



2001

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13 Yale J.L. & Human. 35-67 (2001)

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March 2010

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Law as Culture

Naomi Mezey*

INTRODUCTION

The notion of culture is everywhere invoked and virtually nowhere explained. Culture can mean so many things: collective identity, nation, race, corporate policy, civilization, arts and letters, lifestyle, mass-produced popular artifacts, ritual. Law, at first glance, appears easier to grasp if considered in opposition to culture—as the articulated rules and rights set forth in constitutions, statutes, judicial opinions, the formality of dispute resolution, and the foundation of social order. In most conceptions of culture, law is occasionally a component, but it is most often peripheral or irrelevant. Most visions of law include culture, if they include it at all, as the unavoidable social context of an otherwise legal question—the element of irrationality or the basis of policy conflicts. When law and culture are thought of together, they are conceptualized as distinct realms of action and only marginally related to one another. For example, we tend to think of playing baseball or going to a baseball game as cultural acts with no significant legal implications. We also assume that a lawsuit challenging baseball's exemption from antitrust laws is a legal act with few cultural implications.¹ I think both of these assumptions are profoundly wrong, and that our understandings of the game and the lawsuit are impoverished when we fail to account for the ways in which the game is a product of law and the lawsuit a product of culture—how the meaning of each is bound up in the other, and in the complex

* Associate Professor of Law, Georgetown University Law Center. My thanks to Heidi Li Feldman, Mark Kelman, David Luban, Leti Volpp, and Robin West for their comments on earlier drafts of this Essay and to Rachel Taylor and Philip Ferrera for superb research assistance. The many comments I received from my colleagues at the Georgetown Faculty Workshops and from the participants of the Legal Studies as Cultural Studies Conference have improved this paper in ways large and small; I am particularly grateful to the insights of Lama Abu-Odeh, Sam Dash, Katherine Franke, Michael Gottesman, Angela Harris, Gillian Lester, Michael Musheno, Gary Peller, Milton Regan, Mike Seidman, Girardeau Spann, and Mark Tushnet. Thanks finally to Austin Sarat, Jonathan Simon, and the *Yale Journal of Law & the Humanities* for the opportunity to write and present this Essay, and to Clifford Rosky and John Pellettieri for their very fine editing suggestions.

1. See, e.g., *Flood v. Kuhn*, 407 U.S. 258 (1972); *Toolson v. N.Y. Yankees*, 346 U.S. 356 (1953); *Federal Baseball Club v. Nat'l League*, 259 U.S. 200 (1922).

entanglement of law and culture.

If we are to make headway in understanding legal studies as cultural studies and legal practice as cultural practice, then a contingent clarification of the vague concept of culture is an important threshold question. The goal of this interdisciplinary project is to understand law not in relationship to culture, as if they were two discrete realms of action and discourse, but to make sense of law as culture and culture as law, and to begin to think about how to talk about and interpret law in cultural terms.

This Essay participates in an increasingly lively discussion within law and sociolegal studies about what we ought to mean by culture and what culture can mean for law. These questions have gained urgency of late thanks to recent efforts to investigate the relationship of culture to law, and vice versa, and to make a place in legal studies for a cultural analysis of law.² The engine of this investigation has been the popularity and usefulness of the interdisciplinary methods of cultural studies, which have been particularly keen to invade those disciplines, like law, which have traditionally insisted on their own formal integrity. Yet cultural studies suffers from the same definitional distress as culture itself: No one is exactly sure what it means to others and everyone is loath to offer their own working definitions.

Another motivation for the academic pairing of law and culture emerges from the fact that political "culture wars" are being waged ever more explicitly on legal terrain. Congress, for instance, is increasingly confident that it can change culture through legislative initiative.³ Take, for example, Congress's reaction to the shootings at Columbine High School and youth violence more generally. The rhetoric of the mostly partisan debate, as well as the substance of the proposed legislation,⁴ focused more on regulating youth culture (in the form of movies, video games, and overly

2. Austin Sarat and Thomas Kearns have been indefatigable champions of this cause with their series of books in law, jurisprudence, and social thought. *E.g.*, CULTURAL PLURALISM, IDENTITY POLITICS, AND THE LAW (Austin Sarat & Thomas R. Kearns eds., 1999); LAW IN THE DOMAINS OF CULTURE (Austin Sarat & Thomas R. Kearns eds., 1998); LAW IN EVERYDAY LIFE (Austin Sarat & Thomas R. Kearns eds., 1993); *see also* GUYORA BINDER & ROBERT WEISBERG, LITERARY CRITICISMS OF LAW (2000); ROSEMARY J. COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION AND THE LAW (1999); ROBERT M. COVER, NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT M. COVER (Martha Minow, Michael Ryan & Austin Sarat eds., 1993); PATRICIA EWICK & SUSAN S. SILBEY, THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE (1998); PAUL W. KAHN, THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP (1999); LEGAL STUDIES AS CULTURAL STUDIES: A READER IN (POST)MODERN CRITICAL THEORY (Jerry Leonard ed., 1995). However, many of the important predecessors in this area have worked primarily in anthropology and American studies. *E.g.*, JAMES CLIFFORD, THE PREDICAMENT OF CULTURE: TWENTIETH-CENTURY ETHNOGRAPHY, LITERATURE, AND ART (1988); JANE M. GAINES, CONTESTED CULTURE: THE IMAGE, THE VOICE, AND THE LAW (1991); CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY (1983).

3. *See* discussion *infra* Part III.

4. Juvenile Justice Reform Act, H.R. 1501, 106th Cong. (1999).

secularized public schools) than on regulating guns.⁵ Like Congress, the Supreme Court is increasingly divided over whether the issues before them are issues of law or culture.⁶ Congress is right that legislation can change culture, but it is right for all the wrong reasons. It is more likely that culture will be influenced by law in ways never intended or anticipated by Congress. This common slippage between the purposes and meanings that appear to animate a particular legal rule (or even the absence of a rule), and the actual effects of a rule as it circulates through cultural practice, is the object of inquiry in a cultural interpretation of law. Slippage, a concept on which I will elaborate later, identifies the dislocation between the production of legal meaning and its reception and rearticulation, all of which are mutually informed and always cultural. This dislocation in turn locates the inevitable intersection of law and culture.

This Essay is an attempt to theorize the relationship of law to culture and culture to law beyond the intuitive, commonplace sense that law partakes of culture—by reflecting it as well as by reacting against it—and that culture refracts law. It proposes a theory of law as culture that, in detailing the mutually constitutive nature of the relationship, distinguishes itself from the way law and culture have been conceived by realist and critical legal scholars, as well as by social norms writers. The Essay concludes by speculating about one possible method by which this theorizing might be analytically employed in a cultural interpretation of law.

As an overture toward the goal of understanding law as culture, I offer in Part I what I hope is clarification and rehabilitation of the concept of culture. After canvassing some of the best that has been thought and said about the concept, I offer a provisional way to think about culture as a set of shared signifying practices that are always in the making and always up for grabs.

5. I do not want to suggest that regulating guns is not an act with cultural implications, merely that legislators are increasingly overt in their attempts to use law to reform culture, however cynical those attempts might be.

The House did not entertain measures to make parents pay more attention to their children, or to expand mental health coverage, or to encourage jocks to treat Goths with more respect, but it discussed just about every other Columbine explanation. The widespread sense among members was that the era of big government may be over, but when tragedy strikes, Americans still expect at least the appearance of action from their politicians. In a typical swipe, Rep. Louise M. Slaughter (D-NY) described the debate as “full of solutions in search of problems.”

Michael Grunwald, *Culture Wars Erupt in Debate on Hill*, WASH. POST, June 18, 1999, at A1.

6. See discussion *infra* Section II.C; see also *Romer v. Evans*, 517 U.S. 620 (1996). In *Romer*, the majority found that a Colorado referendum targeting homosexuals violated the Equal Protection Clause because it could not be explained by anything other than animus toward the class it affected. 517 U.S. at 632. Justice Scalia, writing in dissent, claimed that the majority had “mistaken a Kulturkampf for a fit of spite” by a group of tolerant Coloradans who were merely trying to express their cultural preference for heterosexuality. *Id.* at 636. Because Scalia found that nothing in the law prevented Coloradans from doing so, he argued that the Court should not resolve the issue based on its own preferences in an otherwise purely cultural debate. *Id.*

Part II elaborates on what law as culture and culture as law can mean by showing the ways in which law is one of the signifying practices that constitute culture and vice versa. I give examples of three different ways in which we might understand law as culture: one that borrows from the realist and critical approaches by emphasizing the power of law over culture, another that shares some sympathies with a social norms approach by emphasizing the power of culture over law, and a third that envisions an unstable synthesis between the two, formed by a continuous recycling and rearticulation of legal and cultural meanings.

In Part III, I speculate about where this theory might lead by suggesting a very provisional structure for thinking about the work we ask culture to do, particularly with respect to law. What I propose is an investigation into the movement and moments of collision between the dependent discourses of law and culture. I suggest an approach that borrows from the ethnographic method: employing thick description in our accounts of law and culture in an effort to locate the slippage and elision between the two, directing us not so much to a singular explanation as to neglected questions and revealing juxtapositions. This sketch of a method does not aspire to the anthropological goal of making the foreign familiar; instead, it hopes to make the familiar foreign by giving further content to the proposition that law is culture. To this end, a cultural study of law envisions a robust interpretation of how conventionally understood legal and cultural meanings inform each other such that they are no longer intelligible as strictly legal or cultural. In a sense, the method presupposes the object of inquiry. As Sarat and Kearns aptly put it, to focus “on the production, interpretation, consumption, and circulation of legal meaning suggests that law is inseparable from the interests, goals, and understandings that deeply shape or comprise social life.”⁷

I. WHAT WE TALK ABOUT WHEN WE TALK ABOUT CULTURE⁸

Culture is a deeply compromised idea I cannot yet do without.

—James Clifford⁹

There are many ways to talk about culture and many ways to put it to

7. Austin Sarat & Thomas R. Kearns, *The Cultural Lives of Law*, in *LAW IN THE DOMAINS OF CULTURE*, *supra* note 2, at 1, 6.

8. A note on this Part’s title: Among those who talk about culture, there seems to be a prevailing taboo against saying anything that might be understood as definitive on so delicate a topic, even while at the same time purporting to elucidate it. In the face of this trend, I thought I would try to say something definitive without aspiring to elucidation. A nod to Raymond Carver strikes me as a fitting way to acknowledge that culture, like love, is not something you can hold at arm’s length and analyze; because there is no escape from culture, to theorize about it is to theorize within it; to talk about it with others is to make it. See RAYMOND CARVER, *WHAT WE TALK ABOUT WHEN WE TALK ABOUT LOVE: STORIES* (1981).

