

# Three Approaches to Law and Culture

Menachem Mautner

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

---

### Recommended Citation

Menachem Mautner, *Three Approaches to Law and Culture*, 96 Cornell L. Rev. 839 (2011)

Available at: <http://scholarship.law.cornell.edu/clr/vol96/iss4/25>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact [jmp8@cornell.edu](mailto:jmp8@cornell.edu).

## ESSAY

### THREE APPROACHES TO LAW AND CULTURE

*Menachem Mautner*†

INTRODUCTION .....	839
I. THE NATIONAL CULTURE AS CONSTITUTIVE OF LAW: THE HISTORICAL SCHOOL IN GERMAN LAW .....	844
II. LAW AS CONSTITUTIVE OF CULTURE .....	848
A. Joseph Kohler: Law as Preserving and Advancing Elite Culture .....	848
B. Law as Constitutive of Culture and Social Relations ..	848
III. THE LAW OF THE COURTS AS A DISTINCT CULTURAL SYSTEM .....	856
A. Karl Llewellyn: Law as Culture and Craft .....	857
B. James Boyd White: Law as Constitutive Rhetoric ....	861
C. Pierre Bourdieu: Law as a Culture and Field .....	863
1. <i>Habitus</i> .....	863
2. <i>Capital</i> .....	864
3. <i>Field</i> .....	864
4. <i>The Legal Field</i> .....	865
D. Stanley Fish: Law as Practice in the Context of an Interpretive Community .....	865
CONCLUSION .....	867

#### INTRODUCTION

In her address to the 1993 annual meeting of the American Anthropological Association, President Annette B. Weiner talked about the “‘takeover’ of the culture concept by other disciplines”: “[C]ulture’ is increasingly a prized intellectual commodity, aggressively appropriated by other disciplines as an organizing principle.”<sup>1</sup>

Indeed, two major developments in the second half of the twentieth century manifest the concept of culture’s appropriation by academic disciplines beyond anthropology, its traditional custodian. The first development is the rise of the cultural studies movement since

---

† The Danielle Rubinstein Chair on Comparative Civil Law and Jurisprudence, The Buchmann Faculty of Law, Tel Aviv University.

<sup>1</sup> Annette B. Weiner, Culture and Our Discontents, Presidential Address of the 92nd Annual Meeting of the American Anthropological Association (Nov. 1993), in 97 AM. ANTHROPOLOGIST 14, 14–15 (1995).

the mid-twentieth century.<sup>2</sup> The second is the “cultural turn,” the process where, in the closing decades of the twentieth century, scholars in the social sciences and the humanities began to employ the concept of culture as an important tool for gaining insights in their research areas.<sup>3</sup>

---

<sup>2</sup> The cultural studies movement emerged in Britain in the 1950s and 1960s and has since spread to many other countries. See GRAEME TURNER, *BRITISH CULTURAL STUDIES: AN INTRODUCTION* 33–38 (3d ed. 2003); Simon During, *Introduction to THE CULTURAL STUDIES READER* 1, 2–18 (Simon During ed., 3d ed. 2007). The central question that cultural studies scholars deal with is the connection between culture on the one hand and power relations between individuals and groups of individuals on the other hand. See TURNER, *supra*, at 46; Richard Johnson, *What Is Cultural Studies Anyway?*, *SOC. TEXT*, Winter 1986/87, at 38, 39.

The cultural studies movement assumes that the culture in which individuals live plays an important role in creating and maintaining situations of stratification and control. Culture not only determines the categories through which individuals perceive the reality they live in but also attaches normative tags to these categories, reflecting the interests and worldviews of dominant social groups. In that way, cultural categories make an important contribution to preserving the stratifications from which dominant groups benefit. See TURNER, *supra*, at 53–55, 178–79. Therefore, cultural studies scholars aim to expose the mechanisms through which cultural representations are produced, propagated, and consumed. See During, *supra*, at 25–27. However, cultural studies scholars view human beings as having reflexive and creative powers, not as passive products of cultural structuralization and constitution. See TURNER, *supra*, at 23. Thus, cultural studies scholars do not view dominated groups as passive consumers of cultural representations that enhance their subordination. Rather, they assume that part of social life is the creation of cultural products that express opposition to the prevalent social and cultural orders. Cultural studies scholars assume that daily life is the arena in which cultural action takes place: individuals create meaning mainly through the cultural contents to which they are exposed in the course of their daily lives and through the practices in which they take part in the course of their daily lives. See During, *supra*, at 39–40. The constitutive approach subsequently adopted this insight to the connection between law and culture. See *infra* Part II.B.

Also, cultural studies scholars assume that acts of opposition to the prevailing social and cultural orders take place in the context of daily life. The cultural studies movement therefore analyzes the daily experience of individuals in all spheres of activity, such as the consumption of popular culture, rock culture, leisure, sports, fashion, food, shopping, TV, movie watching, advertising, sexual activity, and activities that take place with the family and at the workplace. See TURNER, *supra*, at 50–68, 71; During, *supra*, at 1; Johnson, *supra*, at 3. The cultural studies movement assumes that the cultural contents that people are exposed to in the course of these daily activities play an important role in fixating cultural categories that create and maintain social stratifications. See TONY BENNETT, *CULTURE: A REFORMER'S SCIENCE* 40–59 (1998); FRED INGLIS, *CULTURAL STUDIES* 21–22 (1993); see also Toby Miller, *What It Is and What It Isn't: Cultural Studies Meets Graduate-Student Labor*, 13 *YALE J.L. & HUMAN.* 69, 70 (2001) (“By looking at how culture is used and transformed . . . cultural studies sees people not simply as consumers, but as potential producers of new social values and cultural languages.”); cf. Richard Handler, *Raymond Williams, George Stocking, and Fin-de-Siècle U.S. Anthropology*, 13 *CULTURAL ANTHROPOLOGY* 447, 447 (1998) (“One of the more vexing issues facing anthropologists today is the relationship of our discipline to an emergent discipline that has come to be called ‘cultural studies.’ . . . As many anthropologists see it, if a new discipline can get away with calling itself cultural studies, then it poses a direct challenge to the scholarly authority of anthropology . . .”). See generally JEFF LEWIS, *CULTURAL STUDIES—THE BASICS* (2002) (providing an in-depth discussion on cultural analysis).

<sup>3</sup> See Victoria E. Bonnell & Lynn Hunt, *Introduction to BEYOND THE CULTURAL TURN: NEW DIRECTIONS IN THE STUDY OF SOCIETY AND CULTURE* 1, 2–4 (Victoria E. Bonnell & Lynn

The legal field has not ignored this appropriation. Legal scholarship contains at least twelve approaches that connect the concepts of law and culture. But as I will argue in this Essay, some of these approaches date back to the first half of the nineteenth century and others to the first half of the twentieth century.

This Essay will discuss the three major approaches connecting culture to law that date back to the nineteenth and twentieth centuries. The first approach, the historical school, arose in German jurisprudence in the first half of the nineteenth century. It views law as a product of a nation's culture and as embedded in the daily practices of its people. According to the historical school, statutes are not meant to create law; rather, their function is to reflect existing social practices. And just as each group of nationals has its own language, expressing a unique national spirit, it also has its own distinctive law.<sup>4</sup>

The second approach, the constitutive approach, developed in American jurisprudence in the 1980s. This approach views law as participating in the constitution of culture and thereby in the constitution of people's minds, practices, and social relations. It thus views the relationship between law and culture as working in an opposite direction from what the historical approach assumes; in both, however, law is an inseparable dimension of social relations.<sup>5</sup>

The third approach, found in twentieth-century Anglo-American jurisprudence, views the law that the courts create and apply as a distinct cultural system. Law practitioners internalize this culture in the course of their studies and professional activity, and this internalization comes to constitute, direct, and delimit the way these practitioners think, argue, resolve cases, and provide justifications. In many cases, however, the legal culture allows for more than one possible solution. Therefore, while there may be objectivity in the law, there is also a degree of inconsistency in its application.<sup>6</sup>

Beyond these three approaches concerning the relationship between law and culture, one can identify at least nine additional approaches in legal scholarship. The first, "law and anthropology," applies anthropological research methods to the study of law.<sup>7</sup> The

---

Hunt eds., 1999); see also Larry Ray & Andrew Sayer, *Introduction to CULTURE AND ECONOMY AFTER THE CULTURAL TURN* 1, 1–3 (Larry Ray & Andrew Sayer eds., 1999).

<sup>4</sup> See discussion *infra* Part I.

<sup>5</sup> See discussion *infra* Part II.

<sup>6</sup> See discussion *infra* Part III.

<sup>7</sup> See, e.g., John M. Conley & William M. O'Barr, *Back to the Trobriands: The Enduring Influence of Malinowski's Crime and Custom in Savage Society*, 27 *LAW & SOC. INQUIRY* 847, 847–48 (2002) (describing Bronislaw Malinowski's application of ethnography to the study of law); John M. Conley & William M. O'Barr, *A Classic in Spite of Itself: The Cheyenne Way and the Case Method in Legal Anthropology*, 29 *LAW & SOC. INQUIRY* 179, 179–82 (2004) [hereinafter Conley & O'Barr, *A Classic*] (describing Karl Llewellyn and E. Adamson Hoebel's use of an anthropological case method for studying the law of Cheyenne society); Laura

second, the “legal culture” approach, deals with people’s views on the legal system and beliefs about the feasibility of taking legal action to promote their interests.<sup>8</sup> The third, the “legal consciousness” approach, deals with the legal knowledge that people invoke in the course of their daily social interactions.<sup>9</sup> The fourth, the “law and popular culture” approach, deals with law’s representations in popular culture, its influence over popular culture, and the influence of popular culture on law.<sup>10</sup> The fifth approach deals with the connec-

---

Nader, *The Anthropological Study of Law*, AM. ANTHROPOLOGIST, Dec. 1965, at 3, 3–10 (reviewing scholarship using “methodology of description” in the study of law and culture); *see also* 12 LAW AND ANTHROPOLOGY: CURRENT LEGAL ISSUES 2008 (Michael Freeman & David Napier eds., 2009) (presenting a collection of papers about the state of law and anthropology scholarship today); LAW AND ANTHROPOLOGY (Martha Mundy ed., 2002) (collecting works on the cross-cultural comparison of legal institutions); LAW AND ANTHROPOLOGY: A READER (Sally Falk Moore ed., 2005) (collecting works applying anthropological analysis of enforceable norms to the study of law); LAURA NADER, *THE LIFE OF THE LAW: ANTHROPOLOGICAL PROJECTS* (2002) (collecting works applying anthropological methods to the study of law).

