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IS LAW INSIDE OR OUT? AND WHY DOES IT MATTER?

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I INTRODUCTION

Let me begin by asking, 'Is law inside or out? And why does it matter?' If law is *inside* society, then it directly reflects cultural values, political power relations, and social and economic hierarchies. Law is subject to all the biases, all the shortcomings of society. As Mark Tushnet summarised critical legal studies decades ago, '[l]aw is politics, all the way down'.[1] Law lacks autonomy. As a result, it lacks the institutional power to advance its normative vision, to secure justice for its citizens or to enforce collective values. So, if law is inside, it simply reflects the self-interests of those in power.

But if law is *outside* society, then it has some muscle. It can transcend self-interest and instead promote the public interest. Law outside can move according to a certain kind of logic and rationality. It can follow neutral principles, not partisan ones. In this instrumental — Weberian — view, law has a degree of autonomy.

But if law is outside society, then we have another problem,

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1 Mark Tushnet, 'Critical Legal Studies: A Political History' (1991) 100 *Yale Law Journal* 1515, 1526.

because we know that's not true. As Oliver Wendell Holmes said, '[t]he life of law has not been logic, it has been experience'.[2]

So, which is it? Is law inside or outside society? Volumes have been written about this question, ranging from the classics like Karl Marx, Max Weber, Emile Durkheim, and Roscoe Pound to more recent works by E P Thompson, Sally Falk Moore, Gunther Teubner, Pierre Bourdieu, Michel Foucault, David Nelkin, and Mariana Valverde. Chris Tomlins has reexamined this scholarship in an excellent essay about the autonomy of law in a recent issue of the *Annual Review of Law and Social Science*.[3] Re-reading and reviewing these fascinating debates, I was reminded that I am really *not* a legal theorist. Therefore, in this essay, I will draw on my own strengths, which are those of an empirical socio-legal scholar who addresses questions of theory by working with empirical data. From that perspective, the answer is easy: law is both inside *and* outside of society. Law reflects social practices and it constitutes social practices. That is to say, law is embedded in social and political processes, but it also shapes those processes.

As a political scientist by training, I was initially taught that law's influence came through judicial decisions. But in my first major research project — a study of plea bargaining in Los Angeles — I discovered that the power of criminal law lay not so much in what trial *judges* were doing, but in what the *lawyers* were doing.[4] It was how prosecutors and defense lawyers understood crime and how they communicated to each other and to judges, using the language of the criminal code, but transforming it with social and cultural meanings of their own. It was through lawyers' words and actions that I saw law's power and influence. Most importantly, law's power emerged less through the outcome of particular cases than through the categories of thought that trial lawyers in Los Angeles created and applied in their work.

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2 Oliver Wendell Holmes, Jr, *The Common Law* (Little, Brown and Co, 1881) 1.

3 Christopher Tomlins, 'How Autonomous Is Law?' (2007) 3 *Annual Review of Law and Social Science* 45.

4 Lynn Mather, *Plea Bargaining or Trial? The Process of Criminal Case Disposition* (Lexington Books, 1979).

In this essay, I look at law by considering the officials who patrol the boundaries of legal institutions and legal spaces, by giving meaning to legal categories and by making decisions about issues of legality, standing, and jurisdiction. These are the gatekeepers. I will first illustrate the power of various gatekeepers as they are discussed in key works in law and society. I will then explore three cases of legal gatekeeping drawn from recent news headlines in the last year: urban police and race in the United States; smoking rates and litigation over tobacco; and lawyers and sexual abuse in the Catholic Church.

II GATEKEEPERS

Regardless of whether we think of law as located inside or outside of society, law is also perceived as having its *own* insides and outsides. Legal institutions such as courts or tribunals, for example, are embedded within society but are imagined to operate autonomously, according to legal rules and principles. Yet those legal rules are implemented by individuals and groups through social practices. Moreover, just as legal institutions within society have their own insides and outsides, so does society have institutions or spaces that have at times been considered outside of the law — for example, the Mafia, the Catholic Church, or San Francisco's Chinatown. These social institutions or spaces are seen to operate according to their own normative rules, separate from secular law. Critical socio-legal questions center on the boundaries of those social spaces outside the law and of legal spaces inside of society.

A gatekeeper, according to the Cambridge English dictionary, has two meanings. Most simply, a gatekeeper is 'a person whose job is to open and close a gate and to prevent people entering without permission'.[5] Therefore, a legal gatekeeper decides who goes inside the law and who is excluded — for example, who has access to legal institutions and who does not.

[5] Cambridge Dictionary, *Gatekeeper* <http://dictionary.cambridge.org/us/dictionary/english/gatekeeper>.

Another definition for gatekeeper is 'someone who has the power to decide who gets particular resources and opportunities, and who does not'.[6] That is to say, a gatekeeper decides who is entitled to legality, who has legal rights or is subject to law's power, and who does not exist in a legal sphere. Other gatekeepers may decide what social spheres can operate outside of the law, free of police or judicial intrusions.

In looking at gatekeepers, I will be examining a set of actors who change individually over time, but who have a collective understanding about the world and the law job that they are doing. By looking at the work that is done by these gatekeepers, we can see whether law is inside or out at a particular time or place. Nevertheless, the work of gatekeepers is affected by myriad forces and thus can change over time. The three case studies in the second part of my essay will focus especially on dynamic processes of conflict where legal boundaries change over time.

Who are some of the actors who shape law's boundaries and what do we know about them? One obvious group is the police. They are the traditional gatekeepers to the criminal justice system. They decide who to stop, who not to stop, how to address people they stop, who to arrest, who not to arrest. Police give meaning to law — with law's protection, avoidance, or repression.

Consider a second legal actor — the private lawyer who controls access to the civil courts. The lawyer in private practice decides whether or not to represent a client, how to define their problem as a legal claim, and whether and how to move forward with that claim. Considerable screening occurs as to which clients are accepted and which are not. In the United States, my students are surprised to learn that the most common reason claimants are denied legal representation is money — or rather, their lack of it! If you do not have money to pay a lawyer, then you do not have access to the American legal system with a civil case — unless you have a

[6] Ibid.

particular kind of claim that a contingency fee lawyer will accept,[7] or you are eligible for government-funded legal services, or you can find a private lawyer to represent you pro bono.[8] Thus, we see gatekeeping that depends upon one's resources. The United States provides quite limited legal services in civil cases, compared to Australia and the United Kingdom.

