Mutual engagement: Criminology and the sociology of law

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Abstract. How are conceptions of crime as abnormal sustained in the face of persistent sociological evidence that crime is normal? While ostensibly expressing different images of crime, together the accounts of crime as episodic ruptures of the social fabric and as a normal feature of healthy societies sustain the possibility of the sociality necessary for collective life. This paper explores the contradictory relationships between law and crime as a normal feature of social life and crime as a rupture in the social web. Decades of research in crime, law and deviance have documented how crime is a constituent and normal feature of any legal system: theorized as an aspect of law; professionally managed through law and interpreted on the basis of the normal and conventional character of events and relationships; organized as a reflection and reproduction the encompassing social structure; experienced as familiar, ordinary and frequent. Crime is a normal and expected feature of any legal system whose anticipation is a resource for the production of law. Yet in popular culture, rather than professional sociology, crime is experienced as bizarre, abnormal, a distinct rupture of what is conventionally portrayed as a seamless web of normative conformity. Conceptions of law's abnormality helps to maintain normal appearances, to sustain the illusion of society, to individualize the event as one person's pathology, to contain its threat, and to turn it into an economically and professionally managed project. The contradictory cultural representations and experiences help sustain a hegemonic reality in which crime is both a usual feature of ordinary social life to be understood and managed like any other mundane matter, and an episodic event that need not challenge confidence in what is in effect a reified conception of society.

Introduction

Each of the contributions to this symposium explores the intersection of criminology with various subfields of sociology, noting some productive relationships between criminology and social stratification, criminology and organizations, or criminology and social movements. However, when exploring the relationship between criminology and the sociology of law, the conjunction "and" is superfluous and thus an examination of the intersections between criminology and the sociology of law must begin differently. Crime is internal to law, and thus cannot be adequately analyzed separately. In some ways, the conjunction "and" between crime and law should be an "or," signifying an alternative. In this sense, crime stands as law's other, its alteriority. Crime

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breaks the law, law repairs the crime. Yet if crime challenges law, law also expects and needs crime for its justification. Crime and law assume and require each other. In the comments that follow, I briefly explore ways in which the sociology of law can help us understand the contradictory relationships between law and crime as a normal feature of social life or crime as a rupture in the social web.

If crime is the law's other face - part of the law and not possible without it, then the theoretical frameworks and forms of research that describe how law works should also explain the social dynamics of crime. Indeed, this is the case, as decades of research in crime, law and deviance has documented how crime is a constituent and normal feature of any legal system. Consider for example Karl Llewellyn's canonical account of the nature of law from The Cheyenne Way (1941). "Law has as one of its main purposes to make men go around in more or less clear ways; law does in fact to some extent make men go around in more or less clear ways. Law purposes to channel behavior in such manner as to prevent or avoid conflict; and law does in important degree so channel behavior. Without the purpose attribute, law is unthinkable, without the effect attribute, law cannot be said to "prevail" in a culture, to have "being" in it. But there is more to law than intended and largely effective regulation and prevention. Law has the peculiar job of cleaning up social messes when they have been made. Law thus exists for the event of the breach of law..." (1941: p. 20). Thus, Llewellyn suggests, law and crime are fundamentally married.

From its genesis in the anticipation and commission of an act through the end point of punishment, from the very outset in lawmaking through its management and control, crime is a thoroughly legal matter, a normal feature of any legal system. First, consider at the macro societal level and in the foundations of sociological theory, Durkheim's association between law, crime and social solidarity (1893 [1933]). In societies with varying divisions of labor, law provides legitimacy and integration by defining and punishing threats to the division of labor. Where there is a minimal division of labor and mechanical solidarity rests on the similarity of the members to each other and the similar contributions of each to the well being of the whole, criminal law predominates to control difference or variation. Where there is greater heterogeneity and a more complex division of labor, the law is more of a regulatory mechanism, coordinating and integrating the various contributions necessary for the continued function of the whole. Much research has tried to assess the relative proportions of regulatory to criminal sanctions in societies with varying degrees of heterogeneity and divisions of labor, although the empirical data testing these hypotheses still remains contested (e.g. Freeman and Winch, 1957; Schwartz and Miller, 1964; Wimberley, 1973; Spitzer,

1975; Turkel 1979). The theory remains instructive nonetheless, as so much theory in criminology and sociology of law builds upon this original insight, for example Nonet and Selznick's now classical work, *Law and Society in Transition: Toward Responsive Law* (1978); Donald Black's *Behavior of Law* (1976), or Roberto Unger's, *Law in Modern Society* (1976).