<sup>8</sup> *See, e.g.*, LAWRENCE M. FRIEDMAN, *THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE* 1–24 (1975) (describing the law as one of several social systems); LAWRENCE M. FRIEDMAN, *THE REPUBLIC OF CHOICE: LAW, AUTHORITY, AND CULTURE* 62–83 (1990) (arguing that law functions to effectuate individual choice); Lawrence M. Friedman, *Is There a Modern Legal Culture?*, 7 RATIO JURIS 117, 117–19 (1994) (exploring “the legal culture of modern law”); Lawrence M. Friedman, *Legal Culture and Social Development*, in LAW AND THE BEHAVIORAL SCIENCES 1000, 1000–04 (Lawrence M. Friedman & Stewart Macaulay eds., 1969) (describing the cultural elements of a legal system). *But see* ROGER COTTERRELL, *LAW, CULTURE AND SOCIETY: LEGAL IDEAS IN THE MIRROR OF SOCIAL THEORY* (2006) (applying social theory to law and concluding that the concept of legal culture lacks specification); Roger Cotterrell, *The Concept of Legal Culture*, in COMPARING LEGAL CULTURES 13, 19–21 (David Nelken ed., 1997) (questioning the utility of the concept of legal culture).

<sup>9</sup> *See, e.g.*, PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* 34–35 (1998); P. Ewick, *Law and Everyday Life*, in 12 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 8457, 8459–60 (Neil J. Smelser & Paul B. Baltes eds., 2001); S.S. Silbey, *Legal Culture and Legal Consciousness*, in 13 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 8623, 8627–28 (Neil J. Smelser & Paul B. Baltes eds., 2001); Susan S. Silbey, *Making a Place for Cultural Analyses of Law*, 17 LAW & SOC. INQUIRY 39, 45–46 (1992). Scholars have applied the concept of legal consciousness to a variety of topics. *See, e.g.*, Erik D. Fritsvold, *Under the Law: Legal Consciousness and Radical Environmental Activism*, 34 LAW & SOC. INQUIRY 799, 806–07 (2009) (proposing a new category of legal consciousness to describe radical environmentalists’ view of law); Austin Sarat, “. . . *The Law Is All Over*”: *Power, Resistance and the Legal Consciousness of the Welfare Poor*, 2 YALE J.L. & HUMAN. 343, 343–45 (1990) (describing the prominence of the law in the welfare recipient’s consciousness); Austin Sarat & William L.F. Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer’s Office*, 98 YALE L.J. 1663, 1664 (1989) (considering how lawyers shape people’s attitudes toward the legal system); Barbara Yngvesson, *Inventing Law in Local Settings: Rethinking Popular Legal Culture*, 98 YALE L.J. 1689, 1693 (1989) (exploring the relationship between the popular consciousness and law in county courts and neighborhood justice centers); *cf.* David Nelken, *Law, Liability, and Culture*, in FAULT LINES: TORT LAW AS CULTURAL PRACTICE 21, 22–23, 26–29 (David M. Engel & Michael McCann eds., 2009) (studying the relationship between cultural practices and tort law across jurisdictions).

<sup>10</sup> *See, e.g.*, RICHARD K. SHERWIN, *WHEN LAW GOES POP* 5, 8 (2000); Jo Carrillo, *Links and Choices: Popular Legal Culture in the Work of Lawrence M. Friedman*, 17 S. CAL. INTERDISC. L.J. 1, 4–6 (2007); Anthony Chase, *Toward a Legal Theory of Popular Culture*, 1986 WIS. L.

tion between law and the production of cultural artifacts, such as books and music, and naturally focuses on intellectual property law.<sup>11</sup> The sixth approach, “law and multiculturalism,” is a part of the voluminous literature published in the last four decades on multiculturalism and discusses the functions that law plays, and the normative solutions it should adopt, in culturally diversified countries.<sup>12</sup> The seventh approach looks at the connection between law and culture from the perspective of particular legal branches or doctrines.<sup>13</sup> The eighth approach, “law and culture in law and development,” discusses the role of cultural change in legal and economic development processes that are taking place in developing countries.<sup>14</sup> The ninth approach, “law as an autopoietic system,” views law as an autonomous system whose contents and communications affect social reality in a unique manner, mutually influencing each other and creating law’s

---

REV. 527, 534–35; Douglas J. Goodman, *Approaches to Law and Popular Culture*, 31 LAW & SOC. INQUIRY 757, 757–58, 762–63 (2006); Stewart Macaulay, Images of Law in Everyday Life: The Lessons of School, Entertainment, and Spectator Sports, Presidential Address at the Annual Meeting of the Law and Society Association (May 31, 1986), in 21 LAW & SOC’Y REV. 185, 185–86, 211–14 (1987); Stewart Macaulay, *Popular Legal Culture: An Introduction*, 98 YALE L.J. 1545, 1547, 1551–54 (1989); Jessica M. Silbey, *What We Do When We Do Law and Popular Culture*, 27 LAW & SOC. INQUIRY 139, 144–45 (2002); Symposium, *Civil Litigation and Popular Culture*, 50 DEPAUL L. REV. 421, 421–533 (2000).

<sup>11</sup> See, e.g., JANE M. GAINES, *CONTESTED CULTURE: THE IMAGE, THE VOICE, AND THE LAW* (1991); Wendy Griswold, *American Character and the American Novel: An Expansion of Reflection Theory in the Sociology of Literature*, 86 AM. J. SOC. 740, 741, 748–50 (1981); Martha Woodmansee, *The Cultural Work of Copyright: Legislating Authorship in Britain, 1837–1842*, in LAW IN THE DOMAINS OF CULTURE 65 (Austin Sarat & Thomas R. Kearns eds., 1998).

<sup>12</sup> See, e.g., GAD BARZILAI, *COMMUNITIES AND LAW: POLITICS AND CULTURES OF LEGAL IDENTITIES* 2, 14 (2003); SEBASTIAN POULTER, *ETHNICITY, LAW AND HUMAN RIGHTS: THE ENGLISH EXPERIENCE* 12, 38 (1998); AYELET SHACHAR, *MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN’S RIGHTS* 1–3, 26–28 (2001); Sebastian Poulter, *Muslim Headscarves in School: Contrasting Legal Approaches in England and France*, 17 OXFORD J. LEGAL STUD. 43, 63–67 (1997); Michel Rosenfeld, *Human Rights, Nationalism, and Multiculturalism in Rhetoric, Ethics and Politics: A Pluralist Critique*, 21 CARDOZO L. REV. 1225, 1229–30 (2000); Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 500–02 (2001); Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399, 1409–10 (2003); Leti Volpp, *Feminism Versus Multiculturalism*, 101 COLUM. L. REV. 1181, 1184–85 (2001); see also Leti Volpp, *Talking “Culture”: Gender, Race, Nation, and the Politics of Multiculturalism*, 96 COLUM. L. REV. 1573, 1573–76 (1996) (criticizing scholarly backlash to study of multiculturalism and law).

<sup>13</sup> See, e.g., *MULTICULTURAL JURISPRUDENCE: COMPARATIVE PERSPECTIVES ON THE CULTURAL DEFENSE* (Marie-Claire Foblets & Alison Dundes Renteln eds., 2009) (examining the cultural defense from a theoretical and international perspective); ALISON DUNDES RENTELN, *THE CULTURAL DEFENSE* 5 (2004) (analyzing “the nature of the debate surrounding the admissibility of cultural evidence in the courtroom”); Paul W. Kahn, *Comparative Constitutionalism in a New Key*, 101 MICH. L. REV. (2003) 2677, 2678; Nelken, *supra* note 9, at 1, 28–29; Annelise Riles & Gregory S. Alexander, *The Uses and Misuses of Culture in Legal Property Theory* 5–7 (unpublished manuscript) (on file with author).

<sup>14</sup> See, e.g., Amy J. Cohen, *Thinking with Culture in Law and Development*, 57 BUFF. L. REV. 511, 511–13 (2009); Colloquium, *Law, Culture, and Economic Development*, 12 LAW & BUS. REV. AMERICAS 439 *passim* (2006).

contents from within.<sup>15</sup> These nine approaches are, however, outside the scope of this Essay.

This mapping is tentative and does not purport to be entirely exclusive; one perhaps could suggest other schemes. I do hope, however, that this mapping gives readers a preliminary idea of the widespread use of the concept of culture in the law and invites further reflection on other possible ways to employ the concept of culture in legal scholarship for a richer understanding of the legal phenomenon.<sup>16</sup>

## I

### THE NATIONAL CULTURE AS CONSTITUTIVE OF LAW: THE HISTORICAL SCHOOL IN GERMAN LAW

The first approach to understanding the relation between law and culture views a nation's culture as constitutive of law: law begins as culture, eventually becoming the law of the nation. This approach is identified with the German historical-school of law.

In the course of the seventeenth and eighteenth centuries, the Enlightenment, the intellectual movement that constituted modern Western consciousness, gave birth to a resurgence of the natural law doctrine.<sup>17</sup> In the spirit of the Enlightenment, natural law advocates argued that law should not be developed in close connection to particular local customs. Rather, they argued, the law should be created in light of the universal dictates of human reason, so that the same

---

<sup>15</sup> See, e.g., NIKLAS LUHMANN, *LAW AS A SOCIAL SYSTEM* 230–73 (Fatima Kastner et al. eds., Klaus A. Ziegert trans., 2004); GUNTHER TEUBNER, *LAW AS AN AUTOPOIETIC SYSTEM* (Zenon Bankowski ed., Anne Bankowska & Ruth Adler trans., 1993); Gunther Teubner, *How the Law Thinks: Toward a Constructivist Epistemology of Law*, 23 *LAW & SOC'Y REV.* 727, 730, 736 (1989); Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 *LAW & SOC'Y REV.* 239, 243, 245 (1983).

<sup>16</sup> The study of law and culture has, to some extent, also been institutionalized. The Association for the Study of Law, Culture, and the Humanities has been holding annual conferences since the mid-1990s. See *ASLCH Annual Conference Information*, ASSOCIATION FOR THE STUDY OF LAW, CULTURE AND THE HUMANITIES, <http://www.law.syr.edu/academics/centers/lch/conference.html> (last visited Feb. 11, 2011). Columbia Law School has a Center for the Study of Law and Culture (CSLC). See *The Center for the Study of Law and Culture*, COLUMBIA LAW SCH., [http://www.law.columbia.edu/center\\_program/law\\_culture](http://www.law.columbia.edu/center_program/law_culture) (last visited Feb. 11, 2011). At the University of Southern California, there is a Center for Law, History and Culture. See *USC Center for Law, History and Culture*, USC GOULD SCH. OF LAW, <http://lawweb.usc.edu/centers/clhc/home.htm> (last visited Feb. 11, 2011). The Yale Journal of Law and the Humanities regularly publishes articles dealing with law and culture. See Symposium, *Approaches to the Cultural Study of Law*, 13 *YALE J.L. & HUMAN.* 1 (2001). Furthermore, the Yale Law Journal published a symposium on popular legal culture in 1989. See Symposium: *Popular Legal Culture*, 98 *YALE L.J.* 1545 (1989).