Client resources are not the only factor affecting lawyers' decisions about representation in civil cases. The nature of the claim and the identity of the claimant also matter. As David Engel shows in his classic article about disputing in Sander County — a typical mid-western county in the US — there was a sharp contrast between how lawyers responded to individuals with claims of personal injury and those with broken contracts.[9] As part of the local legal culture (shared by lawyers, jurors, and judges), personal injury lawsuits were discouraged as inappropriate matters for the legal system: when accidents happened, it would be wrong to take advantage of the situation by using the legal system to collect from someone who was negligent or careless. Contract litigation, on the other hand, was perfectly acceptable and common. It rested on 'the traditional value that a person's word should be kept'.[10]

Nevertheless, lawyers in Sander County did accept and file some personal injury claims. Those claims were typically brought by social outsiders — newcomers, those of different ethnicity or

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7 With a contingent fee, clients pay no money up front but instead lawyers receive a fixed percentage (eg, 30 per cent) of any award or settlement. Plaintiffs with tort or discrimination claims typically use contingency fee lawyers. See Herbert Kritzer, *Risks, Reputations, and Rewards: Contingency Fee Legal Practice in the United States* (Stanford, 2004).

8 Pro bono legal services have increased significantly in the last few decades to make up for sharply decreased government funding. Corporate law firms also established pro bono programs to help in recruitment and training of new lawyers, and to provide public service. See Robert Granfield and Lynn Mather, *Private Lawyers and the Public Interest*: *The Evolving Role of Pro Bono in the Legal Profession* (Oxford, 2009).

9 David M Engel, 'The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community' (1984) 18 *Law & Society Review* 551.

10 Ibid 578.

religion, or with social distance from long-time residents. As Engel explains, the insiders knew not to seek formal legal remedies for personal injuries. To do so would seem greedy and an evasion of one's own responsibility for not having been more careful. The outsiders either did not know that or, more importantly, did not have access to the kinds of resources and the informal networks that the insiders did. Consequently, they found lawyers to help them and 'the civil trial court was able to bridge procedurally the gaps that separated people and social groups'.[11] Paradoxically, however, the result of such litigation was to stigmatise the claimants as 'deviant from the community norms' and thus reinforce 'the social boundaries between old-timers and newcomers'.[12]

Another example of legal gatekeeping comes from research on administrative officials who control access to social services. Michael Lipsky first called attention to the political power exercised by those 'street-level bureaucrats' who accept or reject claims for government payments, essentially deciding which claims are legitimate and which are not, who is deserving of a legal entitlement and who is not.[13]

Working from an anthropological perspective, Barbara Yngvesson describes how court clerks in New England not only control access to the court but also construct the moral order of local communities through their decisions to issue (or deny) formal complaints.[14] The clerk seems to know everyone in town and confers legal legitimacy to some problems by issuing complaints. But for other problems, the clerk rejects the complaints. For example, children fighting in some areas of town was dismissed as 'kidstuff' by the clerk — just 'normal trouble' that required more self-control and good parenting rather than any help by the court.[15] Here we see the gatekeeping role played by the court clerk to decide who and

[11] Ibid 572.
[12] Ibid 580.
[13] Michael Lipsky, *Street Level Bureaucracy* (Russell Sage, 1980).
[14] Barbara Yngvesson, *Disruptive Subjects: Order and Complaint in a New England Court* (Routledge, 1993).
[15] Ibid ch 6.

what get into the court, and who and what are kept out.

The concept of a deserving or worthy claimant also emerges as a central concept in immigration law. Legal language creates categories that shape eligibility for asylum and immigration officials give these categories meaning through their day-to-day decisions. Knowing the local patterns of enforcement, NGO (non-governmental organisation) advocates work with immigrants in different communities and advise them how to deal with the legal system to enhance their chance of success. Research by Susan Coutin on legal encounters by Salvadoran immigrants in Los Angeles reveals the gatekeeping role of immigration officials, asylum lawyers, and NGO advocates as they negotiate the legal meaning of asylum in practice.[16] Coutin's ethnography shows how the immigration system actually creates a state of legal nonexistence for these individuals: it allows some to exist, and others not to. Law thereby constructs identity and also erases it. Moreover, 'the legal nonexistence conferred by entering the United States without authorisation is merely the latest in a series of violent erasures of personhood'.[17] This erasure of personhood is similar to the nonexistence they had in their home country facing violence, and then escaping from violence simply to exist. Refugees leave El Salvador for the United States, cross the border, and then try to exist legally in the United States, but they learn that most of them are not going to make it. Through this process, undocumented residents learn law's power to deny them an existence, even though they live in the United States and may have been living there for years.

President-Elect Donald Trump's statements would make explicit the legal nonexistence of the undocumented immigrants by expelling them from the country and building a wall to prevent others from entering. 'They have to go', Trump insisted in 2015.[18] But

[16] Susan Bibler Coutin, *Legalizing Moves: Salvadoran Immigrants' Struggle for US Residency* (University of Michigan, 2000).

[17] Ibid 35.

[18] Alexandra Jaffe, *Donald Trump: Undocumented Immigrants 'Have to Go'* (16 August 2015) NBC News <http://www.nbcnews.com/meet-the-press/donald-trump-undocumented-immigrants-have-go-n410501>.

immigration is an enormous global problem and legal officials in every country perform their gatekeeping roles. And immigrants, in turn, perform their roles in hopes of succeeding and gaining legal entry. Research by Heath Cabot, for instance, focused on the aesthetics of performance necessary for immigrants to Greece to convince the authorities there that they should be admitted. As immigrants and legal officials interact, Cabot explains, they perform a kind of dance, 'a dialogical process' of bureaucratic interviewing and artful storytelling to construct a narrative that will justify legal eligibility.[19] The narrative is crucial since it 'must simultaneously produce and substantiate information about the applicant'.[20]

Each of these studies focuses on gatekeeping, a process in which actors define entry to legal institutions or demarcate certain spaces and people as legal and others as non-legal. In so doing, gatekeepers confer legal identities and resources on some, while denying them to others. When you closely examine any single legal institution or legal space as I have described them so far, you see a picture at a given point in time, a portrayal of everyday socio-legal routines and cultural meanings, framed by legal categories and dependent on the construction of particular social identities. But what happens to such socio-legal spaces as they change over time and how does that change occur? This is where the question of law's borders becomes even more interesting. The three examples that I discuss next show gatekeepers patrolling legal boundaries and reinforcing a particular social order, which then produces political resistance, subsequently transforming — or attempting to transform — the law over time.

