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INTRODUCTION: THE DEATH OF THE SOCIAL AND THE TURN TO CULTURE

Everywhere it seems that culture is in ascendance. More and more social groups are claiming to have distinctive cultures and are demanding recognition of their cultural distinctiveness. Identity politics has merged with cultural politics, so that to have an identity one must now also have a culture.[1] Those who fail to establish their culture risk having their "truth" missed by the myriad of authorities—courts, admissions committees, draft boards—whose judgments help determine life fates. As a result, it sometimes seems as if almost every ethnic, religious, or social group seeks to have its "culture" recognized, and for precisely this reason "the cultural" itself has become a subject of political discourse to a much greater extent than in the past. Yet despite the growing sense that culture must be recognized, there is little consensus on what the boundaries of the cultural are, let alone how to "read" it in any particular instance.[2]

Moreover, the backlash against the proliferation of cultures and identities, and the "politics of recognition,"[3] has been vehement.

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1. Joan Scott, *Multiculturalism and the Politics of Identity*, *in* THE IDENTITY IN QUESTION 3 (John Rajchman ed., 1995).

2. This paradox plays out in many fields of social and legal life today. One example is the criminal law, where the cultural has increasingly appeared in debates over such issues as whether a defendant was reasonable in believing her life was in danger for purposes of justifying the killing of another. *See* SUSAN ESTRICH, GETTING AWAY WITH MURDER: HOW POLITICS IS DESTROYING THE CRIMINAL JUSTICE SYSTEM 19 (1998).

3. CHARLES TAYLOR, MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION (1994).

Politicians declare "culture wars" in an effort to reassert both the meaning and centrality of certain allegedly transcendent human values.[4] Debates about the meaning and significance of culture become arguments about "civilization" itself, in which acknowledgment of cultural pluralism and its accompanying decanonization of the "sacred" Western texts are treated as undermining national unity, national purpose, and the meaning of being "American."[5] Political contests are increasingly fought over values and symbols, with different parties advancing competing cultural programs.[6]

With the decline of ideology as an organizing force in international relations, culture seems to provide another vantage point from which to understand new polarities.[7] In addition, the cache of the cultural is increasingly resonant in public policy, where traditional goals like reducing crime and poverty are giving way to cultural goals like reducing the *fear* of crime, and eliminating the *culture* of dependency. The cultural is the implicit and explicit space of intervention for popular new strategies like "community policing"[8] and "workfare,"[9] which promise to address objective problems by altering the attitudes and experiences of the subjects of policing and welfare. Government and other formal organizations believe that it is essential to have cultural strategies in order to govern their employees and customers more effectively and manage their popular images.

The twentieth century familiarized us with the idea of propaganda and the fact that political forces needed to utilize mass communications in order to realize their power. Today, however, the cultural has become more than a supplement or a delivery vehicle; it is quite literally where the action is.[10] In today's academy, sociologists, political scientists, and lawyers find themselves invoking "culture" at the expense of, or in response to, an emerging crisis within their own master references, such as "the social," "public opinion," and "law." The cultural, in short, has become a stand-in for interpretive grids that can no longer be utilized effectively. It has also emerged in the current retail boom in the United

4. *See* CULTURE WARS: OPPOSING VIEWPOINTS (Fred Whitehead ed., 1994).

5. For a discussion of these debates, see JAMES HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA (1991).

6. *See* BEN J. WATTENBERG, VALUES MATTER MOST (1995); Theodore Caplow & Jonathan Simon, *Understanding Prison Policy and Population Trends, in* 26 PRISONS CRIME & JUSTICE: A REVIEW OF RESEARCH 63 (Michael Tonry & Joan Petersilia eds., 1999).

7. *See* Samuel Huntington, *The Clash of Civilizations*, 72 FOREIGN AFF. 22 (1993).

8. WILLIAM LYONS, THE POLITICS OF COMMUNITY POLICING: REARRANGING THE POWER TO PUNISH (1999).

9. NANCY ELLEN ROSE, WORKFARE OR FAIR WORK: WORKFARE, WELFARE, AND GOVERNMENT WORK PROGRAMS (1995).

10. The recent advertising campaign for the new dollar coin is a noteworthy example of this. Who would have thought that you would need to advertise money? In recognizing that even currency must be given "currency," the Treasury Department affirmed how embedded the cultural has become in the economic and the political.

States, where the commodity nature of goods has been increasingly acknowledged and marketed as such.[11] Indeed, Etienne Balibar has suggested that "culturalism" has become a central logic of late capitalism.[12]

One way to make sense of this turn to culture is to relate it to the parallel decline of "the social"[13]—a decline that has become equally central to the logic of governance throughout Western societies. For more than a century of "reform," which culminated in the "welfare state" of the 1950s, 1960s, and 1970s, the liberal rationality of government associated with laissez faire capitalism and methodological individualism was generally reordered around the social as a terrain for positive knowledge and effective governmental intervention. Until the end of the nineteenth century, law remained the dominant form of expertise relevant to government, relying on courts and legal constructs like sovereignty, property, and contract to rationalize power. In the twentieth century, a new body of expertise became a co-equal, if not dominant, partner to governance. The space of legal constructs was colonized and occupied by "facts" generated by social scientists. Law and government became fundamentally concerned with the social, an engagement revealed (but not defined by) exuberant promises to found a fully social law (legal realism, sociological jurisprudence) or a fully social state (socialism).

Law and government came to rely heavily on the methodologies and constructs of the social sciences in order to shape the exercise of governmental power in areas as diverse as prisons, schools, and labor. The social sciences likewise established themselves as important adjuncts to governance in part through the mediation of law (and to a lesser degree medicine). This was seen first in criminology, social work, and public health, and later in almost every aspect of economic and general policy.[14] Although legal studies never collapsed into pure policy studies, to a great

11. Consider the product designs and marketing of chains like Urban Outfitters and Old Navy.

12. ETIENNE BALIBAR, *Is There a "Neo-Racism"?*, *in* ETIENNE BALIBAR & IMMANUEL WALLERSTEIN, RACE, NATION, CLASS 17 (Chris Turner trans., Verso 1993).

13. By "the social" we do not mean an abstract category of knowledge (distinguishable from the biological or the psychological); rather, we mean the historical formation of a sector of expertise about the causes of problems like crime and poverty, along with a set of institutions like charities, and ultimately government bureaucracies, formed to address these problems. There is a growing scholarly literature on the social in this sense. Some of the leading works include the following: JACQUES DONZELOT, THE POLICING OF FAMILIES (Robert Hurley trans., Pantheon 1979); GIOVANNA PROCACCI, *GOUVERNER LA MISERE: LA QUESTION SOCIALE EN FRANCE 1789-1848* (1993); NIKOLAS ROSE, THE POWERS OF FREEDOM (1999); and WILLIAM WALTERS, UNEMPLOYMENT AND GOVERNMENT: GENEALOGIES OF THE SOCIAL (2000). The view that the social in this sense is dead or dying at the turn of the twenty-first century was first stated in JEAN BAUDRILLARD, IN THE SHADOW OF THE SILENT MAJORITIES OR "THE DEATH OF THE SOCIAL" (1983). *See also* Nikolas Rose, *The Death of the Social? Re-figuring the Territory of Government*, 25 ECON. & SOC'Y 327 (1996).

14. *See* RONEN SHAMIR, MANAGING LEGAL UNCERTAINTY: ELITE LAWYERS IN THE NEW DEAL (1995); Robyn Stryker, *Rules, Resources, and Legitimacy Processes: Some Implications for Social Conflict, Order, and Change*, 99 AM. J. SOC. 847 (1994).

extent, its critical efficacy came from its relationships with governance.[15] Thus, whether we look to government policy, legal doctrine, or social science, the residue of the era of social liberalism remains a powerful fusion of law, social science, and government.

Today, however, after decades in which "social problems" set the agenda of government, the social has come to be defined as a problem to be solved by reconfiguring government.[16] One of the most striking features of our present situation is the general decline in confidence in virtually every institution, reform movement, and program of knowledge-gathering attached to the social. Social work, social insurance, social policy, and social justice—once expected to be the engines of a more rational and modern society—are today seen as ineffectual and incoherent. Socialism, once taken to be a very real competitor with liberalism as a program of modern governance, has virtually disappeared from the field of contemporary politics. The social sciences (especially sociology), which had become court sciences at the highest levels in the 1960s and 1970s, are today largely absent from national government, and experiencing internal drift and discontent. It is probably misleading and certainly premature to speak of the "death of the social." Much of the apparatus of the social remains in place and is likely to remain important.[17] Yet the power of the social to lend a sense of overall coherence and direction to politics, law, and scholarship has been mortally undermined, and patterns of alternative state rationalities have become visible.

It would take a book of its own to describe transformations in the field of legal studies associated with the decline of the social as a nexus of governing. Nonetheless, it has become readily apparent that the shifting engagement between legal studies and government has altered the formation and deployment of legal knowledge at all levels. Consider how much of modern constitutional theory and jurisprudence has been a response to the expansion of the social liberal state. Likewise, the prestige of empirical research has been tied up with the access that social and legal scholars obtained as experimenters and expert consultants, helping to administer state interventions into problems such as prisons, crime, gangs, and urban poverty.[18] Even discourses that have offered a more critical

15. Austin Sarat & Susan Silbey, *The Pull of the Policy Audience*, 10 LAW & POL'Y 98 (1988).

16. This movement is most widely associated with right-wing neoliberal thinking, which views the social as a virtual construction of expansionist government. On this theory, social problems are presumed to disappear (or at least become invisible) when you downsize government. Yet as demonstrated by the success of President Clinton in the United States and Prime Minister Tony Blair in the United Kingdom, the right has no monopoly on this shift, which is better seen as a reconfiguration rather than a downsizing of government. Nikolas Rose has usefully described this emerging paradigm as advanced liberalism. *See* Rose, *supra* note 13; Jonathan Simon, *Law After Society*, 24 LAW & SOC. INQUIRY 143 (2000).