<sup>17</sup> See H.S. Reiss, *The Political Thought of the German Romantics*, in *THE POLITICAL THOUGHT OF THE GERMAN ROMANTICS 1793–1815*, at 1, 1–2 (H.S. Reiss ed., 1955); see also ROGER BERKOWITZ, *THE GIFT OF SCIENCE: LEIBNIZ AND THE MODERN LEGAL TRADITION* 16, 21 (2005) (discussing Leibniz's natural law theory).

law, a product of reason, would be applicable in all legal systems.<sup>18</sup> This reasoning sparked a codification movement in Europe<sup>19</sup> that attempted to regulate social reality by preemptively applying human reason to the normative regulation of social interaction in a rational and abstract manner.<sup>20</sup> The most famous such code at the beginning of the nineteenth century was the French Code Civil of 1804, also known as the Code Napoleon.<sup>21</sup>

In the years after the French Civil Code's enactment, some made suggestions that Germany enact a similar code.<sup>22</sup> Friedrich Carl von Savigny, the most prominent German jurist in the first half of the nineteenth century and the founder of the historical school in German law, spoke against these suggestions.<sup>23</sup> Savigny argued that law is not something created through legislation that parliaments initiate or plan. Rather, law is a product of the life of a people; it comes into being (as opposed to being created) in spontaneous processes occurring in the daily lives of persons throughout their history. Savigny, therefore, concluded that the locus of law is not state legislation but the daily customs and practices of a people and the notions and understandings prevalent among them.<sup>24</sup>

In line with this view of law, Savigny regarded jurists as "the people's guardians" whose task is not to substantively determine the contents of the law. Rather, they have the more technical labor of distilling the people's law from its usages and customs and organizing this law into a methodical system of concepts and rules for the state's parliament to enact. Thus, Savigny regarded parliament not as the creator of law but merely as law's legislator.<sup>25</sup> Savigny thus suggested a nonstatist understanding of law that locates law in the realms of social life and culture.<sup>26</sup>

---

<sup>18</sup> See BERKOWITZ, *supra* note 17, at 21–22.

<sup>19</sup> See *id.* at 1–6.

<sup>20</sup> See *id.* at 60–61.

<sup>21</sup> See *id.* at 67.

<sup>22</sup> See *id.* at 106; see also Reiss, *supra* note 17, at 1, 38.

<sup>23</sup> See Friedrich Carl von Savigny, *On the Vocation of Our Age for Legislation and Jurisprudence*, in *THE POLITICAL THOUGHT OF THE GERMAN ROMANTICS 1793–1815*, *supra* note 17, at 203, 209; see also BERKOWITZ, *supra* note 17, at 112–13; Hermann Klenner, *Savigny's Research Program of the Historical School of Law and its Intellectual Impact in 19th Century Berlin*, 37 *AM. J. COMP. L.* 67, 72 (1989); Mathias Reimann, *The Historical School Against Codification: Savigny, Carter, and the Defeat of the New York Civil Code*, 37 *AM. J. COMP. L.* 95, 97 (1989); Reiss, *supra* note 17, at 1.

<sup>24</sup> See BERKOWITZ, *supra* note 17, at 113; Reiss, *supra* note 17, at 38–39; Savigny, *supra* note 23, at 205–06.

<sup>25</sup> See BERKOWITZ, *supra* note 17, at 114, 117–18.

<sup>26</sup> See *id.* at 115–16.



In line with Herder's conception of nationality,<sup>27</sup> Savigny saw law as analogous to language.<sup>28</sup> A people's language is not the product of a "choice," maintained Herder; language develops spontaneously and slowly, as an organic part of a people's evolution, and it is embedded in a people's daily life.<sup>29</sup> In a similar vein, Savigny argued that law is not the product of conscientious choice; rather, it develops spontaneously and is embedded in the daily life of a people.<sup>30</sup> And by the same token, just as Herder argued that every people (*volk*) has its own distinctive language that reflects its unique spirit (*volksgeist*), Savigny maintained that every people has its own distinctive law that reflects its spirit.<sup>31</sup> Of course, if every people has its own distinctive law that corresponds to its spirit, it logically follows that the law of one people cannot possibly be suited to serve as the law of another. This deduction meant that the Enlightenment and natural law doctrine's attempts to devise one supernational, universal law was futile and baseless.<sup>32</sup>

So, while the codification movement was a legal expression of some of the core principles of the Enlightenment, Savigny's approach manifested some of the core principles of Romanticism. Romanticism challenged the fundamentals of the Enlightenment by underlining the important role played by culture in the lives of human beings, the cultural variety that exists among human societies, the complexity of human existence, and the nonrational traits of human conduct.<sup>33</sup> In line with these positions, Savigny argued that prior to the enactment of a German code, the contents of the law embedded in the life of the German people throughout its history must be verified.<sup>34</sup> Indeed, following Savigny's position, throughout the nineteenth century, German jurists studied the historical contents of German law, and it was only after the completion of this project that the German Civil Code (B.G.B.) of 1896 was enacted.<sup>35</sup>

Savigny's jurisprudence is the product of the era of the nation-state, in which each state was assumed to be involved in creating a single, homogenous national culture by unifying all local cultures and by assimilating all immigrants into its national culture.<sup>36</sup> As is well known, in recent decades the multicultural paradigm has overtaken.

---

<sup>27</sup> See Reiss, *supra* note 17, at 3.

<sup>28</sup> See Savigny, *supra* note 23, at 205.

<sup>29</sup> See BERKOWITZ, *supra* note 17, at 113.

<sup>30</sup> See *id.* at 113; Savigny, *supra* note 23, at 205–06.

<sup>31</sup> See Reiss, *supra* note 17, at 39; Savigny, *supra* note 23, at 206–07.

<sup>32</sup> See BERKOWITZ, *supra* note 17, at 123; Reiss, *supra* note 17, at 39.

<sup>33</sup> See Reiss, *supra* note 17, at 4, 6–8.

<sup>34</sup> See BERKOWITZ, *supra* note 17, at 117, 120–21; Savigny, *supra* note 23, at 208–09.

<sup>35</sup> See BERKOWITZ, *supra* note 17, at 107, 141.

<sup>36</sup> See Klenner, *supra* note 23, at 69–70, 79.

The multicultural paradigm views all states of the world as multicultural—as consisting of more than one national group, more than one religious group, or many ethnic groups.<sup>37</sup> On this view, even though all citizens of the state share a certain cultural layer—the national culture of the state—in many instances, they identify with, and are primarily loyal to, a culture other than that culture—namely, their minority national culture or their religious culture. This view of the state invites a pluralist conception of law that accommodates the differential application of state law, as opposed to the legal-monism/rule-of-law understanding that prevailed during the nation-state era.<sup>38</sup>

Savigny's jurisprudence is also premised on a view of culture as a pure, coherent, and clearly demarcated entity.<sup>39</sup> But in recent decades, we have seen the ascendancy of a new view of culture as a hybrid entity composed of many complex elements originating from varied sources.<sup>40</sup> Under this understanding of culture, even if the origin of the law of the state is in a people's culture, we should view that culture, and its ensuing law, as composed of various elements, some local and some borrowed from foreign legal sources.<sup>41</sup>

In these respects, it is hard to view the historical school as anything but a relic of the past. And yet, there is something very contemporary about the historical school. In recent decades, a new understanding of culture has emerged that views culture not so much as a system of meaning but as practice.<sup>42</sup> This view of culture links the historical school not only to a contemporary understanding of the

---

<sup>37</sup> See Chi. Cultural Studies Grp., *Critical Multiculturalism*, in MULTICULTURALISM: A CRITICAL READER 114, 115 (David Theo Goldberg ed., 1994).

<sup>38</sup> See SHACHAR, *supra* note 12, at 1–2 & n.5; David Theo Goldberg, *Introduction: Multicultural Conditions*, in MULTICULTURALISM: A CRITICAL READER, *supra* note 37, at 1, 3–5.

<sup>39</sup> See BERKOWITZ, *supra* note 17, at 113.

<sup>40</sup> See, e.g., Robert Brighman, *Forget Culture: Replacement, Transcendence, Relexification*, 10 CULTURAL ANTHROPOLOGY 509, 526–27 (1995); Chi. Cultural Studies Grp., *supra* note 37, at 114–15; Paul DiMaggio, *Culture and Cognition*, 23 ANN. REV. SOC. 263, 265 (1997); William H. Sewell, Jr., *Historical Events as Transformations of Structures: Inventing Revolution at the Bastille*, 25 THEORY & SOC'Y 841, 842–43, 861–62 (1996); William H. Sewell, Jr., *The Concept(s) of Culture*, in BEYOND THE CULTURAL TURN: NEW DIRECTIONS IN THE STUDY OF SOCIETY AND CULTURE, *supra* note 3, at 35, 35–37 (Victoria E. Bonnell & Lynn Hunt eds., 1999) [hereinafter Sewell, *Concepts of Culture*].

<sup>41</sup> See Sewell, *Concepts of Culture*, *supra* note 40, at 49–50 (arguing that external spatial and institutional forces influence the meaning of all cultural symbols).

<sup>42</sup> See ANN SWIDLER, TALK OF LOVE: HOW CULTURE MATTERS 12–13, 44–45 (2001); Theodore R. Schatzki, *Introduction to THE PRACTICE TURN IN CONTEMPORARY THEORY* 1, 7 (Theodore R. Schatzki et al. eds., 2001); Sewell, *Concepts of Culture*, *supra* note 40, at 47, 50–51; A. Swidler, *Cultural Expression and Action*, in 5 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 3063, 3063–64 (Neil J. Smelser & Paul B. Baltes eds., 2001) [hereinafter Swidler, *Cultural Expression*]; Ann Swidler, *Culture in Action: Symbols and Strategies*, 51 AM. SOC. REV. 273, 276–277 (1986) [hereinafter Swidler, *Culture in Action*]. See generally PIERRE BOURDIEU, OUTLINE OF A THEORY OF PRACTICE 10–22 (Richard Nice trans., 1977).

concept of culture but also to the second approach to the connection between law and culture.

## II

### LAW AS CONSTITUTIVE OF CULTURE

In this Part, I will present two approaches arguing that the law of the state constitutes the culture of the state. These approaches therefore suggest a link between law and culture opposite to the one that Savigny and the historical school suggest.

