless, the samples contain more male than female lawyers. More importantly, the samples appear not to include many lawyers high in income, experience, and status; relatively few represented doctors, lawyers, businessmen, or others with substantial income and assets. As a general matter, these lawyers also attended less prestigious law schools than the lawyers considered to be at the top of local divorce practice. Thus the findings of this project should not be considered representative of all divorce lawyers. However, other than their relative status within the local bar, we know of no other relevant trait on which these lawyers are different from the rest of the divorce bar, and consider it fair to say that the findings do originate with a sample that is characteristic of lawyers that most people with ordinary financial resources are likely to consult.

42. *See* B. CURRAN, THE LEGAL NEEDS OF THE PUBLIC 103-04 (1974). It is estimated that during the period from March 1987 to March 1988 1,167,000 couples were divorced. THE WORLD ALMANAC AND BOOK OF FACTS 1989 806 (1989).

43. We have not yet systematically examined the data for gender differences nor at this point do we expect gender to play a significant role in explaining the kind of law talk discussed in this paper.

1. *The Significance of Rules*

How do lawyers describe the law, particular laws, or legal processes to their clients? What characteristics are attributed to law and the legal system? Before addressing these questions it is important to note that there is a rather regular progression in law talk—a constant narrative structure. Almost all divorce cases start with the lawyer's brief explanation of divorce procedures as they are laid out in statutes.[44] This law talk is full of explicit references to rules. Lawyers begin, if you will, with formalism. They describe the *rules* that frame the process, establish its limits and provide alternative routes. However, the written law is only a starting point. Formalism fades rather quickly as the interaction progresses. Descriptions and characterizations of the legal system now occur mainly when clients ask why a particular result occurred or what results might be predicted. In response to these unsolicited inquiries, lawyers rarely make explicit reference to rules.[45] Rules and their relevance are taken for granted by lawyers who generally act as if clients already shared their empirical understanding of the legal process. As a consequence, at this point in the interaction, lawyers do not take the time to introduce their clients to the subtle manner in which rules penetrate and permeate the legal process.

Lawyers often talk about what can or cannot be done or what is or is not likely to happen without explicitly noting that their views are shaped by statutes or court decisions, although the trained ear would recognize that their formulations are clearly rooted in an understanding of rules. Typical of such implicit rule references is the response of a lawyer to a

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44. Such explanations are almost always provided in the first conference and are quite formulaic. In Massachusetts, the perfunctory run-through of the statutory parameters of the legal process of divorce is usually the preface to a discussion of whether the divorce will be filed, or counterfiled, on fault or no-fault grounds.

45. While this is generally true even when clients ask what the law is in relation to some particular topic, there are rare exceptions. In one Massachusetts case, for example, the client asked whether it mattered that the marital home was in her husband's name. Her lawyer answered by saying:

> There's a real neat case . . . I don't know if it's real neat . . . some divorce lawyers are really horrified by *Rice v. Rice* which says . . . equitable . . . first one that made it clear that it didn't matter whose name. . . .

A similarly unusual reference occurred in a California case where a client asked whether she would be able to stay in the marital home after the divorce. To this her lawyer noted:

> There is a famous case called the *Duke* case. You don't need to know all the details now, but the *Duke* case—that's why we have a phrase in law called 'they duked it out'—the *Duke* case basically said that Mrs. Duke, who was in very bad economic shape,. . . it dealt with her ability to stay in the house. And so, we now know that a judge has the discretion literally to say to your husband, 'I understand that you own half the house, but I'm not going to order this lady out. . . .'

In two specific contexts, the presence of rules tends to be made explicit on a more regular basis. The first is the rules concerning community property in California. In these discussions community property is not defined in any precise terms but seems to have become a folk term. It is used in the same way that "visitation" or "custody" is used. The second area in which explicit reference to rules is common is in conversations about the tax consequences of divorce, property division and alimony or child support. Client questions about what such events will mean to the Internal Revenue Service are often met with an explicit reference to some rule or provision of the tax code.

client's inquiry about what would happen to child support if his income were reduced:

> You should keep in the back of your mind . . . that if your financial situation changes in the future the judgment can be modified. That's not a problem. It is not etched in stone. . . . Anything to do with a child is always modifiable by the court.

How and why judgments in court "can be modified" is not explained. The client is not told whether that possibility is a result of the ease with which lawyers escape from earlier agreements, or of the sympathy that judges display toward children, or of the rules governing support, custody, and visitation. This failure to identify rules and highlight their relevance prevents clients from having access to law's public discourse and the resources for argument provided by an understanding of rules. In addition, it helps lawyers maintain a monopoly of those resources and focuses client concerns on the professional skills and capacities of their particular lawyer.

Lawyers, in fact, talk to clients in much the same way that they talk to each other.[46] There is no acknowledgement that clients may not already understand the salience of rules. The normal conventions of lawyer-to-lawyer discourse are not translated for divorce clients, who most often bring an incomplete and unsophisticated understanding to their encounters with the legal process. There is no concerted effort to bridge the gap between professional and popular culture.