17. *See* Rose, *supra* note 13; Simon, *supra* note 16.

18. That access has largely disappeared for prisons. *See* Jonathan Simon, *The "Society of Captives" in the Era of Hyper-Incarceration*, 4 THEORETICAL CRIMINOLOGY 285 (2000).

view of the enterprise of social policy and social research have often been promoted by exposing gaps between imagination and action created by racism, patriarchy, and class privilege.[19]

The simultaneous rise in prestige of the cultural in politics, the academy, and law is neither a surprise nor the result of a dangerous compromise among these fields. Instead, it is a response to the destabilization of the established linkages among the academic fields anchored to the social. In making these claims, we do not mean to raise anxieties about the closeness of knowledge and power; indeed, in the tradition of Foucault, we want to call attention to precisely how productive this relationship has been.[20] Whether we like it or not, the practices of governance help set the agenda for legal scholarship, regardless of whether legal scholars imagine themselves as allies or critics of the policy apparatus.[21] Indeed, for legal scholarship to do its job, it must respond to changes in practices of governance by realigning its scholarly practices and knowledge paradigms. Thus, one thing at stake in the movement from *society* to *culture* as a way of organizing social relations is the need for a realignment which will make way for a more prominent and productive engagement among cultural analysis, cultural studies, and law.[22]

Our aim here is to explore the implications of changing logics of governance for interdisciplinary legal scholarship. Our claim is quite simple: As the logics of governance in the late modern era turn from society to culture, legal scholarship itself should turn from society to culture as well, and more fully embrace cultural analysis and cultural studies. We see cultural analysis and cultural studies less as competitors against the multitude of intellectual programs already operating in (what might be called) the post-realist legal landscape—including varieties of realism, legal process, law and economics, critical legal studies, feminism, and critical race theory—and more as valuable supplements to the altered environment of the present. [23] We also believe that legal studies provide a

19. Austin Sarat, *Legal Effectiveness and Social Studies of Law: On the Unfortunate Persistence of a Research Tradition*, 9 LEGAL STUD. F. 23 (1985).

20. A striking example is the tradition of post-World War II empirical studies of criminal justice, which was primarily supported by large, corporately funded foundations and later the government itself, but which operated to expose the manifold failures of the existing institutions of justice in the United States. As late as the late 1960s, a government commission would employ legal sociologist Jerome Skolnick to study the causes of campus and urban civil disorders, producing a volume highly critical of American institutions and government. *See* JEROME H. SKOLNICK, THE POLITICS OF PROTEST (1969).

21. *See* Patricia Ewick, Robert Kagan & Austin Sarat, *Legacies of Legal Realism: Social Science, Social Policy, and the Law*, *in* SOCIAL SCIENCE, SOCIAL POLICY, AND THE LAW 1 (Patricia Ewick, Robert Kagan & Austin Sarat eds., 1999).

22. *See* Susan Silbey, *Making a Place for a Cultural Analysis of Law*, 17 L. & SOC. INQUIRY 39 (1992).

23. Cultural analysis is often associated with "softer" research traditions like feminist jurisprudence and other critical legal studies, but the "harder" traditions like economics and rational choice recently have found themselves grappling with the problem of the cultural as well. Here the work of Robert Ellickson and Robert Cooter stands out. *See, e.g.*, Robert C. Ellickson, *Law and*

crucial site of engagement for the broader movement of cultural analysis and cultural studies. Much of the analytic power of cultural studies in fields like literature and film studies has been to treat these discourses as law-like in being constitutive of the social relations they might otherwise seem merely to represent. In looking beyond the narrowly juridical to show how novels, newspapers, and soap operas also help create the nation as an imaginary community,[24] cultural studies often reads back into these narratives a model of law that is more rule-like, coherent, and functional than that described by legal studies.[25]

The emergent "cultural turn" in legal studies is one we welcome and have sought to participate in.[26] Under the banner of privileging the cultural, scholars have employed research strategies that emphasize listening to the way ordinary people construct the law in their narratives about themselves,[27] listening to the way judges and law professors construct law in their narratives,[28] and reading the implicit norms that govern personal choices and behavior.[29] These are just a few of the ways that the cultural has been invoked.

Today, it is especially important to look for ways to build common links among the diverse knowledge strategies associated with the cultural, now that some of the most polemical assumptions about the opposition between rigorous empirical work and the cultural turn have passed. It is time to explore the terrain of possibilities that might be opened up by a greater

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Economics Discovers Social Norms, 27 J. LEGAL STUD. 537 (1998); Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643 (1996). Indeed, some have now argued that law and economics must take cultural effects into account. *See* Cass Sunstein, *How Law Constructs Preferences*, 86 GEO. L.J. 2637 (1998). The success of these methods, their ability to provide compelling accounts of particular legal problems or solutions, is endangered by the implausibility of the original picture of the individual as rational actor. As they seek to establish a more robust framework, these disciplines necessarily take on features of cultural analysis. Ironically, once methods based on economics and rational choice accept the challenge of accommodating cultural influences in their models, they lose most of the advantages of parsimony and objectivity that seemed to separate them from the softer research traditions. While at the moment disciplines may appear divided by interest in the cultural, we predict that cultural analysis will become part of the production of truth across a broad range of fields. Like public opinion, victimization surveys, and standardized educational test scores, cultural knowledge will become part of what any respectable discipline needs to explain.

24. *See* BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM (1983); LAUREN BERLANT, THE QUEEN OF AMERICA GOES TO WASHINGTON CITY: ESSAYS ON SEX AND CITIZENSHIP (1997).

25. For an interesting example of this tendency, see Marjorie Garber, *Cinema Scopes: Evolution, Media, and the Law*, *in* LAW IN THE DOMAINS OF CULTURE 121 (Austin Sarat & Thomas R. Kearns eds., 1998).

26. *See* LAW IN THE DOMAINS OF CULTURE, *supra* note 25.

27. *See, e.g.*, PATRICIA EWICK & SUSAN SILBEY, THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE (1998).

28. *See* PAUL KAHN, THE CULTURAL STUDY OF LAW (1999). For a discussion of Kahn's contribution to cultural analysis of law, see Austin Sarat, *Redirecting Legal Scholarship in Law Schools*, 12 YALE J.L. & HUMAN. 129 (2000).

29. *See* J.M. BALKIN, CULTURAL SOFTWARE: A THEORY OF IDEOLOGY (1998).

engagement between cultural analysis, cultural studies, and law.[30] Such an endeavor is particularly valuable at a moment when the emergence of the cultural itself seems to be part of a fundamental change in the relationships of knowledge and power tied to the decline of the social. All the disciplines associated with law, governance, and the social face the problem of negotiating the relationship of their own expertise to the new forms of governmental authority, while managing the powerful legacy of the social in their own constitution. In this sense, cultural studies is far from a cheerleader for the rise of the cultural. Indeed, it has flourished in disciplines like anthropology and literature, which have dealt with "culture" as a key term for a long time; yet in these disciplines, cultural studies is associated with work that is self-conscious about the problematic status of culture.

In the next part, before introducing the essays that make up this special issue, we briefly flesh out our claims about the value of engagement between cultural analysis, cultural studies, and law. We first pursue a comparison with legal realism by suggesting a somewhat different way of conceptualizing that intellectual movement, and then explore the dilemma of promoting cultural analysis of law at this particular time in the academic and political life of the concept of culture.

I. UNPACKING THE CULTURAL BAGGAGE OF LEGAL REALISM

With the ascendancy of legal realism during the last two-thirds of the twentieth century, both law and social science found themselves engaged in the practical arts of governing to an extent barely imagined in the preceding century.[31] As the state came to reconfigure its approach to governing around problems of the social, both law and social science were invested with new resources and roles. Social and legal reform reached a peak in the 1960s and 1970s, and not coincidentally, law and social science were reaching their own peaks of prestige at the same time. In the years since, both law and social science have produced a great deal of internal criticism of the reform effort. Moreover, the current generation of social science and legal scholars must contend with a "cultural programming" that is increasingly constraining.[32]

30. Cultural analysis is a broader and more inclusive category that cultural studies. The former emerges most prominently in anthropology and literary studies and emphasizes the interpretation of symbolic processes and the analysis of beliefs and values. Cultural studies, while it has many contemporary sources, is a variant of the neo-Marxist analysis of ideology and ideology formation. It embeds the interpretation of symbolic processes, beliefs, and values in an examination of the material conditions that shape the production, presentation, circulation, and consumption of mediated images and information. In addition, cultural studies offers a self-conscious reflection on the conditions and politics of producing knowledge both in the academy and elsewhere.

31. *See, e.g.*, ROBERT D. PUTNAM, MAKING DEMOCRACY WORK (1993); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 1043-45 (1995).