There is a common political saying in the United States, attributed to Thomas 'Tip' O'Neill, a former Speaker of the US House of Representatives, 'all politics is local'. I think you can extend that insight to say that, 'all law is local'. Much of what I have been talking about so far suggests the ways in which law is locally shaped

[19] Heath Cabot, 'The Social Aesthetics of Eligibility: NGO Aid and Indeterminacy in the Greek Asylum Process' (2013) 40 *American Ethnologist* 452.

[20] Ibid 454.

— how it is constructed by immigration officials, court clerks, jurors, legal services, police, and others. Law written at the state or national level is performed locally. But sometimes what occurs locally has national — or even global — repercussions. Questions of jurisdiction and scale are always being contested. Those who are dissatisfied at one level can seek ways to move the boundary of law to another level. And perhaps find a different space, one in which outsiders can become inside the law. Local legal actions also create cultural images and narratives that may prompt reexamination of legal meanings elsewhere. Looking at legal boundaries across time and across levels provides the answer to the second part of the question in my title: *why does it matter* if law is inside or out? It matters because one's position relative to a legal boundary determines access to the power and resources that law can provide and also to freedom from the constraints and violence of law. The socio-political process of creating new legal boundaries can thus redistribute society's resources and alter its norms and values.

III THREE CURRENT NEWS STORIES IN SOCIO-LEGAL CONTEXT

To construct this essay, I began by thinking about issues in the news over the last year and asking what role does law play in them? In particular, how did shifts occur in the boundaries of legal institutions (such as policing) or economic markets (tobacco sales) or religious institutions (Catholic Church) that redefined who had access to law and who did not? While all three examples come from the United States, each has global implications.

A *Police and Race — 'Protests in Chicago after Video Release'*[21]

My first example addresses police killings of unarmed black men over the last year. This *New York Times* headline of 25 November,

[21] Robin Lindsay and Marcus DiPaola, 'Protests in Chicago After Video Release' *The New York Times* (online), 25 November 2015 <http://www.nytimes.com/video/us/100000004057818/protests-in-chicago-after-video-release.html>.

2015 describes thousands of people in Chicago who demonstrated for several days against a police shooting. The shooting of 17 year old, Laquan McDonald, occurred in 2014, so why a year and a half later were there demonstrations? The reason is, because a dash-cam video of the event had finally been released after a court order requiring the police department to make it public. The police had argued that release of the video would interfere with their investigation of the shooting. But journalists and the state attorney general sued to force the video's release. Broadcast on national TV in November 2015, the video shows a police officer shooting a black teen who was walking away, essentially gunning him down in middle of the street. The officer shoots him 16 times and TV stations even warned, 'Viewer discretion advised', before airing it.[22]

When the video was released, the Chicago prosecutor took the rare step of filing first-degree murder charges against the police officer who shot McDonald.[23] Publicity about the video also came shortly after the media published a comprehensive review of a statistical study of all citizen complaints in Chicago about police misconduct. According to the study, in the last four years, 28,500 complaints about police were filed and 97 per cent resulted in no punishment to the officers.[24] Further, 'African-American officers were punished at twice the rate of their white colleagues for the same offenses, the data shows. And although black civilians filed a majority of the complaints, white civilians were far more likely to

[22] The video of the shooting is available on YouTube at: <https://www.youtube.com/watch?v=Ow27I3yTFKc>.

[23] As social science research has documented, prosecutors rarely file criminal charges against police because of the close working relationship between the two agencies. See, eg, Malcolm Feeley and Mark Lazerson, 'Police-Prosecutor Relationships: An Interorganizational Perspective' in Keith O Boyum and Lynn Mather (eds) *Empirical Theories About Courts* (Quid Pro Books, first published 1983, 2015 ed).

[24] Timothy Williams, 'Chicago Rarely Penalizes Officers for Complaints, Data Shows', *The New York Times* (online), 18 November 2015 <http://www.nytimes.com/2015/11/19/us/few-complaints-against-chicago-police-result-in-discipline-data-shows.html?_r=0>. Interestingly, the study resulted from a lawsuit against the City of Chicago and the Chicago Police Department based on *Freedom of Information Act* to force them to release the data on citizen complaints and their disposition.

have their complaints upheld'.[25]

Chicago, the second largest police department in the country, had essentially kept the law out and created its own internal social order that allowed officers to act with impunity to engage in aggressive, violent, and racist conduct. Attorneys and judges in Chicago's criminal court routinely backed the police.[26] Any information that challenged that order was kept from the public — until the media and civil rights advocates used state law to force it open. Once citizens of Chicago and the nation saw the Laquan McDonald shooting on video and in the context of thousands of other instances of police misconduct with virtually no sanctions, the legal boundaries shifted.

This case from Chicago comes over a year after the fatal shooting by police of an unarmed black teenager in Ferguson, Missouri; after the lethal police chokehold on an asthmatic black man in New York City as he repeated 'I can't breathe, I can't breathe, I can't breathe'; and the fatal shooting by Ohio police of a young black man at Wal-Mart for playing with toy BB gun. All over the country, towns and cities are grappling with incidents of police violence against African-Americans. Indeed, the 986 people shot and killed by police in 2015 in the US was more than double the average annual number for the past decade.[27] Along with the increase in police violence has come an exponential growth in public awareness that has put the issue of police and race on the national agenda. A political movement called 'Black Lives Matter' emerged in 2013 and has spread widely through social media after reports and videos of these (and other) deaths. Its concerns became part of the Presidential campaign when the Democratic primary candidates were asked, 'Do Black lives

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[25] Ibid.

[26] See Nicole Gonzales Van Cleve, *Crook County: Racism and Injustice in America's Largest Criminal Court* (Stanford, 2016).

[27] Sandhya Somashekhar and Steven Rich, 'Final Tally: Police shot and killed 986 people in 2015', *The Washington Post* (online), 6 January 2016 <https://www.washingtonpost.com/national/final-tally-police-shot-and-killed-984-people-in-2015/2016/01/05/3ec7a404-b3c5-11e5-a76a-0b5145e8679a_story.html?utm_term=.1356c2f1fbbd>.

matter or do all lives matter?' Republicans, by contrast, have pretty much ignored the issue or denied its importance, as when Donald Trump injected in a primary debate, 'The police are the most mistreated people in this country'.[28]

Given this context, will there be any sort of federal legal intervention to challenge what has traditionally been a state and local matter — policing? Socio-legal research on urban policing and generations of American history do not provide much hope for change. The working environment of police in the US, going back to Jerome Skolnick's classic 1966 study,[29] shapes their unique culture: constant fear of danger plus authority leads to isolation, suspicion, social solidarity, and alienation. Police experience distrust and hostility from their communities, which makes them even more insular. Such insularity means never ratting on your colleague, no matter what you see him or her do. The Chicago video challenged this subculture. Eight officers on the scene had concurred in the 2014 report that Laquan had lunged at the officer with a knife before his fatal shooting and police had called the shooting a 'justifiable homicide'.[30] But the video told a different story.