Even when rules are explicitly noted, there are few references to or discussions of their determinate power. Lawyers do not describe the legal process of divorce as rule driven or rule governed. Nor do they usually provide an explicit evaluation of the rules themselves. However, when rules do at times emerge as part of the explicit conversational foreground, they are generally disparaged; contrary to the assumptions of both the organized bar and critical scholars, lawyers rarely defend the rationality, importance, or efficacy of legal rules.

For instance, it is common for lawyers to mock rules as irrelevant or useless in governing the behavior of legal officials involved in the divorce process. Rules, according to one California lawyer, do not give "clear-cut

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46. Our research included frequent observations of lawyer-to-lawyer talk in the hallways and conference rooms of courts as well as observations of such talk in more informal settings. For similar conclusions about lawyer-to-lawyer talk, see M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT ch. 6 (1979) and L. MATHER, PLEA BARGAINING OR TRIAL? ch. 6 (1979).

As insiders, what is of interest to lawyers is the way rules are manipulated by the people they deal with every day. Their code, their standard way of thinking about the legal process, would be unintelligible without rules; it is, however, a code in which rules operate in the background, so that in practice calculations and decisions are made without explicit rule references. When they talk with their clients lawyers begin, if you will, in the middle.

answers. If they did we wouldn't even have to be talking." A Massachusetts lawyer spoke more generally about the irrelevance of rules in describing the way the local court system operated: "There really are no rules here, just people, the judge, the lawyers, the litigants." Another maintained that the scheduling of cases reflected the virtually unchecked power of the bailiff:

> When you get heard is up to the court officer . . . he's the one who controls the docket. They don't have a list prepared and they don't start at the top and work down. They go according to his idea of when people should be heard.

Other lawyers extended the argument about the ambiguity or irrelevance of rules to more important aspects of the legal process of divorce. Several suggested that judges refuse to be guided by rules of evidence and that such rules therefore have no bearing on the way hearings are conducted.[47] One Massachusetts lawyer explained that he would not be able to prevent the opposing spouse from talking about his client's alleged adultery even though such testimony would be technically inadmissible according to the literal rules:

> I think we just have to realize that it is going to come out. We just have to take that as a given. You know, they teach you in law school about how to object to that kind of testimony: 'I object, irrelevant,' 'I object hearsay.' But then when you start to practice you realize that judges, especially in divorce cases, don't pay any attention. They act as if there were no rules of evidence.

Other lawyers expressed frustration about the ineffectiveness of rules governing filing periods, establishing times in which responsive pleadings are to be submitted or governing the conduct of discovery.

Moreover, statutes concerning property division are, as lawyers tell it, often irrelevant to actual outcomes. Lawyers in both Massachusetts and California regularly criticized judges for failing to pay attention to those statutes or to the case law interpreting them. As one Massachusetts lawyer told her client in a case involving substantial marital property,

> [i]n this state the statute requires judges to consider fifteen separate things, things like how long you were married, what contributions you and Tom made, whether you have good prospects. It is a pretty comprehensive list, but I've never seen a judge make findings on all of those things. They just hear a few and then divide things up.

47. Lawyers do not explain the special concern for guiding lay juries that accounts for particular rules of evidence. As a result, they do not suggest that judicial "flexibility" is appropriate or understandable.

> Things generally come out roughly even, but not because the rules require it.

Thus, what lawyers do make visible as they respond to their clients' questions are the personalities and dispositions of actors within the legal process and the salience of local norms rather than legal rules. Emphasizing people over rules, law talk acquaints clients with a process in which judges exercise immense discretionary power.[48] The message to the client is that it is the judge, not the rules, that really counts. What the judge will accept, what the judge will do is the crucial issue in the divorce process. With respect to property settlements, Massachusetts clients are reminded that since all agreements require judicial approval there is, in effect, "nothing binding about them. The judge will do what he wants with it." Another lawyer explained that in dividing the marital property, "the judge can do with it as he chooses to do." Still another lawyer informed his client of what he called the "immense amount of power and authority" which judges exercise and suggested that the particular judge who would be hearing his case would use that power "pretty much as he deems fit."

A second way in which lawyers denigrate rules is by characterizing them as unnecessarily technical. They claim that, as a result, even judges and lawyers frequently do not know what they mean. For example:

> Client: Tell me the mechanics of this.
> Lawyer: You should know. It's your right to know. But whether or not I'm going to be able to explain this is questionable. . . . It's sort of simple in practice, but its very confusing to explain. I've an awful lot of really smart people who've . . . who've asked me after the divorce is over, now what the hell was the interlocutory judgment?

A third criticism of rules focuses on their weakness in guiding or determining behavior outside the legal process. Lawyers identify the limits of law.[49] They acquaint their clients with the limited efficacy of legal rules and caution them not to rely too heavily on rules or court orders. This is particularly the case when a lawyer is trying to discourage his client from pursuing a certain course of action. Thus, in one California case, where the client was very disturbed by her husband's continuing refusal to obey a restraining order [restricting contact with the spouse], the lawyer's re-

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48. The thoughtful client may also realize that lawyers, in what they choose to say about rules and judges, also exercise immense discretionary power.