32. Bryant Garth & Joyce Sterling, *From Legal Realism to Law and Society: Reshaping Law for*

One of the most significant features of this programming is the set of imaginary boundaries of the social body—nation, race, gender, ethnicity, sexuality, age, and class—within which the realist paradigm in both law and social science are confined. Realist legal studies almost always operate within a political body, usually the nation, although this body is not often itself an object of realist analysis. The boundaries and exclusions wrapped up in this national frame are made up not just of its political borders, but also of its racial, cultural, and linguistic embodiments. When U.S. citizens of Hispanic origin are stopped by customs agents near the Mexican border of California, Arizona, or Texas, there is an evident surplus to their political identity that is neither identical with, nor protected by, citizenship in the political sense.[33] A similar emphasis on cultural citizenship seems to apply far from the border, or far from direct questions of nationality, when African-American drivers are pulled over by police almost anywhere along the infamous Interstate 95.[34]

Today, scholarship and politics increasingly confront breaches in this imaginary order—such as globalization, the internet, identity politics, and the risk society—for which the realist paradigm seems inappropriate. Within legal studies, new scholarship has taken up race, space, and the nation as imaginary communities,[35] but so long as this scholarship is treated as a new mode of realist discourse, it may continue to have little effect on the great mass of legal thought.[36] Even when mainstream legal scholarship self-consciously looks beyond the national, the priority remains on those topics and actors of greatest concern to Western nations, such as copyright protection and trade in goods and services. In the meantime, the transnational flows of labor, black market profits, and

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the Last Stages of the Social Activist State, 32 LAW & SOC'Y REV. 709 (1998); Simon, *supra* note 16.

33. On the nature of this surplus, see Margaret Montoya, *Border/ed Identities: Narrative and the Social Construction of Legal and Personal Identities*, *in* CROSSING BOUNDARIES: TRADITIONS AND TRANSFORMATIONS IN LAW AND SOCIETY RESEARCH 129 (Austin Sarat et al. eds., 1995).

34. The highway that runs from Miami, Florida, to Maine has been labeled a drug corridor by law enforcement for years. At various points along it, local, state, and sometimes federal agents have sought to apprehend cars moving drugs or drug money. The result, it has been alleged, is the profiling of black drivers who are pulled over with minimal or no legal justification in the hopes of winning consent to search their cars. Even when no drugs are found, large sums of cash have been seized as drug money. *See* DAVID COLE, NO EQUAL JUSTICE (1999).

35. *E.g.*, DAVID DELANEY, RACE, PLACE, AND THE LAW, 1836-1948 (1998); IAN HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996).

36. A notable example is the hostility of the United States Supreme Court to the discussion of global legal norms. The United States is increasingly alone among liberal systems in ignoring the force of arguments from other legal systems. Justice Thomas recently criticized lawyers for a condemned inmate for discussing international human rights law:

> I write only to point out that I am unaware of any support in the American constitutional tradition or in this Court's precedent for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed. Indeed, were there any such support in our own jurisprudence, it would be unnecessary for proponents of the claim to rely on the European Court of Human Rights, the Supreme Court of Zimbabwe, the Supreme Court of India, or the Privy Council.

Knight v. Florida, 120 S. Ct. 459, 460 (1999) (Thomas, J., concurring in denial of certiorari).

refugees, which concern much of the Third World, tend to be ignored.

A second of legal realism's continuing constraints is precisely its realism. The realism paradigm is limited by its assumptions about the interpretive value of certain kinds of observations, namely the behavior of formal legal actors, social forces, and institutions. The first wave of realists entered into an alliance with practitioners of the fledgling social sciences, absorbing a positivist epistemology with its emphasis on counting and statistical analysis.[37] This epistemological link has proved remarkably enduring.[38] Despite its academic success, the positivist frame has been strained by transformations in our understanding of the construction of subjectivity.

Post-realist legal studies, like much of the dominant social science discourse of the post-World War II era, has largely ignored the problem of the subject.[39] This oversight has profound implications for our understandings of power, since the exercise of power always has subjective effects on its targets and observers. These include terror, sexual arousal, admiration, and guilt. Often they are precisely the intended effects of, but not infrequently they are also indicators of, long-term domination.[40]

Yet in most legal studies, the breadth of interest in subjectivity extends little beyond the rational actor of law and economics.[41] Efforts to describe the "unthought" or "unconscious" parameters of legal studies have hardly begun. In addition, the new economy taking shape around the high technology sector in the United States reflects the tremendously successful cultural revolutions of the 1960s and 1970s, with their emphasis on personal satisfaction (paradigmatically sexual), intense experiences (once

37. *See* John Henry Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFF. L. REV. 459 (1979).

38. Today, some six or seven decades later, the elite law schools remain heavily invested in this model of interaction with the social sciences. This remains true despite the fact that social sciences themselves have evolved a far more complex set of research strategies.

39. When it inevitably has to explore the space of the subject in order to address the social-psychological motivations that underlie realist assumptions about social action, the results are far less persuasive or rigorous than the rest of the analysis. For an influential example of a study that raises the problem of motivation and causation in legal and social change, see GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS MAKE SOCIAL CHANGE (1989). For an argument that this is the Achilles heel of the project, see Jonathan Simon, *The Long Walk Home to Politics*, 26 LAW & SOC'Y REV. 923, 933 (1992). For Rosenberg's critique of a more subject-centered analysis, see Rosenberg's review of Michael McCann and McCann's rejoinder. Gerald N. Rosenberg, *Positivism, Interpretivism, and the Study of Law*, 21 LAW & SOC. INQUIRY 435 (1996); Michael McCann, *Causal versus Constitutive Explanations (or, On the Difficulty of Being So Positive)* 21 LAW & SOC. INQUIRY 457 (1996).

40. The deployment of a new medicalized approach to defining and regulating homosexual conduct in the twentieth century is a well-known example that has sparked a good deal of research over the last two decades. This deployment has emphasized deviant subjects, rather than abhorrent acts, and has invested great social significance in the distinctive subjectivity of the "homosexual." *See* LES MORAN, THE HOMOSEXUAL(ITY) OF LAW (1996). The highly successful movement to protect the civil rights of gay and lesbian people grew from this investment and its unintended effect of making homosexual conduct a more powerful anchor for identity. On this phenomenon, see LISA KEEN & SUZANNE B. GOLDBERG, STRANGERS TO THE LAW: GAY PEOPLE ON TRIAL (1998).

41. *See, e.g.*, ROBERT ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991).

drugs, now expensive trips to Nepal), and forms of interpersonal transcendence (sexual, religious, group process). For legal studies to address these revolutions, and effectively unpack the place of culture in the new logics of governance, requires us to consider not only different sites of analysis (poems, novels, letters), but wholly different strategies of relating to data.

As we shall detail in the next part, cultural analysis and cultural studies are well suited to aid post-realist legal discourses in accomplishing this task by revealing the constraints of forms of knowledge production and engagement with governance that have shaped the disciplinary space in which post-realist discourses currently operate. Since its beginnings in 1950s British Marxism, cultural studies has long been concerned with the unthought or unconscious mechanisms that underlie the central solidarities of modern societies (e.g., nation, race, class, gender).[42] Many of the techniques used by cultural studies to pursue this uncovering, including deconstruction, genealogy, psychoanalysis, Marxist dialectics, and feminism, are already widely familiar in legal studies. Less familiar, however, is the commitment to engage with the cultural imaginary and unconscious as a factor in law.

Cultural studies has also long been attentive to the role of subjectivity in history and the complex interpenetrations of power and subjectivity,[43] to what Richard Johnson has called "the subjective side of social relations."[44] Indeed, much of the corpus of cultural studies consists of tools for tracking the production of subject positions, as well as a growing set of "case studies" of the subjective history of power in modern liberal democracies. Beyond methodological innovation, cultural studies can promote change in legal studies by widening the moments of subjectivity that are even considered in the analysis of law and legality. In addition, while legal studies has shown a growing interest in popular culture, it remains occasional, episodic, and isolated.[45] Thus, few legal scholars writing on rape or capital punishment would assume that it is relevant, let alone essential to review the leading contemporary films that have imagined these experiences; yet most would almost certainly consult the leading Supreme Court opinions on those topics, even if their primary interest lay elsewhere.[46] Cultural analysis and cultural studies encourage such shifts in

42. *See, e.g.*, Stuart Hall, *Cultural Studies: Two Paradigms*, *in* CULTURE/POWER/HISTORY: A READER IN CONTEMPORARY SOCIAL THEORY 520 (Nicholas B. Dirks et al. eds., 1995).

43. *Id.*

44. Richard Johnson, *What Is Cultural Studies Anyway?*, 16 SOC. TEXT 38, 39 (1986).

45. Examples of this interest are found in LEGAL REELISM: MOVIES AS LEGAL TEXTS (John Denvir ed., 1996); Les Moran, *From Part Time Hero to Bent Buddy: The Male Homosexual as Lawyer in Popular Culture*, 18 STUD. L. POL. & SOC'Y 3 (1998); and Alison Young, *Murder in the Eyes of the Law*, 17 STUD. L. POL. & SOC'Y 31 (1997).

46. *But see* Austin Sarat, *The Cultural Life of Capital Punishment: Responsibility and Representation in* Dead Man Walking *and* Last Dance, 11 YALE J.L. & HUMAN. 153 (1999).

attention.

II. HIGH RISK CONTACTS

For many inside legal studies, the crises we have ascribed to the social liberal state and its effects on the production of legal knowledge are experienced as a serious methodological weakening.[47] For example, a perceived decline in original empirical research is sometimes ascribed to hostility toward science and social reform by younger scholars; yet it may be equally a result of declining social reform activity and its attendant reduction in opportunities for classic empirical "gap" research. Given this sense of malaise, the entreaty to engage further with cultural analysis, let alone cultural studies, will strike many as a high-risk endeavor.[48] Indeed, because cultural analysis and cultural studies often are identified with a particularly intense form of boundary breaking—a challenge to givens which regularly invoke the transgressive—one might rightly be skeptical about whether a legal studies field that experiences itself as vulnerable in a highly competitive academic universe would welcome the destabilizing agendas and strategies associated with either cultural analysis or cultural studies. To many, taking on cultural analysis and cultural studies seems like accepting an invitation to enter into the intellectual equivalent of a cocktail lounge, where they will be exposed to small talk, secondhand smoke, and perhaps even worse.[49]

Various responses can be suggested. As Carol Weisbrod has recently observed:

> One relates to the point that law creates the conditions of culture to some degree. Another notes that law, as a cultural product, may have something in common with other cultural products. Still another focuses on the point that while law is to some extent a mandarin text, it is itself a subject of popular culture.[50]

As these suggestions indicate, a cultural analysis/cultural studies of law not only helps to challenge traditional ideas of culture, it may also help to advance new conceptions of law. Some of these conceptions may call attention to the possibility that the proliferation of law in film, on television, and in mass-market publications has altered and/or expanded

47. *See, e.g.*, Joel F. Handler, *Postmodernism, Protest, and the New Social Movements*, 26 LAW & SOC'Y REV. 697 (1992).

