

interpretive exercise, in constant interplay with "culture" — understood as yet another interpretive exercise. Law and Culture scholarship focuses on representations of law, power, and politics in legal arenas, such as trials, and in "non-legal" arenas, such as television shows, pop concerts, or commercial advertisements, and seeks to understand the ways in which these various representations bolster or undermine each other, in the constant creation and re-creation of legalism. A seminal article from the "law and culture" genre is excerpted below.

Naomi Mezey, *Law as Culture*

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

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. . . What I am after is not to make sense of law and culture, but law as culture. . . . This conceptualization is related more generally to what many in sociolegal studies call a constitutive theory of law, in which law is recognized as both constituting and being constituted by social relations and cultural practices. In other words, law's power is discursive and productive as well as coercive. Law participates in the production of meanings within the shared semiotic system of a culture, but it is also a product of that culture and the practices that reproduce it. A constitutive theory of law rejects law's claim to autonomy and its tendency toward self-referentiality. . . . Whether called constitutive theory or legal consciousness, this understanding of the mutual constructedness of local cultural practices and larger legal institutions provides a way of thinking about law as culture and culture as law. At their most radical, these theories question the common conviction that law "is still recognizably, and usefully, distinguishable from that which is not law."

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

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

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

Property and contract rights together have powerful state-sanctioned distributional effects. Property rights affect the relative bargaining power of the parties and

hence the contract terms that can be bargained for; the terms of the contract in turn affect the ability of the parties to increase their power and possessions. "The distribution of market power is thus only partly a function of private decisions of market actors; to a substantial extent, it is determined by the legal definition and allocation of property rights." Thus the realists showed that conditions and relationships which were popularly thought to be non-legal, like class or employment, were largely determined by law.

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

Unless, then, the non-owner can produce his own food, the law compels him to starve if he has no wages, and compels him to go without wages unless he obeys the behests of some employer. It is the law that coerces him into wage-work under penalty of starvation — unless he can produce food. . . . [B]ut in every settled country there is a law which forbids him to cultivate any particular piece of ground unless he happens to be an owner. Where we still tend to think of law as guiding employment relationships only at the margins, putting a floor on wages, a ceiling on hours, or governing the rules of a strike, the realists saw law as creating both employers and employees, and structuring that relationship in its most mundane and intimate aspects.

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

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

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

This is only the beginning of the story. The relative bargaining power of men and women when they confront one another from gendered positions is affected by hundreds of discrete legal rules. For example, the following legal choices structure

women's bargaining power within marriage: the legalization of contraception and abortion, limited protection against domestic abuse, no-fault divorce, a presumption of custody in the mother, some enforcement of child support rules, and alimony without a finding of fault in the husband.

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

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Second, law as culture might mean emphasizing the pervasive power of culture, a power that might be conceived as either excluding the possibility of a legal realm that could be articulated without recourse to culture, or establishing the possibility of cultural regulation that functioned independently of law. Either way, law is a colony in culture's empire, and sometimes a rather powerless one.

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

Moreover, changes in the formal speed limit often have little or no lasting impact on the speed at which motorists drive. Montana, which has seen the most fluctuation in its legal speed limit, provides the most vivid example. For almost twenty years prior to the federally-imposed, fifty-five mile-per-hour speed limit in 1975, Montana had no set speed limit and operated under what it called its "Basic Rule," which simply required a daytime speed that was reasonable and prudent under the prevailing conditions. In 1995, after almost twenty years under the federal speed limit, Montana returned to using its Basic Rule. Robert King and Cass Sunstein have concluded, in reviewing the history of the Montana speed limit, that the changes in the law had little impact on the behavior of drivers. Montana motorists effectively ignored the federal fifty-five mile-per-hour speed limit when it was imposed and did not drive significantly faster once it was rescinded. Indeed, current speed limits suggest that, if anything, the impact appears to have moved in the opposite direction, with states setting the formal legal speed limit to correspond roughly with the general practice of motorists in that state.

Culture can also be said to dictate a "legal" speed limit that differs from either the formal speed limit or the one determined by driving conventions. The color of one's car, or more important still, the color of one's skin, will change the legally enforced speed limit and traffic laws generally. In this case, the shared yet contested meaning of race, combined with a subculture of policing, means that African-American drivers are far more likely to be stopped by police than white drivers, even when they are a smaller percentage of the total drivers in a particular area. This practice is so common that it is now popularly known as "DWB," Driving While Black. David Cole, in his widely lauded book on race and class in the criminal

justice system, has collected evidence suggesting that there is a consistent and gross disparity between the rate at which blacks and whites are subject to pretextual stops. For example, a review conducted in the early 1990s of more than one thousand traffic stops on one stretch of interstate highway in Florida "found that while about 5 percent of drivers on that highway were dark-skinned, nearly 70 percent of those stopped were black or Hispanic." On Interstate 95 in Maryland, between 1995 and 1997, 29% of the drivers stopped and 70% of those searched were black, although African-American drivers made up only 17.5% of the traffic on that road. The statistical disparity is striking and consistent with studies done in other states.