Reworking Durkheim's original insight, Foucault conceives of criminal law, not as a remnant of societies with simpler divisions of labor but as a means of disciplining and ordering social variation in complex societies as well. Because punishment does not eliminate offenses, Foucault, like Durkheim, hypothesizes a functional source for the endurance of criminal punishment. Rather than "render docile those who are liable to transgress the law," criminal laws function as one among several mechanisms of subjugation working to distinguish among offenders, to distribute and stratify them. "Penality," Foucault concludes is "a way of handling illegalities, of laying down the limits of tolerance, of giving free reign to some, of putting pressure on others, of excluding a particular section, of making another useful, of neutralizing certain individuals and of profiting from others" (Foucault, 1979: p. 272). From these Durkheimian and Foucauldian macro perspectives, legally defined and created crime is a normal and inevitable feature of any healthy society, a tactic of social organization, and one technique of political economy.

Crime is not only theorized as an aspect of law, it is professionally managed through law, and specifically managed on the basis of this normal and conventional character. Although the classic studies of the police, for example by Jerome Skolnick (1966), Gary Marx (1988), and Egon Bittner (1990), demonstrated that much police work took place outside of legal prescriptions, the agents were authorized, in Bittner's phrase, by their legal mandate to use "situationally justified" force. The legal mandate authorizes the actors, if not the particular action, and professional agents seem to respond to situations, David Sudnow (1965) taught us nearly 35 years ago, on the basis of the typical situational features of the event. Normal crimes are "occurrences whose typical features, e.g. the ways they usually occur and the characteristics of persons who commit them (as well as the typical victims and typical scenes), are known and attended to" by competent members of the criminal justice system. Enforcement officer operate under rubrics (linguistic and procedural routines) that derive not from statute or case law but from both the organized practices of offenders and their own professionally trained skills.

Crime is also normal in third sense that expands Sudnow's notion of the socially constructed categories of the official agents. For non-professional actors, definitions of crime are also a function of non-legal variables, for example the relationship among the participants to the event. Depending on

what is expected as part of the normal relationship, events are interpreted as conforming or deviant with gradations of seriousness depending on the intimacy of the relationship. Money taken from a purse by a child is often not interpreted parents as theft. Batteries among friends or siblings are interpreted as horsing around. Research has shown that the more distant the relationship between the parties, the more likely an unwelcome or non-routine event will be interpreted in terms of legal definitions or proscriptions, and the more likely that the authorities will be called. This is not to say that no mother has ever taken her son to the juvenile officer for pilfering money from her wallet. It does mean, however, that the events that are likely to be perceived as crimes, to be reported to the police, and to become part of the record of crime is a function of the citizenry's understanding of what constitutes normal social interaction (Merry, 1981).

Fourth, crime, like law, reflects and reproduces the encompassing social structure. Law is costly and the costs are distributed differentially according to social class, status, and organizational positions. Whether in the eighteenth or twentieth centuries, for example, rates of grievance and litigation reproduce patterns of class, ethnic, and gender stratification (Kagan, 1981; Trubek, Grossman, Kritzer, Felstiner and Sarat, 1983). Not only are there differential barriers to invoking law, but there are also differential costs to complying with law and the ability to pass along to others the costs of compliance. This is true for crime in the suites and crime in the streets. Distribution and variation in types and costs of crime mirror the conventional features of social stratification. Legal regulation "operates as a kind of regressive taxation, burdening the have-nots far more than the haves" (Macaulay, 1984: p. 152; Galanter, 1974).

There is a fifth sense in which crime is normal, as in commonplace, familiar, ordinary and frequent. Again much research suggests that most people violate or break laws at some time or other, and some of us – not merely those who frequently reside in penitentiaries – violate laws many times. And, as I am sure we are all quite aware as well, these violations are not always trivial; they are frequently injurious to others and often involve felony offenses. In effect then, crime is a constituent feature of everyday social life. It happens all the time, it is expected and predictable.