48. *But see Conclusion* to Paul Kahn, *Freedom, Autonomy, and the Cultural Study of Law*, 13 YALE J.L. & HUMAN. (2001) (arguing that legal scholars who analyze the culture of the bench and the legal academy, rather than popular culture, promote freedom by placing "the self at risk").

49. For another analogy, see Peter Brooks, *A Slightly Polemical Comment on Austin Sarat*, 10 YALE J.L. & HUMAN. 409 (1998) ("In the humanities, we have seen cultural studies become a kind of hotel lobby where all disciplines can hang out, brought together by a self-satisfied discourse on the implication of knowledge with power, on the marginal and the hegemonic.").

50. CAROL WIESBROD, EMBLEMS OF FEDERALISM (forthcoming 2001).

the sphere of legal life itself. Moreover, they may push us to consider law as a world of images whose power is not located primarily in their representation of something exterior to the image, but is found in the image itself.[51] Almost a century ago, legal realists helped to put the study of law in action on the agenda of legal scholars. Today, perhaps a cultural analysis/cultural studies of law will help expand the terrain of learning about law, open up new arenas for the exploration of law's power, for the pursuit of justice around, and perhaps through, law, and for the development of new understandings of the self's relation to the social. But just as the emergence of realism provoked intense anxiety, so too the emergence of cultural analysis and cultural studies arouses its own distinctive concerns.

To understand those concerns and how to respond to them, it may be helpful to deepen this comparison with legal realism. Like cultural analysis and cultural studies, legal realism is not a single strand of work with a deep conceptual unity, but rather describes several strands with a family resemblance.[52] Like the former, legal realism has been both assimilated and criticized as a moral danger. Both are relatively easy to caricature. The canard about predicting the law by what judges eat for breakfast continues to make legal realism seem both extremist and silly, decades after most of legal studies adopted important realist innovations. Likewise, such cultural studies icons as Judith Butler, Homi Bhabha, and Andrew Ross are sometimes dismissed as self-inflating dilettantes who use forceful rhetoric to replace substantive analysis,[53] even as new generations of scholars put their insights to productive use.

When we compare the anxieties associated with the cultural turn with those aroused by legal realism, we have in mind those provoked by innovations in the forms of knowledge recognized by legal discourse, and the place of lawyers in practicing the arts of government.[55] From this perspective, the main contribution of legal realism was not to introduce a

51. This claim is made by Austin Sarat, *Imagining the Law of the Father: Loss, Dread, and Mourning in* The Sweet Hereafter, 34 LAW & SOC'Y REV. 3 (2000).

52. The diversity of legal realism is described by Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1152 (1985).

53. An example is the pillorying of Butler and Bhabha by a right-wing philosophy journal, *The Journal of Philsoophy and Literature*, that awarded them a prize for unintelligibility. This story was picked up uncritically by the news media, including National Public Radio. *See* Ron Grossman, *Honors are Dubious for Academics Winning Bad Writing Contest*, DALLAS MORNING NEWS, Feb. 27, 1999, at 7C; John Leo, *Tower of Pomobabble*, U.S. NEWS & WORLD REP., Mar. 15, 1999, at 16.

55. The renewal of interest in realism and its meaning is itself evidence of the larger shift we discuss here. *See* AMERICAN LEGAL REALISM (William W. Fisher III, Morton J. Horwitz, & Thomas Reed eds., 1993); JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE (1995).

particular body of legal theory into the discursive universe of legal scholars (although it gave rise to multiple and conflicting theoretical expressions), but to position legal analysis with respect to new technologies of knowledge (the behavioral sciences) and new forms of governing (the progressive and later New Deal state).[56] The old legal science not only excluded the new knowledge from the high church of legal analysis (post-realism would do that as well), but also purported to ignore its existence, in the same way it ignored the burgeoning administrative law created by the new modes of state power.[57] Realism as an academic revolution swept away the legal science positions, even if the establishment that replaced legal science was far more conservative than realism's vanguards. Cultural analysis and cultural studies may not prove as threatening to the established order as realism was, but their significance lies in the same direction: They position legal studies in relation to new technologies of knowledge and power operating in the aftermath of the social liberal state.

III. CULTURALISM, LAW, AND LATE MODERNITY

If Etienne Balibar is right that the cultural is all over the place—as a privileged source of knowledge, a crucial level on which to govern effectively, and a commodity in the market—and that culturalism is a dominant logic of late capitalism (and one might easily add or replace that with late modernity), then we should not be surprised that the cultural is already emergent in legal studies. Under these circumstances, the question is whether, in the midst of this cultural turn, legal studies can make the status of the cultural a theoretical problem for itself, and whether such an enterprise is critical to gaining an "empirical" understanding of the legal life of late modernity.

As we take on these questions, it is important to recognize that the ascendance of the cultural comes paradoxically at a time when scholars have increasingly begun to contest the concept of culture and recognize its troubling vagueness. Talking about culture at the start of the twenty-first century means venturing into a field where there are almost as many definitions of the term as there are discussions of it,[58] and where

56. BRUCE ACKERMAN, RECONSTRUCTING AMERICAN LAW (1984).

57. Herbert Wechsler makes this point in explaining that the Columbia of his law student days in the late 1920s was transformed by realism even though its new Dean, Young B. Smith, was the candidate of the conservatives and many of the most ardent realists had left Columbia for Yale and the new program at Hopkins. *See* Norman Silber & Geoffrey Miller, *Toward "Neutral Principles" in the Law: Selections from the Oral History of Herbert Wechsler*, 93 COLUM. L. REV. 854, 861 (1993).

58. An earlier version of the following pages appeared in Austin Sarat & Thomas R. Kearns, *The Cultural Lives of Law*, *in* LAW IN THE DOMAINS OF CULTURE, *supra* note 25, at 1. While we acknowledge the difficulty of disciplining the concept of culture, we do not agree with those who believe it to be analytically useless. For examples of such claims, see Mary Douglas, *The Self-Completing Animal*, TIMES LITERARY SUPP., Aug. 8, 1975, at 886 (writing, of the concept of culture,

arguments rage inside as well as outside the academy.[59] In recent years, as we noted above, these arguments have come to play a progressively more visible role in our national life and in universities.[60] There the history, meaning, and utility of culture as a category of analysis in the humanities and social sciences are all up for grabs.[62] Where once the analysis of culture could neatly be assigned to the respective disciplines of anthropology or literature, today the study of culture refuses disciplinary cabining and forges new interdisciplinary connections.[63] Thus, we should resist the temptation to treat battles over academic curricula, federal arts, and museum programming as penumbras of some deeper social conflict. They represent their own conflicts, which are equally fundamental.

Traditionally, the study of culture was the study of "'that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society.'"[64] This definition, in addition to being hopelessly vague and inclusive, treated culture as a thing existing outside of ongoing local practices and social relations. In addition, by treating culture as "capabilities and habits acquired," this conception made culture into a set of timeless resources to be internalized in the "civilizing" process through which persons were made social. Finally, culture was identified as containing a kind of inclusive integrity, parts combining into a "whole." This conception of culture still has its defenders and may even be on the rise as a political knowledge.[65]

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that "never was a fluffy notion at large . . . since the singing angels blew the planets across the medieval sky or ether filled the gaps of Newton's universe"); and Stephen Greenblatt, *Culture*, *in* CRITICAL TERMS FOR LITERARY STUDY 225, 225 (Frank Lentricchia & Thomas McLaughlin eds., 1990) ("Like 'ideology' (to which, as a concept, it is closely allied) 'culture' is a term that is repeatedly used without meaning much of anything at all, a vague gesture toward a dimly perceived ethos.").

59. As Renato Rosaldo puts it, "These days questions of culture seem to touch a nerve." RENATO ROSALDO, CULTURE & TRUTH: THE REMAKING OF SOCIAL ANALYSIS, at ix (1989).

60. *See* GERALD GRAFF, PROFESSING LITERATURE: AN INSTITUTIONAL HISTORY (1987).

62. As Robert Brightman writes, "The recent critics of culture in no respect comprise an internally homogeneous block, and the objections currently in play represent a complex skein of partially discrete, partially convergent influences from political economy, modernist and postmodernist anthropologies, varieties of feminist writing, cultural studies, and diverse other sources." Robert Brightman, *Forget Culture: Replacement, Transcendence, Reflexification*, 10 CULTURAL ANTHROPOLOGY 509 (1995).

63. Annette Weiner notes about the discipline of anthropology and its relation to the idea of culture that "[t]oday . . . 'culture' is increasingly a prized intellectual commodity, aggressively appropriated by other disciplines as an organizing principle." Annette Weiner, *Culture and Our Discontents*, 97 AM. ANTHROPOLOGIST 15 (1995).

64. Edward B. Tylor quoted in Greenblatt, *supra* note 55, at 225.

65. The fashionableness in recent years of speculating about the cultural deficits of the poor, and liberalism's role in worsening them, speaks to this.