#### A. Joseph Kohler: Law as Preserving and Advancing Elite Culture

Joseph Kohler, a German jurist active in the late nineteenth century and the early twentieth century, published a long series of books in the areas of private and commercial law and in the area of philosophy of law.<sup>43</sup> Kohler's conception of culture is the same that prevailed at the end of the nineteenth century: the embodiment of the best of mankind's spiritual heritage.<sup>44</sup> Kohler argued that the supreme vocation of humanity is to promote and develop culture in that sense of the term—i.e., the attainment of greater spiritual achievements—and the function of law is to facilitate the realization of this human vocation.<sup>45</sup> Law can achieve that function by preserving human values that are worthy of preservation, by creating continuity and stability with regard to such values, by allowing human beings to create viable institutions for cooperative action, and by allowing people to overcome haphazard and unexpected events in their lives (e.g., by means of insurance).<sup>46</sup> However, Kohler viewed law as a constantly developing dynamic medium. He was aware of the risk that if law supported culture, it could impair culture's further development. Therefore, a central function of law, according to Kohler, is to create an appropriate balance between preservation and stability on the one hand and flexibility, openness to change, and further development on the other.<sup>47</sup>

#### B. Law as Constitutive of Culture and Social Relations

Since the 1980s, a rich scholarship has grown in the United States that perceives law as playing an important role in constituting individ-

---

<sup>43</sup> His major book, *Philosophy of Law*, appeared in 1914. See JOSEF KOHLER, *PHILOSOPHY OF LAW* (Adalbert Albrecht trans., Augustus M. Kelley 1969) (1914). For discussion of Kohler's jurisprudence, see ROSCOE POUND, *INTERPRETATIONS OF LEGAL HISTORY* 141–51 (1923); see also EDGAR BODENHEIMER, *JURISPRUDENCE: THE PHILOSOPHY AND METHOD OF THE LAW* 113–14 (rev. ed. 1974).

<sup>44</sup> See CHRIS JENKS, *CULTURE* 18–22 (2d ed. 2005); KOHLER, *supra* note 43, at 36.

<sup>45</sup> See KOHLER, *supra* note 43, at 12, 22, 49.

<sup>46</sup> See *id.* at 50–51, 81, 135, 177.

<sup>47</sup> See *id.* at 4–7, 32.

uals' minds, practices, and social relations.<sup>48</sup> This approach took its point of departure from Clifford Geertz's 1983 essay, *Local Knowledge: Fact and Law in Comparative Perspective*.<sup>49</sup> Geertz rejected approaches that viewed law as a dispute resolution mechanism and functionalist approaches that regard it as distinct from society and that acts on society from without so as to respond to needs that arise within society.<sup>50</sup> Instead, Geertz suggested a view of law as something that "makes" social life, as "constructive," "constitutive," and "formational" of it.<sup>51</sup> Geertz wrote that law is "constructive of social realities rather than merely reflective of them."<sup>52</sup> He thus argued that along with science, art, religion, and ideology, we should view law as a system of meaning.<sup>53</sup>

Following these words, and under the influence of the cultural studies movement,<sup>54</sup> many writers belonging to the schools of law and society, critical legal studies, legal feminism, and law and literature offered a view of law as constitutive of culture ("the constitutive approach"). These writers viewed law as consequently creating meaning in the minds of individuals and as constituting the practices and social relations in which individuals are involved.<sup>55</sup> Pierre Bourdieu expressed the essence of this approach by saying,

---

<sup>48</sup> See Austin Sarat & Thomas R. Kearns, *The Cultural Lives of Law*, in *LAW IN THE DOMAINS OF CULTURE*, *supra* note 11, at 1, 5. See generally R. Cotterrell, *Law as Constitutive*, in 12 *INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES*, *supra* note 9, at 8497, 8497–98 (describing the sociological and critical-legal-studies roots of the constitutive approach).

<sup>49</sup> CLIFFORD GEERTZ, *Local Knowledge: Fact and Law in Comparative Perspective*, in *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 167, 230 (1983); see also Sarat & Kearns, *supra* note 48, at 6.

<sup>50</sup> See GEERTZ, *supra* note 49, at 232–33.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 232.

<sup>53</sup> *Id.* at 182, 184, 230, 232. Geertz's approach is dialectic: law—much like science, art, and religion—constitutes social relations and is constituted by them.

<sup>54</sup> The cultural studies movement is a group of scholars who maintained that culture plays a decisive role in constituting social life and in producing and maintaining power relations between individuals and between social groups. See *supra* note 2.

<sup>55</sup> See, e.g., MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 242–68 (1987); GARY MINDA, *POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END* 106–27 (1995); Paul Schiff Berman, *Telling a Less Suspicious Story: Notes Toward a Non-Skeptical Approach to Legal/Cultural Analysis*, 13 *YALE J.L. & HUMAN.* 95, 109–10 (2001); Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 *HASTINGS L.J.* 805, 838–39 (1987); Cotterrell, *supra* note 48, at 8497–98; Bryant G. Garth & Austin Sarat, *Justice and Power in Law and Society Research: On the Contested Careers of Core Concepts*, in *JUSTICE AND POWER IN SOCIOLEGAL STUDIES* 1, 9 (Bryant G. Garth & Austin Sarat eds., 1998); Robert W. Gordon, *Critical Legal Histories*, 36 *STAN. L. REV.* 57, 109 (1984) [hereinafter Gordon, *Critical Legal Histories*]; Robert W. Gordon, *New Developments in Legal Theory*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 281, 288–90 (David Kairys ed., 1982); Carol J. Greenhouse, *Constructive Approaches to Law, Culture, and Identity*, 28 *LAW & SOC'Y REV.* 1231, 1231 (1994); Paul W. Kahn, *Freedom, Autonomy, and the Cultural Study of Law*, 13 *YALE J.L. & HUMAN.* 141, 149–50 (2001); David Kairys, *Introduction to THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE*,

Law is the quintessential form of the symbolic power of naming that creates the things named . . . . [It] is the quintessential form of "active" discourse, able by its own operation to produce its effects. It would not be excessive to say that it *creates* the social world, but only if we remember that it is this world which first creates the law.<sup>56</sup>

There is an interesting relationship between the historical school and the constitutive approach. Both approaches view law as embedded in the daily lives of people. But whereas the historical school holds that the source of law lies in spontaneous processes occurring in the daily practices of people, the constitutive approach holds that the source of law lies in the control that social groups exert over the institutions that create law. The two approaches therefore envision reverse processes: the historical school assumes a transition from the law of a people, embedded in social practices and culture, to the law of the state, while the constitutive approach assumes a transition from the law of the state to culture and daily social interactions.

To understand the implications of the constitutive approach, I wish to divide the history of American law in the past one hundred and fifty years into two major periods. The first, the period of legal formalism, lasted from the middle of the nineteenth century until the 1920s.<sup>57</sup> Legal formalism's ideal is the organization of law's norms into a system that has its own internal vertical and horizontal logic.<sup>58</sup>

---

*supra*, at 1, 6–7; Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMAN. 35, 48 (2001) [hereinafter Mezey, *Law as Culture*]; Naomi Mezey, *Out of the Ordinary: Law, Power, Culture, and the Commonplace*, 26 LAW & SOC. INQUIRY 145, 153 (2001); Robert Post, *Introduction: The Relatively Autonomous Discourse of Law*, in LAW AND THE ORDER OF CULTURE vii, vii (Robert Post ed., 1991); Austin D. Sarat, *Redirecting Legal Scholarship in Law Schools*, 12 YALE J.L. & HUMAN. 129, 135–43 (2000) (reviewing PAUL W. KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* (1999)); Austin Sarat & Thomas R. Kearns, *Editorial Introduction to LAW IN EVERYDAY LIFE* (Austin Sarat & Thomas R. Kearns eds., 1993); Austin Sarat & Jonathan Simon, *Beyond Legal Realism?: Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship*, 13 YALE J.L. & HUMAN. 3, 9–13 (2001); David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575, 589 (1984). See generally KAHN, *supra* (proposing a framework for studying the culture of the law); LAW IN THE DOMAINS OF CULTURE, *supra* note 11 (collecting case studies in the field of sociocultural legal studies).

<sup>56</sup> Bourdieu, *supra* note 55, at 838–39.

<sup>57</sup> See, e.g., P.S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW 5–21 (1987); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870–1960, at 9–19 (1992); Larry Alexander, "With Me, It's All or Nuthin'": Formalism in Law and Morality, 66 U. CHI. L. REV. 530, 531 (1999); Morton J. Horwitz, *The Rise of Legal Formalism*, 19 AM. J. LEGAL HIST. 251, 252 (1975); Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 352–53 (1973); Brian Leiter, *Positivism, Formalism, Realism*, 99 COLUM. L. REV. 1138, 1144–46 (1999) (reviewing ANTHONY J. SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE (1998)); Fredrick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988); Ronen Shamir, *Formal and Substantive Rationality in American Law: A Weberian Perspective*, 2 SOC. & LEG. STUD. 45, 47–49 (1993).

<sup>58</sup> See Shamir, *supra* note 57, at 47.

This structuring of law's norms is meant to make it possible for legal decision makers to classify every problem brought to their resolution into the one legal category that contains the solution to it.<sup>59</sup> Legal formalism therefore aims to turn legal decision making into a technical-mechanistic process, as if it were a procedure.<sup>60</sup> According to formalism, turning legal decision making into a procedure is meant to neutralize the influences of the person (typically a judge) involved in the process—specifically, the contribution of the decision maker's unique personal experience, preferences, character, and cultural background.<sup>61</sup> The systemic structuring of law's norms is also meant to make it possible for legal decision makers to apply the law according to law's own internal logic without taking any regard of the possible effects that law may have on the society in which it functions.<sup>62</sup>

The second period in the history of American law began in the 1920s with legal realists' critique of legal formalism. The realists set forth two arguments—one normative, the other descriptive.<sup>63</sup> Both reintroduce the person back into the law. The normative argument of legal realism was that searching for a solution embedded in the contents of the law—doctrines, concepts, rules, and precedents—was not the right way to go about dealing with legal problems. Rather, in dealing with legal problems, which have to do with human beings and the relations between them, one needs to expose and discuss the normative meaning of possible legal solutions (i.e., what values will prevail in the lives of human beings) and the social implications of possible solutions (i.e., how material resources will be distributed if a particular legal solution is adopted).<sup>64</sup> The normative argument of legal realism is therefore a humanistic argument through and through, to the effect that the supreme criterion for whatever takes place in the law is its effects on the lives of human beings.

---

<sup>59</sup> See Kennedy, *supra* note 57, at 355.

<sup>60</sup> Where people follow a procedure, the outcome of their actions is embedded, so to speak, in the procedure, and the personality of the person that applies the procedure is not supposed to affect the outcome.