In these ways, conventional sociology, and the sociology of law in particular, teaches us that crime is part of the normal features of law and society. Without law, there is difference and deviance, dispute and disagreement; there is harm, error, and misjudgement. Legal proscription turns ontological and normative variation into crime, mischief into malice. Crime is a normal and expected feature of any legal system whose anticipation is a resource for the production of law.

Yet despite this well documented understanding of normal crime, in popular culture rather than professional sociology crime is neither considered nor experienced as normal. It is the bizarre, the abnormal, a distinct rupture of what is conventionally portrayed as a seamless web of normative conformity – were it not of course for these unwelcome excrescences on the body politic.

A recently published interpretation by Joyce Carol Oates (1999) of the Jon Benet Ramsey murder provides an apt illustration of this popular consciousness of crime. Oates writes that "the profound and disturbing disequilibrium provoked by the commission of a crime demands a response if the fabric of society is not to be rent." Moreover, she continues, the non-fiction genre of "true crime" is as popular as it is, consumed by a large and diverse audience because in it "most murders are solved. Disequilibrium has been quelled," in this way satisfying a fundamental need for social repair. The biblical injunction "an eye for an eye, a tooth for a tooth" is merely an ancient formula for humanity's essential need for revenge and recomposition which we have, she argues, developed into a complex and rationalized system of punishment and justice.

In this uncharacteristically banal account, Oates conveys very commonplace perceptions - perceptions shared by victims and the general public alike - that crime is a tear in the fabric of society and that the function of the criminal justice system is to reweave the threads. In his very fine book, Seductions of Crime, Jack Katz (1988) provides a similar account, this time of perpetrators' experiences of crime as the abnormal rupture of everyday life. According to Katz, crime can be a matter of extraordinary pleasure, sublime achievement, and existential seduction. Rather than mundane and profane, Katz suggests an element of the sacred in the phenomenology of criminal acts, a divine pleasure derived from violation of collective norms. Sometimes, as in trespass, it is an episodic rapture produced in collaboration with subjects who willingly define themselves as victims; the exhiliration relies on the victim's veneration and consecration of space as property. Or, in doing stick-up or robbery, the gratification may derive from the skillful manipulation of moral scripts, from what the perpetrators experience - quite opposed to legal theorist's claims – as their own superior moral competence.

The conception of social life as harmonious and crime as rupture is so commonplace as to almost go without saying, and I will not take the space to document further its various representations. The important question for sociologists is how and why it persists. How is this sense of crime as abnormal, as rupture of social expectations, produced and sustained in the face of the overwhelming evidence of its normalcy? That is the dilemma.

Recent insights from the sociology of law concerning its everyday experience may help us to better understand crime, and may demonstrate more

concretely what can be contributed to criminology from its continued integration within sociology. As my example, I will use the work Patricia Ewick and I recently published as *The Common Place of Law: Stories from Every-day Life*. In that work, we argue that the durability and power of legality as a structure of social action derives directly from the ideological contradictions embedded in the popular consciousness of law. The major point I wish to import from that work to this symposium is the role of contradiction in sustaining cultural hegemony. Then, I will try to apply that insight from the sociology of law to the understanding of crime.

For the analysis of popular legal consciousness,¹ Patricia Ewick and I spent several years collecting stories of events and situations that constitute the ordinary lives of Americans. We interviewed over 400 residents of the state of New Jersey; they were randomly selected from a stratified sample of residents in four counties. We have no reason to believe that these people were a peculiar sample except in so far as they lived in New Jersey. Our sample approximated well the racial and economic composition of the state.

Although we were able to demonstrate the pervasive presence of law in a wide range of everyday phenomena, outside of official institutional forms and offices, to show how, in effect, "the law is all over," we did not discover a single unified cultural experience; instead, we heard complex and contradictory stories about law. From the thousands of stories offered by our respondents (over 5900 incidents were described), we identified three dominant understandings of law. At times, in some situations, people describe themselves standing before a law that is removed and distant from everyday life. Here, the law is depicted as impartial, powerful, and autonomous. In this account, people describe judges as "Gods," answerable to no one, delivering disinterested objective decisions for issues of general importance. Rather than trivial matters of personal concern, the law is reserved in these accounts for matters of real, collective harm. This sense of law's general public purpose was expressed in a variety of ways. For example, one interviewee disqualified mundane problems as appropriately legal matters, in this sense for being petty, and even infantile. Gretchen Zinn said,

I think that ... if its a neighbor, you should try and resolve disputes yourself. I don't think the police are there for that purpose, to be honest with you... We have a police force to solve, you know, to take care of crime. Not to be our daddies and mommies, because we can't handle something ourselves.