49. There is, of course, another message which might be discerned if one were to focus on the frequency with which lawyers implicitly make reference to rules. In those instances, lawyers seldom speak about the efficacy of law or rules. Nevertheless, the way they talk suggests that this silence is a function not of cynicism about rules but of the pervasive way that rules are interwoven into lawyers' thinking about divorce. However, given the ambiguity that arises from the gap between the taken-for-grantedness of rules in the thinking of lawyers and their explicit critique of particular rules in talking to clients, clients are likely to come away with a view about the relevance of rules in the divorce process that is very different from their lawyer's actual perspective.

sponse was to stress the futility of going to court to obtain a contempt order:

> Lawyer: Okay. So what you would like is what? You'd like phone calls if he need to . . .
> Client: Limited to the concern of the children or medical bills, and, you know, never mind giving me all his heartache trouble.
> Lawyer: You know, he's in violation of the court order [restricting contact with the spouse], but to take him to court, it can be done, I'm not saying that we won't do it or anything, it's a matter of proving contempt. We can prove it, but then what do you get out of that. You don't get anything. . . .

"You don't get anything" suggests that since rules and orders are not self-executing, they do not necessarily govern behavior or resolve problems. This lawyer is schooling his client in what has been called the "gap" problem, the extremely loose coupling between legal rules and social behavior.[50]

The same emphasis on the limited efficacy of rules is conveyed in the following discussion of joint legal custody, where a Massachusetts lawyer talks to his client about the irrelevance of joint legal custody. The client brings substantial preconceptions about the meaning of joint custody to this exchange. The lawyer's effort is to disabuse him of those preconceptions, to emphasize that what matters is the ongoing relationship between spouses rather than the posture of official arrangements:

> Client: The custody order I would like to be requested is joint custody. That means, and correct me if I'm wrong, that I shall be aware and informed and be able to have input in my daughter's life as well as she would have the right to be aware, informed and have input in my daughter's life whether my daughter is there with her or here with me.
> Lawyer: There's no such thing as court ordered joint custody. In a realistic sense, real sense of joint custody. You are thinking of it as if there is. Just like it's a court ordered step. You get custody and she has visitation rights. That means definite things. You have the custody and you control the child's life: She becomes a visitor. On joint custody that's something that is worked out between the two individuals who right from the start are able to deal with the child with at least no major problems. They would deal with the child in a normal manner. . . .

This lawyer's comparison of court orders and what really happens suggests a parallel between the ineffectiveness of rules governing the behavior

50. *See* Abel, *Law Books and Books About Law*, 26 STAN. L. REV. 175, 184 (1973); *see also* Sarat, *Legal Effectiveness and Social Studies of Law*, 9 LEGAL STUD. F. 23 (1985).

of those who are part of the legal apparatus—lawyers, court officers, judges—and the limited power of rules to control the behavior of people outside the legal process.[51]

2. *The Critique of Legal Officials*

When attention is turned from assessment of rules to evaluation of the behavior of actors in the legal process, lawyers continue their law talk in a critical, realistic mode. In their characterizations of judges, lawyers tend to think in comparative terms, often noting that different judges react differently to similar combinations of facts and rules. Thus law talk turns discretion into difference. The legal process is said to individualize results, not on the basis of the idiosyncratic fact patterns or the litigants' particular needs, but as a reflection of the propensities of the individual judge. In one case, for example, the lawyer suggested that he might have difficulty getting the judge to accept a particularly favorable division of property. As he explained,

> [s]ome judges wouldn't care. I could do it by representation. Just present the papers to the judge, tell him what we've done, and he'd shake his head and go okay, and sign an order and we'd be all done. Okay. Judge Max doesn't let that happen. . . . Other judges, excuse me, most other judges, would not even ask questions other than saying something like 'Are you satisfied?' But this judge . . . will very likely want to ask her if she indeed understood the agreement before she signed it and he'll want to run through the thing.

As another lawyer put it, "[t]here are no 'for sures,' you are dealing with the antithesis of science . . . at the other end, with opinion, viewpoint."

While some judges are considered better than others, and better judges are deemed "smart" or "experienced" or "savvy" or "reasonable," the clear tendency of lawyers' talk about judges is to call into question their skill, dedication, and concern. In the lawyers' vocabulary, no word is more prominent in describing judges than "arbitrary." Judges are portrayed in ways that suggest that they are capable of making decisions on grounds that have nothing to do with facts or rules. As one Massachusetts lawyer said in explaining to his client what to expect in a hearing, "[y]ou have to be careful in terms of how you do certain things because you can really prejudice the judge against you by bringing up certain issues in a certain way."

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51. It is not surprising that divorce lawyers de-emphasize rules. The rules in divorce typically invite a high level of discretion, and issues often become matters of individual equity rather than formalized rules. *See* K. DAVIS, DISCRETIONARY JUSTICE 43 (1972) (discretion plays significant role in equity).