The concept of 'The Thin Blue Line', from Errol Morris' award-winning documentary of that name, underscores the special boundary around police. As the prosecutor in the film says, police constitute the thin blue line between civilised society and criminal anarchy. But if so — as the film implicitly asks — who polices the police? What happens when police departments create their own norms, reinforcing the racism of a few officers out of solidarity and

[28] Bijan Stephen, *Minutes* (January 2016) New Republic <https://newrepublic.com/minutes/127785/two-hours-6th-gop-debate-no-mention-black-lives-matter>.

[29] Jerome Skolnick, *Justice Without Trial: Law Enforcement in Democratic Society* (John Wiley, 1966).

[30] Since the video's release, the Chicago Mayor fired the police chief and, in August 2016, recommended that the seven officers who testified on the shooter's behalf also be fired: John Byrne, 'Chicago mayor agrees: 7 police should be fired over Laquan McDonald shooting', *Los Angeles Times* (online), 16 August 2016 <http://www.latimes.com/nation/la-na-emanuel-poice-officers-20160822-snap-story.html>.

ignoring the law outside? As the Chicago Mayor's Task Force on Police Accountability noted, the rules and policies created by police unions and the city have 'essentially turned the [police] code of silence into official policy'.[31]

Historically, episodes like Laquan McDonald and movements like 'Black Lives Matter', are hardly new. In August 1965, rioting in the black community of Watts, a neighborhood of Los Angeles, erupted against police and lasted five days, sparking urban riots in inner cities all over the United States. Over the next decade, federal legislation was passed to support criminal justice research and develop ways to improve urban courts and police. By the 1980s, interest in cities had decreased and fear of crime had replaced it. In 1992, riots broke out again in Los Angeles after a jury acquitted the four police officers who had violently beaten a black taxi driver, Rodney King — a beating that had been videotaped by a bystander. Over 50 people were killed in the riots and there was more than $1 billion in damage to property. Again, attention focused on race and policing and a task force was established to study LA Police Department practices. Although some significant changes occurred in the LAPD, national attention died down and the largely invisible local patterns of policing continued. In 2016 and 2015 the country has been witnessing the same problem. The deep-seated racism, protection of police, and severe inequality in urban areas suggests that once again, nothing will change.

Consider two other forces shaping the boundary around police: technology and globalisation. On the positive side, through cell phone videos and dash-cams, there is greater awareness of police violence. The fact that you can go on YouTube and see every one of the shootings or killings I have mentioned creates the potential for a national audience and political pressure for change. Web videos circulated widely through social media have been able to mobilise

[31] Editorial, 'Chicago police reforms: Mayor Emanuel's meager "down payment"', *Chicago Tribune* (online), 22 April 2016 <http://www.chicagotribune.com/news/opinion/editorials/ct-chicago-police-task-force-laquan-emanuel-edit-0425-jm-20160422-story.html>.

people to reassert the rule of law over policing. Private security cameras have proliferated as well at gas stations, stores, and the like. Law's nonexistence for urban black youth is apparent when a police officer is able with impunity to just shoot a black man. Or when black motorists are pulled over for 'Driving While Black'.[32] Technology and data collection about policing are making law's boundaries more visible. They are bringing law from the outside in — to the dark streets where police have previously been able to enforce their own view of order.[33]

A counter argument that unfortunately reinforces a bleaker historical view comes from comparative research on urban policing. This work examines racial tensions similar to those in Chicago but arising from police interactions in London, Paris, and Amsterdam. A recent ethnography by Didier Fassin, a French anthropologist, powerfully drives this point home.[34] Fassin spent a year and a half riding with police in high crime areas in Paris and in suburbs with many French-Algerian residents. He describes the aggressive, violent, racially and ethnically insensitive ways in which police behaved in these communities. The resultant public distrust of police was intensified by the accelerating trend of policing as part of the fight on terrorism. Fassin notes the paramilitarisation of police in both France and the US as officers in some areas shift from preventive policing to repressive policing, relying on sophisticated equipment and methods previously used only by the military. Other trends that Fassin discusses include a managerially driven interest in evaluating police performance and a growing social and ethnic distance between police and the citizens that they are patrolling. These trends all suggest that the police are working in an increasingly autonomous fashion, once again accountable to no one

[32] See, eg, Charles R Epp, Steven Maynard-Moody, and Donald Haider-Markel, *Pulled Over: How Police Stops Define Race and Citizenship* (Chicago, 2014).

[33] A caveat is needed here: while some cities and states are passing legislation to *require* videotaping by police, this still does not ensure visibility of police conduct. Indeed, Chicago police all had dash-cams in the Laquan case but inexplicably the audio portion of those tapes did not work in *any* of them and some cars experienced video malfunctions.

[34] Didier Fassin, *Enforcing Order: An Ethnography of Urban Policing* (Polity, 2013).

but themselves.

Why does it matter if law is inside or outside of society? Or, more specifically, why are the boundaries of legal spaces within society so important? The answer from this example lies in the police message to minority citizens — telling them in effect, 'We decide if you are inside or outside of the law. You do not have access to legal rights, you do not have legal space, unless we agree'. The divergent trends in policing I have just described provide evidence of change in both directions — toward greater political voice and legal protections for minority residents through more public scrutiny, but also toward more political autonomy and less external legal oversight for urban police. The US national election of 2016 and other sociopolitical forces will influence race and policing in the years ahead.

B *Tobacco Use Decreases — '"Real Progress": Percentage of US Smokers Plummets, CDC Finds'* [35]

Let me turn to a second, very different example of shifting legal boundaries. In mid-November, 2015, the US Center for Disease Control (CDC), reported the lowest rate of smoking in the United States in over fifty years, down to 16.8 per cent, a 20 per cent drop in just ten years. Similar statistics for Australia also show a sharp decline, with a smoking rate of only 12.8 per cent.[36] These dramatic changes in behavior could stem simply from public health initiatives and education about the dangers of smoking, without any legal input. But to the contrary, law has substantially shaped this issue. From the early nineties onward, litigation and legislation have been critical in changing the costs of smoking, limiting space for smokers, and

[35] Maggie Fox *'Real Progress': Percentage of US Smokers Plummets, CDC Finds* (12 November 2005) NBC News <http://www.nbcnews.com/health/health-news/real-progress-percentage-u-s-smokers-plummets-cdc-finds-n462336?cid=eml_onsite>.