<sup>61</sup> See HORWITZ, *supra* note 57, at 16–17.

<sup>62</sup> See Kennedy, *supra* note 57, at 359.

<sup>63</sup> ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 185–225 (1993); Hanoeh Dagan, *The Realist Conception of Law*, 57 U. TORONTO L.J. 607, 612–613 (2007).

<sup>64</sup> See, e.g., BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 101–02 (1921); FELIX S. COHEN, *ETHICAL SYSTEMS AND LEGAL IDEALS: AN ESSAY ON THE FOUNDATIONS OF LEGAL CRITICISM* 276–85 (Great Seal Books 1969) (1933); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 844 (1935); Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 3, 7, 9 (1894); O.W. Holmes, *The Path of the Law*, Address at Boston University School of Law (Jan. 8, 1897), in 10 HARV. L. REV. 457, 467–68, 469 (1897); Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1222–23, 1236, 1249 (1931); Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 473, 474, 499–503 (1988) (reviewing LAURA KALMAN, *LEGAL REALISM AT YALE: 1927–1960* (1986)).

Legal realism's normative argument gave birth to an instrumental conception of law, which reached its peak in American law in the 1960s and 1970s following the landmark 1954 case of *Brown v. Board of Education*.<sup>65</sup> Following *Brown*, many legal scholars in the United States adopted the view that law may serve as an important instrument for effecting social change, particularly in attaining higher levels of distributive justice and equality. The constitutive approach gained ascendance in American law in the 1980s, challenging the dominance of the instrumental approach in thinking about law among scholars dealing with the interrelationship between law and society. The constitutive approach sees law as constitutive of culture and, consequently, as creating meaning in the minds of individuals and constituting the practices and social relations in which they are involved.<sup>66</sup> Put differently, the constitutive approach holds that law, by its participation in the constitution of culture, also participates in the creation of the mind categories through which individuals perceive the social relations in which they take part—i.e., their status vis-à-vis other individuals, what others are entitled to do to them, what they are entitled to do to others, and the self-perceived identities of individuals and groups.

The constitutive approach therefore sees law as acting upon society in a much more profound way than does the instrumental approach. According to the constitutive approach, law is not an entity distinct from society; it is embedded in the social relations that it constitutes, making the two inseparable.<sup>67</sup> As Patricia Ewick and Susan Silbey explain, this approach “conceiv[es] of law not so much [as] operating to shape social action but *as* social action,” “an internal feature of social situations.”<sup>68</sup> And as Austin Sarat and Thomas Kearns write, to think about law in the framework of the constitutive approach is “to see that social practices are not logically separable from the laws that shape them and that social practices are unintelligible apart from the legal norms that give rise to them.”<sup>69</sup>

What are the intellectual roots of the constitutive approach? I think that its main source was the cultural studies movement that arose in Britain in the 1960s and 1970s. Cultural studies scholars see culture as an important source of social control—e.g., the maintenance of social hierarchies of class, gender, race, and ethnicity. Following Antonio Gramsci's notion of hegemony, cultural studies assumes that control over culture allows dominant social groups to make individuals belonging to other social groups internalize an ac-

---

<sup>65</sup> 347 U.S. 483 (1954).

<sup>66</sup> See Sarat & Simon, *supra* note 55, at 19.

<sup>67</sup> See KELMAN, *supra* note 55, at 253–55.

<sup>68</sup> EWICK & SILBEY, *supra* note 9, at 34–35.

<sup>69</sup> Sarat & Kearns, *supra* note 48, at 10.

ceptance of their low ranking in social hierarchies as being in the nature of things, something that cannot be challenged.<sup>70</sup> The constitutive approach adopts this line of thought and posits law before culture: law is perceived as constitutive of culture and consequently as also constitutive of the mind categories of individuals and of the social relations in which they are involved.

Indeed, according to the constitutive approach, in line with the insights of the cultural studies movement, once the law has succeeded in establishing social relations, for those who participate in these social relations, it turns them into something natural and self-evident to which no alternatives can possibly be suggested.<sup>71</sup> As Robert Gordon writes,

the power exerted by a legal regime consists less in the force that it can bring to bear against violators of its rules than in its capacity to persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live.<sup>72</sup>

It is a tenet of the constitutive approach that law arises under conditions of inequality between social groups.<sup>73</sup> Therefore, the social relations that law constitutes are unequal. Law allocates to various groups of individuals different kinds and different quantities of powers that they are to employ in their social relations, and law fixates in their minds hierarchies of class, gender, race, and ethnicity. As a result, law functions as an important instrument of social control: it serves to create and preserve inequality between individuals and between social groups.<sup>74</sup> However, in spite of the clearly critical tendencies accompanying the birth of the constitutive approach, one may generalize its insight to the effect that law can be viewed as constitutive of social life in general, not necessarily in connection to the interests of any particular group.

The constitutive power of law can be exemplified in numerous ways. I wish to set out three examples below.

The first is the sexual harassment doctrine. The doctrine furnishes women with a novel legal category—sexual harassment—for conceptualizing social situations in which they may find themselves

---

<sup>70</sup> See *supra* note 2.

<sup>71</sup> See Cotterrell, *supra* note 48, at 8498; Sarat & Simon, *supra* note 55, at 19.

<sup>72</sup> Gordon, *Critical Legal Histories*, *supra* note 55. In a similar fashion, John Rawls claims that citizens living in liberal democracies can unite behind a shared political conception of the principles governing the functioning of the central institutions of their states because people who grow up in a liberal democracy internalize the “shared fundamental ideas” that are “implicit in the public political culture” of their country. See JOHN RAWLS, *POLITICAL LIBERALISM* (1993) 100–01.

<sup>73</sup> See Kahn, *supra* note 55, at 149 (“[L]aw is a set of sites of social conflict . . .”).

<sup>74</sup> See Sarat & Simon, *supra* note 55, at 19–20 & n.92.



and thus reconstitutes the social relations between women and men. It is easy to see that in countries where this doctrine is a part of the law, women now function in workplaces and universities shielded by a protective wall provided by the rights that the doctrine provides. Further, men deal with women knowing that certain acts of theirs, which formerly lacked legal significance, have acquired legal meaning. Consequently, the relations of women and men substantially differ in these countries from countries that do not recognize the sexual harassment doctrine. Moreover, if the doctrine succeeds in constituting the interactions between women and men over time (i.e., if the doctrine manages to overcome the gap problem<sup>75</sup>), a new generation of women and men will interact in line with the imperatives of the doctrine not because of any particular awareness of it but simply and mainly because they will have been born into a culture that complies with the doctrine's imperatives and internalized the contents and practices of that culture.

The second example is family law, which allocates to husbands and wives powers and rights in the course of their marriages and, if their marriages should end, custody rights, rights concerning the distribution of family property, and so forth. Through such allocations, family law participates in constituting the relations between husbands and wives in the course of their marriages. Imagine the daily life of a husband and wife in the context of a law that allows the husband to unilaterally terminate the marriage and retain exclusive custody of the couple's children and possessions, leaving the wife without any property whatsoever. Now imagine the daily life of a husband and wife in the context of a legal regime premised on equality. Obviously, the nature of the daily interactions between married people substantially varies for those living under the sway of these two very different legal systems. Furthermore, in countries that recognize same-sex marriage, this recognition directly affects partnerships of people of the same sex and the status of homosexual persons in society in general.

The third example is labor law. Imagine an employee in a legal system that allows an employer to lay the employee off at will in contrast to an employee who enjoys job tenure and the protection of a union. Obviously, the way an employee perceives herself in her relations with her employer, the nature of the relations between employee and employer, and the way an employee feels and behaves in the course of a day's work all vary greatly in each of these two legal regimes.

Interestingly, the constitutive approach sees law as constitutive of social relations not only when it actively regulates social interaction

---

<sup>75</sup> See *infra* notes 79–82 and accompanying text.

but also when it abstains from doing so. Thus, for example, where the law does *not* prohibit discrimination in the workplace on the basis of gender or race, or when law does not criminalize the conduct of a husband who forces sexual relations on his wife (i.e., the law does not apply the category of rape to the husband's conduct), law *does* determine the nature of the relevant social relations even though it seems to be missing from them. A missing law is still constitutive because our lives take place in the framework of a tight grid of normative and legal arrangements that give meaning to our conduct. Indeed, to paraphrase Robert Cover in another context,<sup>76</sup> we could say that sleeping late on Sunday morning does not mean recovery from a hard week's work if it occurs against the background of a norm that mandates participation in religious ritual, and eating is not a routine and trivial biological activity if it takes place in the course of the Jewish Day of Atonement.

I have noted that, according to the instrumental approach, law and society are perceived as two distinct entities and law is seen as acting on society from without. Therefore, a major question that arises in the context of the instrumental approach is under what conditions may law succeed in effecting change in society, and under what conditions does it fail to do so, thus leading to a gap between what the law requires and the way people actually behave. As a result, a large body of literature—"gap studies"—appeared during the twentieth century and tried to trace the sources of the gap between what Roscoe Pound, as early as 1910, called "law in the books" and "law in action."<sup>77</sup> These studies pointed to the failure to allocate state resources, corruption, lack of intention to enforce a statute in the first place, and many other reasons as the bases of the gap phenomenon.<sup>78</sup> These studies are relevant to the constitutive approach: if for some reason law fails to constitute culture, the causal chain between law and people's daily interactions will dissolve.

The constitutive approach recognizes that one reason for the gap between law's content and actual social relations may be that cultural meanings are not in accord with the contents of law.<sup>79</sup> Thus, for example, even though the law may state that all citizens are equal, due to racial bias, police may stop a higher proportion of black men and women.<sup>80</sup> Likewise, a law that stipulates that honor killings are murder

---

<sup>76</sup> See Robert M. Cover, *The Supreme Court 1982 Term—Forward: Nomos and Narrative*, 97 HARV. L. REV. 4, 7–8 (1983).

<sup>77</sup> See Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 13 (1910); see also Garth & Sarat, *supra* note 55, at 1, 4–6.

<sup>78</sup> See Garth & Sarat, *supra* note 55, at 6–7 (summarizing a number of gap studies).

<sup>79</sup> See Mezey, *Law as Culture*, *supra* note 55, at 47 (rejecting the idea that law and culture are indistinguishable).

<sup>80</sup> Empirical studies show this phenomenon. See *id.* at 51–54.

may conflict with a rooted tradition among men who give such killings an opposite, positive meaning. And a law that states that spousal abuse is a severe criminal offense will barely change the situation of battered women if these women live in a culture where a wife is taught to submit herself completely to the authority of her husband and where all family problems are meant to be settled within the confines of the family.<sup>81</sup> In such situations, these women will continue to suffer severe physical and emotional harassment, possibly for many years, and they will abstain from reporting their husbands to the police or seeking refuge in shelters.