Today, however, critiques of the traditional, unified, reified, civilizing idea of culture abound within the academy.[66] Indeed, it is now almost imperative to write (to quote Lila Abu-Lughod's influential essay) "against culture,"[67] or, in the face of these critiques, to "forget culture."[69] Thus, in his study of a suit filed by the Mashpee Indians of Cape Cod in 1977, James Clifford examines the way culture stood up in a context where the very idea of cultural authenticity was on trial. According to Clifford, culture

> was too closely tied to assumptions of organic form and development. In the eighteenth century culture meant simply "a tending toward natural growth." By the end of the nineteenth century the word could be applied not only to gardens and well-developed individuals but to whole societies. . . . [T]he term culture retained its bias toward wholeness, continuity, and growth. Indian culture in Mashpee might be made of unexpected everyday elements, but it had in the last analysis to cohere, its elements fitting together like parts of a body. The culture concept accommodates internal diversity and an "organic" division of roles but not sharp contradictions, mutations, or emergences. . . . This cornerstone of the anthropological discipline proved to be vulnerable under cross-examination.[70]

Culture, he concludes, is "a deeply compromised idea. . . . Twentieth-century identities no longer presuppose continuous cultures or traditions."[71] Or, as Luhrmann observes, the concept of culture is "more unsettled than it has been for forty years."[72]

In this unsettled moment in the life of the concept of culture efforts are underway to rehabilitate and reform it. Contemporary cultural studies has played an especially important role in these efforts.[73] Cultural studies has had a bracing impact in giving new energy and life to the study of culture, freeing it from its homogenizing and reifying tendencies. It has done so by radically extending what counts as culture beyond the realm of "high culture."[74] It invites study of the quotidian world. Film, advertising, pop art, contemporary music, and other products of "popular culture" have

66. For a particularly useful summary of these critiques, see Brightman, *supra* note 58, at 509.

67. Lila Abu-Lughod, *Writing Against Culture*, *in* RECAPTURING ANTHROPOLOGY: WORKING IN THE PRESENT 137 (1991).

69. *See* Brightman, *supra* note 58, at 509.

70. JAMES CLIFFORD, THE PREDICAMENT OF CULTURE: TWENTIETH-CENTURY ETHNOGRAPHY, LITERATURE, AND ART 323, 338 (1988).

71. *Id.* at 10, 14.

72. T.M. Luhrmann, *Review of Hermes' Dilemma and Hamlet's Desire: On the Epistemology of Interpretation*, 95 AM. ANTHROPOLOGIST 1058 (1993).

73. *See* CULTURAL STUDIES (Lawrence Grossberg et al. eds., 1992).

74. HERBERT GANS, POPULAR CULTURE AND HIGH CULTURE: AN ANALYSIS AND EVALUATION OF TASTE (1974).

been legitimized as objects of study.[75]

In addition to this liberating expansion in the objects of study, cultural studies has linked the study of culture to questions of social stratification, power, and social conflict. "[C]ultural processes," as Johnson notes,

> are intimately linked with social relations, especially with class relations and class formations, with sexual division, with the racial structuring of social relations. . . . [C]ulture involves power and helps produce asymmetries in the abilities of individuals and social groups to define and realize their needs. And . . . culture is neither an autonomous nor externally determined field, but a site of social differences and struggles.[76]

Thus culture, Johnson continues, can be understood as "historical forms of consciousness or subjectivity, or the subjective forms we live by."[77]

Law and legal studies are relative latecomers to cultural analysis and cultural studies.[78] As Robert Post explains,

> We have long been accustomed to think of law as something apart. The grand ideals of justice, of impartiality and fairness, have seemed to remove law from the ordinary, disordered paths of life. For this reason efforts to unearth connections between law and culture have appeared vaguely tinged with exposé, as though the idol were revealed to have merely human feet. In recent years, with a firmer sense of the encompassing inevitability of culture, the scandal has diminished, and the enterprise of actually tracing the uneasy relationship of law to culture has begun in earnest.[79]

In the last thirty years, however, legal scholars have come to attend to the cultural lives of law, first with the development of critical legal studies, then with the growth of the law and literature movement, and more recently with the growing attention to legal consciousness and legal ideology in sociolegal studies.[80] Fueled in part by Clifford Geertz's description of law as "a distinctive manner of imagining the real,"[81] they have begun to attend to the imaginative life of the law and the way law lives in our imagination. Law, as Geertz suggested, is not "a mere

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75. *See* STEVE REDHEAD, UNPOPULAR CULTURES: THE BIRTH OF LAW AND POPULAR CULTURE (1995).

76. Johnson, *supra* note 44, at 39.

77. *Id.* at 43.

78. *But see* STUART HALL ET. AL., POLICING THE CRISIS: MUGGING, THE STATE, AND LAW AND ORDER (1978).

79. Robert Post, *Introduction* to LAW AND THE ORDER OF CULTURE, at vii. (Robert Post ed., 1991).

80. *See* Sibley, *supra* note 22; *see also* Anthony Chase, *Historical Reconstruction in Popular Legal and Political Culture*, 24 SETON HALL L. REV. 1969 (1994); Anthony Chase, *Toward a Legal Theory of Popular Culture*, 1986 WIS. L. REV. 527; Stewart Macaulay, *Images of Law in Everyday Life: The Lessons of School, Entertainment, and Spectator Sports*, 21 LAW & SOC'Y REV. 185 (1987); Symposium, *Popular Legal Culture*, 98 YALE L. J. 1545 (1989).

81. CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 184 (1983).

technical add-on to a morally (or immorally) finished society[; it] is, along of course with a whole range of other *cultural realities* . . . an active part of it."[82] Treating law as a cultural reality means looking at the material structure of law to see it in play and at play, as signs and symbols, fantasies and phantasms.[83]

In the tradition of cultural studies, cultural analysis of law rejects "the dichotomy between agency and structure . . . . Treating consciousness as historical and situational, cultural analyses also shift attention to the constitution and operation of social structure in historically specific situations."[84] It insists on examining the ways that the cultural lives of law contribute to what Johnson calls "asymmetries in the abilities of individuals and social groups to define and realize their needs."[85] Cultural study of law connects the symbolic and material by resisting their dichotomization. As Silbey puts it, "[L]aw does more than reflect or encode what is otherwise normatively constructed . . . [It] is part of the cultural processes that actively contribute in the composition of social relations."[86] Law is part of the everyday world, contributing powerfully to the apparently "stable, taken-for-granted quality of that world and to the generally shared sense that as things *are*, so *must* they be."[87]

Cultural analysis and cultural studies suggest that law operates largely by influencing modes of thought, rather than determining conduct in any specific case. It enters social practices, and is "imbricated" in them, shaping consciousness and making asymmetries of power seem, if not invisible, then natural and benign. Law is, in this sense, constitutive of culture, "a part of the cultural processes that actively contribute in the composition of social relations."[88]

Cultural analysis insists, however, on the significance of agency. Though law's "demands" tend to seem natural and necessary (hardly like demands at all), we are not merely the inert recipients of law's external pressures. In this way, the cultural lives of law, as Peter Fitzpatrick contends, have been central "in the scaffolding of the modern-nation state," with its construction of the rights-bearing subject, imagined social contract, and insistence on boundaries and boundedness.[89] Legal meanings are not, however, invented and communicated in a unidirectional process. Litigants, clients, consumers of culture, and others bring their own

82. *Id.* at 218.

83. For a general discussion of the materiality of cultural life, see RAYMOND WILLIAMS, PROBLEMS IN MATERIALISM AND CULTURE: SELECTED ESSAYS (1980).

84. Silbey, *supra* note 22, at 47.

85. Johnson, *supra* note 44, at 39.

86. Silbey, *supra* note 22, at 41.

87. Austin Sarat & Thomas R. Kearns, *Across the Great Divide: Forms of Legal Scholarship and Everyday Life*, *in* LAW IN EVERYDAY LIFE 21, 30 (Austin Sarat & Thomas R. Kearns eds., 1993).

88. Silbey, *supra* note 22, at 41.

89. PETER FITZPATRICK, THE MYTHOLOGY OF MODERN LAW 202 (1992).

understandings to bear[91]; they deploy and use meanings strategically to advance interests and goals. They press their understandings in and on law, and, in doing so, invite adaptation and change in legal practices. Law thus exists as what Raymond Williams calls "moving hegemony."[92]

The priority of the cultural in late modern societies also raises the salience of law as an object of study. Most social relations are permeated with law. Long before we ever think about going to a courtroom, we encounter landlords and tenants, husbands and wives, barkeeps and hotel guests—roles that already embed a variety of juridical notions. The hyper-mediated quality of communities established under the conditions of late modern life embeds law at an even more molecular level because the very flesh of those communities—the bandwidths of the broadcast world, the networks of cable and phone lines known as the internet—come to us already legally processed to a great degree.[93]

Law has played, and continues to play, a large role in regulating the terms and conditions of cultural production.[94] Cultural analysis and cultural studies call on scholars to attend to this role. The regime of copyright, to take a prominent example, has protected and promoted certain kinds of expression and discouraged others; it has tethered the life of signs to the fortunes of capital, contributing importantly to the linkage of artistic value with ideas of originality, authenticity, and "ownership of the image."[95] Through doctrines of "personality rights," law "authors the celebrity" and, in so doing, gives a particular shape to the practices of "popular culture."[96] In such a setting, even those forms of cultural analysis

91. *See* Austin Sarat, *". . .The Law Is All Over": Power, Resistance, and the Legal Consciousness of the Welfare Poor*, 2 YALE J.L. & HUMAN. 343 (1990); *see also* MICHEL DE CERTEAU, THE PRACTICE OF EVERYDAY LIFE 37 (Steven Rendell trans., Univ. of Cal. Press 1984); JON CRUZ & JUSTIN LEWIS, VIEWING, READING, LISTENING: AUDIENCES AND CULTURAL RECEPTION (1994).