9. CLIFFORD, *supra* note 2, at 10.

work. The contemporary work that culture is asked to do is most often explanatory; it is the product of a transformation in the concept of culture from “something to be described, interpreted, even perhaps explained . . . [to] a source of explanation in itself.”¹⁰ Adam Gopnik, an insightful culture critic for *The New Yorker*, made this point by reflecting on the pervasive use of the word “culture” in all the attempted explanations of the shootings at Columbine High School, and the ultimate misuse and even meaninglessness of the term in its constant invocations:

But most often by “culture” we pop sociologists don’t even mean violence in movies and TV and video games. We just mean—well, nothing, really. It’s just decor. The only difference between saying that America is a violent country and saying that it has a “culture of violence” is that the second has a comforting, classy tone, and gives the illusion of depth. By appending the word “culture” to an observation, you somehow promote it from a description to an explanation. . . . Every age has a term to explain things that resist explanation. The Elizabethans had Fate; the Victorians had History; we have Culture.¹¹

Of course, he is right, and he is not right. Gopnik is right in the sense that the word has become a kind of political expedient which we use to mean many different things and sometimes to mean nothing at all, and that this practice tends to erode the usefulness of the word. However, this problem may have as much to do with our “culture of confusion” as it does with our ubiquitous use of the word itself. Gopnik is wrong in the sense that the way he thinks we use culture is not the only way we might use it. As Gopnik suggests, when culture is deployed as political device, it is effective precisely because it has no analytical content, and it is popular because it sounds like it does. But it only sounds like it has analytic bite because the concept of culture belongs to a rich and contested intellectual history in which it has functioned frequently and effectively as an analytical device.¹² It is in this sense that I use the word. Culture as analytical device has not been drained of all interpretive and explanatory power simply because as a concept it resists explanation, or because we hope that its invocation alone explains more than it does. Culture is one way of explaining things. When we make the effort to clarify what we mean by the term and are cautious about the sort of work we ask it to do, the concept may still prove to have teeth.

To talk about law and culture, or to suppose that law *is* culture, is to presume that we understand the concepts that provide the basis of our

10. ADAM KUPER, *CULTURE: THE ANTHROPOLOGISTS’ ACCOUNT*, at xi (1999).

11. Adam Gopnik, *Culture Vultures*, *NEW YORKER*, May 24, 1999, at 27, 28.

12. For example, see KUPER, *supra* note 10, gives an account of the history of the concept within anthropology and, to a lesser extent, within sociology.

inquiry. Undoubtedly the concepts, at their most complex, resist the closure of definition. Culture especially is a “deeply compromised” concept.¹³ Among anthropologists, there has been much hand-wringing, some of it very useful, about what it means to write culture.¹⁴ Rosemary Coombe insists that “[t]he relationship between law and culture should not be defined” because both law and culture developed conceptually in the eighteenth and nineteenth centuries into categories that were understood as organic and discreet, and used to naturalize and legitimate European colonial power.¹⁵ “An exploration of the nexus between law and culture will not be fruitful,” she contends, “unless it can transcend and transform its initial categories.”¹⁶ I would argue that our understandings and uses of both law and culture are plastic—they cannot help but change and evolve—and that their evolution is mutually informed. Admittedly, while they have moved well beyond their initial categories, they also cannot help but bear that influence. “[E]ven if they are expressed in novel idioms, discourses on culture are not freely invented; they refer back to particular intellectual traditions that have persisted for generations. . . . New formulations can be set in a long genealogy, even if they are related to the needs of the moment.”¹⁷ I now turn to a brief summary of that genealogy.

Raymond Williams, that spectacular genealogist of culture, called culture “one of the two or three most complicated words in the English language.”¹⁸ Williams chronicles the meanings of the word beginning in the fifteenth century, following its association in English with the process of cultivation, first in husbandry and then in manners, to the German use

13. CLIFFORD, *supra* note 2, at 10.

14. See, e.g., WRITING CULTURE: THE POETICS AND POLITICS OF ETHNOGRAPHY (James Clifford & George E. Marcus eds., 1986); Lila Abu-Lughod, *Writing Against Culture*, in RECAPTURING ANTHROPOLOGY: WORKING IN THE PRESENT 137 (Richard G. Fox ed., 1991). These authors criticize the implicit hierarchy in ethnography, which articulates “the authority of the anthropologist by telling anthropology’s essential(ist) story—that most modern triangle—of the grand encounter between the West and the rest, with the anthropologist as hypotenuse.” Richard G. Fox, *For a Nearly New Cultural History*, in RECAPTURING ANTHROPOLOGY: WORKING IN THE PRESENT, *supra*, at 93. Renato Rosaldo puts it more pointedly:

The Lone Ethnographer’s mask of innocence (or, as he put it, his “detached impartiality”) barely concealed his ideological role in perpetuating the colonial control of “distant” peoples and places. His writings represented the human objects of the civilizing mission’s global enterprise as if they were the ideal recipients of the white man’s burden.

RENATO ROSALDO, CULTURE AND TRUTH: THE REMAKING OF SOCIAL ANALYSIS 30 (1998).

15. See Rosemary J. Coombe, *Contingent Articulations: A Critical Cultural Studies of Law*, in LAW IN THE DOMAINS OF CULTURE, *supra* note 2, at 21.

16. *Id.*

17. KUPER, *supra* note 10, at 9-10.

18. RAYMOND WILLIAMS, KEYWORDS: A VOCABULARY OF CULTURE AND SOCIETY 87 (rev. ed. 1983). Others have more thoroughly summarized Williams’s genealogy. See, e.g., CLIFFORD, *supra* note 2, at 233-34; DICK HEBDIGE, SUBCULTURE: THE MEANING OF STYLE 6-7 (1979). Coombe provides a genealogy of the concept of culture which, drawing extensively from the work of Robert Young, links it more explicitly to law. Coombe, *supra* note 15, at 22-25; see also KUPER, *supra* note 10; ROBERT J.C. YOUNG, COLONIAL DESIRE: HYBRIDITY IN THEORY, CULTURE, AND RACE (1995).

of the word to mean civilization.¹⁹ Williams locates an important innovation in the understanding of culture in the late eighteenth century, when it is first used in the plural, to mean “the specific and variable cultures of different nations and periods, but also the specific and variable cultures of social and economic groups within a nation.”²⁰ This important move marks a rejection of the idea of culture as the universal progress of humanity and a shift toward something like “a particular way of life.”²¹ This conception of culture stands in contrast to the still popular use of the term to mean intellectual and artistic production,²² “the best that has been thought and known in the world,” in Matthew Arnold’s words.²³ Finally, Williams distinguishes between culture as primarily material production, which he associates with archaeology and cultural anthropology, and culture as “signifying or symbolic systems,” which he associates with history and cultural studies.²⁴ It is mainly in this latter sense, inspired by both cultural studies and sociology, that I use the term culture.

Cultural studies has tended to favor, among the various definitions of culture that Williams has sketched elsewhere,²⁵ some form of what he calls the social definition,

19. WILLIAMS, *supra* note 18, at 87-89; *see also* 3 OXFORD ENGLISH DICTIONARY 257 (2d ed. 1971). Culture as civilization was meant to be the antithesis of nature or barbarism. Coombe, *supra* note 15, at 23.

20. WILLIAMS, *supra* note 18, at 89.

21. Williams attributes this innovation to Johann Gottfried von Herder who, sounding exceedingly modern, attacked the idea of culture as universal; he decried the use of the term to naturalize the progress of human development at the expense of those cultures that Europe subjugated. Williams quotes Herder:

Men of all the quarters of the globe, who have perished over the ages, you have not lived solely to manure the earth with your ashes, so that at the end of time your posterity should be made happy by European culture. The very thought of a superior European culture is a blatant insult to the majesty of nature.

Id. at 89 (quoting Herder without citation).

22. *Id.* at 90-91.

23. MATTHEW ARNOLD, CULTURE AND ANARCHY AND OTHER WRITINGS 79 (Stefan Collini ed., 1993). Although Arnold’s is perhaps one of the most frequently quoted phrases on the meaning of culture, much less often quoted is the passage from which this phrase is taken. It demonstrates the moral and egalitarian impulses behind Arnold’s formulation, which is most often referenced for its elitism. *See, e.g.*, CLIFFORD, *supra* note 2, at 337-38. According to Arnold, culture was about perfection; not the perfection of artistic production but the perfecting of human beings. ARNOLD, *supra*, at 59. Culture, according to Arnold,

seeks to do away with classes; to make the best that has been thought and known in the world current everywhere; to make all men live in an atmosphere of sweetness and light, where they may use ideas, as it uses them itself, freely,—nourished, and not bound by them. . . . [T]he men of culture are the true apostles of equality.

Id. at 79.

24. WILLIAMS, *supra* note 18, at 91.

25. In *The Long Revolution*, Williams identifies three categories in the definition of culture that correspond to some of the themes already mentioned: 1) the ideal, which understands culture as “a state or process of human perfection” according to universal values; 2) the documentary, where culture is “the body of intellectual and imaginative work”; and 3) the social, described above. RAYMOND WILLIAMS, *THE LONG REVOLUTION* 41 (rev. ed. 1966).

in which culture is a description of a particular way of life, which expresses certain meanings and values not only in art and learning but also in institutions and ordinary behavior. The analysis of culture, from such a definition, is the clarification of the meanings and values implicit and explicit in a particular way of life, a particular culture.²⁶

Williams himself was interested in reconciling the different views of culture that he canvassed, and he cautioned against accepting any singular approach to culture, because the “variations of meaning” capture the complexity of the term.²⁷ As Williams realized, the concept of culture will always bear the imprint of the interests and ideologies that influenced its development. And this may not be such a bad thing; it certainly does not justify abandoning the term or adopting the convolutions of theoretical shorthand in order to speak of it only obliquely. It means that as we venture to name and give shape, no matter how provisional, to our subjects, we must remain attentive to the ways in which they defy us, meaning at once more and less than we may wish.

Drawing from Williams’s rather generalized social definition of culture, and emphasizing the importance of signifying systems that have been the focus of cultural studies, critical anthropology, and sociology, I will provisionally call culture any set of shared, signifying practices—practices by which meaning is produced, performed, contested, or transformed. As the sociologist William Sewell has put it, culture is *both* a semiotic system with its own logic and coherence *and* the practices that reproduce and contest that system—practices which are contradictory and always in flux.²⁸ Bearing in mind Williams’s claim that the emergence of the modern concept of culture is “a process, not a conclusion,”²⁹ I want to emphasize the process of cultural practice as one of making, reproducing, and contesting meaning.

I want to distinguish here between a couple of different ways in which this version of culture might be read. Culture can be conceived as the almost unconscious meaning-systems that people inhabit and enact without choice. It can also be thought of as the more self-conscious deployment of certain symbols whose meaning becomes temporarily salient. It is at this slightly more conscious level of cultural practice that meanings are contested. Stuart Hall identifies a similar version of this

26. *Id.* Stuart Hall identifies this “culturalism” (as opposed to structuralism) of Williams, Hoggart, and Thompson as the dominant paradigm within cultural studies. Stuart Hall, *Cultural Studies: Two Paradigms*, in *CULTURE/POWER/HISTORY: A READER IN CONTEMPORARY SOCIAL THEORY* 520, 527 (Nicholas B. Dirks, Geoff Eley & Sherry B. Ortner eds., 1994).

