Redirecting Legal Scholarship in Law Schools

Austin D. Sarat
Book Review

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I. INTRODUCTION

If, as the saying goes, all politics is local, then perhaps all (or if not all then much) scholarship is disciplinary, written to imagined audiences cabined by their differing departmental affiliations. Political scientists write mostly to and for other political scientists, anthropologists to and for other anthropologists, psychologists to and for other psychologists, law professors to and for other law professors. Seen from the inside of any one of these disciplines, a particular book may appear powerful, profound, even paradigm shifting. Seen from the outside, from the terrain of another discipline, that same book may seem to be a bit less original, less striking.

Paul Kahn's *The Cultural Study of Law: Reconstructing Legal*

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Scholarship is, for me, just such a book. From the perspective of legal education in professional schools, this will be a controversial and truly important book, laying out a program for a new academic discipline freed from the constraining vision and needs of legal practice. Calling for the "reconstruction" of legal scholarship, pointing the way for "cultural" analysis of what he sometimes labels the "rule of law" and at other times simply "law's rule," Kahn quite rightly asks: "Would a legal scholar who purports to suspend belief in law's rule—even as a program of reform—be welcome in the nation's law schools?" Advocating the development of a discipline in which law could take its rightful place alongside philosophy, economics, or politics as a pillar of scholarly inquiry, he observes that "[l]egal scholars are not studying law, they are doing it."

The development of "a discipline of study outside of the practice of law" depends, Kahn contends, on a reorientation of the scholarly ambitions of law professors. Instead of focusing their attention on the project of improving the law, they should make room for a more purely academic effort to understand the place of law in culture, its power over the imagination of citizens, and its relative importance—as against politics on the one hand and love on the other—in colonizing the human imagination. In this new conception of legal scholarship, "[a]ll questions of reform—the traditional end of legal study—are bracketed." Comparing the situation of legal scholarship at the end of the twentieth century with the situation of religious studies at the end of the nineteenth, he notes:

[Until the turn of the twentieth century, the study of Christianity was not an intellectual discipline. It was, instead, a part of religious practice. Its aim was the progressive realization of a Christian order in the world. . . . Only when the theological project became capable of suspending belief in the object of its study could a real discipline of religious study emerge. . . . Similarly, the scholar of law's rule should not be asked whether law is the expression of the will of the popular sovereign and thus a form of self-government. These are propositions internal to the systems of belief. A scholarly discipline of the cultural form approaches these propositions not from the perspective of their validity, but from the perspective of the meaning they have

2. Id. at 2.
3. Id. at 3.
4. Id. at 27.
5. Id. at 3.
6. Id. at 2.
for the individual within the community of belief.7

"Suspending belief in the object of its study" is a wonderfully evocative phrase to describe the attitude that Kahn rightly suggests must characterize a genuinely academic discipline of law.8 By suspending belief, legal scholars can focus their attention "on the intellectual project of understanding a culture of law."9 The central issue for such a project is, in Kahn's view, "not whether law makes us better off, but rather what it is that the law makes us."10 "A new discipline of law," he argues, "needs to conceive its object of study and its own relationship to that object in a way that does not, at the same moment, commit the scholar to those practices constitutive of the legal order."11 By making this argument, Kahn, a well-respected legal academic, seems to distance himself courageously from the professional project of the legal academy,12 though, as I argue below, the manner in which he makes his argument reaffirms the privileges of the law school as the appropriate center of legal scholarship.

As Kahn lays out what he takes to be the central focus of a kind of legal scholarship freed from the professional project, he compares the work of such scholarship to the work of cultural anthropology.13 He asserts that "the question that defines a cultural discipline of law is: What are the conceptual conditions that make possible that practice that we understand as the rule of law?"14 As he elaborates this question he suggests that legal scholarship ought to identify the forms of understanding that "make possible the range of behaviors that we characterize as living under the rule of law."15