In another conversation, a lawyer encouraged his client to adopt a particular demeanor in the courtroom:

> Lawyer: But you sit there somewhat respectful. Do the same thing in this courtroom, okay? Hands in front of you are just fine, or on the table just fine. I don't care, but don't cross your legs.
> Client: (Crosses legs)
> Lawyer: Okay. I asked you not to do that. If you do it I'll probably nudge you in the shoulder and ask you to stop crossing your legs. Okay? No arms over the back of the chair. Okay?
> Client: (Sits up very straight)
> Lawyer: That's alright. You look nice and neat and scared that way, that's okay. But sit up with your arms and hands in front of you; I don't care where they go, but in front of you, and without the crossed legs. Okay? And then one other thing I ask of you. Don't go like this (puts head on his desk), or anything, but don't go like this. Okay? No matter how tired you are tomorrow morning I want you to look pretty alert. It's best if you can just remember to keep your hands on the table or in your lap, and you'll be all set. Okay? Why? Why am I asking you to do this? Only because the judge will be looking at you. Okay? And he's going to make a decision, a fairly important one, and I don't want that decision to be influenced just by the way you sit.
> Client: Like, he don't care.
> Lawyer: Well, he might, if he doesn't like you. Okay? And even if he doesn't like you but you look concerned and you're interested, he'll probably go your way anyway. Okay. Judges are people, and well, I'll tell you, we might as well play the odds rather than have some surprises develop just because the judge doesn't like the way you're sitting. Okay?
> Client: Some would do that?
> Lawyer: Yup, some do.

In explaining why he must talk about such things as posture and appearance, this lawyer is guarding against the possibility that the judge's decision may be "influenced just by the way you sit." While this is an extreme case, law talk is peppered with references to extra-legal factors that influence judges, including their backgrounds and experiences. Thus one lawyer cautioned a female client that her chances of arranging joint custody for her child were not great because

> [j]udges don't have a real good sense of what to do about this. . . . It is a very male dominated view, because most of the judges are in the 40s and 50s or over and the concept anybody would. . .They find it hard in their own experience to digest the notion. . .In their day, when they were practicing lawyers, you either get custody or you don't. So they don't quite know what to do with joint custody.

While judges are influenced by minute details of client dress and behavior in the courtroom, they are also alleged to be incapable of grasping the nuances and subtleties of legal arguments, uninterested in the details of particular cases, and to act in ways that make their decisions difficult to understand. As one Massachusetts lawyer said in explaining a judge's ruling:

> I don't think he's totally oblivious to some of the more obvious things. The more subtle things I'm not sure he's catching on to. And he's not exercising his authority to allow us to delve into a lot of the more subtle things. Perhaps the judge doesn't want to rule on the motion for sanctions because he wants you to get your evidence in . . . okay . . . and because he wants to hear enough so that he can grant you your divorce . . . there is the possibility . . . that he can see at least the obvious things down below him and those are enough for him. And that he doesn't care about the subtleties and that those things that are so obvious to him are all he needs and he wants to give you . . . what we want to obtain. Now that's a possibility, and we shouldn't discount it yet. . . . However . . . as much as I hope and pray that that's just what he's doing I'm not all that optimistic on it either. And I wouldn't guess that he was doing that based on the reputations developed among other . . . attorneys. Based on that reputation I have my doubts that he is that bright . . . he's that aware of what's going on. But if he is we should be aware that he might be.

This lawyer's critique is doubled in the rhetorical play of the words obvious and oblivious. At the same time, the general criticism is softened by the suggestion that the judge's limitations may work, in this case, to the client's advantage.

In other cases, judges are said to lack the requisite qualifications or knowledge to make the decisions that the law requires them to make. As one California lawyer put it, in explaining why he was not optimistic about a favorable ruling on a complicated property issue, "[y]ou've got a judge with a 110 IQ who is sitting there, and he says, 'Hey, I don't want to hear all the god damned complications. . . Let's do it the simplest way.' " Or as another lawyer suggested:

> [h]ere's the problem. . . . What they really ought to do in domestic law is every judge who hears domestic law ought to have, literally a CPA, or somebody familiar with financial data, prepare for him or her something before the case to say somehow there is magic going on here. . . . [Judges] don't think even logically to say where's the money going to come from.

Criticism of judges does not end with issues of competence and qualification; it also includes issues of motivation, sensitivity, and concern. Many

judges are said to be lazy, insensitive, concerned more with their own convenience than with the issues, and generally uninterested in "justice." As one lawyer put it, they "don't want to make tough decisions." Another suggested that

> [j]udges are not tolerant of subtleties. . . . All they want you to do is, they want you out the door and the rulings are usually gross. They're gross rulings. They don't consider and factor in the subtleties of what the people are trying to do.

The talk of this and other lawyers indicates that the ease of making decisions is a major influence on the judiciary.[52] It suggests that the inattentiveness, insensitivity, and incompetence of judges must be taken into account in deciding how to process cases. As one lawyer says, "whatever arbitration system you choose is better than the judge."

These explanations describe the legal system as idiosyncratic and personalistic, and, in so doing, they endow lawyers with a mystique of insider knowledge and experience that is unavailable to even well-educated, well-read clients. They suggest that the skilled lawyer is more than a good legal technician; he is someone who knows the back corridors of legal institutions, the personalities of judges and how to present client desires in such a way as to appeal to the judges' proclivities. They highlight a "private knowledge" the full details of which cannot be shared with clients, and, at the same time, serve to shift responsibility for bad results from lawyers to powerful and unapproachable legal authorities. The critique of judges thus works to empower lawyers at the expense of their clients.