A cultural practice of targeting minority drivers persists in spite of the posted speed limit or other formal traffic laws and, more seriously, in spite of the Equal Protection Clause's guarantee that the Fourth Amendment's promise of freedom from unreasonable searches and seizures applies equally regardless of race. In an interesting and ironic twist, the law has made it nearly impossible to use a constitutional challenge to halt this cultural practice — another, more sinister version of law acquiescing to culture. In 1996, in *Whren v. United States*,¹³ the Supreme Court held that as long as there is an observed traffic violation, no matter how minor, a stop is reasonable under the Fourth Amendment, even if the traffic violation is pretextual and not ultimately enforced. Because driving is so minutely regulated and technical traffic violations so common, *Whren* essentially allows officers to make stops for any motive. Moreover, the Court explicitly rejected the argument "that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved." As Cole points out, *Whren* "allows officers who have no more basis for suspicion than the color of a driver's skin to make a constitutional stop." Harris takes the point further, contending that *Whren* not only approves such stops but implicitly approves the actual practice of using such stops disproportionately against African Americans and Hispanics. Hence the law here aids in the triumph of culture by providing some protection for a cultural practice that is otherwise potentially illegal.

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

To understand law as culture synthetically and dynamically — to acknowledge that institutionally legal actors participate in creating culturally specific meanings

¹³ *Whren v. United States*, 517 U.S. 806 (1996).

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

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Ideally, there are three distinct interpretive aspects of what I am calling a cultural interpretation of law. The first is an interpretation of law at a site of production (the courtroom, the committee room, etc.), which would make use of both traditional and nontraditional modes of legal interpretation. The second is an interpretation of the cultural practices that might be said to inspire the law and those that the law confronts when applied. Ethnography or thick description is particularly well-suited to this investigation. The third, and most crucial, is an interpretation of the encounter between law and culture — an interpretation of the interventions of culture in law and law in culture, of the dissolution of production and reception into circulation of the interdependencies, contradictions, and conspiracies in meaning.

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

Congress has been an especially potent producer of meaning in the recent debates over gun control and youth violence. Legislators have seemed to assume a direct causal link both between culture and youth violence and between legislative proposals and social behavior. The link between culture and the shootings at Columbine was repeatedly expressed in congressional debates over possible legislative responses. The link between legislative regulation and behavior was assumed in the mammoth juvenile justice bill that grew out of the Columbine shootings. That bill, still unpassed, is heavy on cultural initiatives. It proposes

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

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

The legal discourse relevant to unpacking the significance of the Columbine shootings is bound up with the meanings of a number of cultural conventions and practices that would also be the object of a cultural interpretation of law. An ethnographic inquiry might focus on the relevant details of Goth subculture; the rituals of Colorado suburban life; militias; and the hierarchies of social cliques at Columbine High School. Alternatively, one might look at the extensive recent literature on youth culture more generally to help make sense of the event. While I advocate the use of ethnography and semiotics to examine the social discourses that might give cultural meaning to these shootings, one could also use the methodologies of literature, history, psychology, or sociology to get a thicker, if different, description.

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

It might be the case that the story law tells about youth culture does not in fact bear any causal relationship to the story law tells about youth violence. As Andrew Sullivan observes, "The era that has seen the popular culture ratchet up its drug-addled, bigoted, violent messages to new levels of depravity has also seen one of the sharpest declines in teen violence, sex, and drug use ever." On the other hand,

the causation might exist, but run in the opposite direction, with violent forms of popular culture functioning as a benign surrogate for the aggressive fantasies of teenagers.

Another way to think about the interaction of legal and cultural meaning in the context of youth violence is to consider the ways in which the cultural power of gun advocates has influenced our notion of what is legally possible. Robin West has pointed out that when gun advocates are taken seriously, gun ownership is invested with constitutional authority, and hence constitutional meaning. . . . The gun owner becomes an ideal, and an ideal which is constitutional. Her defiance defines us. Even if their legal claim ultimately fails, in other words, the NRA's depiction of our nature, and of what it means to be an American, remains, with respect to guns and gun ownership, the only constitutional story being told. One implication of this argument is that the greatest obstacle to gun control legislation may not be politics or the Constitution, but the cultural power of guns.

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

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

FURTHER READINGS

For further readings on Law and Society, see PETER FITZPATRICK, *MODERNISM AND THE GROUNDS OF LAW* (Cambridge 2001); HARRY P. STUMPF, *AMERICAN JUDICIAL POLITICS* (2d ed. Prentice Hall: 1998); LAW & SOCIETY READER (Richard Abel, ed., New York: NYU Press. 1995); Lauren B. Edleman, *Rivers of Law and Contested Terrain: A Law and Society Approach to Economic Rationality*, 38 L. SOCIETY REV. 181 (2004); Lawrence M. Friedman, *The Law and Society Movement*, 38 STANFORD LAW REV. 763-80 (1986); David Trubek & John P. Esser, "Critical Empiricism" in *American Legal Studies: Paradox, Program, or Pandora's Box?*, 14 LAW & SOC. INQ. 3 (1989); Peter Fitzpatrick, *Law and Societies*, 22 OSGOODE HALL L.J. 115 (1984); Stuart Macaulay, *Law and the Behavioural Sciences: Is There Any 'There' There?*, 6 LAW & POLICY 156-187 (1984); A. SARAT, M. CONSTABLE, D. ENGEL, VALERIE HANS & S. LAWRENCE, *CROSSING BOUNDARIES: THEORETICAL AND*