27. WILLIAMS, *supra* note 25, at 43; *see also* Hall, *supra* note 26 (contextualizing Williams’s discussion of culture in *The Long Revolution*).

28. William H. Sewell, Jr., *The Concepts of Culture* (1996) (unpublished manuscript, on file with author).

29. RAYMOND WILLIAMS, *CULTURE & SOCIETY: 1780-1950*, at 295 (1958).

distinction in cultural studies, which has used culture to mean “*both* the meanings and values which arise amongst distinctive social groups and classes . . . through which they ‘handle’ and respond to the conditions of existence; *and* as the lived traditions and practices through which those ‘understandings’ are expressed and in which they are embodied.”³⁰ Culture as any set of shared, signifying practices can refer to both of these meanings.

The contradictions within and contestations over cultural meanings cannot be overemphasized. That contradictions exist within and between cultures is a point that can be missed by using terms, like “structure,” “system,” or “shared meaning,” which suggest an elegant coherence. Renato Rosaldo provides an important corrective when he argues for attention to the “internal inconsistencies, conflicts and contradictions” of cultures.³¹

In contrast with the classic view, which posits culture as a self-contained whole made up of coherent patterns, I use the term “culture” to mean a more porous array of intersecting practices and processes that emerge from within and beyond its borders. Such heterogeneous workings of culture often derive from differences of age, gender, class, race, and sexual orientation.³²

Differences, conflicts, and confusion among people who otherwise share many signifying practices help explain why cultures are never neat, bounded, or complete.³³ It is also in the very construction of difference that we see the cultural integration of law, as law partly “generates the signs and symbols—the signifying forms—with which difference is constituted and given meaning.”³⁴ Rosaldo, among others, emphasizes not just the differences and contradictions within cultures, but also the increasing hybridity among cultures and the fluidity of cultural boundaries that must be part of any cultural analysis.³⁵

While it is critical to acknowledge that misunderstanding, conflict, and

30. Hall, *supra* note 26, at 527.

31. ROSALDO, *supra* note 14, at 28.

32. *See id.* at 20-21.

33. Clifford’s essay about the Mashpee is an exceptional discussion of this proposition as well as the repercussions of our assumptions otherwise. In the essay, Clifford points out that “the culture idea, tied as it is to assumptions about natural growth and life, does not tolerate radical breaks in historical continuity. . . . Metaphors of continuity and ‘survival’ do not account for complex historical processes of appropriation, compromise, subversion, masking, invention, and revival.” CLIFFORD, *supra* note 2, at 277, 338.

34. Coombe, *supra* note 15, at 37.

35. Clifford notes, “The increased pace of historical change, the common recurrence of stress in the systems under study, forces a new self-consciousness about the way cultural wholes and boundaries are constructed and translated.” CLIFFORD, *supra* note 2, at 231. Edward Said links this reassessment of cultural boundaries more explicitly to imperialism: “Partly because of empire, all cultures are involved in one another; none is single and pure, all are hybrid, heterogenous, extraordinarily differentiated, and unmonolithic.” EDWARD W. SAID, *CULTURE AND IMPERIALISM*, at xxv (1993).

change occur within cultures and are sometimes due to differences in, say, age or race, it is equally important not to assume that the familiar categories popularized by identity politics are generally coterminous with a fixed cultural group. Where culture, in the sense of art, learning, and civilization, was once associated with Western superiority and whiteness, the inverse association is still true: Certain practices deemed troubling or offensive are often attributed to a racialized culture.³⁶ The trajectory of the concept of culture has been such that culture might now be experienced as transparent for white Americans, who are sometimes thought not to “have culture,” while “culture for communities of color is a fixed, monolithic essence that directs the actions of community members.”³⁷

Although in some cases cultures may be contiguous with communities of color or class, in most cases they cut across familiar categories because they are generally more complex than any one characteristic of a group can account for. Given the always incomplete and increasingly intersecting qualities of culture, it may sometimes make more sense to speak of specific subcultures. Yet, to employ the term subcultures is not to imply that there is always a coherent and larger constellation known as culture that encompasses them, nor is it to equalize the power or substance among cultures. Some groups have more opportunities to make rules and organize meanings;³⁸ some cohere fleetingly, while others endure over generations. Culture, in the sense I am using it, can operate both horizontally across populations and vertically through generations. American urban professionals, young Goths, and Hasidic Jews constitute very different types of subcultures, but they all articulate and reproduce their respective identities through signifying practices specific to their respective cultures. The forms those practices take and the objects around which they evolve often reflect the relative power of different subcultures.

Dick Hebdige, in his well-known study of subculture, locates many of these signifying practices in the potent gestures of style: “[T]he tensions between dominant and subordinate groups can be found reflected in the surfaces of subculture—in the styles made up of mundane objects which have a double meaning.”³⁹ The double meaning emerges when the symbols employed by a subculture (the sports utility vehicle, the trench

36. See Leti Volpp, *Blaming Culture for Bad Behavior*, 12 YALE J.L. & HUMAN. 89 (2000) (using examples of forced and voluntary adolescent marriages).

37. *Id.* at 94 (discussing Paul Gilroy’s contention that “[w]hen culture is brought into contact with ‘race’ it is transformed into a pseudo-biological property of communal life” (quoting PAUL GILROY, *SMALL ACTS: THOUGHTS ON THE POLITICS OF BLACK CULTURES* 24 (1993))); see also Dorothy E. Roberts, *Why Culture Matters to Law: The Difference Politics Makes*, in *CULTURAL PLURALISM, IDENTITY POLITICS, AND THE LAW*, *supra* note 2, at 85; ROSALDO, *supra* note 14, at 198-204. Rosaldo argues that one problem with conflating culture with difference is that it masks power: “[T]he more power one has, the less culture one enjoys, and the more culture one has, the less power one wields.” ROSALDO, *supra* note 14, at 202.

38. See HEBDIGE, *supra* note 18, at 14.

39. *Id.* at 2.

coat, the tallis) draw ridicule or rage from others but are signs of identity and hence “sources of value” for those who use them.⁴⁰ Style, then, can be deployed as a partly self-conscious aspect of cultural practice. Sewell writes: “[T]o engage in cultural practice means to utilize the existing cultural symbols to accomplish some end. The employment of a symbol can be expected to accomplish some goal only because the symbols have more or less determinate meanings.”⁴¹ But, as Hebdige makes clear, the meaning of particular acts or symbols can change as they are referenced in new contexts or for new purposes.

For example, among some gay men in the Bay Area, paying a bridge toll for someone does not signify altruism, but sexual interest. The practice of picking up cute guys on the freeway is accomplished through a shared symbolic system that has other meanings in other contexts. The same potential for multiple or changing meaning of cultural symbols is also present in the symbolic power of clothing and the practice of dress: A trench coat can signify an affection for staying dry in the rain; it can allude to the tough but sympathetic figure cut by the 1940s private detective; or it can be worn to convey an affiliation with a subculture of disaffected middle-class youth.

II. LAW AS CULTURE

[L]aw, rather than a mere technical add-on to a morally (or immorally) finished society, is, along of course with a whole range of other cultural realities from the symbolics of faith to the means of production, an active part of it.

—Clifford Geertz⁴²

The view of culture sketched in Part I necessarily implicates law because law is one of the most potent signifying practices. As Paul Kahn puts it, the “rule of law is a social practice; it is a way of being in the world.”⁴³ Law can be seen as one (albeit very powerful) institutional cultural actor whose diverse agents (legislators, judges, civil servants, citizens) order and reorder meanings.⁴⁴ For example, using the pick-up scenario I just mentioned, law might change the semiotic code operative in some segments of the gay population if the San Francisco city council decided to prohibit drivers from paying more than one toll or if

40. *Id.* at 3.

41. Sewell, *supra* note 28, at 19.

42. GEERTZ, *supra* note 2, at 218.

43. KAHN, *supra* note 2, at 36.

44. Sewell does not address law specifically, but he makes the important point that “much cultural practice is concentrated in and around powerful institutional nodes—for example, religions, communications media, business corporations, and, most spectacularly, states.” Sewell, *supra* note 28, at 31.

undercover police used the code in order to identify and harass gay men. Or, more concretely, the trend toward statutory regulation of dress in schools has altered the meaning of the symbols at issue and the cultural practice.⁴⁵

As Geertz has said, law is one way in which we make sense of the world, one way of organizing meaning, one “distinctive manner of imagining the real.”⁴⁶ Law is simply one of the signifying practices that constitute culture and, despite its best efforts, it cannot be divorced from culture. Nor, for that matter, can culture be divorced from law. “To recognize that law has meaning-making power, then, is to see that social practices are not logically separable from the laws that shape them and that social practices are unintelligible apart from the legal norms that give rise to them.”⁴⁷ Therefore, if one were to talk about the relationship between culture and law, it would certainly be right to say that it is always dynamic, interactive, and dialectical—law is both a producer of culture and an object of culture. Put generally, law shapes individual and group identity, social practices as well as the meaning of cultural symbols, but all of these things (culture in its myriad manifestations) also shape law by changing what is socially desirable, politically feasible, legally legitimate. As Pierre Bourdieu puts it, “law is the quintessential form of ‘active’ discourse, able by its own operation to produce effects. It would not be excessive to say that it creates the social world, but only if we remember that it is this world which first creates the law.”⁴⁸

But perhaps we should not speak of the “relationship” between law and culture at all, as this tends to reinforce the distinction between the concepts that my description here seeks to deny. What I am after is not to make sense of law *and* culture, but law *as* culture. This dynamic understanding of law as culture is influenced directly by Patricia Ewick and Susan Silbey’s important book *The Common Place of Law*, in which they “conceiv[e] of law not so much operating to shape social action but *as* social action.”⁴⁹ This conceptualization is related more generally to what many in sociolegal studies call a constitutive theory of law,⁵⁰ in which law is recognized as both constituting and being constituted by

45. See *infra* note 116 and accompanying text.

46. GEERTZ, *supra* note 2, at 184.

47. Sarat & Kearns, *supra* note 7, at 10.

48. Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 814, 839 (1987); see also EWICK & SILBEY, *supra* note 2, at 39 (1998) (describing “a reciprocal process in which the meanings given by individuals to their world become patterned, stabilized, and objectified. These meanings, once institutionalized, become part of the material and discursive systems that limit and constrain future meaning-making.”).

49. *Id.* at 34-35.