The constitutive approach recognizes the possibility that a gap might exist for another reason as well: people are not passively governed by law. Rather, as shown by many culture researchers,<sup>82</sup> human beings are creative, manipulative, and enterprising. Therefore, the constitutive approach views individuals as often taking action to obstruct law's imperatives and its allocation of rights and powers.<sup>83</sup>

Needless to say, a comprehensive understanding of the relations between law and society would have to be circular—viewing society as creative of law, which in turn acts upon society, subject to the problem of the gap, and so forth. The constitutive approach acknowledges, of course, that the law not only constitutes social relations, but that social relations also constitute the law. Being an academic paradigm, however, the constitutive approach identifies one element of the complex relations between law and society—law's action upon society—and focuses only on it.

### III

#### THE LAW OF THE COURTS AS A DISTINCT CULTURAL SYSTEM

In this Part, I shall discuss the writings of four authors who share a (not necessarily explicit) perception of the law that courts create and apply as a distinct cultural system. One major insight that emerges from these authors' works is that lawyers who wish to prepare arguments for court should be acquainted with the theory of cultural interpretation as much as with the minute details of the contents of the law. Put differently, if the law that courts make and apply is a distinct cultural system, as these authors argue, then sensitivity to trends in the law and the ability to correctly assess the relative weight

---

<sup>81</sup> See Sally Engle Merry, Resistance and the Cultural Power of Law, Presidential Address at the Annual Meeting of the Law and Society Association (June 18, 1994), in 29 *LAW & SOC'Y REV.* 11, 18–20 (1995).

<sup>82</sup> See, e.g., SWIDLER, *supra* note 42, at 6–8; Swidler, *Cultural Expression*, *supra* note 42, at 3067–68; Swidler, *Culture in Action*, *supra* note 42, at 276–82.

<sup>83</sup> Indeed, lawyers are familiar with the way judges and lawyers themselves may resort to creative interpretation when the need arises to neutralize a legal imperative even when such an imperative is drafted in unequivocal language.

of law's many elements are indispensable for making persuasive legal arguments.

#### A. Karl Llewellyn: Law as Culture and Craft

I have noted that, in addition to the normative argument, legal realists developed a descriptive argument contending that legal formalism fails to accurately portray legal decision-making processes even within the context of a legal system that adheres to the essentials of a formalist conception of law. The realists demonstrated that in many cases, adjudication is not premised on the application of a procedure but is rather an activity, within the context of rich contents that are open to multiple conflicting interpretations, at the core of which lie discretion and choice. They showed that in many instances the unique personality of the judge plays an important, even decisive, role in determining the content of the judicial decision. Thus, the human agent was reintroduced into law not only by the normative argument of legal realism but also by the descriptive argument as well: it reintroduced the judge as a human agent with the power to shape the legal outcome of a case.<sup>84</sup>

The descriptive argument of legal realism, which for many years now has been widely regarded as a truism,<sup>85</sup> forced the realists to face "the devil of subjectivism"—the fear that if formalism fails to accurately portray legal decision-making processes, then the true picture is that judges are not constrained in any way in resolving legal disputes and every judge may resolve a case in any way he or she wishes.<sup>86</sup>

Karl Llewellyn, the intellectual leader of the realists, played an important role in refuting legal formalism. But Llewellyn was a great admirer of the common law and of the Aristotelian practical-wisdom decision-making model on which the common law is premised.

---

<sup>84</sup> See Paul Gewirtz, *Narrative and Rhetoric in the Law*, in *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 2, 11–12 (Peter Brooks & Paul Gewirtz eds., 1996); Kairys, *supra* note 55, at 2; David Kairys, *Legal Reasoning*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE*, *supra* note 55, at 11, 14; Trubek, *supra* note 55, at 578.

<sup>85</sup> Critical legal studies scholars subsequently adopted and developed realism's descriptive argument. See, e.g., Charles E. Clark & David M. Trubek, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, 71 *YALE L.J.* 255, 255 (1961); Daniel A. Farber & Suzanna Sherry, *Legal Storytelling and Constitutional Law: The Medium and the Message*, in *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW*, *supra* note 84, at 37, 52; Gordon, *Critical Legal Histories*, *supra* note 55; Kairys, *supra* note 55; Kairys, *supra* note 84; Trubek, *supra* note 55. Many other scholars also adopted realism's descriptive argument. See RONALD DWORKIN, *LAW'S EMPIRE* 10 (1986); STEPHEN GUEST, RONALD DWORKIN 214 (2d ed. 1997); KAHN, *supra* note 55; Berman, *supra* note 55, at 138; Gewirtz, *supra* note 84; John Hasnas, *The Myth of the Rule of Law*, 1995 *WIS. L. REV.* 199, 232; Sarat & Felstiner, *supra* note 9, at 1667–68; Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 *VA. L. REV.* 1717, 1766–67 (1997).

<sup>86</sup> Menachem Mautner, *Luck in the Courts*, 9 *THEORETICAL INQUIRIES L.* 217, 219 (2007); see also GUEST, *supra* note 85, at 214; Clark & Trubek, *supra* note 85, at 256.

Therefore, the claim that a postformalist law is a subjectivist law disturbed Llewellyn. Early on in his career, he therefore attempted to rehabilitate the common law's credibility through a project demonstrating that common law decision-making processes meet a reasonable standard of objectivity even within the context of a postformalist conception of law that recognizes the important role that judges play in legal decision making. Llewellyn accomplished that by presenting the law of the courts as a cultural system.

Llewellyn had read Bronislaw Malinowski's *Crime and Custom in Savage Society*,<sup>87</sup> and one of Llewellyn's colleagues at Columbia University was Franz Boas, a world-famous anthropologist. Moreover, in 1941, Llewellyn together with E. Adamson Hoebel, published an influential book of legal anthropology, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence*.<sup>88</sup> Thus, Llewellyn was certainly well aware of the concept of culture and its importance. But at the time he became involved in the anthropological endeavor, the concept of culture, which was firmly in the possession of the discipline of anthropology, was confined to nonstate, non-Western (e.g., "primitive" or "savage") societies.<sup>89</sup> It was impossible therefore for Llewellyn to apply the concept to the workings of common law courts.

Indeed, Llewellyn rarely used the term *culture* when he wrote about the common law; he usually referred to that law as a "tradition."<sup>90</sup> But given the way he perceived law, it is clear that had he written in the past three decades—the years of the "cultural turn"<sup>91</sup>—he would undoubtedly have used "culture" when referring to the law that common law courts create and apply. In any event, decades before use of "culture" became so common in all disciplines of the

---

<sup>87</sup> See generally BRONISLAW MALINOWSKI, *CRIME AND CUSTOM IN SAVAGE SOCIETY* (Rowman & Littlefield Publishers, Inc. 1989) (1926) (discussing anthropological studies in primitive law).

<sup>88</sup> K.N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* (1941).

<sup>89</sup> Steven Wilf writes that *The Cheyenne Way* was the last book to appear in an eighty-year scholarship on "legal primitivism" which, "[i]n a symbolic binary code of opposites," was perceived as the ultimate "other" of legal modernism. See Steven Wilf, *The Invention of Legal Primitivism*, 10 *THEORETICAL INQUIRIES* L. 485, 489 (2009). Llewellyn and Hoebel "treated the Cheyenne as a world apart." *Id.* at 507; see also KARL N. LLEWELLYN, *THE BRAMBLE BUSH: THE CLASSIC LECTURES ON THE LAW AND LAW SCHOOL* 115 (2008) (stating that "[b]y *civilization* I mean what anthropologists call *culture*" and demonstrating that Llewellyn thought about culture the way anthropologists of his time did).

<sup>90</sup> Sometimes Llewellyn refers to the law of the courts in terms of "culture." See KARL LLEWELLYN, *THE CASE LAW SYSTEM IN AMERICA* 9–11, 113 (Paul Gewirtz ed., Michael Ansaldi trans., 1989) [hereinafter LLEWELLYN, *CASE LAW SYSTEM*]; KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 49–50 (William S. Hein & Co., Inc. 1996) (1960) [hereinafter LLEWELLYN, *COMMON LAW TRADITION*].

<sup>91</sup> See *supra* note 3.

social sciences, the humanities, and law, Llewellyn had the great insight that the law of the courts needs to be perceived as a culture.<sup>92</sup>

Llewellyn's argument was premised on two pillars that to some extent overlap. The first pillar is the contents of the law and the modes of thought that are prevalent in the law. Llewellyn argued that the contents of the law are organized in certain categories and that there are certain recurrent modes of thinking and arguments in the law. In the course of their professional lives, lawyers internalize the contents of the law and the modes of thinking and arguments prevalent in the law, and therefore these contents and modes not only pervasively structure the way lawyers function in the law but also severely constrain the options available to them. Thus, lawyers that operate within the same legal system will act in similar fashion, and there will be no far-reaching variety in their conduct when they handle similar legal problems.<sup>93</sup>

The second pillar on which Llewellyn's argument is premised is the professional culture within which lawyers and judges operate. Llewellyn writes about law in terms of "craft" (i.e., a profession that employs a repertoire of "do and don't" rules that those operating in the field in the course of their professional training and functioning internalize). The customary conduct of courts and the modes of justification prevalent in legal opinions work as such craft rules, and they channel judges into nonsubjectivist conduct. Moreover, other people active in the judges' professional culture constantly review judges' opinions; other judges, lawyers, law professors, and law students read judges' opinions. Readers of court opinions react positively to opinions that abide by the norms prevalent among lawyers, and they react negatively to opinions that deviate from what is customary. These processes of reading and review guarantee that judges' opinions will conform, in terms of both content and modes of justification, to the standards prevalent in the professional culture of the law.<sup>94</sup>

---

<sup>92</sup> An additional connection between Llewellyn and the concept of culture can be found in the drafting of the Uniform Commercial Code (Code) and in Llewellyn's vision of the Code's application. On the one hand, in drafting the Code, Llewellyn regularly drew on the input of market experts. On the other hand, implicit in the Code's famous standards ("good faith," "reasonableness," "usage of trade") is the expectation that judges will apply norms prevalent in the relevant business communities to resolve commercial disputes. See generally Conley & O'Barr, *A Classic*, *supra* note 7; Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465 (1987); Imad D. Abyad, Note, *Commercial Reasonableness in Karl Llewellyn's Uniform Commercial Code Jurisprudence*, 83 VA. L. REV. 429 (1997).

<sup>93</sup> See LLEWELLYN, *supra* note 89, at 76, 77; LLEWELLYN, *CASE LAW SYSTEM*, *supra* note 90, at 76-77, 80; LLEWELLYN, *COMMON LAW TRADITION*, *supra* note 90, at 34-61, 119, 154-57, 201, 203.