Many of these same themes are repeated when lawyers and clients discuss the behavior of other lawyers. In their most generous characterizations, lawyers describe other lawyers as "reasonable." Typical was the comment of a California lawyer:

> Yeah, you know, it's a problem. But, he has to deal with Joe Jordan too and he has to deal with him on a personal basis and, you know, he can change attorneys but Joe Jordan is a reasonable person. I'm glad he chose him, frankly. Because there are other attorneys I would rather he not have, you know, who would go ahead and tell him to do these things. But I think Joe Jordan is reasonable and I think if he can give him a lecture and really tell him about contempt because if he does get caught or if he's got enough of these phone

52. These are the very characterizations of judges that, were they to be made public, might provoke disciplinary action. *See* Kentucky Bar Ass'n v. Heleringer, 602 S.W.2d 165 (Ky. 1980), *cert. denied*, 449 U.S. 1101 (1981) (judge's decisions "highly unethical and grossly unfair"); *In re Estes*, 355 Mich. 411, 94 N.W.2d 916, *cert. denied*, 361 U.S. 829 (1959) (trial court said to have "violated every rule in the books"); Nebraska State Bar v. Rhodes, 177 Neb. 650, 131 N.W.2d 118 (1964) (court described as a "kangaroo court"); *In re* Hinds, 90 N.J. 604, 449 A.2d 483 (1982) (lawyer characterized judge as racially biased); State Bar v. Semaan, 508 S.W.2d 429 (Tex. Ct. App. 1974) (judge called a "midget among giants").

> calls or calls at work where fellow workers see him too, or when he comes to work.

Opposed to the reasonable lawyer is, among others, the "hypothetical maniac." According to one California lawyer, such legal mania tempts all lawyers, though only a few succumb:

> And he may say, well what's a little leak in a roof, and then all of a sudden if it gets out of hand you've got to go to a judge to determine what a little leak in the roof is . . . . See, the real core of all these things is you can become a hypothetical maniac as I call it. In law school we used to laugh because there was always a guy in the back who would raise his hand and said, Now what if the person was a diabetic and crossed the street and a hemophiliac was coming left, but the hemophiliac belonged to a club; and you sit in your chair and think, my God, this guy's a maniac in the back row. Well unfortunately the practice of law becomes, for two reasons, you are kind of guarding yourself from malpractice and you are also thinking, my God, the one time I don't alert somebody she's going to walk out the door and it's going to happen. And it happens just enough to make you real sensitive. So, what I think lawyers would be better off doing is telling the client is probability scale. If there was some way of telling them. Hopefully this won't be a problem, hopefully your roof won't blow off.

In other cases, lawyers affirm and further unravel the dangers of dealing with lawyers who are excessively preoccupied with "technical" matters:

> What your husband's lawyer has just done—it's a technical point and I am absolutely right, okay; there's no issue on it; in fact, it's never come up before because no one would ever question it—and what they've done is, in the midst of negotiation, gone off to the side and have your husband's lawyer telling him something which he then tells you, which then would jeopardize any of this, which is just kind of a fascinating way—instead of the lawyer saying, don't worry about that now, or even. . . . In other words, the lawyer—your husband's lawyer—didn't even have to tell him. It's nothing in which he has decisions to make about.

The message is that clients are not well served by lawyers who alert them to every possible eventuality no matter how remote.[53] To do so only makes

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53. This message provides a rhetorical justification for lawyer paternalism. *See* Wasserstrom, *Lawyers As Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975). It also provides justification for lawyers who withhold access to legal knowledge and, in so doing, reinforces the tendency of professionals to treat their expertise as a private possession. *See* J. KATZ, THE SILENT WORLD OF DOCTOR AND PATIENT (1984).

negotiations more difficult and increases the probability of a contested hearing.

Political agendas are also alleged to lead to unreasonable lawyer behavior. The most commonly expressed criticism of this type targets "feminist" lawyers:

> Client: What's Claire's (wife's lawyer's) track record on these things (willingness to reach negotiated settlements)? I mean, how does she. . . What's her normal way of operating on these things?
> Lawyer: What I know about Claire is that she can be very reasonable. On the other hand, it is my opinion that her feminism has been distorted in terms of how it relates to divorce law. Therefore, if there's any rhetoric from your wife (about) what spousal support is supposed to be, Claire will foster and cultivate that, rather than be reality with her. . . . Claire is also an ardent feminist and often confuses the issues of when to say enough is enough.

The distortion introduced by feminism encourages the wife to ask for more spousal support; to "foster and cultivate" is to convert "rhetoric" into concrete demands. The reasonable lawyer, on the other hand, separates political belief from professional practice[54] and knows when to say "enough is enough."

Other lawyers are more direct in calling into question the professionalism, integrity, and ethics of their opponents. One of the most dramatic instances of this occurred in a Massachusetts case in which the husband's lawyer was repeatedly frustrated in his efforts to obtain discovery from his client's wife:

> Client: He said we'll produce these things in seventy-two hours.
> Lawyer: He also defended her. Okay . . . he actually tried to make arguments as to why they weren't answered . . . all of them, I assure you, counterfeit as they could be. They were . . . there was nothing of substance to those arguments and I found it most distasteful. And I shouldn't be telling you this I suppose. The ordinary client I wouldn't tell it to, but as far as I'm concerned his arguments are quite distasteful to me as an attorney in my profession . . . .