92. Williams defines hegemony as "a complex interlocking of political, social, and cultural forces" that sustains particular forms of inequality and domination. *See* RAYMOND WILLIAMS, MARXISM AND LITERATURE 112 (1977). This concept, Barbara Yngvesson explains, allows us to recognize the "coexistence of discipline and struggle, of subjection and subversion and directs attention toward a dynamic analysis of what it means to be caught up in power." Barbara Yngvesson, *Inventing Law in Local Settings: Rethinking Popular Legal Culture*, 98 YALE L.J. 1693 (1989).

93. Rosemary Coombe, *Contingent Articulations: A Critical Cultural Studies of Law*, *in* LAW IN THE DOMAINS OF CULTURE, *supra* note 25, at 38.

94. *See* JANE GAINES, CONTESTED CULTURE: THE IMAGE, THE VOICE, AND THE LAW (1991).

95. *See* BERNARD EDELMAN, OWNERSHIP OF THE IMAGE: ELEMENTS FOR A MARXIST THEORY OF LAW (Elizabeth Kingdom trans., Routledge 1979); MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT: A TREATISE ON THE LAW OF LITERARY, MUSICAL, AND ARTISTIC PROPERTY AND THE PROTECTION OF IDEAS (8th ed. 1989); *see also* Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 DUKE L. J. 455.

96. Rosemary Coombe, *Author/izing The Celebrity: Publicity Rights, Postmodern Politics, and Unauthorized Genders*, *in* THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE 101 (Martha Woodmansee and Peter Jaszi eds., 1994); *see also* Harold Gordon, *Right of Property in Name, Likeness, Personality, and History*, 55 NW. U. L. REV. 553 (1960); Joan Gross, *The Right of Publicity Revisited: Reconciling Fame, Fortune, and Constitutional Rights*, 62 B.U. L. REV. 986 (1982).

and cultural studies that remain anchored in literature or cinema or music must move beyond treating them as metaphors of legality. Novels and newspapers are not simply analogous to legal acts, but their operation, the way they circulate, are questions of law.

Cultural study of law is important, then, as a way of unpacking what Rosemary Coombe calls "the signifying power of law and law's power over signification."[97] It invites us to acknowledge that legal meaning is found and invented in the variety of locations and practices that comprise culture, and that those locations and practices are themselves encapsulated, though always incompletely, in legal forms, regulations, and symbols. Thus, reading everyday cultural forms is a complex interpretive task.

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The essays collected in this special issue take on the topic of culture in spite of its vagueness. An outgrowth of the Symposium on Law and Cultural Studies held at the Yale Law School in April 2000, this volume brings together work from within the field of cultural studies and the broader movement to foster a cultural study of law. It is, however, neither a comprehensive overview of the ways law shapes culture and culture shapes law, nor a survey of cultural approaches to law. Instead it provides a sampling of significant theoretical issues in the cultural analysis of law and illustrates some of those issues in provocative examples of that genre. It is designed as an encouragement in the still tentative efforts to forge a new interdisciplinary synthesis, a cultural studies of law.

What would legal studies look like if they were to embrace cultural analysis and/or cultural studies? How does a cultural study of law enlarge and alter our conception of the way law lives in and through our identities, interpretations, and imaginings? Can the intellectual strategies of cultural analysis and cultural studies be disciplined and made serviceable as vehicles for the analysis of legal phenomena? Can cultural studies be put into productive dialogue with other forms of cultural analysis, or will such dialogue diminish the significance of both as forces in legal scholarship? These are the questions that this collection of essays addresses. Doing so at this point in the development of cultural study and legal study is indeed daunting, since the richness and plurality of the former is now as great as it has ever been, and legal scholarship is as open as it has ever been to interdisciplinary interests. But, as we have tried to show, the separation of legal study and cultural analysis, in all its variety, is increasingly costly at this time in the history of the rationalities of governance. Maintaining such a separation means overlooking the objects to which empirical methods

97. Coombe, *supra* note 67, at 61.

need to be applied if we are to maintain any hope of getting purchase on the role of law in contemporary society.

This volume seeks to overcome that separation and elaborate a cultural analysis of legal life. Yet the essays collected here march under no single programmatic banner. Each speaks in its own voice; each brings its own perspective to bear in talking about, or performing, a cultural analysis of law. Together they exemplify the kinds of contributions that cultural analysis and cultural studies make to interdisciplinary legal study, even as they highlight points of contest between cultural studies and its allied forms of scholarship. Together they help reposition legal study in response to the death of the social and the rise of the cultural in the governance of late modern societies.

The first section—*Approaches to the Cultural Study of Law*—contains four essays, each exemplifying a distinctive approach to the cultural study of law. The juxtaposition of these perspectives maps the terrain which cultural analysis/cultural studies might traverse. This section begins with Naomi Mezey's effort to identify the contribution of cultural analysis to legal studies at a time when, as she notes, "culture is everywhere invoked and virtually nowhere explained." She describes the pervasive invocation of culture as a fact of late modern life, calling our attention to the explanations of the shootings at Columbine High School, which made reference to a "culture of violence," or to the Juvenile Justice Bill recently debated in Congress, which would have allowed schools to post the Ten Commandments in classrooms in an effort to combat youth crime. Quoting the critic Adam Gopnik, Mezey observes, "'Every age has a term to explain things that resist explanation. The Elizabethans had Fate; the Victorians had History; we have Culture.'"

In light of the pervasiveness of culture as an explanation for social problems and a strategy of governance, Mezey argues that we need to pursue a "cultural interpretation of law"—even at a time in which the status of culture is problematic. What, Mezey asks, would such an interpretation do? First, it would give culture some definition, however provisional. Culture, in Mezey's view, is any shared set of signifying practices through which "meaning is produced, performed, contested, or transformed." Second, a cultural interpretation would require us to attend to the way law orders meanings, and to the "slippage" that almost inevitably accompanies its efforts to do so. Mezey calls attention to such quotidian practices as the way gay men in California pay someone's highway tolls to try to "pick up" other gay men, and the way students in California wear Oakland Raiders football jackets to signify gang affiliation. In her analysis, she alerts us to the ways the significations change in the face of legal regulations.

The work of cultural interpretation, Mezey argues, will never have the parsimony of law and economics and will, as a result, struggle to find a

place in the legal academy. Yet its complexity is precisely its virtue. And to neglect cultural interpretation in favor of other kinds of scholarship is to shirk our responsibility as scholars: to make sense of the pervasiveness of culture as a category through which events in our world are now so frequently described and explained.

A similar sense of the ethical and political imperative of cultural analysis of law informs the next contribution. This essay claims that cultural studies is a preferred style or type of cultural analysis, precisely because of its engagement with, and attentiveness to, the political struggles of our era. Toby Miller provides a definition and overview of cultural studies as well as an example of the kind of work Mezey advocates. His example is drawn from a real world struggle in which he was involved, namely the effort of graduate students to unionize at New York University. Through an examination of that effort, Miller highlights what happens at the intersection between legal institutions (in this case, the National Labor Relations Board) and cultural practices (specifically, what he sees as the exploitation of graduate students by research universities). The struggle to unionize, argues Miller, reminds us that cultural studies itself signifies an academic commitment to "progressive social change."

Miller's essay contains a genealogy of cultural studies that calls attention to its multigenerational, multinational origins and lays out a series of understandings of culture. Some of these serve the needs of social reproduction and others, he claims, promote contestation and social transformation. At the heart of the difference between these conflicting uses of cultural analysis, Miller argues, is a controversy over the viability of "historical materialism." In the face of new rationalities of governance, he claims that scholars must now bring together cultural studies and what he calls "critical political economy." His object is to politicize theory and theorize politics. The cultural analysis of law should use the method of historical materialism to contribute to an understanding of "the reproduction of culture through structural determinations on subjects versus their own agency."

Miller shows what such an analysis might look like in his description of the struggles of graduate students at N.Y.U. In doing so, he notes the contradictory position of university officials who, in the name of maintaining a democratic university, oppose the effort to democratically determine whether graduate students wish to bargain collectively under the auspices of a union. He also explores the difficulty of speaking to and through law, represented here by the National Labor Relations Board. Throughout his essay, Miller exposes the complicity between the politics of discursive practices and the political economy of university life.

While Miller's genealogical and critical narrative exemplifies the kind of work that Mezey seeks to encourage, this narrative becomes an

(unnamed) object of critique in the essay by Paul Berman. Miller's style of work relies on what Berman, borrowing from Paul Ricoeur, calls the "hermeneutics of suspicion." Such an approach to cultural study seeks to "unmask, demystify, and expose the real from the apparent." It is relentlessly critical, seeing power and domination everywhere. Berman faults such an approach on two grounds. First, it situates the analyst in a superior position to the object of study. By unmasking ideologies and power dynamics, "the writer implies that he or she is able to get beyond the mystification and see the situation more accurately than those caught 'within' the system." Second, and more importantly, the hermeneutics of suspicion has, in Berman's view, a "corrosive effect on our psyches and society as a whole," leading us to despair of the prospect of social change through law.

Berman advocates "sympathetic reading," which identifies "what is worthwhile in the efforts of people to construct ideas, systems, or principles." He would fault Miller for not being more empathetic toward the university administrators he describes, and Miller's form of cultural studies for not telling stories of "beauty, optimism, noble efforts, hope." Moreover, Berman believes that law provides a powerful institutional home for a view of culture that is both dynamic and tolerant. He urges scholars not to turn away from projects of reform, but to tell stories that envision law "not merely as an instantiation of embedded power, but as an activity that might have true intellectual, imaginative, ethical, and political value."