[36] *Tobacco Smoking (NDSHS 2013 Key Findings)* Australian Institute of Health and Welfare <http://www.aihw.gov.au/alcohol-and-other-drugs/ndshs/2013/tobacco/>.

helping to make smoking socially unacceptable.[37]

Prior to the 1990s, law in the US protected the tobacco industry, basically by leaving it alone. A bipartisan agreement in Congress had rejected attempts to regulate cigarette smoking and cigarette taxes in the US were among the lowest of any country. Although hundreds of product liability lawsuits had been filed on behalf of sick or dying smokers between 1950 and 1995, tobacco interests prevailed in all but one. Unlike the negotiated settlements that commonly resolve civil lawsuits, tobacco companies stood firm against settlement, vastly outspending their opponents at trial. Courts and juries ruled in favor of tobacco based in part on a theory of assumption of risk. That is, smokers must have known of tobacco's health risks and therefore they, not the tobacco industry, bore responsibility for their illnesses or deaths.

In the early 1990s, all that changed. New information emerged from damaging documents within the industry about cigarette marketing deliberately aimed at teenagers, industry knowledge that nicotine is addictive, and companies' manipulation of nicotine levels to increase smokers' addiction. Focusing national attention on the issue in 1994, Democratic legislative leaders and the Commissioner of the Food and Drug Administration sought legislation to regulate smoking but lacked the votes in Congress. A former executive at Brown and Williamson Tobacco agreed to share his insider knowledge and documents showing that although tobacco executives had sworn under oath before Congress that nicotine was *not* addictive, in fact, their own industry-sponsored scientific research showed the opposite. The whistleblower was later celebrated in a 1999 Hollywood film, *The Insider*. Law began to move *inside* tobacco's once-protected free market space due to litigation and legislative efforts.

[37] This next section draws from my research: Lynn Mather, 'Theorizing About Trial Courts: Lawyers, Policymaking, and Tobacco Litigation,' (1998) 23 *Law & Social Inquiry* 897.

Three parallel streams of anti-tobacco litigation began in 1994. One involved class actions, including the *Castano* tort suit against all seven major cigarette manufacturers in the US. Charging negligence, fraud, and deceit for concealing research on nicotine addiction, lawyers in this federal case claimed to represent all current and former smokers in the United States, a class estimated to include up to one hundred million people.[38] The tobacco industry countered that it was ludicrous to generalise the individual health problems of Peter Castano into a class of that size but the trial judge allowed the litigation to move forward, posing an enormous risk for tobacco companies. A second stream of litigation came from tort suits on behalf of individual plaintiffs, using the newly released tobacco documents to hold manufacturers responsible for the harms caused by cigarettes. Some large jury verdicts for sick or dying smokers, with enormous punitive damages against tobacco companies, encouraged the plaintiffs' bar and led to additional claims. From the end of 1994 to the end of 1997, the number of lawsuits against tobacco in the US jumped from 73 to 733.[39] The litigation attracted media attention, created coalitions between public health advocates and trial lawyers, and produced new narratives of blame and of responsibility to transform the politics of tobacco.

Lawsuits filed against tobacco manufacturers by state governments constituted the third stream. The state Attorney-General of Mississippi, the poorest state in the country, litigated based on a creative new theory of liability. Mississippi argued that it had paid money to the federal government for Medicaid coverage for its low-income residents and many of those residents were now suffering from heart disease, emphysema or lung cancer as a result of cigarette smoking. Since it was the tobacco companies whose product caused those illnesses, they should be liable for the healthcare costs that Mississippi had paid to Medicaid. Within a few years, most of the other states filed similar healthcare reimbursement lawsuits. The fact that these suits were litigated on behalf of state governments enhanced their legitimacy and attracted extensive

[38] Ibid 910, 919.
[39] Ibid 911.

media coverage.[40]

Negative publicity about smoking accompanied the increase in anti-tobacco lawsuits. Analysis of magazine articles on the litigation from 1993-1996 shows that media coverage 'was virtually all negative from the tobacco industry's point of view'.[41] 'Big Tobacco' became a pariah in popular culture and public opinion began to shift against the industry. The American Medical Association, state pension funds, and other institutions voted to divest their tobacco securities, producing jitters in the stock market. Amid this legal and financial uncertainty, the major players sought federal legislation: cigarette manufacturers wanted protection from legal liability and an end to the litigation; public health advocates, state officials, and lawyers wanted Congressional regulation over cigarettes and compensation for health care costs.

The original bill proposed failed in Congress — each side claimed that the other had overreached during the legislative negotiations — but the state attorneys general and the tobacco companies reached a private legal settlement in November 1998. It was the largest civil settlement in US history, with tobacco manufacturers agreeing to pay $206 billion to 46 states over the next twenty-five years to cover the health care costs of smoking (after already paying $40 billion to four states on the eve of trials) and also agreeing to various restrictions such as on cigarette advertising. Interestingly, in terms of how law shapes politics, no judge or jury ever legitimised the Medicaid reimbursement theory but vocal lawyers, the media, and the litigation itself created a cultural narrative of industry blame. Tobacco companies tacitly reinforced that narrative when they agreed to pay billions of dollars to the states to drop their lawsuits. But the companies also fought back with campaigns for tort reform and ads against the plaintiffs' bar, successfully shifting press coverage after the settlement to embrace freedom of choice for smokers and to demonise greedy plaintiff

[40] Ibid 917.
[41] Ibid 923.

lawyers for the huge fees they collected.[42]

Nevertheless, by 2016, legal regulation and taxes on tobacco had increased and workplace and restaurant anti-smoking laws were passed throughout the country. In short, in roughly twenty years, tobacco control advocates succeeded in redrawing the legal boundaries that once protected the tobacco industry and in creating moral blame for those who continued to smoke.