When providing this account of legality as a general good, issues were legitimately legal matters only when they could be framed as having a public purpose. Interviewee Jules Magnon stated it most starkly, "I don't have to

be afraid to pursue justice. As long as I am doing something for everyone's benefit."

At other times, however, people describe law as a game with which they engage and play. Recognizing the importance of unequally distributed cultural and material resources, people sometimes describe the law as an arena – not for the pursuit of collective goods, but for the legitimate pursuit of self-interest. It is not a free space, but one bound by rules but one which those with experience and greater resources can play to win and can play to change the rules. One of our respondents, Raymond Johnson, articulated this account quite explicitly in describing a dispute he had with his landlord. He had carefully deduced the limits of the landlords authority and used the local ordinances and lease provisions to secure the continuation of his lease. As he explained his negotiating skill and success, Mr. Johnson claimed, "there is no justice. You either win, or you lose. As long as you can accomplish your objectives, you win. I'm not concerned about justice."

Finally, in a third account of law, people report being caught within a power they are unable to affect and yet to which they cannot acquiesce. In this account, legality is understood to be an arena where might makes right, where the possibilities of justice exist but where the power and cumbersome forms of law often make it inaccessible and unreliable. People describe their attempts at making do, and using what situations momentarily and unpredictably make available to fashion solutions not conventionally accepted or legitimate. Michelle Stewart typified this conception of legality.

I wouldn't go through the system, because I think that you get hung. I don't trust it at all. I have learned to trust me, period... I wouldn't put myself in the hands of the law. It works nice on paper, you know... But a paper law, from what I've seen, doesn't work.

To remake situations as they stand, to use the resources at hand, people use what they can to get what they need. They rely on their understandings of social organization and use the very elements of their subordination: roles, rules, and hierarchy. People invent roles by masquerading as others; they use rules literally because they know that rules only work if they are routinely ignored; and, to make do with the resources at hand when legal power seems overwhelming, people leap frog over layers of hierarchy.

Through these three common accounts, legaltiy² was described as both a hallowed domain of transcendant justice and an arena of strategic and tactical maneuvering where skilled and unskilled players battle for advantage. These alternative accounts were not provided by entirely different groups of people; sometimes the same person provided several different accounts of legality. The law was described as both distant, far away from everyday life and

present in the here and now, solemn and mundane, revered and reviled, sacred and profane. This experiential and ideological heterogeneity, we argued, did not represent ideological or theoretical confusion; rather, we suggest that it sustains law as a durable and powerful institution.

In and of itself, this is not necessarily remarkable, and certainly the observation of contradictions in social consciousness is not new. What seems interesting to us, however, is the way we have theorized this contradiction and the resolution it provides to persistent dilemmas in the sociology of law and we suspect in criminology and sociology more generally.

In conventional sociological accounts, social institutions have been understood as sets of relationships organized around or in support of a central value or norm. For most of the twentieth century, for example, law was described as a rationalized system of dispute resolution, the family as an organization of reproduction and socialization; the gang as an alternative family or support network. You get the picture. These normative foundations were identified through a process of generalization and theoretical abstraction. Often, however, empirical researchers could make plausible arguments that these same institutions supported different values and functions. These were sometimes interpreted as organizational dysfunctions, or in some instances the alternatives were successfully defended as the new and more appropriate definition of the institution. Thus if law's function was not dispute resolution, it may have been identified as a system of legitimation for capital; or the family may have been seen as an economic rather than affectual unit, or similarly for the gang. The history of twentieth century sociology is a series of paradigms substituting one institutional function for another.