<sup>94</sup> See LLEWELLYN, *CASE LAW SYSTEM*, *supra* note 90, at 76-77; LLEWELLYN, *COMMON LAW TRADITION*, *supra* note 90, at 26, 53, 154-57, 205, 213-23. An approach similar to Llewellyn's can be found in the writings of two other prominent realists, Felix Cohen, see

Thus, Llewellyn succeeds in solving the problem of subjectivity in the law. He persuasively argues that there is objectivity in the law (i.e., that a judge cannot resolve a case any way he or she wishes but is rather severely constrained by the contents of the legal culture within which he or she is operating).<sup>95</sup> However, Llewellyn fails to solve another central problem: the lack of uniformity in legal outcomes. Llewellyn's reasoning cannot overcome the decisive role that any unique, particular judge plays in legal decision-making processes.

Llewellyn's failure to overcome the problem of lack of uniformity in the law is unavoidable. Culture constitutes the human subject; to live in a culture is to choose from the repertoire of options that the culture makes available and also to be creative and add new contents to the culture. If the law of the courts is a distinct cultural system, then judges operate in the law by choosing from the options the legal culture makes available to them or by creating new contents for that culture. There is objectivity in the law. Judges that have gone through a similar process of professional socialization will act in similar fashion.<sup>96</sup> But there can be only a partial uniformity in the outcomes that judges reach and in the justifications they provide for their decisions. It is impossible to eliminate a judge's unique personality, character, life experience, and cultural background from the judge's legal decision making. To some extent—and it certainly is not negligible—the outcome of adjudication is a matter of luck.<sup>97</sup>

Indeed, Llewellyn was aware that he had failed to solve the problem of lack of uniformity in the law. Although his writings reveal a heroic effort to show that there is no unconstrained subjectivity in the law, in many places, side by side with that attempt, one finds an acknowledgement of the unique, singular contribution of the particular judge to the contents of judicial decisions in a way that undermines law's uniformity.<sup>98</sup>

---

Cohen, *supra* note 64, and Benjamin Cardozo, *see* CARDOZO, *supra* note 64, at 105–06, 108–10, 174.

<sup>95</sup> See LLEWELLYN, *supra* note 89, at 77.

<sup>96</sup> See LLEWELLYN, COMMON LAW TRADITION, *supra* note 90, at 34–35 (noting the “known bench” phenomenon arising from the professional socialization of judges).

<sup>97</sup> Where luck determines what happens in our lives, two elements are involved: (1) a plurality of possible outcomes—namely, that *two* or more (good or bad) outcomes may ensue; (2) lack of control—namely, there is no way, or no significant way, of ensuring a particular outcome. Mautner, *supra* note 86, at 217; *see also* S.L. HURLEY, JUSTICE, LUCK, AND KNOWLEDGE 106–32 (2003); THOMAS NAGEL, MORTAL QUESTIONS 24–38 (1979). The way that judges interfere in our lives is, to a great extent, a matter of luck. First, in many cases, there is a plurality of outcomes by which a legal dispute may be resolved. Second, we are not supposed to have any way of controlling the judge that determines our case; in a decent society, the basic norm we expect judges to abide by is impartiality. *See* Mautner, *supra* note 86, at 217.

<sup>98</sup> Compare LLEWELLYN, COMMON LAW TRADITION, *supra* note 90, at 34 (“[O]ne must not forget that a particular bench tends strongly to develop a characteristic going tradition

### B. James Boyd White: Law as Constitutive Rhetoric

A perception of the law of the courts as a distinct cultural system can be found in the writings of James Boyd White, the founding father of the “law and literature” movement in American law and a prominent thinker on the relationship between law and culture.<sup>99</sup> White sees adjudication as the central event that takes place in the legal field. Adjudication is a discursive process in which various normative options are raised, clarified, and discussed, and one of them is eventually chosen. White argues that the arguments lawyers make in the course of legal proceedings expose the community’s normative potentiality and that courts’ opinions determine its normative identity. When a lawyer presents an argument to a court, he or she offers a vision as to the values that should govern the community and as to the weight that the court ought to assign to competing values in the community’s life. The opposing party’s lawyer offers a rival vision composed of other values or of different relative weights assigned to the same values. Eventually, the court determines which values will govern the life of the community and what weight is to be assigned to each of them.<sup>100</sup> The operation of law by courts is therefore, according to White, “a continual process of education, of intellectual and moral self-improvement . . . [in which] [t]he community makes and remakes itself . . . over time.”<sup>101</sup>

In line with this perception of the nature of the judicial process, White calls the law that courts create and apply “constitutive rhetoric.”<sup>102</sup> White does not use the term “rhetoric” with the low, pejorative meaning it has acquired since Plato’s *Gorgias*—i.e., an activity in which a speaker who knows his or her goals in advance seeks to gain the audience’s consent by manipulating their minds. Rather, White uses the term rhetoric in the sense of a discourse in the course of which the possible arguments in the context of a culture are put forward bona fide and, after they have been discussed and weighted, a conviction is reached as to the normative positions that the community ought to adopt. Interestingly, White uses the term “constitutive”

---

not only of ways of work but of outlook, and of working attitudes of one judge toward another.”), *with id.* at 35 (“*Per contra*, there are situations . . . where part of the bench’s personnel dominate the deciding and where it may be impossible to know in advance which of the personnel will move into the driver’s seat.”).

<sup>99</sup> See JAMES BOYD WHITE, *HERACLES’ BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* (1985) [hereinafter *WHITE, HERACLES’ BOW*]; JAMES BOYD WHITE, *JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM* (1990) [hereinafter *WHITE, JUSTICE*]; James Boyd White, *What Can a Lawyer Learn from Literature?*, 102 *HARV. L. REV.* 2014 (1989) (reviewing RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1988)).

<sup>100</sup> See *WHITE, JUSTICE*, *supra* note 99, at 101–02.

<sup>101</sup> *Id.* at 157.

<sup>102</sup> *WHITE, HERACLES’ BOW*, *supra* note 99, at 28–48.



with regard to legal rhetoric.<sup>103</sup> His view of law as constitutive of culture and of social life is, therefore, similar to that of the constitutive approach.<sup>104</sup>

White, then, sees legal decision making as an element in an ongoing collective process of community *bildung*—i.e., a process in which a community determines its normative profile by clarifying the normative options available to it and by choosing among these options.<sup>105</sup> This view of adjudication is clearly of a republican cast.<sup>106</sup> According to White, the normative deliberations that take place in the course of legal proceedings differ from the public discourse that takes place outside the courts. Law creates a distinct discourse of its own in the context of which words are assigned meaning in light of the law's purposes and in light of the meanings prevalent in law and not according to the shifting inclinations of daily discourse.<sup>107</sup> Furthermore, White also argues that the law the courts create and apply is

deeply democratic not in the sense that it reflects, as a market or referendum might, the momentary concatenation of individual wills, but in the sense that in it we can build, over time, a community that will enable us to acquire knowledge and to hold values of a sort that would otherwise be impossible.<sup>108</sup>

---

<sup>103</sup> See *id.* at 28, 215–42.

<sup>104</sup> See *supra* Part II.

<sup>105</sup> See WHITE, JUSTICE, *supra* note 99, at 80; White, *supra* note 99, at 2047.

<sup>106</sup> The essence of republican political theory is deliberation among equals over a common good they are to pursue as a collective. See generally PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT (1997) (distinguishing republicanism from liberal and communitarian philosophies); MAURIZIO VIROLI, REPUBLICANISM (Antony Shugaar trans., 1999) (exploring the core ideals of political republicanism); Knud Haakonssen, *Republicanism*, in 2 A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY 729, 729–33 (Robert E. Goodin et al. eds., 2d ed. 1993) (providing a brief history of republicanism); Morton J. Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57 (1987) (tracing the history of the debate between republicanism and liberal political theory); Cynthia V. Ward, *The Limits of "Liberal Republicanism": Why Group-Based Remedies and Republican Citizenship Don't Mix*, 91 COLUM. L. REV. 581 (1991) (addressing the history and shortcomings of liberal republicanism). Republicanism is to be contrasted with "interest group politics," the dominant view of politics in the United States in recent decades that sees politics as a sphere governed by the logic of the market—a want-regarding sphere in which rival self-interested groups that constitute civil society compete over the distribution of material and symbolic goods. See PETTIT, *supra*, at 202–05, 256. For White, in contrast, but very much in tune with the republican worldview, lawmaking through adjudication is a deliberative activity conducted on the basis of procedural equality, in which a state organ—a court—is assigned the task of defining the common good of a society. See WHITE, JUSTICE, *supra* note 99, at 107–12. White's jurisprudence is an important reminder that beyond the communitarian-liberal debate over the division of labor between the state (communitarians) and civil society (liberals) in determining a country's "common way of life," state courts play an important role in doing exactly that.

<sup>107</sup> See White, *supra* note 99, at 2046–47; see also WHITE, JUSTICE, *supra* note 99, at 155–57.

<sup>108</sup> WHITE, JUSTICE, *supra* note 99, at 157.

White therefore sees the law that courts create and apply as a distinct cultural system—as a distinct system for assigning meaning to events that take place in the daily lives of individuals. For White, lawyers are people who operate using the contents of the legal culture and who are capable of developing, in the context of that culture, arguments that suggest normative solutions to the problems brought to the resolution of the courts. Therefore, law is the collection of resources a culture makes available to lawyers for the sake of thinking, arguing, and persuading. The activity of lawyers is therefore first and foremost argumentative, according to White, and a central trait of the legal culture is that it is argumentative—continuously developing and reshaping itself by presenting arguments in the context of the options available as part of the legal culture, which lawyers are constantly making and remaking.<sup>109</sup>

### C. Pierre Bourdieu: Law as a Culture and Field

Pierre Bourdieu is widely regarded as one of the greatest sociologists of culture in recent decades. Bourdieu's sociology of culture is premised on three central concepts: habitus, capital, and field.<sup>110</sup>

#### 1. *Habitus*

The habitus is a collection of categories through which individuals perceive their situation in the context of daily life. It is composed of a series of possible goals and a series of possible scenarios for action. The habitus has both an objective and subjective dimension at the same time: its source lies in the culture and practices with which individuals grow up and live, but it is internalized in the minds of individuals on a durable, stable, and ongoing basis throughout their lives. It follows that individuals who undergo similar processes of socialization will share the same habitus and therefore function in a similar fashion in daily situations. On the other hand, because many

---

<sup>109</sup> See *id.*; White, *supra* note 99, at 2045.