Tobacco control through litigation is not only an American story, however. While the anti-tobacco lawsuits were unfolding in the United States, tort lawyers in other countries filed similar cases against tobacco manufacturers. Indeed, the Tobacco Products Liability Project, based in Boston, held large conferences twice a year for lawyers, doctors, and antismoking advocates worldwide to exchange information and advice about litigation. By informal networking, learning about new medical research, and sharing incriminating documents (some of which had been obtained through pre-trial discovery), the project encouraged legal activism against tobacco. Having attended several of those conferences in the late 1990s, I recall meeting solicitors from all over. One Australian solicitor spoke passionately about the anti-tobacco lawsuits he had filed in Australia, while another described the progress of his group action in England.[43] A solicitor from Ireland was confident that 'we're going to ban smoking in public places in Ireland'. I was incredulous, knowing how thick the smoke was in an Irish pub, but sure enough, five years later Ireland was the first country in the world to prohibit smoking in all workplaces, including restaurants and bars. How to explain this? A surge of global litigation, a

[42] William Haltom and Michael McCann, *Distorting the Law: Politics, Media, and the Litigation Crisis* (Chicago, 2004), ch 7.

[43] The Australia litigation was relatively successful while the UK cases collapsed. See, eg, Richard A. Daynard, Clive Bates, and Neil Francey, 'Tobacco Litigation Worldwide' (2000) 320 *The BMJ* 7227; Lynn Mather, 'Lawyers and Solicitors Separated by a Common Legal System: Anti-Tobacco Litigation in the United States and Britain' in David M Engel and Michael McCann (eds) *Fault Lines: Tort Law as Cultural Practice* (Stanford University Press, 2009) 192.

coalition of public health and legal activists, widespread publicity, and new ways of thinking about tobacco and smoking created a policy window for legal change. And lawmakers in cities, states and countries used that window to pass new restrictions on smoking.

Legal and medical activists against tobacco also engaged in negotiations at the World Health Organization (WHO) to mobilise transnational political power against multinational tobacco companies. The *WHO Framework Convention on Tobacco Control* was passed in May 2003 (effective 2005) and ratified within the year by 168 countries.[44] The treaty advocated tax increases on tobacco to reduce consumption, bans on smoking in workplaces, limits on tobacco advertising, and placement of health warnings on cigarette packages (including graphic images).[45] In essence, this important treaty sought to establish global norms of tobacco control.

Nevertheless, while smoking rates have *declined* in developed countries like the US, UK, and Australia, they have continued to *rise* in many developing nations. Thus, the success of the anti-tobacco legal efforts I have just discussed has been countered by increased tobacco consumption and smoking rates in countries like China, Russia, and Eastern Europe.[46] Moreover, the multinational tobacco companies have also moved to the global arena — using a different international legal forum — to protect their marketing under international trade laws. The first lawsuit was filed against Uruguay, with similar litigation against Australia and Norway, challenging the anti-tobacco advertising regulations recommended by the WHO as

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[44] *Parties to the WHO Framework Convention on Tobacco Control* (26 July 2016) World Health Organisation <http://www.who.int/fctc/signatories_parties/en/>.

[45] An FDA report summarises research that supports its mandate to change packaging in the US: FDA, *Required Warnings for Cigarette Packaging and Advertisements* (12 November 2010) <http://www.regulations.gov/#!documentDetail;D=FDA-2010-N-0568-0001>. Tobacco manufacturers sued to block the packaging change, however, and the case is still pending.

[46] *Cigarette Use Globally* (2015) The Tobacco Atlas <http://3pk43x313ggr4cy0lh3tctjh.wpengine.netdna-cdn.com/wp-content/uploads/2015/02/CH8_Cigarette-Use-Globally.pdf>.

violations of bilateral investment treaties.[47] Not only do tobacco manufacturers have extensive support from top-notch lawyers, but they also have the backing of the largest private lobby group in the United States, the US Chamber of Commerce.[48]

Thus, today we see negotiations and debates over tobacco law and policy occurring in corporate boardrooms, courts, and global legal arenas around the world. The 'palace wars' in the US between Big Tobacco and their medical and legal opponents during the 1990s have become internationalised.[49] Legal boundaries around tobacco markets and tobacco policy within each country are influenced by outside actors. And the boundaries between inside (pro-tobacco? anti-tobacco?) and outside are continually shifting.

C *Clergy and Sexual Abuse — 'Sex abuse claims have cost the US Catholic Church almost $4 billion'*[50]

My third example traces the movement of legal boundaries from long-standing protection of the Catholic Church to recent litigation against the Church for clergy sexual abuse of children. As this new report from the US Conference of Bishops reveals, the US Catholic Church has paid nearly four billion dollars to settle lawsuits for sexual abuse over six decades, a billion dollars more than previous

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47 Philip Morris lost its lawsuit against Uruguay in 2016: Benedict Mander, 'Uruguay Defeats Philip Morris in Test Case Lawsuit', *Financial Times* (online), 9 July 2016 < https://www.ft.com/content/1ae33bc8-454e-11e6-9b66-0712b3873ae 1>.

48 On 30 June, 2015, the *New York Times* published a highly critical article about the U.S. Chamber of Commerce and the major role it plays in protecting tobacco interests around the world: Danny Hakim, 'US Chamber of Commerce Works Globally to Fight Antismoking Measures', *The New York Times* (online), 30 June 2015 <http://www.nytimes.com/2015/07/01/business/international/us-chamber-works-globally-to-fight-antismoking-measures.html>.

49 See Yves Dezalay & Bryant Garth, *Internationalization of Palace Wars* (Chicago, 2002).

50 Carey Lodge, *Sex abuse claims have cost the US Catholic Church almost $4 billion* (3 November 2015) <http://www.christiantoday.com/article/sex. abuse.claims.have.cost.the.us.catho lic.c hurch.almost.4.billion/69511.htm>.

estimates.[51] The early payments had been sealed by court orders under confidentiality agreements and are only now coming to light. In the past, parents of victims were persuaded that closed settlements would best protect the reputation of the Church and respect the victims' privacy. The Church told complainants that clergy misconduct was a matter for pastoral healing and forgiveness or perhaps for professional treatment, but certainly not a matter for law. The victims — preteen boys — were also often unwilling to come forward out of fear, shame, guilt, and embarrassment.