Contemporary cultural analyses expose the limitations and inadequacies of understanding social institutions in terms of singular or homogeneous normative orientations. Moreover, cultural analyses burrow beneath abstract accounts of social action and institutions to describe the mediating processes through which local practices constitute and construct what is experienced as stable and durable, perhaps homogeneous, structures. This research has gone beyond the observation of gaps between ideal and reality, theory and practice, and beyond a sequence of alternate general models. Perhaps cultural analysis has progressed quite far in the sociology of law because of the nature of the subject where the ideals and central values have been more authoritatively articulated, perhaps because the distinction between ideals and practices animated sociological research from the outset. Whatever the historical sources, with this initial distinction between ideals and practices - the law-on-the-books and the law-in-action - in place, scholars put their energies into describing the local practices they observed. Much of twentieth century sociology of law, and certainly most of the research of the last fifty years,

has produced a solid body of valid, reproducible accounts of the ordinary practices of legal actors and organizations.

More importantly, we have begun to specify the ways in which local practices aggregate and condense into systematic institutionalized action. Alan Hunt describes this work as a process of "grasping . . . [the] mutual articulation of interaction" of what he loosely calls "big power" and "little power" (1992: p. 11). The task of researchers has been to make visible the mechanisms of accumulation and condensation that transform individual local actions into regular, repeated patterns, expectations, and institutions, that in turn have the capacity to shape local techniques. They document situations in which local processes recursively reproduce state institutions, for example, and macro social structures and, at the same time, provide openings for creativity in reshaping those structures. In addition, researchers notice the opportunities for resistance in the same processes that also contribute to structural reproduction.

In this line of research, Ewick and I have been able to show that there is a specific pattern to the variations observed in experiences and descriptions of particular social institutions. By tracing the law in the daily lives of individuals - on the ground, in kitchens, in backyards, offices, and school houses -we have been able to demonstrate that the alternative accounts and models produced in different pieces of research and in different theories of law are simultaneously present in the popular consciousness of law. The cultural experience of legality is composed of both ideals and practices, normative aspirations and grounded understandings of social relations. In the constitution of legality, a general, ahistorical truth is constructed alongside, but as essentially incomparable to, particular local practices. Through the opposition of generalized ahistorical ideal and local practices, firsthand evidence and experience that might potentially contradict that general truth (normative ideal) is excluded as largely irrelevant. By effacing the connections between the concrete particular and the transcendant general, hegemonic ideologies conceal social organization (Ewick and Silbey, 1995, 1998). Concealing social organization, power and privilege are preserved through what appears to be the irreconciliability of the particular and the general. In The Common Place of Law, the possibility of both disinterested decisionmaking and the pursuit of self-interest, the predictability produced through constraining rules and the opportunities to play with and subvert rules, constitutes legality as a durable structure of meaning and action.

Now, if we redirect our focus from law to crime, can we identify a similar pattern in the ideological effects created by the contradictory images of normal crime as a constituent feature of law and crime as a rupture and breach of law? To begin with, the conception of crime as abnormal allows us to

maintain, as Goffman wrote, normal appearances, to sustain the illusion of society. Even the briefest of inquiries reveals the frail and delicate foundations of modern social life (Pollner, 1975). We live among strangers whose capacities, intentions, and habits we do not know. In order to accomplish the most mundane tasks, our own intentions and actions rely upon these strangers' reliable and consistent conformity with basic norms of interaction, for instance not pushing or walking into people strolling on a sidewalk, no less driving a car on the sidewalk. Muggings, trespass, and burglary are especially frightening and usually the measure of crime waves and panics because they violate the illusion of sociality that is required for minimal social life. (Pollner, 1975; Berger and Luckmann, 1966; Schutz, 1970; Bittner and Messinger, 1981) This is especially important if indeed it is true, as researchers have shown, that interpersonal violence is more likely to occur during times and in places of relaxation and informal socializing rather than more organized settings and activities.

The conception of crime as the abnormal rupture of an otherwise harmonious social world allows us to individualize the event, to see it as one or several person's abberations, incapacities, and pathologies. The threat to the illusion of sociality, or more concretely to one's own safety, can be minimized because it is not a general but an individual phenomenon. Because crime is conceptualized as only an episodic and individual event, the rest of us can also feel confident that we are normal and moral. The individualization directs attention away from the social context and collective responsibility, allowing the law abiding members to feel rewarded in their conformity and supportive of that to which they conform. Violations, if they are episodic, identify the boundaries and limits of the morally acceptable. These are, of course, part of Durkheim's arguments for the latent functions of crime.