<sup>110</sup> See generally BOURDIEU: CRITICAL PERSPECTIVES (Craig Calhoun et al. eds., 1993); BOURDIEU: A CRITICAL READER (Richard Shusterman ed., 1999) (collecting essays on Bourdieu's social theories); PIERRE BOURDIEU, THE FIELD OF CULTURAL PRODUCTION: ESSAYS ON ART AND LITERATURE (Randal Johnson ed., 1993) [hereinafter BOURDIEU, FIELD OF CULTURAL PRODUCTION] (developing the theory of the cultural field); BOURDIEU, *supra* note 42 (developing the habitus thesis); BRIDGET FOWLER, PIERRE BOURDIEU AND CULTURAL THEORY: CRITICAL INVESTIGATIONS (1997) (describing Bourdieu's cultural-capital theory); DEREK ROBBINS, BOURDIEU AND CULTURE (2000) (analyzing Bourdieu's work from a sociological and cultural-studies perspective); JEN WEBB ET AL., UNDERSTANDING BOURDIEU (2002) (providing a contemporary reading of Bourdieu's sociocultural philosophy); Swidler, *Cultural Expression*, *supra* note 42 (discussing Bourdieu's habitus concept); Loïc Wacquant, *Habitus*, in INTERNATIONAL ENCYCLOPEDIA OF ECONOMIC SOCIOLOGY 317 (Jens Beckert & Milan Zafirovski eds., 2006).

conflicting elements compose the habitus, it is possible for people to act in more than one way in many social situations.<sup>111</sup>

When people act in the framework of a habitus, they do not consciously choose their goals after calculating, weighing, and deliberating over the options. Nor do they choose courses of action to attain their goals by consciously following a set of rules. Rather, to act in the framework of a habitus means to act at a low level of consciousness and reflexivity. It means choosing courses of action according to “a feel for the game” in the context of the circumstances. Also, when acting in the context of a habitus, people improvise on the basis of courses of action with which they are already familiar: they transfer familiar courses of action from one context to another so as to cope with new situations of similar structure, adapting them to the particular conditions of the new context.<sup>112</sup>

## 2. *Capital*

Much like economics, Bourdieu's sociology of culture is premised on the view that people constantly take part in struggles over the appropriation of various limited resources. In these struggles, people draw on various types of capital—i.e., resources that can serve as bases of power for the attainment of their goals. Bourdieu lists four major types of capital: economic capital (liquid valuable assets); cultural capital (know-how and skills); social capital (prestige, respect, reputation, celebrity, connections, and membership in groups); and symbolic capital (social recognition of the possession of any of the former types of capital by a person).<sup>113</sup> According to Bourdieu, these types of capital are mutually convertible. For example, economic capital may allow the acquisition of cultural capital and social capital, and cultural capital and social capital may be conducive to the acquisition of economic capital.

## 3. *Field*

A field is a structured context of competitive social action for the acquisition of social capital. People acting in a field share a common habitus that determines which actions will be regarded as worthy and leading to success in the field. A distinct and stable power structure characterizes every field. Those who are active in a field are involved

---

<sup>111</sup> See BOURDIEU, *supra* note 42, at 72–73, 81–82, 85–87.

<sup>112</sup> See *id.* at 78–79, 86–87.

<sup>113</sup> See PIERRE BOURDIEU, IN OTHER WORDS: ESSAYS TOWARDS A REFLEXIVE SOCIOLOGY 87–93 (Matthew Adamson trans., 1990); BOURDIEU, *supra* note 42, at 171–83; Pierre Bourdieu, *The Forms of Capital*, in HANDBOOK OF THEORY AND RESEARCH FOR THE SOCIOLOGY OF EDUCATION 241, 242–43 (John G. Richardson ed., 1986); Pierre Bourdieu, *What Makes a Social Class? On the Theoretical and Practical Existence of Groups*, 32 BERKELEY J. SOC. 1, 9–14 (1987).

in two kinds of struggles: internal struggles over the accumulation and allocation of the capital that is available for distribution in the field and external struggles that are meant to assure the continued existence of the field and to neutralize any external attempts to take it over.<sup>114</sup>

#### 4. *The Legal Field*

Bourdieu argues that lawyers, the actors who function in the legal field, share a common habitus, so that what distinguishes them from nonlawyers is their abidance by the legal habitus.<sup>115</sup> This argument is tied to another of Bourdieu's arguments, that lawyers make their decisions not by following rules but by following the dictates of the legal habitus. In line with the descriptive argument of legal realism, Bourdieu argues that the legal contents that are pertinent to resolving a legal problem are always multiple, flexible, amenable to varied interpretation, and may support a series of outcomes, rather than one particular outcome.<sup>116</sup>

Bourdieu argues that the main internal struggles that take place in the legal field are between lawyers who represent clients in courts.<sup>117</sup> As to the struggles over the maintenance of the boundaries of the legal field, Bourdieu describes the relations between judges, on the one hand, and legal academics, on the other. This discussion draws on the particular experience of European countries, such as France, so it is doubtful whether it contains any insights pertinent to the struggles taking place in other countries, particularly common law countries.<sup>118</sup>

#### D. Stanley Fish: Law as Practice in the Context of an Interpretive Community

Stanley Fish argues that to act in the law is to act in the context of a practice. But it is impossible to regulate a practice by creating a code of rules, argues Fish, and it is impossible to teach people how to act in the context of a practice by teaching them the contents of rules. Rules are embedded in practices; it is impossible to separate rules and the practices in which they are embedded. Rules gain their viability and meaning through practices, argues Fish.<sup>119</sup>

---

<sup>114</sup> See BOURDIEU, FIELD OF CULTURAL PRODUCTION, *supra* note 110, at 6, 30–73.

<sup>115</sup> See Bourdieu, *supra* note 55, at 807–08, 842.

<sup>116</sup> See *id.* at 825–26, 833.

<sup>117</sup> See *id.* at 808–09.

<sup>118</sup> See *id.* at 824–26 & n.36, 842–43.

<sup>119</sup> See generally STANLEY FISH, IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES *passim* (1980) [hereinafter FISH, IS THERE A TEXT]; STANLEY FISH, Dennis Martinez and the Uses of Theory, in DOING WHAT COMES NATURALLY 372, 372–98 (1989); STANLEY FISH, *Fish v. Fiss*, in DOING WHAT COMES NATURALLY, *supra*, at 120, 120–40

Fish maintains that a good example of the connection between rules and practices is a sports game such as basketball. It is impossible to teach a basketball player rules to guide his or her conduct in all the varying situations that may develop in the course of a game. It is impossible to anticipate every possible situation and to devise an appropriate mode of conduct for each of them in advance. All one can do is make the player participate in the game and hope that he or she will acquire "a feel for the game" and make the appropriate moves in the situations that develop. Fish argues that by the same token that players who take part in a game do not act by following rules, so also lawyers do not act in the law by following rules; what constitutes lawyers' conduct is their internalization of the essentials of the practices in which they participate.<sup>120</sup>

The similarity between Fish's perception of law and Bourdieu's is clear. Bourdieu argues that a distinct habitus activates legal actors and that this distinguishes lawyers from nonlawyers. A low-level consciousness characterizes lawyers' activity; it takes place in accordance with a feel for the game as opposed to rule following, calculation, weighing, and deliberation.<sup>121</sup> Likewise, Fish argues that lawyers' actions are not governed by rules but by the professional conventions that prevail in their field of activity that they usually internalize in the course of their professional socialization.<sup>122</sup> The similarity between this understanding of the nature of activity in the legal field and Llewellyn's understanding of law as craft is also obvious.

The major critique that may be raised against Fish's and Bourdieu's views of law is that they disregard the important role that reasoned processes of weighing, deliberation, and planning play in the law in the activities of both lawyers and judges. It is true that much activity in the law takes the form of the practices to which Fish and Bourdieu refer. But any understanding of law that disregards the reasoned element in the conduct of lawyers is deficient.

In literary theory, Fish is famous for coining the term "interpretive community."<sup>123</sup> This term was meant to facilitate breaking away from approaches that expect readers of literary texts to search for the author's "intention," approaches according to which the meaning of a literary text is autonomously embedded in it, and approaches that hold the reading and interpretive process to be utterly subjective for the reason that every reader brings his or her unique preconceptions

---

[hereinafter FISH, *Fish v. Fiss*]; STANLEY FISH, *Still Wrong After All These Years*, in *DOING WHAT COMES NATURALLY*, *supra*, at 356, 356–71; STANLEY FISH, *Working on the Chain Gang: Interpretation in Law and Literature*, in *DOING WHAT COMES NATURALLY*, *supra*, at 87, 87–102.

<sup>120</sup> See FISH, *Fish v. Fiss*, *supra* note 119, at 123–26, 128.

<sup>121</sup> See Bourdieu, *supra* note 55, at 833.

<sup>122</sup> See FISH, *Fish v. Fiss*, *supra* note 119, at 123–26.

<sup>123</sup> See FISH, *IS THERE A TEXT*, *supra* note 119.

to it.<sup>124</sup> Fish acknowledges that the process of assigning meaning depends on the reader's preconceptions,<sup>125</sup> but he claims that what a reader brings to it is highly objective in the sense that it is shared by whoever belongs to the same interpretive community as the reader and therefore allows for a limited scope of interpretation.<sup>126</sup> Put differently, the interpretive community operates in the context of a culture that constitutes the individuals acting in it and determines the repertoire of interpretations available to these individuals. Fish applies the concept of interpretive community to lawyers. His solution to the problem of law's subjectivity is therefore close to that of Llewellyn's, which sees judicial decision making as an activity that takes place in the context of a professional community that shares understandings as to the moves that are possible in the law.

#### CONCLUSION

In this Essay, I have discussed three approaches to the connection between law and culture. The first approach is that of the historical school, which arose in German jurisprudence in the first half of the nineteenth century. It views law as a product of the national culture and as embedded in the daily practices of a people. The second approach, the constitutive approach, developed in American jurisprudence in the 1980s. It views law as participating in the constitution of culture and thereby in the constitution of people's minds and social relations. The third approach is found in twentieth-century Anglo-American jurisprudence. It views the law that the courts create and apply as a distinct cultural system in its own right. Beyond these three approaches, nine additional approaches to the connection between law and culture have been noted. This discussion and mapping invite further reflection on the possible contribution of the concept of culture to a richer understanding of the complex phenomenon of law.

---

<sup>124</sup> See *id.* at 10–11, 13–14, 16.

<sup>125</sup> Hans-Georg Gadamer made this point in the strongest possible terms. See HANS-GEORG GADAMER, *TRUTH AND METHOD* 199, 397–98, 578 (Joel Weinsheimer & Donald G. Marshall trans., 3d rev. ed. 2004).

<sup>126</sup> See FISH, *IS THERE A TEXT*, *supra* note 119, at 11.