50. See, e.g., ALAN HUNT, EXPLORATIONS IN LAW AND SOCIETY: TOWARD A CONSTITUTIVE THEORY OF LAW (1993); LAW IN EVERYDAY LIFE, *supra* note 2, at 27-32; Susan S. Silbey & Austin Sarat, *Critical Traditions in Law and Society Research*, 21 LAW & SOC’Y REV. 165 (1987).

social relations and cultural practices.⁵¹ In other words, law's power is discursive and productive as well as coercive. Law participates in the production of meanings within the shared semiotic system of a culture, but it is also a product of that culture and the practices that reproduce it. A constitutive theory of law rejects law's claim to autonomy and its tendency toward self-referentiality.⁵² As Alan Hunt explains, "It serves to focus attention on the way in which law is implicated in social practices, as an always potentially present dimension of social relations, while at the same time reminding us that law is itself the product of the play and struggle of social relations."⁵³ Whether called constitutive theory or legal consciousness,⁵⁴ this understanding of the mutual constructedness of local cultural practices and larger legal institutions provides a way of thinking about law as culture and culture as law. At their most radical, these theories question the common conviction that law "is still recognizably, and usefully, distinguishable from that which is not law."⁵⁵

While I agree that law and culture do not exist independently of each other, I disagree that their necessary interconnections make them indistinguishable from one another. Even acknowledging that the negotiation of legal meaning is always a cultural act, I believe that we still can, and should, distinguish between the kinds of power assigned to the law and legal actors, and the way power and resistance are exercised among the least powerful. To talk about the making and contestation of meaning is necessarily to talk about power. "Power is seen in the effort to negotiate shared understandings, and in the evasions, resistances, and inventions that inevitably accompany such negotiations."⁵⁶ It is partly in the different forms that power takes that law and culture are still recognizably distinct. Their differences are greatest when legal power manifests itself as state-sanctioned physical force or ideological influence. Indeed, most critical theorists of law think that law's hegemonic, ideological character is more effective than its violence.⁵⁷ While the

51. Naomi Mezey, *Out of the Ordinary: Law, Power, Culture and the Commonplace*, 26 *LAW & SOC. INQUIRY* 145 (2001).

52. See HUNT, *supra* note 50, at 304-05.

53. *Id.* at 3.

54. Ewick and Silbey use the term legal consciousness "to name participation in the process of constructing legality. . . . [E]ach person's participation sustains legality as an organizing structure of social relations." EWICK & SILBEY, *supra* note 2, at 45.

55. *Id.* at 19.

56. AUSTIN SARAT & WILLIAM L.F. FELSTINER, *DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS* 11 (1995).

57. Robert Gordon gives one of the classic statements of the hegemonic power of law:

[T]he power exerted by a legal regime consists less in the force that it can bring to bear against violators of its rules than in its capacity to persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live.

Robert Gordon, *Critical Legal Histories*, 36 *STAN. L. REV.* 57, 108 (1984). For the original source on "hegemony," see ANTONIO GRAMSCI, *SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI* 242, 245-46 (Quintin Hoare & Geoffrey Newell Smith eds. & trans., 1971).

differences between legal and cultural exercises of power are significant,⁵⁸ I think they are also too often exaggerated.⁵⁹ For example, law's hegemonic power depends deeply on culture to be effective, and much of the violence evident in culture likewise depends on inequalities directly and indirectly attributable to law.

Law as culture might be understood in a number of different ways. I want to suggest three possibilities. First, one might analyze the relationship between law and culture by articulating the unspoken power of law in the realm of culture. Second, one might think about the relationship by emphasizing the enduring power of culture over legal institutions and decision-making. Lastly, one might reject the distinctions suggested by a "relationship" between the two and seek to synthesize law and culture, by pointing to the ways in which they are one and the same. None of these understandings is wrong, and many of the examples that I give of each one could be recharacterized as belonging to the other two. Yet even though the distinctions are fragile, they enable us to appreciate what law as culture can mean.

A. The Power of Law

First, law as culture might mean emphasizing the pervasive power of law and excluding the possibility that there is an autonomous cultural realm that could be articulated without recourse to law. Here, culture is a colony in law's empire. "We live," as Ronald Dworkin puts it, "in and by the law. It makes us what we are: citizens and employees and doctors and spouses and people who own things."⁶⁰ This version of law as culture is best exemplified by the realist insight, elaborated by critical legal scholars, that law operates even when it appears not to, that legal permissions and prohibitions are in force in the most intimate and non-legal relationships—indeed, that legal rules structure the very baseline from which we negotiate our lives and form our identities. Furthermore, these legal ground rules are all the more effective because they are not visible as law. Rather than think of legal permission as law, we tend to think of it as individual freedom, the market, or culture.

The realist insight was epitomized by the critique of the state's powerful role in determining the background rules for social action and maintaining

58. Robert M. Cover, *Violence and the Word*, reprinted in COVER, *supra* note 2, at 203.

59. Sarat and Felstiner offer a valuable corrective when they describe the power in the lawyer-client interactions they observed as "not possessed at all. It is mobile and volatile, and it circulates such that both lawyer and client can be considered more or less powerful, even at the same time." SARAT & FELSTINER, *supra* note 56, at 19.

60. Dworkin continues:

It is sword, shield, and menace: we insist on our wage, or refuse to pay our rent, or are forced to forfeit penalties, or are closed up in jail, all in the name of what our abstract and ethereal sovereign, the law, has decreed. . . . We are subjects of law's empire.

RONALD DWORKIN, *LAW'S EMPIRE*, at vii (1986).

an unequal distribution of wealth, particularly through the use of contract and property law.⁶¹ Realists rejected the claims of classical theorists that contracts and property rights were part of a private law system based on individual autonomy rather than legal coercion.⁶² Realists argued that contracts are public, rather than private, because individuals ask the state to enforce them by using law to aid one party against the other.⁶³ Likewise, they claimed that property is not a natural right protected by the state only in the rare event of a threat of dispossession, but a right created by the state to exclude others generally. Thus, the “law of property helps me directly only to exclude others from using the things which it assigns to me.”⁶⁴ The law, then, does not merely protect owners in their possessions, but also creates both owners and possessions, by creating and enforcing a right called property.

Property and contract rights together have powerful state-sanctioned distributional effects.⁶⁵ Property rights affect the relative bargaining power of the parties and hence the contract terms that can be bargained for; the terms of the contract in turn affect the ability of the parties to increase their power and possessions.⁶⁶ “The distribution of market power is thus only partly a function of private decisions of market actors; to a substantial extent, it is determined by the legal definition and allocation of property rights.”⁶⁷ Thus the realists showed that conditions and

61. While this story has been told many times by many different scholars, I rely here primarily on Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151 (1985); Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465 (1988).

62. *Lochner v. New York*, 198 U.S. 45 (1905), is the now infamous expression of the classical approach to contract. The *Lochner* Court understood the power of the state to legislate and the power of the individual to contract as two separate and competing powers, and concluded that the statute at issue was

an illegal interference with the rights of individuals, both employers and employes [sic], to make contracts regarding labor upon such terms as they may think best. . . . Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual.

198 U.S. at 61.

63. See, e.g., Morris Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 562 (1933); cf. Jay M. Feinman & Peter Gabel, *Contract Law as Ideology*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 373 (David Kairys ed., 1990) (tracing the history of contract law through its ideological imagery).

64. Morris Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 12 (1927).

65. See *id.* at 13 (“The extent of the power over the life of others which the legal order confers on those called owners is not fully appreciated by those who think of the law as merely protecting men in their possession.”); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 478 (1923) (“The distribution of income, to repeat, depends on the relative power of coercion which the different members of the community can exert against one another. . . . The resulting distribution is very far from being equal, and the inequalities are very far from corresponding to needs or to sacrifice.”).

66. Singer, *supra* note 61, at 489. Put bluntly, “Property law, when combined with contract law, delegates to property owners the power to coerce nonowners to contract on terms imposed by the stronger party.” *Id.* at 490. The only pressure operating to counteract the power of coercion is the relatively weak power of the nonowner to withhold her labor. *Id.*

67. *Id.* at 488.

relationships which were popularly thought to be non-legal, like class or employment, were largely determined by law.⁶⁸

The realist reconceptualization of law is captured in their view of the employer-employee relationship, a relationship they saw not as defined by two autonomous agents, whose actions were dictated by culture, but as a relationship determined by legal coercion. Law, by creating owners, also transforms non-owners into laborers, who need certain possessions to survive. As Robert Hale puts it:

Unless, then, the non-owner can produce his own food, the law compels him to starve if he has no wages, and compels him to go without wages unless he obeys the behests of some employer. It is the law that coerces him into wage-work under penalty of starvation—unless he can produce food. . . . [B]ut in every settled country there is a law which forbids him to cultivate any particular piece of ground unless he happens to be an owner.⁶⁹

Where we still tend to think of law as guiding employment relationships only at the margins, putting a floor on wages, a ceiling on hours, or governing the rules of a strike, the realists saw law as creating both employers and employees, and structuring that relationship in its most mundane and intimate aspects.

As the realists revealed, law reaches into our lives in its absence as much as in its presence. Affirmative laws create the rights of property owners. But the absence of law also creates rights of a sort. In the employment context, the absence of a federal law prohibiting employers from discriminating against people on the basis of sexual orientation means that where no local or state law dictates otherwise, law affirmatively gives employers permission to discriminate openly against gay, lesbian, or transgendered employees, by refusing to grant such employees a remedy for discrimination.⁷⁰

Duncan Kennedy, who, as a critical legal scholar, can be seen as taking

68. Peller, *supra* note 61, at 1237 (explaining that the realist contention “was that the distinctions between the terms public and private, free will and coercion, were constructed in the very opinions which purported to proceed from them”).

69. Hale, *supra* note 65, at 473; *see generally* BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* (1998). Hale’s position can be distinguished from the standard Marxist critique of capital by the emphasis he puts on the ability of both workers and consumers to exert some counter-coercion on labor. Hale, *supra* note 65, at 474.

70. Title VII of the Civil Rights Act of 1964 prohibited discrimination on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a) (1964). With passage of the Age Discrimination in Employment Act, 29 U.S.C. § 621 (1967), and the Americans with Disabilities Act, 42 U.S.C. § 12,102(2) (1991), age and disability have been added as protected categories. Federal legislation to prohibit discrimination on the basis of sexual orientation has been introduced in Congress but has not passed. Employment Non-Discrimination Act, S. 2056, 104th Cong. (1996); S. 1276, 106th Cong. (1999). The Employment Non-Discrimination Act has been reintroduced in the 107th Congress as Title V to the Protecting Civil Rights for All Americans Act, S. 19, 107th Cong. (2001).

up where the realist project left off, contends that the pervasive distributional effects of law are not just felt in economic relations, but in all relations of power.⁷¹ The relative power of men and women or blacks and whites is primarily constituted not through culture, but through law. For example, according to Kennedy, the historical legality of marital rape and battery as well as their current under-enforcement are part of the legal background rules that define the possibilities of male behavior, and hence structure the relations between men and women, even in the context of nonviolent relationships.⁷²

Since we can imagine a legal program that would radically reduce the incidence of rape, the impact of rape on the relative bargaining power of nonviolent men and women is a function of the legal system.

This is only the beginning of the story. The relative bargaining power of men and women when they confront one another from gendered positions is affected by hundreds of discrete legal rules. For example, the following legal choices structure women's bargaining power within marriage: the legalization of contraception and abortion, limited protection against domestic abuse, no-fault divorce, a presumption of custody in the mother, some enforcement of child support rules, and alimony without a finding of fault in the husband.⁷³

One version of the critique offered by the realists and further developed by critical legal theorists is that virtually all human action, from going to bed to going to work, is either implicitly or explicitly defined and structured by law, which operates all the more effectively for appearing not to be law.⁷⁴

B. The Power of Culture

Second, law as culture might mean emphasizing the pervasive power of culture, a power that might be conceived as either excluding the possibility of a legal realm that could be articulated without recourse to culture, or establishing the possibility of cultural regulation that

71. DUNCAN KENNEDY, *The Stakes of Law, or Hale and Foucault!*, in *SEXY DRESSING ETC.: ESSAYS ON THE POWER AND POLITICS OF CULTURAL IDENTITY* 83 (1993).