Later, the same lawyer laments that the actions of the other lawyer are

> Incredible. . . . Whether he's just a plain pain in the ass, or whether he, or whatever the reasons, you know. Whether they have some sexual affinity, which I'm not even intimating, whether they have a religious affinity, whether they just like each other, whether he just wants to push his client's story whether he knows it's true or not, whether he's irresponsible, whether he is someone who will cir-

54. Simon, *supra* note 14.

> cumvent the law and the rules to obtain any result that he can, whether he doesn't even know what he's doing. Whatever the reasons. The facts are that he's been doing what he's been doing . . . and that's what we're dealing with, and I think it's a monster.

This lawyer employs powerful, but contradictory, rhetoric. He acknowledges that lawyers should not criticize other lawyers and should avoid mudslinging in general, yet he does both at length. He notes that his adversary's motives are irrelevant to planning case strategy even as he elaborates various interpretations of those motives. Nowhere does he consider that the behavior which he finds so frustrating might arise from responsible professional practice or from a well-intentioned effort to do justice.

Such condemnation of other lawyers occurs frequently and tends to promote client cynicism. As a result, clients might increasingly perceive legal professionals as insufficiently self-disciplined or as excessively self-interested, or simply as insensitive and unethical. The legal process of divorce is thus presented as a game where rules are abused and ignored by major participants.

3. *Justice and the Legal Order*

What do lawyers say to clients about the efficiency, fairness, and social utility of law in general, and about the legal process of divorce in particular? Again one begins by noting the relative absence of positive characterizations. Lawyers, at least in the divorce context, do not defend the legal order in which they participate as either the critics would predict or the organized bar would prescribe. Instead, law talk suggests distance between lawyer and legal order, with the former portrayed as struggling valiantly within the confines of a process that seems neither equitable nor just.[55] In numerous instances, moreover, lawyers suggest that their clients are being "victimized" rather than being well-served by the legal process. Here, the goal of law talk is to initiate the client into a jaded professional world, disabused of the illusions of formalism.

Money, clients are advised, is the chief determinant of legal results. Legal rights are "absolute" to the extent that clients "want to invest the time, effort, energy and money" necessary to assert or defend them, but, at the same time, clients are often advised that they cannot afford to do so. As a result, lawyers suggest that clients should settle for less than the client initially perceives as fair.[56] As one Massachusetts lawyer explained to a client in a hotly contested divorce in which the wife's wealthy family was paying her lawyer:

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55. A similar phenomenon is described in a study of the way members of Congress describe that body to their constituents. R. FENNO, HOME STYLE 166-67 (1978).

56. *See* Sarat & Felstiner, Selling Settlement, *supra* note 39.

> I'm not just making this up. I'm telling you very frankly it appears as though he's (the wife's lawyer) doing a $10,000 case. That's just the way it is. Your—no matter who you go to—you can't afford a $10,000 case. Can't do it. And that's part of the injustice of the American legal system but I'm not going to do as much work as he is at the moment. I can't . . . I'm just not equipped to do it. If you were to give me $10,000 I would drop everything, drop everything, and work 40 hours a week, but I can't based on what you can afford.

This lawyer attributes the "injustice" of the "American legal system" to the law's inability to compensate for economic differences. At the same time, he shifts responsibility for any possible failure from his own performance to the client's limited means while he both suggests the wisdom of putting more money into the case and disclaims an interest in having the client do so.

Cost is not the only factor that lawyers point to in their critiques of the legal order. Clients are also introduced to a system in which backlog and delay are pervasive, where rights are eroded by wars of attrition carried out over extended periods of time:

> It is wearing and tearing. Just how much wear and tear can you take. You've seen more than most divorce victims of how the courts work. And so you should have a pretty good idea of what it's going to be like. It's going to be dragged out . . . [a]fter the trial, even if you 'win', there's going to be a lot of stuff dragged out after that.

The repeated references to a "dragged out" process and to "wear and tear" suggest that the pace of litigation is one of the factors that turn litigants into "victims of how the courts work."

Courts are not the only objects of this criticism. The theme of the needless infliction of distress is found in a Massachusetts lawyer's evaluation of the state legislature, which established a longer waiting period for no-fault than for fault divorces:

> They feel that if you go in and fight that's going to prevent people from going through divorces. They're worried that if you make divorce too easy everybody's going to go through divorce. I don't personally see it that way. I just don't see the need of putting people through the anguish. It's a tough decision, but I think once people make it they're going to stick with it . . . I don't think they're really accomplishing what they think they are. They're causing more pain than they should.

A costly, slow, and painful process might be justifiable if it were fair, reliably protected important individual rights, or responded to important human concerns. Law talk is, however, full of both lawyer and client doubts about whether the legal process even aims at meeting those goals:

> Client: Sure. I mean, that's as much as can be expected, I believe. Am I right in that?
> Lawyer: I think so, too. I think that that effects a good settlement. Well, it effects an equal division. I don't know—is a legal settlement, a fair settlement? It gets the legal aspects of the case over.

Here the lawyer notes that a "legal settlement" entails an "equal division" while questioning whether such a result, or a settlement that deals only with the "legal aspects of the case," is "fair."