Then, in 1985, a particularly egregious case of child sexual abuse by Father Gilbert Gauthe in rural Louisiana attracted national attention in the press. A few years earlier, after a ten-year old boy told his father about Father Gauthe's sexual conduct with him, other parents in the small town began asking their sons about their experiences with the priest. Horrified by accounts of fondling and sodomy by Gauthe — who regularly had altar boys over for group 'sleepovers' — the parents complained to the bishop. They finally succeeded in having the diocese remove Father Gauthe from his position and sent for treatment, but the bishop refused to publicly acknowledge the reason for Gauthe's departure.[52] Angered by this response, some of the families hired a lawyer and filed civil suits against Gauthe, the bishop, and other Church officials. Their lawsuits were settled out of court with a confidentiality agreement and the records were sealed. The victims' own lawyers agreed with the diocese to keep the case out of the press, thus reinforcing a boundary that maintained clergy misconduct as a private matter for the local Church, not a matter for law.

One family, however, refused to accept this arrangement and wanted to warn others about the priest. Father Gauthe had abused their son beginning when he was only seven and even visited him

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[51] Ibid.

[52] The discussion that follows draws from CBS News: David Kohn, *The Church on Trial: Part 1* (11 June 2002) CBS News <http://www.cbsnews.com/news/the-church-on-trial-part-1-11-06-2002/>; Timothy D. Lytton, *Holding Bishops Accountable: How Lawsuits Helped the Catholic Church Confront Clergy Sexual Abuse* (Harvard, 2008), 1-3 and 14-19.

two years later when he was hospitalised for unexplained rectal bleeding. After trying to hide from the priest, the boy finally confessed to his parents that the priest always had guns around and had threatened to harm his parents if he ever mentioned the abuse. With the help of a new attorney, the family succeeded in convincing the local judge to unseal the records in previous cases against Gauthe. Testimony in depositions and diocese records showed that the Church had known of Gauthe's behavior for over a decade and had reassigned him to a new parish each time parents raised complaints about sexual abuse. To avoid further disclosures, the Church admitted their liability for Father Gauthe's conduct and jury proceedings focused only on damages. The jury awarded the victim $1.25 million, later reduced to $1 million. Additional civil cases were filed against Gauthe, resulting in Church payments that totalled $22 million. Louisiana prosecutors also charged Gauthe with thirty-four counts of criminal sexual abuse with children. He pled guilty and was sentenced to twenty years in prison.[53]

Publicised widely in the media in the mid-1980s, the Gauthe cases tentatively shifted boundaries, moving the reach of law to include behavior inside the Church. 'Prior to the Gauthe case', Lytton writes, 'bishops had ignored complaints, denied allegations, blamed victims, reassigned offenders, failed to report crimes to police, and concealed information'.[54] But with national attention on this case, Catholic leaders pledged reform: a 'Committee on Priestly Life & Ministry' to investigate the problem, guidelines for local dioceses for reporting, support for victims and their families, and clerical training to prevent child abuse.[55] At the same time, more and more victims of clergy sexual abuse around the country continued to come forward to tell their stories. In 1989, a support network called Survivors Network for those Abused by Priests (SNAP), was created to share information and provide victims with advice. Plaintiff lawyers also learned ways to effectively convey victims' stories in legal negotiations and to counter the power of the Church.

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[53] Released for good behavior after only ten years in prison, Gauthe was arrested within the year for molesting a three-year old boy. See Kohn, above n 52.

[54] Lytton, above n 52, 17.

[55] Ibid 16-17.

An excellent new Hollywood movie *Spotlight* powerfully dramatises actual events in Boston that culminated in 2002, prompting another wave of litigation against the Church for clergy abuse (a wave that is still ongoing and has spread to other countries).[56] The film focuses on the *Boston Globe's* investigation of sexual abuse by Catholic priests that resulted in a Pulitzer Prize-winning series of articles, headlined, 'Church allowed abuse by priest for years**:** Aware of Geoghan record, Archdiocese still shuttled him from parish to parish'.[57] Beginning with reports of multiple complaints against John Geoghan, a Massachusetts priest since 1962 who had served in six different parishes, the *Globe* investigation widened to include the Church's knowledge of the priest's pedophilia, its actions to suppress complaints against him, and discovery of abuse charges against other Catholic priests in the Boston area that had also been covered up. The film documents how the journalists followed up on leads, relentlessly gathered facts, and were often stonewalled by those in power in the tight-knit Catholic community of Boston. The *Globe* interviewed victims who had quietly settled cases against the Church as well as the two lawyers who had represented them in their civil lawsuits.

In the course of their investigation, the journalists learned of the official directory of Catholic priests with their annual parish assignments, showing periods when clergymen were placed on 'sick leave', or otherwise had an unexplained absence. Clues from this directory, along with names of offending priests obtained from victims, provided journalists with a list of nearly 90 different priests in Massachusetts possibly implicated in clerical sexual abuse and Church cover-up. The *Globe* needed more proof before running a story of this magnitude, however. One particularly dramatic moment in the movie shows the journalist angrily demanding that a plaintiff lawyer reveal the names of the priests he had sued. When the lawyer refuses — based on the confidentiality of the legal settlements — the

[56] The film received the Oscar for Best Picture of 2015.

[57] 'Church allowed abuse by priest for years: Aware of Geoghan record, archdiocese still shuttled from parish to parish', *Boston Globe* (online), 6 January 2002 <https://www.bostonglobe.com/news/special-reports/2002/01/06/church-allowed-abuse-priest-for-years/cSHfGkTIrAT25qKGvBuDNM/story.html>.

journalist responds tartly, 'We got two stories here: a story about degenerate clergy, and a story about a bunch of lawyers turning child abuse into a cottage industry. Which story do you want us to write? Because we're writing one of them'.[58] I won't tell you what the lawyer does, but it is a very powerful scene in the film. The scene also starkly poses the question of where the law is and how it matters. For the lawyer to have used confidentiality in this way to collude with Church officials in the cover-up of priests' abhorrent behavior with their clients is inexcusable, even if common and ostensibly required by legal ethics.

Another dramatic scene in the film underscores the power of institutions to move beyond law's reach. The *Globe* files a legal motion against the Church asking the court to unseal legal documents on another group of abuse cases that, according to the plaintiff lawyer who settled them, will show that Cardinal Law had known about clergy sexual abuse in Boston and covered it up. After the judge rules in the *Globe's* favor, the lawyer tells the reporter that he won't find the documents at the court. The reporter is incredulous: 'Mitch, are you telling me that the Catholic Church removed legal documents from that courthouse?' The lawyer responds, 'Look, I'm not crazy, I'm not paranoid. I'm experienced. Check the docket. You'll see. They control everything'.[59]

The Catholic Church's dominating presence in Boston and its interconnections with other institutions — police, the court, the legal profession, the schools, community groups, etc — had created a legal boundary that prevented public scrutiny of clergy abuse. Victims' complaints to police and prosecutors were routinely rebuffed, civil lawsuits were settled in secrecy, and incriminating documents were sealed under court order. This boundary between inside and out in these cases clearly mattered because the victims — powerless children with their own legal nonexistence — suffered well into adulthood as a result of their sexual abuse by priests. Their

[58] *Spotlight: Quotes* Internet Movie Database <http://www.imdb.com/title/tt1895587/quotes?ref_=tttrv_ql_4>.