72. *Id.* at 103-04; see also DUNCAN KENNEDY, *Sexual Abuse, Sexy Dressing, and the Eroticization of Domination*, in *SEXY DRESSING ETC.*, *supra* note 71, at 126. In other respects Kennedy's book is a great example of a synthetic approach to law and culture.

73. See KENNEDY, *supra* note 71, at 104.

74. Mark Tushnet suggested to me a wonderful example of the invisibility of ground rules: There are implicit rules that most people recognize governing whether it is okay to let someone cut into a line, and whether it is better to let them in ahead of you or behind you, but the more powerful and less visible ground rule is evinced by the fact of the line itself.

functioned independently of law.⁷⁵ Either way, law is a colony in culture's empire, and sometimes a rather powerless one.

For example, on most roads there is a legal speed limit; there are formal laws, usually enacted by state legislatures, that set the posted maximum speed.⁷⁶ Despite the existence of formal law, it is culture that actually determines the "legal" speed limit. The speed limit that is enforced, by the police and in traffic court, and hence operates as the de facto "legal" speed limit, is the limit set by the conventions of drivers—conventions which vary depending on the stretch of road, the time of day, the prevailing conditions, or the habits of a particular city or geographic region.⁷⁷

Moreover, changes in the formal speed limit often have little or no lasting impact on the speed at which motorists drive.⁷⁸ Montana, which has seen the most fluctuation in its legal speed limit, provides the most vivid example. For almost twenty years prior to the federally-imposed, fifty-five mile-per-hour speed limit in 1975, Montana had no set speed limit and operated under what it called its "Basic Rule," which simply required a daytime speed that was reasonable and prudent under the prevailing conditions.⁷⁹ In 1995, after almost twenty years under the federal speed limit, Montana returned to using its Basic Rule.⁸⁰ Robert King and Cass Sunstein have concluded, in reviewing the history of the Montana speed limit, that the changes in the law had little impact on the behavior of drivers.⁸¹ Montana motorists effectively ignored the federal fifty-five mile-per-hour speed limit when it was imposed and did not drive

75. I associate this second version of the power of culture with some social norms scholarship. See, e.g., ROBERT ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

76. In 1974, in response to the Arab oil embargo, Congress passed a federally imposed fifty-five mile-per-hour speed limit in an effort to save fuel. Law of Jan. 4, 1975, Pub. L. No. 93-643, § 102(b), 88 Stat. 2281 (1975), *repealed by* National Highway System Act of 1995, 23 U.S.C. § 101 (1995). With full federal highway funds as an incentive, every state eventually complied. See Tyce Palmaffy, *Don't Brake for Big Government*, J. AM. CITIZENSHIP POL. REV., Sept-Oct. 1996, at 11. In 1995 the newly Republican Congress, with the reluctant support of President Clinton, repealed the federal speed limit and returned authority to the states. National Highway System Act of 1995, 23 U.S.C. § 101 (1995). All states except Hawaii have since raised their highway speed limits to between sixty-five and seventy-five miles-per-hour for cars. *Maximum Speed Limits in Each State*, at <http://web.missouri.edu/~c669885/ncas/limits.html> (last updated Feb. 13, 2000).

77. See Ronald J. Krotoszynski, *Building Bridges and Overcoming Barricades: Exploring the Limits of Law as an Agent of Transformational Social Change*, 47 CASE W. RES. L. REV. 423, 424 n.3 (1997) ("[N]on-compliance was greatest in the western United States, whose long expanses of sparsely populated land created a culture among Westerners that demanded higher speed limits.").

78. See *id.* (suggesting that lower speed limits imposed in response to the oil crisis in the 1970s did not change most people's driving habits); Quentin Hardy, *Transportation: Westerners Rev Up To Speed Legally Again*, WALL ST. J., Nov. 13, 1995, at B1 (citing both federal and local statistics to show that changes in the speed limit "don't seem to affect driving behavior much").

79. MONT. CODE ANN. § 61-8-303 (1973).

80. Tom Kentworthy, *New Life in the Fast Lane: Wide-Open Throttles in Wide Open Spaces*, WASH. POST, Dec. 9, 1995, at A3. Montana subsequently imposed a numerical speed limit in 1999. MONT. CODE ANN. § 61-8-303 (1999).

81. Robert E. King & Cass R. Sunstein, *Doing Without Speed Limits*, 79 B.U. L. REV. 155, 162-68 (1999).

significantly faster once it was rescinded.⁸² Indeed, current speed limits suggest that, if anything, the impact appears to have moved in the opposite direction, with states setting the formal legal speed limit to correspond roughly with the general practice of motorists in that state.

Culture can also be said to dictate a “legal” speed limit that differs from either the formal speed limit or the one determined by driving conventions. The color of one’s car, or more important still, the color of one’s skin, will change the legally enforced speed limit and traffic laws generally. In this case, the shared yet contested meaning of race, combined with a subculture of policing, means that African-American drivers are far more likely to be stopped by police than white drivers, even when they are a smaller percentage of the total drivers in a particular area. This practice is so common that it is now popularly known as “DWB,” Driving While Black.⁸³ David Cole, in his widely lauded book on race and class in the criminal justice system, has collected evidence suggesting that there is a consistent and gross disparity between the rate at which blacks and whites are subject to pretextual stops.⁸⁴ For example, a review conducted in the early 1990s of more than one thousand traffic stops on one stretch of interstate highway in Florida “found that while about 5 percent of drivers on that highway were dark-skinned, nearly 70 percent of those stopped were black or Hispanic.”⁸⁵ On Interstate 95 in Maryland, between 1995 and 1997, 29% of the drivers stopped and 70% of those searched were black, although African-American drivers made up only 17.5% of the traffic on that road.⁸⁶ The statistical disparity is striking and consistent

82. *Id.* at 160, 163. Their ability to flout the federal speed limit was undoubtedly aided by the law in Montana that required a mere five-dollar fine for speeding, payable in cash on the spot. Kentworthy, *supra* note 80, at A3. King and Sunstein report that during the first few months of Montana’s return to the Basic Rule, total average speeds increased only negligibly, from seventy-two to seventy-four miles-per-hour. King & Sunstein, *supra* note 81, at 163. The one exception to the constancy of driver behavior were tourists. According to King and Sunstein, the “repeal of the national speed limit turned Montana into a national speed magnet.” *Id.* at 164 (recounting the exploits of “speed tourists” and test drivers).

83. See, e.g., David A. Harris, “Driving While Black” and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544 (1997) [hereinafter Harris, “Driving While Black”]; David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265 (1999) [hereinafter Harris, *Stories*]; Kathryn K. Russell, “Driving While Black”: Corollary Phenomena and Collateral Consequences, 40 B.C. L. REV. 717 (1999); David A. Harris, *Driving While Black: Racial Profiling on Our Nation’s Highways*, ACLU Special Report (June 1999); John Lamberth, *Driving While Black: A Statistician Proves That Prejudice Still Rules the Road*, WASH. POST, Aug. 16, 1998, at C1.

84. DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 25, 34-41 (1999) (discussing studies done in California, Maryland, Florida, Colorado, and New Jersey). While the studies vary in the size of the area under investigation and in design, Cole’s conclusion that “traffic stops are routinely used as a ‘pretext’ to stop minority drivers” is compelling and widely regarded as sound. *Id.* at 38; see also Harris, *Stories*, *supra* note 83, at 275-88 (detailing the studies done in New Jersey, Maryland, and Ohio).

85. COLE, *supra* note 84, at 37. This study also suggests that the practice is more accurately called “Driving While Brown.”

86. Lamberth, *supra* note 83, at C1. The results of this study are even more astounding once we

with studies done in other states.⁸⁷

A cultural practice of targeting minority drivers persists in spite of the posted speed limit or other formal traffic laws and, more seriously, in spite of the Equal Protection Clause's guarantee that the Fourth Amendment's promise of freedom from unreasonable searches and seizures applies equally regardless of race. In an interesting and ironic twist, the law has made it nearly impossible to use a constitutional challenge to halt this cultural practice—another, more sinister version of law acquiescing to culture. In 1996, in *Wren v. United States*,⁸⁸ the Supreme Court held that as long as there is an observed traffic violation, no matter how minor, a stop is reasonable under the Fourth Amendment, even if the traffic violation is pretextual and not ultimately enforced.⁸⁹ Because driving is so minutely regulated and technical traffic violations so common, *Wren* essentially allows officers to make stops for any motive.⁹⁰ Moreover, the Court explicitly rejected the argument “that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved.”⁹¹ As Cole points out, *Wren* “allows officers who have no more basis for suspicion than the color of a driver's skin to make a constitutional stop.”⁹² Harris takes the point further, contending that *Wren* not only approves such stops but implicitly approves the actual practice of using such stops disproportionately against African Americans and Hispanics.⁹³ Hence the law here aids in the triumph of culture by providing some protection for a cultural practice that is otherwise potentially illegal.⁹⁴

consider that it was conducted *after* the Maryland State Police had settled a lawsuit against them alleging racial profiling practices. As part of the settlement, the police agreed to issue a policy barring the practice, to train police in the new policy, and to submit to monitoring of all stops that resulted in a search. COLE, *supra* note 84, at 36.

87. The rolling study Lamberth conducted in Maryland used the same technique as a study he had done of a stretch of the New Jersey Turnpike. In the New Jersey study, African Americans made up 13.5% of the total number of drivers, 15% of the speeders, and 35% of those pulled over. Lamberth, *supra* note 83, at C1. As Lamberth points out, “blacks were 4.85 times as likely to be stopped as were others.” *Id.* While Lamberth did not study the rate of searches, he notes that police data showed that over 73% of those arrested along the turnpike were black. *Id.*

88. 517 U.S. 806 (1996).

89. *Id.* at 819. The case arose out of a stop of two black men in a new car. The plainclothes vice-squad officers contended that the car was stopped for too long at a stop sign, made a turn without signaling, and proceeded at an unreasonable speed. *Id.* at 808.

90. *Id.* at 810.