I do not wish to claim that only the perception of crime as the abnormal has ideological effects, nor by the way, am I suggesting that ideology is false knowledge, I am using the term ideology as contested accounts of social organization and power. The conception of crime as a normal feature of society is a professional sociological account but it is also present in popular culture as the research has shown and it too has ideological consequences.

By normalizing crime, we contain its threat. We collectivize and socialize it and in this way it becomes a public project, and economically productive. More importantly, by normalizing it, we can not only collectively but systematically manage it. Were it not for the normal features of crime, as I indicated above and the corpus of criminology demonstrates, we would not be able to devise professional strategies of response. Thus, its normal features become the basis of knowledge, occupation, and rationalized action.

While ostensibly expressing vastly different and contradictory images of crime, together the episodic and normal accounts help sustain social reality – dare I say a hegemonic reality. At any moment, crime is both a usual feature of ordinary social life to be understood and managed like any other mundane matter, and an episodic event that need not challenge confidence in what is in effect a reified conception of society. Dismissals of the importance of crime because of its episodic character, can be rebutted by noting its systemic normal features. An insistence that crime be thought of as entirely and solely abnormal and as an equilibrium threatening disturbance would make law enforcement unimaginable and the continuity and stability of ordinary social life unexplainable in the face of the ever-present crime. At the same time, concerns about the constancy and volume of crime can be repulsed by noting its statistical insignificance for a particular person or life.

Let me conclude by reference to Joachim's animating concern. What has criminology to gain from its association with sociology, and in particular the sociology of law, and what might it lose from abandoning that association? Very simply, the segregation of criminology from mainstream sociology reduces the probability of being a science with a firm systematic theoretical foundation. This is not to say theorizing is not possible outside of sociology, but the breadth that sustains general theory is less likely. The sociology of law has developed its grounded, complex, and highly predictive conception of legality because it has taken on general problems of sociological theory, for example, the continuing concerns of social theory and critical theory particularly to specify the mechanisms by which structure is enacted locally, or conversely by which local action is cumulatively aggregated. It is the explication of this general theoretical problem (structure/agency) within much sociology of law that could also inform studies of crime. Indeed some of the best and recently honored work in criminology struggles with just these fundamental theoretical issues., e.g. Katz 1988 Seductions of Crime, Sanchez-Jankowski 1991, Islands in the Street, Simon 1993, Poor Discipline, Singer 1996, Recriminalizing Delinquency. Just as engineering stands in a dependent relationship to science, so too would criminology's remove from sociology put it in a similar relationship to social science, as it would increase the probability of criminology becoming even more of a policy enterprise. As a policy arena, the desire to effect and engineer social phenomenon is more urgent than the goal to understand. As a policy arena, criminology would be more inclined to accept the popular conceptions of crime rather than try to understand them. Outside of sociology, and removed from the sociology of law, criminology is more likely to see crime as a rupture than as a normal and constituent part of the law.

Notes

- 1. We use the term "consciousness" to name "participation in the production of structures. In this sense, consciousness entails both thinking and doing: telling stories, complaining, lumping grievances, working, playing, marrying, divorcing, suing a neighbor, or refusing to call the police. As we go about invoking available cultural schemas and deploying resources, we literally (re)produce social structures," (Ewick and Silbey 1998: 224–225). We use "'legal consciousness' to refer to the ways in which people participate in the processes of constructing legality. ... Every time a person interprest some event in terms of legal conscepts or terminology whether to applaud or to criticizez, whether to appropriate or to resist legality is produced. The production may include innovations as well as faithful replication. Either way, repeated invocation of the law sustains its capacity to comprise social relations." (Ewick and Silbey 1998: 45)
- 2. In The Common Place of Law: Stories From Everyday Life, we use the term legality to refer to "the meanings, sources of authority, and cultural practices that are commonly recognized as legal, regardless of who employs them or for what ends. In this rendering, people may invoke and enact legality in ways neither approved nor acknowledged by the law." Although we recognize a "sense of the legal that exists independently of its institutional manifestations," we also recognize institutionalized forms of legality. "Because the designation of some actors or actions as 'official' and others as 'lay' is an important cultural distinction, one drawn and respected by people we studied," we used the term "law" specifically to refer to aspects of legality as it is employed by or attributed to formal institutions and their actions. Because the theoretical foundation upon which that distinction is premised is not elaborated in this paper, I am not systematically distinguishing law and legality.

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