Paul Kahn's work is directly critical of Berman's embrace of reform as a touchstone for, or object of, the cultural analysis of law. Such an approach, Kahn contends, treats the *study* of law as if it were the *practice* of law. For Kahn, Berman's call to reform exemplifies the powerful influence that law schools exercise over the ways that law is studied. Law schools, Kahn argues, hold all forms of scholarship to a pragmatic, instrumentalist test, evaluating them in terms of their utility for policy. "The modern law school," he says, "lives within this burden of establishing the form of knowledge appropriate to law." Kahn wishes to distance himself from that conception of what a cultural analysis of law must be.

Yet he also wishes to distance himself from Miller's version of cultural studies, which emphasizes popular, resistant practices, and views law as a set of "sites of social conflict, and resources . . . for those involved in conflict." In contrast, Kahn focuses on the top of the legal hierarchy, on the beliefs and self-conceptions of those who produce law. Studying that group reveals, Kahn argues, that the language of law's rule is our dominant language of political legitimacy. The task of cultural analysis should be to offer a "phenomenology of this distinctive American political culture of the rule of law." What is the world that is imagined in that

culture? How is that world contested by other symbolic forms?

Cultural analysis of law depends, Kahn argues, on distanced, disinterested analysis, because it seeks to promote a conception of freedom informed by an understanding of the cultural presuppositions that guide our practices. Rather than pursuing projects of reform, Kahn turns cultural analysis on his own beliefs. "Bringing cultural study into the heartland of the legal academy is," Kahn concludes, "a way of putting the self at risk" and making the self, rather than the other, the subject of inquiry.

The three essays that make up the next section—*Deploying Law and Legal Ideas in Culture and Society*—identify moments of coincidence and conflict between legal and cultural practices, and chart the significance of moments when law comes to culture and culture comes to law. They show that while law may be part of a larger "culture," the latter is not a "system" in which law plays a consistent role across all contexts. In our culture, no one would mistake a poem for a court's judgment, but neither would a jurisdictional hierarchy place law above or below poetry. Indeed, much of the work involved in producing culture and law lies in managing the boundaries between them, a game played with often ruthless seriousness by judges and lawyers. But at the same time, law is always already thoroughly and irreversibly infected by the (often dated) cultural content of its own objects. This puts all of the authors in this section in the difficult position of explicating connections between law and culture, while working from other points of contact between the two.

Carol Greenhouse uses the encounter between cultural studies and legal studies to confront the deep cultural connections among law, social science, and post-World War II American liberalism. The latter is now canonized in the landmark civil rights and civil liberties victories of the 1950s and 1960s. According to Greenhouse, the social movements of that period, especially the Civil Rights Movement, produced both a "pragmatics of reform," which animated public discourse in that era, and a "poetics of citizenship," which helped shape and define a way of imagining America.

What remains of that era are deep but often hidden connections between the reform agenda of postwar liberalism, on the one hand, and ethnography and literature, on the other. These connections are welded together by the force of the Civil Rights Movement. During the 1980s and 1990s, as the public influence of civil rights waned, and the United States Congress and courts turned hostile to the civil rights agenda, the liberal project became more associated with literature, the arts generally, popular culture, and the academy. This new relationship constitutes, for Greenhouse, the cultural conditions of neo-liberalism.

Literature and ethnography remain influential ways of imagining the United States as a national community that is paradoxically made up of

autonomous local communities. Novels by African-American women shaped directly by participation in the Civil Rights Movement, such as those by Alice Walker and Toni Morrison, have been best sellers, even as the electorate has unashamedly rejected many of the legislative victories of the Movement itself. While ethnography is read by a much smaller audience, there is a lively discourse of "community studies" focused very much on the legacy of the Civil Rights Movement, i.e., the fate of the inner city "ghettos" and their successor communities of the very poor and the ethnically or racially marginalized. Both literature and ethnography operate in the thrall of the now-absent Civil Rights Movement. Thus, while many critics of the cultural turn in the American academy see it as an abandonment of engagement with power, Greenhouse shows that even in the cultural camp, the unexamined relationship to liberalism, and its current crisis, continues to haunt the academy.

Greenhouse offers an internal critique of American ethnography aimed at reestablishing its dialogue with the fading liberalism of the mid-twentieth century and the emerging neo-liberalism of the turn of the twenty-first century. At the core of both post-Civil Rights literature and American ethnography, she contends, is the relationship of the "national community"—embodied in the federal government, its agencies, and sometimes in the narrators of the texts—to a local community, which is defined as singular, yet quintessentially American. In part, ethnographic discourse was produced to make local communities available to the gaze of the federal government, whose claims to power presumed direct access to the local.[98] Ethnography has continued in this mode since the 1970s despite the dismantling of much of the liberal governmental project. In its current form it constitutes a kind of nostalgic program. Greenhouse suggests that if social-legal studies and ethnography are to have a more critical role in the shaping of neo-liberal governance, they must revisit their cultural background, reposition themselves with respect to those movements now shaping the cultural life of law, and pursue a new ethnography of American communities, one attentive to postcolonialism, globalization, and transnationalism.

The next essay in this section operates on a similar terrain, exploring law's relationship to its narrative others. Here the other is the science of the late nineteenth century and the first half of the twentieth. Whereas the social sciences taken up in Greenhouse's essay directly competed and cooperated with law in a visible struggle to shape governance, the traces of natural science that Dimock explores operated in the imagination of legal academics who sought to define their own status as producers of

98. The famous "maximum feasible participation" formula of the 1960s "war on poverty" was only one instance of this pattern of federal power, which has existed since the 1930s. *See* DANIEL MOYNIHAN, MAXIMUM FEASIBLE MISUNDERSTANDING: COMMUNITY ACTION IN THE WAR ON POVERTY (1969).

expertise (academic law). It is this expertise, in part, that helped form the civil rights coalition Greenhouse describes.

Since the nineteenth century (at the latest), those seeking to recast law as a practice and body of knowledge have repeatedly invoked the model of science. Christopher Langdell, Dean of Harvard Law School and inventor of the influential "case-method," described his goal as moving law from a craft to a science where the law library with its collection of judicial opinions would play the same role that the laboratory, the museum of natural history, and the botanical garden played for other disciplines in the university setting. Early in the twentieth century, Roscoe Pound (another Harvard Dean and promoter of what he called "sociological jurisprudence"), and a bit later the legal realists at Columbia and Yale, rejected Langdell's approach as a form of mysticism and promoted their own scientific vision of legal studies as an empirical approach to law. As Dimock carefully shows, these invocations of science have often been strikingly distant from actual scientific practices. Thus Langdell invoked the logical analysis of written texts as the model of science at a time when the physical and life sciences were increasingly experimental. Even the realists, who allied themselves with the empirical social sciences emerging in the same period, ignored real differences between the normative objectives of legal argument and the descriptive practices of social science.

It is not only law, however, that has engaged in a systematic misrecognition of its relationship to science. Science also has a metaphoric relationship to law, especially in the notion of a "law of science." The standard self-description of science emphasizes the discovery of "universal laws," i.e., generalizations that apply across time and place. Dimock shows that the notion of the universe as "law abiding" is itself a highly selective gloss of the sciences. Some sciences, like physics, do seem to move from empirically observed regularities to the discovery of law-like rules that apply everywhere and always. Yet most scientific work may ironically be closer to the contingent predictions that lawyers give. The life sciences especially deal with phenomena in which so many factors, including contingency, come to bear, that universal laws are rarely if ever described.

What law and most of the sciences actually share is a vulnerability to the diachronic processes, history and time, which the metaphorical conception of law in both jurisprudence and science rarely acknowledges. This may be most critical in those areas where law and science interact in practice rather than speak about each other through metaphor. Dimock develops an important example of this point in the field of intellectual property. The legal enforcement of "patents," authorized in the United States Constitution itself, permits successful investigators to limit access to their inventions and discoveries, subordinating scientific development

to the interests and whims of the patent holder. Yet the idea of patentable discovery held by the Framers of the Constitution was far more limited than the discoveries that courts regularly recognize today.

This latter analysis shows what cultural studies might look like if it sought to describe and interpret the cultural exchange between practices like law and science. Such an interpretation would be attentive to the diachronic stories often implicit in the constellations of discourse and practice that students of cultural studies produce. Most scholarship, according to Dimock, attends solely to structural patterns that link developments at any time among different institutional fields. The hard work of history carried out in terrains not preordained by political categories such as nation and language is all too often left undone.

In the next essay, Peter Brooks looks at a one particular point of contact between law and a form of scientific expertise, therapy, focusing particularly on the production of knowledge from recovered memory. Recovered memory is only the most recent of a series of flashpoints between law and what Nikolas Rose calls the "psy" experts, which go back well into the nineteenth century, if not earlier.[99] Indeed, recovered memory emerges at a time when, quite unlike the turn of the last century, the role of knowledge of the human psyche has been in general retreat from the courtroom. Few today would share Roscoe Pound's expectations that modern law would inevitably become a branch of human science.[100]

In Brooks's view, the recent trend to produce cultural analysis of law runs into the power of law both to exclude and to domesticate other narratives and forms of expertise. The recovered memory cases should be particularly troubling to law because the very facts underlying the cause of action (often incestuous sexual abuse as a child) are produced through the work of therapy. Courts follow what Brooks considers a familiar pattern, admitting the claims while keeping out the therapeutic experts. Recovered memory is admitted because it is memory, but the only voice permitted to speak that memory is the subject to whom it belongs, to the exclusion of the therapeutic discourse that produced it.

Under the banner of "common sense," psychological truth has become part of modern legal truth. The Supreme Court's confession jurisprudence, which Brooks has made the subject of a recent book,[101] includes many psychological presumptions about what motivates subjects to confess, but almost no serious discussion of the status of those theories in psychology or its fellow psy-discourses. In place of critical dialogue between legal and psy-expertise, there has been a series of largely metaphorical

99. NIKOLAS ROSE, INVENTING OURSELVES: PSYCHOLOGY, POWER, AND PERSONHOOD (1996).

100. Thomas A. Green, *Freedom and Criminal Responsibility in the Age of Pound: An Essay on Criminal Justice*, 93 MICH. L. REV. 1915 (1995).