91. *Id.* at 813. While intentionality does not matter for Fourth Amendment purposes, it may form the basis of an Equal Protection Clause challenge. *Id.*

92. COLE, *supra* note 84, at 39.

93. Harris, “*Driving While Black*,” *supra* note 83, at 560.

94. It is also possible to characterize this practice as the power of law over culture in that it takes law to protect the cultural practice; however, given the conflicting and unresolved impulses in the law (between protecting police discretion and protecting people equally from police abuses of discretion), it makes more sense to think of this problem as the power of culture over law. One might also argue that it could be thought of as the third option of synthesis—law as always culturally informed and culture as always legally informed to the extent that it is nearly impossible to distinguish them. Here a

C. Law as Culture as Law

Third, law as culture might mean emphasizing the mutuality and endless recycling between formal legal meaning-making and the signifying practices of culture, demonstrating that, despite their denials and antagonisms, these processes are always interdependent. The Supreme Court's famous decision in *Miranda v. Arizona*⁹⁵ and its recent reconsideration of that case in *Dickerson v. United States*⁹⁶ exemplify the constitutive nature of law and culture: The legal rule laid down in *Miranda* so effectively infiltrated cultural practice that forty years later the cultural embeddedness of *Miranda* warnings provided the justification for recognizing the constitutional status of the rule.

In *Miranda*, the Court was confronted with the problem of confessions resulting from custodial interrogation practices by police that effectively infringed the privilege against self-incrimination afforded by the Fifth Amendment.⁹⁷ The Court consciously sought a rule that would change culture in the narrow sense, by altering law-enforcement practices that ranged from the psychologically menacing to the physically brutal.⁹⁸ By requiring that custodial interrogations begin with a warning to the suspect that "he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him,"⁹⁹ the Court not only changed police practices, but also altered culture in the broadest sense—it created new meanings which circulated globally. The legal rule found its way not only into police stations, but into television stations, movies, children's games, as well as the popular imagination of Americans and foreigners alike. The *Miranda* warnings became part of culture.

While one might say that *Miranda* had a more profound impact on popular culture than it did on the specific practices of law enforcement,¹⁰⁰ its impact in both contexts is complex and intertwined. In one sense, the effects of *Miranda* fit within the first paradigm of law as culture in which most cultural acts, symbols, and practices are traceable to the presence or

cultural practice conflicts with the law, but with law's approval. Likewise, the meaning of race and racial discrimination is both culturally and legally informed.

95. 384 U.S. 436 (1966).

96. 120 S. Ct. 2326 (2000).

97. 384 U.S. at 439.

98. *Id.* at 445-55. The Court dedicated considerable time to documenting historical and contemporary interrogation practices that it gleaned from studies and police manuals. It concluded that "such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner" and such coercion is incompatible with the principle "that the individual may not be compelled to incriminate himself." *Id.* at 457-58.

99. *Id.* at 479.

100. Mike Seidman has argued that *Miranda* did not change the methods by which police obtained confessions, but instead provided a relatively easy way to sanitize confessions against claims of coercion. Louis Michael Seidman, *Brown and Miranda*, 80 CAL. L. REV. 673, 744-45 (1992).

absence of legal rules. Certainly, the broad cultural salience of the Miranda warnings depended upon their widespread adoption within specific legal contexts. This reading, however, misses the interdependence of legal and cultural meanings. Although the legal rule had dramatic cultural influence, the influence was not unidirectional: It is plausible that, as the warnings gained cultural significance, their very familiarity made them both more mandatory and less meaningful in the context of actual interrogations.¹⁰¹ One might also argue that it was culture in the narrow sense that created the need for the warnings in the first instance; they were a legal safeguard against police interrogation practices that were themselves a kind of cultural struggle over law's reach and authority.

The Supreme Court's reconsideration last term of its famous *Miranda* decision evinces the third paradigm, the near-total entanglement of law and culture. At issue in *Dickerson* was whether the warnings spelled out in *Miranda* were required by the Fifth Amendment of the Constitution or were merely a prophylactic evidentiary rule meant to safeguard constitutional rights, but not required by the Constitution itself. Two years after *Miranda*, Congress had enacted a statute that sought to undermine the Miranda warnings by making the admissibility of a confession depend only on a finding of voluntariness.¹⁰² If the *Dickerson* Court had concluded that the Miranda warnings were not constitutionally required, then Congress would have had the authority to legislate evidentiary rules governing confessions, and the statute might have overruled *Miranda* more than thirty years ago. Despite some tough cases to the contrary,¹⁰³ the Court in *Dickerson* confirmed that *Miranda* was a constitutional decision entitled to stare decisis protection and thus upheld it.¹⁰⁴

What is most interesting about *Dickerson* is that the majority seemed to uphold the constitutional status of *Miranda* without a majority of the Court actually believing that Miranda warnings were ever constitutionally required. As Justice Scalia pointed out in dissent, Justices Kennedy, O'Connor, and Rehnquist, who each joined the *Dickerson* majority, had previously participated in undercutting the constitutional rationale of *Miranda*.¹⁰⁵ Moreover, the *Miranda* court itself had anticipated and

101. For a discussion of the cultural feedback loop between *Miranda* and television, see Susan Bandes & Jack Beerman, *Lawyering Up*, 2 GREEN BAG 5, 11, 13-14 (1998).

102. 18 U.S.C. § 3501 (1994).

103. In his dissent in *Dickerson*, Justice Scalia made effective use of *Michigan v. Tucker*, 417 U.S. 433 (1974); *Oregon v. Hass*, 420 U.S. 714 (1975); *New York v. Quarles*, 467 U.S. 649 (1984); and *Oregon v. Elstad*, 470 U.S. 298 (1985) on this score. See 120 S. Ct. at 2340-42 (Scalia, J., dissenting).

104. Interestingly, the *Dickerson* Court did not quite conclude that the *Miranda* warnings were constitutionally required. Rather, it held more obliquely that "*Miranda* announced a constitutional rule that Congress may not supersede legislatively." 120 S. Ct. at 2336 (emphasis added). Needless to say, this rhetorical avoidance sent Scalia, writing in dissent, into mouth-foaming fits. See *id.* at 2337-38 (Scalia, J., dissenting).

105. *Id.* at 2337 (citing *Davis v. United States*, 515 U.S. 452 (1994); *Duckworth v. Eagan*, 492

encouraged legislative experimentation with warnings, admitting that “we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted.”¹⁰⁶ Although the *Dickerson* majority appeared united by a commitment to stare decisis, it was an odd sort of stare decisis, in that the Court was faithful less to legal precedent, and more to what that precedent had come to signify in popular culture. After *Miranda*, law had transformed culture; in *Dickerson*, culture transformed law. The *Dickerson* Court quickly and confidently declined to overrule *Miranda* because the decision “has become embedded in routine police practice to the point where the warnings have become part of our national culture.”¹⁰⁷ Precisely because of its cultural ubiquity, a decision that the Court, had been retreating from for some time was explicitly upheld, and upheld as a constitutional rule. The twist, however, is that the Court found that the warnings were constitutionally required not because the Constitution demanded them but because they had been popularized to the point that they were culturally understood as being constitutionally required.

In *Dickerson*, the synthesis of law and culture is complete: Law became so thoroughly embedded in culture that culture became the rationale for law. While it is possible to read *Miranda* as a triumph of law over culture and *Dickerson* as a triumph of culture over law, I think such readings overlook the way in which both opinions participate in a broader narrative, in which law and culture are mutually constituted, and legal and cultural meanings are produced precisely at the intersection of the two domains, which are themselves only fictionally distinct.

III. NOTES TOWARD A CULTURAL INTERPRETATION OF LAW

Cultural analysis is intrinsically incomplete. And, worse than that, the more deeply it goes the less complete it is.

—Clifford Geertz¹⁰⁸

The main task of this Essay is not to inaugurate a novel methodology, but to elaborate theoretically on the uneasy entanglement of law and culture. Even the best work being done in this area has not adequately conceptualized and detailed the possible ways of thinking about law as culture and culture as law within a constitutive perspective. There is value in this theoretical endeavor, quite apart from its practical applications and

U.S. 195 (1989); *Elstad*, 470 U.S. at 298; *Quarles*, 467 U.S. at 649).

106. *Miranda v. Arizona*, 384 U.S. 436, 467 (1966).

107. 120 S. Ct. at 2336.

108. CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 29 (rev. ed. 2000).

normative implications.¹⁰⁹ But it is also worth thinking about what this theorizing might mean for legal and sociolegal scholars and what cultural studies might do for legal studies. To that end, I want to sketch briefly one possible way of thinking about a cultural interpretation of law. There is work being done in a number of different fields—in sociology,¹¹⁰ anthropology,¹¹¹ literature,¹¹² history,¹¹³ and economics,¹¹⁴ to name only a few—which could be called varieties of a cultural studies of law. In this Part, I borrow from semiotic and ethnographic approaches in order to approximate one methodology of cultural studies that might be fruitfully applied to law.

A. An Object of Inquiry: Slippage

If law is culture, then all interpretations of law are cultural interpretations. While this is widely accepted in theory, it is rarely admitted in practice; given the insularity of much legal analysis, it is therefore useful to make a cultural interpretation of law more explicit. I suggest a cultural interpretation of law that incorporates the third, synthetic view of law as culture elaborated above, and that is sympathetic to semiotic and ethnographic approaches. This interpretation employs “thick description” to give a complex account of the slippage between the production and the reception of law and legal meanings, of the ways in which specific cultural practices or identities coincide or collide with specific legal rules or conventions, thereby altering the meanings of both. In the slippage between a law’s aims and effects, you often see this collision of cultural and legal meanings.

To understand law as culture synthetically and dynamically—to acknowledge that institutionally legal actors participate in creating culturally specific meanings and that legal symbols embedded in culture feed back into law—does not tell you anything substantive about how cultural meaning and practice change in response to, say, a legal rule. Slippage is the term I give to the inconsistencies between the production of legal meaning and its cultural reception. A legal prohibition might effectively eliminate a social practice. Or, more likely, it will alter the meaning of the practice, hence changing the purposes and effects of the practice in a way not entirely contemplated by—and in some cases

109. KAHN, *supra* note 2, at 91-92 (urging a cultural inquiry of law that resists the pervasive insistence on a normative conclusion about what the law should be).

110. *E.g.*, EWICK & SILBEY, *supra* note 2.

111. *E.g.*, CAROL J. GREENHOUSE, BARBARA YNGVESSON & DAVID M. ENGEL, *LAW AND COMMUNITY IN THREE AMERICAN TOWNS* (1994).

112. *E.g.*, BINDER & WEISBERG, *supra* note 2.

113. *E.g.*, *LAW AS CULTURE AND CULTURE AS LAW: ESSAYS IN HONOR OF JOHN PHILLIP REID* (Hendrik Hartog & William E. Nelson eds., 2000).

114. *E.g.*, ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000).

directly contrary to—the aims of the legal rule.

For example, in a recent juvenile justice bill, the House approved an amendment of questionable constitutionality allowing states to permit displays of the Ten Commandments on public property.¹¹⁵ While it seems unlikely that posting the Ten Commandments in classrooms will significantly reduce youth violence, it seems quite possible that it will increase the cynicism of kids who perceive a divergence between what adults preach and what they practice. Indeed, there is some possibility that posting the Ten Commandments in classrooms could have an effect opposite to the one Congress intended: It could actually *increase* youth violence, by increasing youth cynicism. In the case of the Columbine shootings, for example, this outcome is more plausible than it might initially appear. The two killers apparently targeted religious classmates and asked them whether they believed in God. Given that religion partly motivated the violence in that instance, it seems relatively safe to say that posting the Ten Commandments at Columbine would not have prevented the killings, and might have even helped to precipitate them. Similarly, in a related but less speculative vein, a legal prohibition against wearing trench coats in schools might only increase their symbolic power, adding an outlaw status to their prior significance.¹¹⁶ The point is that understanding the inevitability of slippage makes the relationship between law and culture, if not clearer, clearly inescapable.