[59] Ibid.

problems included drug addiction, alcoholism, suicide, and profound struggles with faith as well. This wasn't just sexual abuse. As some of the victims put it, it was also *spiritual* abuse, as if God himself was punishing them.

The issue of clergy sexual abuse exploded after the media attention in Boston. Cardinal Bernard Law — once considered a potential candidate for Pope — was forced to resign and six bishops were also implicated in the scandal.[60] Hundreds of lawsuits have been filed throughout the United States and by 2016 twelve Catholic dioceses in the United State had declared bankruptcy — including those in major cities like Portland, Oregon; Tucson, Arizona; and Minneapolis/St Paul, Minnesota.[61] Almost every one of these bankruptcies occurred when abuse cases against the diocese were on the verge of civil trial. Each trial would have examined not only the pedophilia of individual priests, but also the institution itself for overlooking and then covering up sexual abuse of children. Diocese officials argue that bankruptcy would ensure that all victims would get their fair share of the compensation and not just those whose cases came first in the queue, while also sparing victims from having to testify and be dragged through the press. Entering bankruptcy, however, raises new criticisms of the relation between Church officials and plaintiff lawyers. Doesn't this legal strategy simply re-play the secrecy and protection of clergy from an earlier generation — along with a sizeable fee for the lawyers? Since bankruptcy stops all discovery or legal testimony, where is the public accountability for wrongdoing? Current developments are thus part of ongoing negotiations over the boundary of law. Civil litigation in these cases successfully reframed the problem from an individual one (just a few bad apples) to one of institutional responsibility for overlooking the

[60] Cardinal Law's close ties to Rome resulted in his appointment in 2004 as archpriest at the Basilica di Santa Maria Maggione where he remained a member of the College of Cardinals: David Boeri, *Where is Cardinal Bernard Law Now?* (22 September 2015) WBUR News <http://www.wbur.org/news/2015/09/22/cardinal-bernard-law>.

[61] Amy Julia Harris, *Several Catholic dioceses declared bankruptcy on eve of sexual-abuse trials* (2 April 2015) MinnPost <https://www.minnpost.com/business/2015/02/several-catholic-dioceses-declared-bankruptcy-eve-sexual-abuse-trials>.

abuse. But critics of bankruptcy such as a SNAP director said, 'it's far less about money or the victims than protecting church documents and secrets'.[62]

As litigation against the Church and bankruptcy proceedings unfolded in the US, complaints arose in other countries. The Geoghan case led victims to reevaluate their own experiences with clergy and to share their stories. At the end of the *Spotlight* movie, the final credits show a lengthy list of similar scandals in Ireland, UK, France, Italy, Germany, Spain, Brazil, Mexico, etc. The issue affected the selection of the last two Popes, with debate over how they would address clergy sexual abuse and what might change within the Church to prevent such abuse in the future. That the problem has moved to another level, a global level, occurred not through any legal rule or court decision, but through a shift in the way of thinking about law and the boundary between the Catholic Church and secular authority.

IV CONCLUSION

What do these narratives have in common? Each begins with a snapshot of a legal structure completely controlled by a powerful political, economic, or social institution: criminal justice in Chicago gave free rein to police, backed up by criminal courts; cigarette smoking and sales were controlled by large tobacco companies, largely free of legal regulation; behavior of clergy was a matter for the Church hierarchy and beyond the purview of law. Law did not penetrate inside these structures, leaving Black inner-city residents at the mercy of Chicago police, teenagers misled by tobacco ads becoming addicted to smoking, and young boys sexually abused by their religious leaders.

But over time, each of these pictures changed, providing victims with some access to the resources and power of law. Individual

[62] Ibid.

victims and their families resisted structures once taken for granted. Gatekeepers who assisted them included the media, lawyers, and supporters such as Black Lives Matter, civil rights organisations, public health groups, and SNAP. Ironically, the law that allowed these spaces to operate on their own for so long also provided tools of resistance: a court order forced Chicago police to release the video of the shooting; anti-tobacco litigation uncovered internal documents damaging to tobacco; and unsealing confidential settlements revealed the facts of clergy sexual abuse. Law also produced influential cultural narratives in videos of police shootings and in films such as *The Insider* and *Spotlight* that reinforced victims' views and challenged hegemonic powers, creating new ways of thinking about familiar issues.

At this point, it is not clear how any of these pictures will change, that is, what new socio-legal structures will be in place ten or twenty years from now. Changing urban police will be the most difficult, given American history of violence against Blacks and Chicago's own political history. Achieving change within the Catholic Church may be the most feasible, due to the shocking nature of the abuse and the enormous financial repercussions from them. Tort litigation succeeded in reframing the problem from an individual one to one of institutional responsibility in the case of clergy sexual abuse, but the same litigation strategy was less successful against tobacco. Perhaps there is some morality and a sense of justice residing in one institution (the Church) as opposed to organisations in business just to sell cigarettes, where it is all about the money. But there is also a difference in the relationship between the victim/plaintiffs and the defendant organisations. For those suing tobacco, the money matters, although some also seek public acknowledgement of the product's harms. But lawsuits against the Church demand acceptance of responsibility, confession, and apology, consistent with faith and spiritual teaching. Law is better suited to enforcing the transfer of money than it is to facilitating apology, so it is not clear how well the Church's acceptance of responsibility through payment to victims will resolve the issue.

Considering research on legal gatekeepers and these three current

examples, I have tried to show how legal boundaries are socially constructed and maintained in particular spaces, how law is both outside *and* inside society, always subject to change depending on particular configurations of power and possibilities for resistance. Globalisation impacts boundaries by providing opportunities in law for expansion of conflict beyond any one country so that law is no longer simply local. But at the same time there are pressures to move conflicts to local spaces where they can be more easily contained and law can, as it traditionally does, reflect the hierarchy of a particular jurisdiction. These ongoing negotiations over law as inside or out will surely continue. And I have tried to show why they matter for determining the outcome of political and social conflicts.