101. PETER BROOKS, TROUBLING CONFESSIONS (2000).

appropriations akin to those made by Dimock's academic legal theorists. This method of appropriation leaves law peculiarly vulnerable to cultural infection by discourses that it cannot recognize as distinctive or potentially invasive. While Brooks does not provide the kind of historical examination suggested by Dimock, his discussion of confessions registers the receding role of the empirical social sciences that Greenhouse invoked with her "pragmatism of reform." Brooks's warning that producers of cultural analysis of law should attend to how law appropriates outside analysis recalls Greenhouse's appeal for a critical engagement of social science and law with neo-liberalism.

Each of the essays in the last section—*Reading Legal Events*—focuses on moments of judgment, moments in which law is asked to understand the world beyond its boundaries. Each shows law's dependence on a series of unacknowledged aesthetic, psychological, historical, and cultural assumptions. Each also reveals the power of law to produce forms of subjectivity and moments of truth, and uses the techniques of cultural analysis and cultural studies to decode and critique the assumptions and pathways of power.

Shoshana Felman revisits one of the most contested moments of post-World War II legality, the 1957 trial of Holocaust administrator Adolph Eichmann. Her essay focuses on a particularly searing moment in that trial (which was one of the first trials to be televised): the collapse of a prosecution witness while on the stand. The witness was Auschwitz survivor and author Yehiel Dinoor, better known by the German slang term meaning concentration camp inmate—K-Zetnik. K-Zetnik was only one of many survivors to take the stand and attempt to describe the Holocaust directly from the perspective of the victims, but, as Felman points out, he was also one of the few survivors whose testimony was directly relevant to Eichmann's relationship to Auschwitz. His testimony had only barely begun when, in response to a set of preliminary questions about his name, K-Zetnik went into a trance-like state and fainted on the stand. He had a paralytic stroke, which kept him near death in a hospital for more than two weeks.

On one level, Felman raises a question similar to that posed by Brooks—namely, how does the law respond to the trauma of violence and recovered memory? On another level, Felman shows us a different face of law's relationship to trauma. Here the trauma is on a scale beyond comprehension, and the problem of recovery is less one of personal recall than of the capacity to communicate the truth of an historical event. Whereas Brooks's judges were mainly concerned to normalize the testimony of recovered memory and reduce it to a legally managed fact, the Eichmann trial, including the prosecutors and judge, sought to produce the emotional truth of the Holocaust through its survivors. At the same time, law's demand for tight control of other discourses set real limits on

the terms in which the emotion of trauma could speak. Felman ultimately reads K-Zetnik's collapse as evidence both of these limits and of the kinds of sacrifice it takes to transcend them.

While in Brooks's account the battle is primarily between the law of evidence and the knowledge that therapy produces about recovered memory, the response to the Holocaust demonstrates the multiple ways that law can relate to the production of such memories. The Eichmann trial, with its deliberate invocation of the voices of the survivors, was a striking contrast to the approach taken at the 1945 trial of Nazi officers conducted by the Allies in the German city of Nuremberg. The Nuremberg prosecutors, led by the American lawyers, chose to put on a documentary case, which left the survivors' voices out of the evidence. In contrast, the Eichmann trial was quite explicitly aimed at producing survivor testimony of the Holocaust. This strategy carried real risks of failure and delegitimation.

From this perspective, K-Zetnik's collapse marks a moment when the narrative needs of law, especially the temporality that requires locating an event in the past, ran up against the explosive presentness of trauma to the victims.[102] Trials like Eichmann's revolve around the production of memories and the conversion of personal suffering into national memory. While legal theory has prioritized the difficulties of the judgments made at both the Nuremberg and the Eichmann trials, Felman's account reminds us that the moments of memory that lie behind judgment place law in far more jeopardy than somewhat abstract "legitimation crises" alone. K-Zetnik's collapse, broadcast repeatedly over the years, produced its own cultural truth. In the end, Felman argues, the Eichmann trial succeeded not in spite of, but because of its failures. The witness's inability to testify allowed the muteness at the center of the Holocaust's horror to exist within law but also as legal art.

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102. Felman reads K-Zetnik's collapse and its legal meaning both with and against a portion of Hannah Arendt's legendary critique of the Eichmann trial, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (1967). Felman takes the opportunity to read the event through the genealogy of Arendt's earlier work, which sought to use the trials as a window into the relationship between law and evil. Arendt was highly critical of the prosecution's approach to the Eichmann case, which she regarded as in many respects a "show trial." Arendt pays specific attention to K-Zetnik's collapse, which she turns into a metaphor for the wages of producing the truth of the Holocaust through its victims.

Reading Arendt psychoanalytically, Felman traces her harsh repression of the voice of the victim to Arendt's own grief for her friend Walter Benjamin's suicide while in custody at the Spanish border. Benjamin was truly a victim of the banality of evil. The custody that Benjamin despaired of escaping was little more than bureaucratic bad luck at the border. By insisting that only law govern the meaning of the Holocaust, and that law avoid the risks of inviting the remembrance of violence, Arendt was excluding from the interpretation of the Holocaust what her friend Benjamin had prophetically described as the "expressionless." Benjamin thought that the ability to give voice to a sense of trauma depended on a context shared between speaker and listener that was broad enough to encompass the trauma. Felman's analysis of Arendt reminds us that the power of law to transform the cultural meaning of events and memories—including its ability to demythologize evil—can be a political choice as opposed to simply an inevitable expansion of law, or a strategy of the most powerful.

Like Felman, Anthony Paul Farley is interested in finding ways to talk about haunting absences in legal events. In his contribution, he explores the representations that haunt the Supreme Court's recent efforts to define the role of racial identity in the construction of constitutionally adequate voting districts. In striking down a number of black majority districts, the court has emphasized seemingly neutral concerns like compactness, but has inched precariously close to articulating a notion of whiteness that underlies the body politic of the United States. Drawing on the psychoanalytic work of Jacques Lacan, Farley probes the cultural penumbra of the implicit legal question at issue in most of these challenges: How are white people harmed when they are represented by blacks? The answer lies not in the legal position of the parties, but in the enduring threat that the black body poses to the imaginary coherence and power of the white body politic.

What Farley uncovers is a powerful cultural investment in black bodies as the negated bond holding white communities together. While notions of racial community are denigrated by official discourse of all sorts, especially Supreme Court opinions, Farley finds explosive symbolic links between the Court's metaphysical reasoning about the shape of voting districts and the physical torture and dismemberment of blacks in the rituals of lynching. The Court's repugnance toward oddly shaped districts has reflected a displacement of the white community's enthusiasm for the hideous shapes produced by lynching, while the Court's judgment has reaffirmed the central role of race in defining political community in the United States.

The final essay, by Alison Young, continues Farley's interest in the nature of legal judgment, its absences, and its haunting specters. Young uses HIV, and the legal cases and artistic images it generates, to interrogate the meaning of legal judgment. Young first shows how, in a variety of cases arising from attacks on gay men or efforts to expel them from the military, law depends on what she calls an "aesthetics of appearance." In these cases, law relies on the visual force of phantasy. Sometimes phantasies of abuse are used to make sense of a violent attack on a gay man; sometimes phantasies of blood uncontrollably spilling forth are used to justify removal of an HIV-positive soldier from military service. Through these imaginings, gay men are subject to community values in a way that denies them a place in the community or devalues the place that they occupy.

Young turns to art and film in order to explore the "aesthetics of disappearance." These cultural artifacts refigure the image, turning it from a device that severs relations into a bridge that connects viewers to the bodies of gay men with HIV. Young reads various works of Felix Gonzalez-Torres, an artist who died of AIDS in 1996. These works—piles of paper, spills of candy, fabric blowing in the wind—suggest processes of

motion, disappearance, and loss. Viewers, Young argues, are invited to both witness and participate in these moments. We are connected to, not severed from, the suffering of embodied, but disappearing beings. We are brought to respect alterity through a framework of judgment that brings self and other into a proximate relationship.

In Derek Jarmen's film *Blue*, the image does not move. The camera stays fixed on a cobalt blue background as viewers hear voices, sounds, bells, poems. Jarmen, who at the time he made this film was losing his eyesight to AIDS, captures and makes literal the difficulty of representing HIV—a difficulty never acknowledged in the legal cases that Young describes. In those cases visual realism leads to a failure in legal judgment at both the aesthetic and moral levels. "The written texts of law," Young suggests, "reconstruct the event (the 'real') of HIV in the order of vision, where judgment is governed by the desire to see, and in 'seeing,' to have done with HIV." For Young, cultural studies speaks to this failure by providing a different way of reading images and a different scene of judgment, one that can take account of the fragmented, suffering, fleshy body and help "the eye of the law . . . [to] flicker from the mark to the pain of the other in law [by] subjecting the legal and the living to the horizon of deathbound subjectivity."

In these varied readings of legal events and of the flow of legal ideas into and through culture, we encounter accounts, sometimes explicit, sometimes implicit, of the power and possibilities of cultural analysis and cultural studies described in the first section of this Introduction. Even as they insistently attend to the cultural basis and operation of law, they do not display the type of reduction of the social to the cultural that marks the politics of our era. They call us to attend to the cultural, not for its recuperative or redemptive potential, but instead to expose the layers of power that the turn to culture in the political realm often seeks to mask. They call us to the cultural as a point of departure for a critique of the epistemology and ethics that today hold out culture as an explanation and a cure for problems that cannot in truth be addressed through culture itself. In the end, these readings, like the legal realism of the past, remind us that legal scholarship can be both critical and transformative.

Approaches to the Cultural Study of Law