The Indian Gaming Regulatory Act (IGRA)¹¹⁷ and its reception among different Native American cultures provides another example of slippage.¹¹⁸ IGRA allows a limited gaming monopoly on Indian reservations. The stated purpose of IGRA was to create economic opportunities for tribes that would help them increase their sovereignty and decrease their poverty and dependence on the federal government. Like most statutes, IGRA invoked a vision of its proper subjects—in this case, the most traditional and poorest tribes. Thus, the legislation produced not just legal rules (about what tribes must do in order to game) but engaged other sorts of cultural meanings (about what it means to be

115. Juvenile Justice Reform Act, H.R. 1501, 106th Cong. (1999). The amendment was offered by Representative Aderholt and passed by the House on June 17, 1999. It declared in its findings: “The organic laws of the United States Code and the constitutions of every state, using various expressions, recognize God as the source of the blessings of liberty.” H.R. 1501, 106th Cong. § 1201(2) (1999).

116. This is similar to the regulation of “gang-related apparel” in California, which has been found to be “hazardous to the health and safety of the school environment.” CAL. EDUC. CODE § 35,183(a)(2) (West 2000). The state has given school districts the authority to adopt dress codes, including restrictions on “gang-related apparel” and mandatory uniforms. CAL. EDUC. CODE § 35183(b) (West 2000). The prohibitions that many schools have on wearing Los Angeles Kings or Oakland Raiders jackets, baggy pants, and bandanas contribute to the saliency of those symbols.

117. 25 U.S.C. §§ 2701-21 (1988).

118. See generally Naomi Mezey, *The Distribution of Wealth, Sovereignty, and Culture Through Indian Gaming*, 48 STAN. L. REV. 711 (1996).

Native American). At the level of reception, however, the legal meaning of IGRA and its implementing regulations was utterly transformed by its tension with cultural practice. The most traditional tribes—arguably those that needed economic opportunities the most—refused to take advantage of the statute’s benefits because its requirements were seen as an affront to their sovereignty, its opportunities as an affront to their identity. The tribes that were most able to benefit from the statute were either those least likely to need it, or those that were the products of the law itself—tribes that sought recognition in order to game.¹¹⁹ Thus, once a law is implemented—a process that always takes place in culturally specific contexts—its intended and unintended meanings circulate and are transformed. Those whom the law seeks to govern may redefine the law, the law may redefine them, or both. Getting at how this happens is the object of a cultural interpretation of law.

B. A Method of Inquiry: Thick Description

Although many disciplinary methods can and should be used in cultural interpretation, I want to suggest that Geertz’s famous ethnographic method, with some modification, is particularly well-suited to the task. Geertz’s concept of “thick description,”¹²⁰ from which I borrow, was itself borrowed from Gilbert Ryle, who used it to show that descriptively there is no distinction between a twitch and a wink, as both are accurately described as the rapid contraction of an eyelid.¹²¹ Making sense of the difference between a twitch and a wink requires capturing, through thick description, the cultural context of the eyelid contraction—the social codes that give it meaning as a twitch, a wink, a fake-wink, a parody of a wink, a rehearsal of a wink, etc.¹²² Geertz uses thick description to mean ethnography, the rendering of “piled-up structures of inference and implication” that give contingent meaning to gestures, acts, rituals, things.¹²³ It is evident, then, that Geertz understands ethnography as not just descriptive, but also as explanatory and interpretive. As he says, “It is explication I am after, construing social expressions on their surface enigmatical.”¹²⁴

119. The Pequots have gotten the most attention and criticism for their ability to profit handsomely from IGRA. Whether they are seen as having been invented by IGRA, or as using a fortuitous statute to reassemble a tribe that was almost entirely annihilated by the colonists, is a matter of one’s cultural lens. Mezey, *supra* note 118, at 724-28.

120. GEERTZ, *supra* note 108, at 3.

121. *Id.* at 6-7.

122. *Id.* at 7.

123. *Id.* “Doing ethnography is like trying to read (in the sense of ‘construct a reading of’) a manuscript—foreign, faded, full of ellipses, incoherencies, suspicious emendations, and tendentious commentaries, but written not in conventionalized graphs of sound but in transient examples of shaped behavior.” *Id.* at 10.

124. *Id.* at 5.

I propose to modify this method in order to emphasize the interpretive aspects of thick description as against its representational possibilities. Cultural anthropology has come under attack for its antique, anthropological renderings of other societies, which were represented as “organic, unified, and whole,”¹²⁵ and which were used to distinguish, through description, those unlike us. Obviously, even description can be implicitly interpretive or normative (for example, when you describe someone as a “heathen”).¹²⁶ However, despite some legitimate conceptual ambiguity, the primary task of much classical cultural anthropology has been representation rather than interpretation. This is one use of thick description that I caution against.

In addition, despite the fact that Geertz stressed that thick description was essentially interpretive,¹²⁷ others have pointed out that thick descriptions can still render thin interpretations.¹²⁸ The emphasis of a cultural interpretation of law should not be on documentation, but rather on the interpretive battles in the ongoing struggle over meaning. A cultural interpretation of law does not seek to sort out the informal rules of a particular culture or to speculate about the “cultures” of law and legal practice. Instead, a cultural interpretation of law involves the slightly more convoluted investigation of two intertwined social discourses and aims less at interpreting the rules of each and more at explaining the nature of their necessary intersection.

Ideally, there are three distinct interpretive aspects of what I am calling a cultural interpretation of law. The first is an interpretation of law at a site of production (the courtroom, the committee room, etc.),¹²⁹ which would make use of both traditional and nontraditional modes of legal interpretation.¹³⁰ The second is an interpretation of the cultural practices

125. Coombe, *supra* note 15, at 23.

126. Frederick Schauer, *Instrumental Commensurability*, 146 U. PA. L. REV. 1215, 1222 (1998) (recognizing that “descriptive sentences containing seemingly descriptive words arrayed in a seemingly descriptive semantic structure often mask statements and conclusions that are in important ways normative, evaluative, and prescriptive” such as when you describe some behavior as “rude”); see also Heidi Li Feldman, *Objectivity in Legal Judgment*, 92 MICH. L. REV. 1187, 1188-90, 1191-1212 (1994).

127. GEERTZ, *supra* note 108, at 14-15, 20.

128. Renato Rosaldo, *While Making Other Plans*, 58 S. CAL. L. REV. 19, 24 (1985) (noting the “slender interpretation” in Geertz’s own example of thick description, which “for all the insight it displays in the sheer telling, raises interpretive issues that outstrip Geertz’s concluding efforts to contain it within a model of mutually uncomprehending cultural systems”).

129. I want to be clear that by looking at the passage of law or at its “legal” interpretation as the site of the production of legal meaning, I do not mean to suggest that the meanings generated or rearticulated there are not cultural; indeed, they are, and they could not be otherwise. That is the point of constitutive theory. But we need an entrance into the analysis and an explanation of the inseparability of law and culture, so I am rather artificially suggesting this distinction between sites of production and reception.

130. By suggesting the use of “traditional” legal interpretation, I do not mean to imply a narrow range of formalist choices about the mode of inquiry. Rather, I mean to make clear that I think that there is some value in exploring those interpretations of law that lawyers recognize as legal.

that might be said to inspire the law and those that the law confronts when applied. Ethnography or thick description is particularly well-suited to this investigation. The third, and most crucial, is an interpretation of the encounter between law and culture—an interpretation of the interventions of culture in law and law in culture, of the dissolution of production and reception into circulation of the interdependencies, contradictions, and conspiracies in meaning.

C. Some Implications of a Cultural Interpretation of Law

At this point, I want to return to an example in order to discuss in very broad terms how these strands of inquiry might come together. To attribute the Columbine shootings to “a culture of violence” is to invoke culture as a political device devoid of content.¹³¹ A cultural interpretation of the legal responses to Columbine specifically, and youth violence generally, could be an opportunity to investigate the slippage between the production and reception of legal meanings. In this context, such an inquiry might begin at various sites of legal production and investigate their legal and cultural significance in relation to the shootings. The most obvious starting point might be the Second Amendment of the Constitution,¹³² including the scholarly debates about its scope and interpretation, as well as its symbolic power (invoking, as it does, potent myths about pre-legal, individualistic norms of structured violence and freedom).¹³³ Judicial opinions interpreting the Second Amendment would be another important source of legal meaning.¹³⁴ In addition, Congress’s role in supporting the presence and absence of gun control regulation is also significant in the legal debate over youth violence. Here, the lack of strong gun control laws and the political pressure on both sides of the issue contribute to the meaning of guns and the increased possibilities for legal violence.

Congress has been an especially potent producer of meaning in the recent debates over gun control and youth violence. Legislators have seemed to assume a direct causal link both between culture and youth violence and between legislative proposals and social behavior. The link between culture and the shootings at Columbine was repeatedly expressed in congressional debates over possible legislative responses.¹³⁵ The link

131. This was the basic approach of Representative Tancredo of Colorado. 145 CONG. REC. H2328 (daily ed. Apr. 27, 1999) (statement of Rep. Tancredo); *see also supra* note 11 and accompanying text.

132. “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. CONST. amend. II.

133. *See, e.g.*, GUN CONTROL AND THE CONSTITUTION: SOURCES AND EXPLORATIONS ON THE SECOND AMENDMENT (Robert J. Cottrol ed., 1994).

134. *Compare* *Presser v. Illinois*, 116 U.S. 252 (1886), *with* *United States v. Miller*, 307 U.S. 174 (1939).

135. Representative Tancredo was especially prolific on this point:

between legislative regulation and behavior was assumed in the mammoth juvenile justice bill that grew out of the Columbine shootings.¹³⁶ That bill, still unpassed, is heavy on cultural initiatives. It proposes redefining juvenile gangs;¹³⁷ directs the National Institutes of Health to study “the effects of violent video games and music on child development and youth violence;”¹³⁸ establishes parenting training programs;¹³⁹ allows for antitrust exemptions to entertainment-industry agreements aimed at alleviating the impact of violent and sexual subject matter in the media;¹⁴⁰ and seeks to prevent juvenile delinquency through character education.¹⁴¹ The congressional responses to Columbine, none of which has yet become law, attempt to change youth culture without acknowledging the participation of the law in the production of that culture. As a result, legislative proposals are less effective to the extent that they miss the salience of cultural practices that might contradict statutory goals and misjudge the ways in which statutes influence social life. For example, gun control advocates often overlook one cultural consequence and unintended effect of their proposals—namely the likely increase in the symbolic power of guns.