This exchange represents another example of the discourse in which lawyers teach clients about the distance between law and society, not just because of the limited efficacy of legal rules, but because of the law's tightly limited concerns. This indoctrination is especially important because there is frequently a clash between the client's ultimate objectives and the lawyer's description of what the law can actually do; typically, the client's agenda is broader than the law's alleged competence.[57] Lawyers readily point out the limited nature of legal justice:

> Client: Well, I mean, I'm a liberal. Right? A liberal dream is that you will find social justice, and so here was this statement that it was possible to fight injustice, and you were going to protect me from horrible things like judicial abuse. So that's uh, it was really nice. . . . But as you say, if you want justice in this society, you look somewhere other than the court. I believe that's what you were saying to Bob.
> Lawyer: Yeah, that's what I said. Ultimate justice, that is.

Juxtaposing legal and "ultimate" justice, this California lawyer implies that any person seeking such a final accounting is clearly not going to be fully satisfied by a system with more narrow concerns. Law talk encourages clients to come to terms with this reality by lowering their expectations and by implicitly directing them to look elsewhere for consolation.

III. From Legal Realism to Professional Self-Defense

The common conversational practice of debunking formalism and equity, thereby flattening the ideals of legal justice and fairness, would seem to call into question the very role and authority of divorce lawyers themselves. As clients learn that rules are not central to the divorce process, sooner or later it must dawn on them that the purported technical expertise of lawyers, their presumably sophisticated knowledge of rules, are really only of limited value. Yet, since law talk proceeds by increasingly relegating rules to the background, and by stressing instead the peculiar

57. This is not a problem limited to divorce. *See* Mather & Yngvesson, *Language, Audience and the Transformation of Disputes*, 15 Law & Soc'y Rev. 775 (1980-81).

patterns of individual legal actors, it prepares the way for an alternative defense of professional power: one based not on rules but on local knowledge, insider access, connections, and reputation.[58] Lawyers often suggest that their most important contribution is knowledge of the ropes, not knowledge of the rules;[59] they describe a system that is not bureaucratically rational but is, nonetheless, accessible to its "priests." One illustration is provided by a California case in which the client presses her lawyer for some explanation of why a restraining order was issued against her, an order issued before she became a client of the lawyer with whom she is now conferring:

> Client: How often does a case like this come along—a restraining order of this nature?
> Lawyer: Very common. . . . Yeah, you know, I talked, I did talk to someone in the know—I won't go any further than that—who said that this one could have been signed purely by accident. I mean, that the judge could have—if he looked at it now—said, I would not sign that, knowing what it was, and it could have been signed by accident, and I said, well, then how does that happen? And he said, well, you've all this stuff going; you come back to your office, and there's a stack of documents that need signatures. He says, you can do one or two things: you can postpone signing them until you have time but then it may be the end of the day; the clerk's office is closing, and people who really need this stuff aren't going to get the order, because there's someone else that needs your attention, so you go through them, and one of the main things you look for is the law firm or lawyer who is proposing them. And you tend to rely on them.

Two themes weave their way through these comments. First, this description of how judges handle court orders suggests a high level of routinization and inattention. Judges sign orders without reference to their legal merit or to their substantive effects, but simply to satisfy "people who really need this stuff." Second, the lawyer emphasizes the importance of insider status and reputation. While judges are said to ignore the substance of orders, they do pay attention to the identity of the lawyer or firm requesting them. Presumably, repeat players, those known to be reliable, get their orders signed, while others do not.[60] This use of reputation is

58. Blumberg, *The Practice of Law As a Confidence Game*, 1 LAW & SOC'Y REV. 15 (1967).

59. This emphasis on connection and reputation as the key service provided by lawyers is not unusual where a lawyer's practice tends to be confined to a single geographic area. *See* J. CARLIN, LAWYERS ON THEIR OWN (1962); London, *Clients, Colleagues and Community*, 1985 AM. B. FOUND. RES. J. 81; Nelson, Reconsidering the Obvious: Lawyers and the Structure of Influence in Washington (1986) (unpublished manuscript) (on file with authors); Sarat, Ideologies of Professionalism: Conflict and Change Among Small Town Lawyers (1988) (unpublished manuscript) (on file with authors).

60. For a general discussion of the advantage of being a repeat player, see Galanter, *Why the 'Haves' Come Out Ahead*, 9 LAW & SOC'Y REV. 95 (1974).

redoubled in its rhetorical power by the explanation of how this lawyer obtained his information. His reference to talking to "someone in the know" suggests that he himself is an insider, trusted enough to be the recipient of confidential information. Moreover, by refusing to say who gave him the information ("I won't go any further than that"), he simultaneously arouses curiosity and implies that his informant has committed an impropriety. Combined with the earlier reference to "accident" as an explanation for why this order was signed, this talk hardly inspires client confidence in the legal process.[61]

Lawyers frequently go to great lengths to impress clients with their range of contacts and importance on the local legal scene. Such references take many different forms. One Massachusetts lawyer, trying to reassure his client in a difficult case, noted:

> By the way, the judge has been appointing me on all the guardianship and guardian ad litum cases up here where an attorney is needed from out of town. So maybe that is a sign that he likes me. And maybe that's a sign that he's inclined your way anyway.