Next, there is a whole category of sources that would be of secondary interest to an inquiry into the production of legal meaning surrounding the Columbine shootings: laws governing school funding, zoning, the distribution of mental health care, or law enforcement. A cultural interpretation of law would take up any or all of these laws and attempt to make sense of them as law, and also as metaphor and symbol, understanding them as part of a larger set of social discourses of which they are an inextricable part. In other words, at the level of production, a cultural interpretation of law would try to account for the legal constructions that animate, and are animated by, the social practices at issue.

The legal discourse relevant to unpacking the significance of the Columbine shootings is bound up with the meanings of a number of cultural conventions and practices that would also be the object of a

Ours is a culture wrapped in cotton candy nihilism. Poses and attitudes of nihilism are struck and celebrated. The academy has its au courant ideologies. Feminism, postmodernism, structuralism, scientific materialism all presuppose a purposeless universe without any transcendent order where society is predicted on power and violence. Entertainment has its explicit nihilistic messages—the goth rock of Marilyn Manson and KMFDM—its ironically hip ones—the accomplished, but immoral, films of Quentin Tarrantino—and its implicit nihilism—Jerry Springer, or the titillation cum therapy of MTV’s Loveline. Indeed, nihilism in a soft and weak form is everywhere.

145 CONG. REC. H2328 (daily ed. Apr. 27, 1999) (statement of Rep. Tancredo).

136. H.R. 1501, 106th Cong. (1999); S. 254, 106th Cong. (1999).

137. H.R. 1501, at tit. II, § 204.

138. *Id.* at tit. III, § 302.

139. *Id.* at tit. III, subtit. D.

140. *Id.* at tit. IV, subtit. A.

141. *Id.* at tit. XIII.

cultural interpretation of law. An ethnographic inquiry might focus on the relevant details of Goth subculture;¹⁴² the rituals of Colorado suburban life; militias; and the hierarchies of social cliques at Columbine High School.¹⁴³ Alternatively, one might look at the extensive recent literature on youth culture more generally to help make sense of the event.¹⁴⁴ While I advocate the use of ethnography and semiotics to examine the social discourses that might give cultural meaning to these shootings, one could also use the methodologies of literature, history, psychology, or sociology to get a thicker, if different, description.

Finally, if there is a pay off to a cultural interpretation of law, it is in locating the entanglements of legal and cultural meanings. In the case of Columbine, the meanings of gun regulation and deregulation circulate in the world in which kids live and help inform their relationships to school, parents, authority generally, their conflicts with peers, as well as their sense of agency and powerlessness.¹⁴⁵ As a result, the reception and reinterpretation of legal meaning are usually quite different from its production—different in ways that are made comprehensible by placing legal acts and omissions in their cultural contexts.

It might be the case that the story law tells about youth culture does not in fact bear any causal relationship to the story law tells about youth violence. As Andrew Sullivan observes, “The era that has seen the popular culture ratchet up its drug-addled, bigoted, violent messages to new levels of depravity has also seen one of the sharpest declines in teen violence, sex, and drug use ever.”¹⁴⁶ On the other hand, the causation might exist, but run in the opposite direction, with violent forms of popular culture functioning as a benign surrogate for the aggressive fantasies of

142. There is not a clearly defined Goth subculture, and there have been disavowals by self-proclaimed Goths that the clique at Columbine known as the Trench Coat Mafia was not Goth. See Gersh Kuntzman & Ed Robinson, *Goths: Those Loonies Aren't with Us*, N.Y. POST, Apr. 22, 1999, at 6. Although they favored a dark aesthetic and fantasy games, Harris and Klebold parted from Goths by admiring Hitler, white supremacy, and German techno music. Tina Griego, Ann Imse & Lynn Bartels, *Quiet Loners Worried Other Students: Trench Coat Mafia Spoke About Violence, Carried Reputation for Being Outsiders*, ROCKY MTN. NEWS, Apr. 21, 1999, at 6A; Robin McDowell, *Outcasts Linked to Killings: "Trench Coat Mafia" Not Liked by Students*, DET. NEWS, Apr. 21, 1999, at A5.

143. See, e.g., Randy Holtz, *Shootings Fuel Debate over "Jock Elitism" at Columbine*, ROCKY MTN. NEWS, Apr. 27, 1999, at 28A (“Joe Stair, one of the original members of the Trench Coat Mafia, said the group formed about four years ago to protect its members from harassment by jocks.”); see also Renate Robey, *Cliques: A Fact of Life but Violence a Recent Reaction by Outcasts*, DENV. POST, Apr. 25, 1999, at A8.

144. See generally COOL PLACES: GEOGRAPHIES OF YOUTH CULTURES (Tracey Skelton & Gill Valentine eds., 1998); JONATHAN S. EPSTEIN, YOUTH CULTURE: IDENTITY IN A POSTMODERN WORLD (1998); PATRICIA HERSCH, A TRIBE APART: A JOURNEY INTO THE HEART OF AMERICAN ADOLESCENCE (1999); MIKE MALES, FRAMING YOUTH: 10 MYTHS ABOUT THE NEXT GENERATION (1999).

145. See Calvin Morrill, Christine Yalda, Madeline Adelman, Michael Mushen & Cindy Bejarana, *Telling Tales in School: Youth Culture and Conflict Narratives*, 34 LAW & SOC'Y REV. 521 (2000).

146. Andrew Sullivan, *Real World*, NEW REPUBLIC, Oct. 2, 2000, at 10.

teenagers.¹⁴⁷

Another way to think about the interaction of legal and cultural meaning in the context of youth violence is to consider the ways in which the cultural power of gun advocates has influenced our notion of what is legally possible. Robin West has pointed out that when gun advocates are taken seriously, gun ownership is

invested with constitutional authority, and hence constitutional meaning. . . . The gun owner becomes an ideal, and an ideal which is constitutional. Her defiance *defines* us. Even if their legal claim ultimately fails, in other words, the NRA's depiction of our nature, and of what it means to be an American, remains, with respect to guns and gun ownership, the only constitutional story being told.¹⁴⁸

One implication of this argument is that the greatest obstacle to gun control legislation may not be politics or the Constitution, but the cultural power of guns.

From this perspective, there will be double-slippage between law and culture: first, between the aims of the current legislative initiatives directed at popular culture, and their significance among consumers of movies and video games; second, between virtually any form of gun control that might pass Congress, and the cultural saliency of guns and gun ownership. The inevitability of slippage is not a politically inspiring story, but it is truer to the webs of signification that bind law and culture.

If rage expressed through gun violence is part of culture (road rage, school rage, ethnic rage), then we need to make sense of how and why this is so, beyond the platitudes and easy indictments of popular culture. If law is culture, then the reception of legal meaning in social practices and the equation of guns with personal freedom and self-realization do not begin in either law or culture, but rather tend to make clear that they are part of the same economy of signification. To dismiss and distance such rage as a product of a "culture of violence" misses the opportunity to make sense of it as a deeper part of our culture and a product of our laws. In this case, the interpretation is "thick" to the extent that it can explain how legal violence is constructed and understood in both legal and cultural practices, and how those specific practices help constitute each other.

CONCLUSION

I have tried to explore three different versions of what law as culture has meant and might mean. I have also briefly sketched a method for trying to apply the synthetic version of law as culture. Outlining the task of a cultural interpretation of law this broadly has the advantage of leaving

147. *Id.*

148. Robin West, *Gun Rights*, TIKKUN, Sept./Oct. 1999, at 25.

room for variations on the theme, improvisations of approach, and engagement with the tools of other disciplines. Whereas a positivist scholar of law and culture might consider theoretical variety to be a vice,¹⁴⁹ I consider it a virtue. To my mind, one of the gifts of cultural studies is the hybrid vigor of theoretical mixing. I agree with Geertz that the object of analysis should determine the theory and not the other way around;¹⁵⁰ to script a theoretical method tightly would risk “locking cultural analysis away from its proper object, the informal logic of actual life.”¹⁵¹

This raises the problem of formulating abstract theories at all, such as the one in this Essay. I have provided a provisional framework for a cultural interpretation of law that I realize will (or will not) be persuasive only in the context of specific applications. While I cannot dispute that theoretical formulations “stated independently of their applications . . . seem either commonplace or vacant,”¹⁵² I think that such a sketch, as well as the formulations of law as culture that animate it, is valuable to the extent it enables scholars of law and culture to work toward some sort of agreement, however tentative, about what it is that we are doing. As scholars in a field that is still forming, more theoretical guidance, with plenty of room for dissent, would, I think, be helpful. A more coherent framework and a more consistent vocabulary would encourage this sort of work—work which at its best invites attention to issues of justice, power, recognition, and self-definition. To focus on culture is to locate the ways in which law influences who we are and who we aspire to be, and moves us beyond the standard critique of what the law is and what we want it to be. Kahn is right to insist that the crucial “issue is not whether law makes us better off, but rather what it is that the law makes us.”¹⁵³ As Sarat and Kearns so eloquently note, “we come, in uncertain and contingent ways, to see ourselves as the law sees us; we participate in the construction of law’s ‘meanings’ and its representations of us even as we internalize them, so much so that our own purposes and understandings can no longer be extricated from those meanings.”¹⁵⁴ Thus we all, in the most intimate sense, stand to gain from understanding law as culture.

There is, lastly, the issue of the complexity and uncertainty that attends scholarship of this kind. Some consider it a serious drawback that it is

149. See, e.g., ELLICKSON, *supra* note 75, at 149 (criticizing the failure of the law-and-society school to develop a unified, monolithic theory of human nature, culture, and social control).

150. GEERTZ, *supra* note 108, at 24-25 (“This is the first condition for cultural theory: it is not its own master. As it is unseverable from the immediacies thick description presents, its freedom to shape itself in terms of its internal logic is rather limited.”).

151. *Id.* at 17.

152. *Id.* at 25.

153. KAHN, *supra* note 2, at 6.

154. Sarat & Kearns, *supra* note 7, at 7-8.

messy and makes appraisal so difficult.¹⁵⁵ With respect to appraisal, Guyora Binder and Robert Weisberg suggest that we judge legal representations of the social and law itself “aesthetically rather than epistemologically . . . according to the society it forms, the identities it defines, the preferences it encourages, and the subjective experience it enables.”¹⁵⁶ My hope is that the appraisal of such work could be both aesthetic and epistemological. With respect to its messiness, I suspect that the cultural study of law will never attain the status of law-and-economics within law schools, precisely because, rather than simplify law, it complicates it.¹⁵⁷ I count myself among those who consider the complexity of the endeavor a virtue. That is why our agreements as to method can and should be only rough. A cultural interpretation of law, like interpretive anthropology, is an enterprise “whose progress is marked less by a perfection of consensus than by a refinement of debate. What gets better is the precision with which we vex each other.”¹⁵⁸

155. ELLICKSON, *supra* note 75, at 149.

156. BINDER & WEISBERG, *supra* note 2, at 463.

157. Jeffery Cole, *Economics of Law: An Interview with Judge Posner*, 1 LITIG. 23, 26 (1995) (quoting Judge Posner as saying, “There are simplifiers and complicators, and I’m a simplifier. I don’t much like it when postmodern scholars talk about nuance and thick description and complexity and the need for constant qualification.”).

158. GEERTZ, *supra* note 108, at 29.