Other references to the importance of reputation are even more blatant:

> Now I think I have a good reputation with the registrar of probate here. Judge Murdoch is married to, no, what am I saying, Judge Murdoch's sister is married to Bob's wife. My God, try again. His sister is Bob's wife. Okay. They talk all the time. Bob likes me very, very much. We get along very, very well. And I have a good reputation in this court and I think it's going to get through to the Judge.

It is not reputation in some general sense that counts, but reputation "in this court." This specificity typifies law talk in the divorce lawyer's office; that talk is laced with references to how things are done in particular courts and with comparisons suggesting that no two courts (or even no two judges) operate in the same way. The legal system, thus portrayed, is localized, governed by peculiar and specific practices rather than by universal norms and therefore requires extensive familiarity with the local scene. Both the unrepresented client and the inexperienced lawyer are pictured as being at a real disadvantage.

At the same time that they create doubts about the legal process, divorce lawyers give clients reasons to rely on them by emphasizing the importance of their insider status. In this posture, the interests of the profes-

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61. A public suggestion of judicial favoritism or an alleged pattern of undue influence has frequently subjected lawyers to disciplinary proceedings. Compare the quoted material with the statement by defendant attorney Nelson that, "The courts are . . . much more concerned with who appears before them than with what the facts are and what the law is." State v. Nelson, 210 Kan. 637, 504 P.2d 211 (1972); *see also* Ramirez v. State Bar of California, 28 Cal. 3d 402, 619 P.2d. 399, 169 Cal. Rptr. 206, (1980).

sional depart from those of the legal system. Lawyers construct a picture of the legal process which creates individualized client dependency while it jeopardizes trust in the legal system and may damage the legitimacy of the legal order.

IV. CONCLUSION

In a legal order whose legitimacy rests on the claims of formalism and, to a lesser extent, on those of equity, the law talk of the divorce lawyer's office may be partially responsible for the common finding that people who use legal processes tend, no matter how favorable the results of their encounter, to have a less positive view of the law than those with no direct experience.[62] Law talk in the divorce lawyer's office, as it interprets the internal workings of the legal system, exposes law as failing to live up to the expectations which people have about it. The law talk of the divorce lawyer's office is replete with "rule skepticism."[63] Moreover, while it acknowledges the importance of discretion, and of the particular proclivities of the actors who exercise it, it is highly critical of their motivations, capacities, commitments, and concerns. If the presentation of a formalist front, or of a legal system whose officials are fully committed to doing substantive justice, is necessary to legitimate the legal order, then the presentation of the legal process at the street level may work to unwind the bases of legitimation that other levels work to create.[64]

Given the absence of research similar to our own, it is difficult to say whether the discourse of the lawyers we observed is characteristic of other settings or areas of legal practice. However, some similar themes have been reported elsewhere. We know, for example, that an emphasis on personal contacts, local knowledge, and reputation is often part of the transaction between lawyers and clients in criminal cases.[65] In that context lawyers stress their connections to, and reputation with, local prosecutors as they try to "sell" plea bargains to their clients. In contexts other than divorce or criminal prosecution, where law is more rule-intensive, it may be that lawyers talk to their clients about the discretion that an *oversupply* of rules makes available to legal officials.[66] Moreover, in any context where clients are sophisticated users of legal services, have frequent dealings with legal officials, or operate in bureaucratic environments, such cynical interpretations may have less impact than they have on divorce clients.

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62. Sarat, *supra* note 12.
63. *See* J. FRANK, COURTS ON TRIAL (1949).
64. Merry, *supra* note 12.
65. *See* Blumberg, *supra* note 58; *see also* L. MATHER, *supra* note 46.
66. The "availability of law" has been documented by Silbey and Bitner, but their description does not extend to the way that the consequences of that phenomenon are explained to laypeople. *See* Silbey & Bitner, *The Availability of Law*, 4 LAW & POL'Y Q. 399 (1982).

Nevertheless, if mass legal consciousness has, in fact, taken a turn toward cynical instrumentalism, the pattern of practice that we observed in the divorce context may be a contributing factor. On the other hand, if the American public is mystified by the pretenses of legal formalism and is, as a result, allegiant, it remains so in spite of the law talk of the divorce lawyer's office. But, no matter what its impact, law talk suggests that divorce lawyers, at least, do not take seriously the professional obligation to "maintain due respect for courts of justice and judicial officers."[67] Indeed, while critical scholars are devoted to proving the proposition that legal rules are indeterminate and to enlisting practicing professionals in the project of demystifying and exposing the claims of legal formalism,[68] divorce lawyers seem routinely to be engaged in this same project as they counsel clients.[69] Yet there is no evidence that the demystification that accompanies lawyers' cynical characterizations of law has led, as the critics would hope, to a reorientation of professional practice or to the elimination of the perceived boundary between law and politics.

67. Ramirez v. State Bar of California, 28 Cal. 3d at 408 n.12, 619 P.2d at 405 n.12, 169 Cal. Rptr. at 212 n.12.

68. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984).

69. Critical scholars would not, however, be content with the way in which the unmasking of law is used to maintain client dependency and reinforce professional power. *See* Simon, *supra* note 14.