This effort requires inquiries that he labels "genealogical" and

7. Id. at 2-3.
8. Id. at 2.
9. Id. at 5.
10. Id. at 6.
11. Id. at 27.
13. The cultural anthropologist, Kahn says, "suspends her ordinary beliefs and normative commitments; she does not judge the object of her inquiry ... but pursues each proposition offered by her informants with yet another question." KAHN, supra note 1, at 34. For other views of the role of the anthropologist, see JAMES CLIFFORD, THE PREDEMACMENT OF CULTURE (1988); WRITING CULTURE: THE POETICS AND POLITICS OF ETHNOGRAPHY (James Clifford & George Marcus eds., 1986) (advocating a more self-reflective and political approach).
14. KAHN, supra note 1, at 36.
15. Id. at 37. Though this description posits a world of understandings formed and sustained independently of law, Kahn's book, as I suggest below, calls attention to the role that law plays in generating such understandings.
"architectural." 16 Genealogical work is designed to "show how the nature of belief in the rule of law emerges from longer traditions within Western culture . . . ." 17 Scholarship that is "architectural" in its focus describes "the shape of experience within the contemporary social practice of law's rule." 18 The "ambition" of the new discipline that Kahn seeks to advance is to combine genealogical and architectural analyses in order to make explicit "those structures of thought by which we organize space when we live our lives under the rule of law." 19

In issuing this call Kahn joins an ongoing struggle over the place of law schools in the extended university. 20 His is a fresh, if not entirely new, voice bringing Geertz and Foucault to the conversation about what counts as good scholarship in law schools. The Cultural Study of Law may very well turn out to be one of those galvanizing intellectual moments, giving voice to sentiments already present but not previously given such a striking and powerful articulation, creating a rallying point for an entire generation of young law professors. Indeed it would not be surprising were it to draw forth a Paul Carrington-like rebuke 21 — "Get thee from the cathedral"— from defenders of the mainstream vision of professional legal education.

Yet from my particular vantage point, situated outside a law school, there is something odd and unsettling about Kahn's book. 22 He writes as if much of what he desires is not already being done, as

16. Id. at 41.
17. Id.
18. Id. at 43.
19. Id. at 65.
20. For a discussion of this struggle, see ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850s TO THE 1980s (1983).
21. Carrington argues that "when . . . the University accepted responsibility for training professionals, it also accepted a duty to constrain teaching that knowingly dispirits students." Paul Carrington, Of Law and the River, 34 J. LEGAL ED. 222, 227 (1984).
22. Nonetheless, as someone who has bemoaned the pull of the policy audience in legal scholarship, see Austin Sarat & Susan Silbey, The Pull of the Policy Audience, 10 L. & POLY 97 (1988), argued in the pages of this Journal that interdisciplinary legal scholarship "should aspire to do more than to rescue, or recuperate, any particular conception of legal education or lawyering," and that "[t]he value of our work should not be judged primarily by its contribution to the reform of legal education or law practice," Austin Sarat, Traditions and Trajectories in Law and Humanities Scholarship, 10 YALE J.L. & HUMAN. 401 (1998), edited books such as LAW IN THE DOMAINS OF CULTURE (Austin Sarat & Thomas R. Kearns eds., 1998) and CULTURAL PLURALISM, IDENTITY POLITICS, AND THE LAW (Austin Sarat & Thomas R. Kearns eds., 1999), co-founded a Department of Law, Jurisprudence & Social Thought at Amherst College (established in 1993; it is one of more than 50 programs offering majors or minors in interdisciplinary legal studies in colleges and universities around the country), presided over a recent meeting of the Law & Society Association under the theme "The Legal Imagination: Taking on Cultural Studies" (Chicago, Il., May 26-31, 1999), and recently helped to establish a National Working Group on Law, Culture & the Humanities, I am hardly in a position to take issue with the general thrust of Kahn's project.
if the kind of mapping of the cultural life of law for which he calls were not already a substantial component of interdisciplinary legal scholarship, as if the effort to develop a new discipline of legal study in the liberal arts, analogous to the study of religion, were not already underway. He does not discuss, acknowledge, or reference the substantial literature in interdisciplinary legal scholarship that is on all fours with his argument.

Never one to fetishize the footnote, I am nonetheless struck by Kahn’s failure to take that literature into account. We all construct arguments by differentiating ourselves, but this appears to be argument by elision. Does this failure to pay attention to, or take account of, a substantial body of scholarship reflect the privileged position of the law professor, who remains insulated from the quotidian world of interdisciplinary legal scholarship outside law schools? Or is something else at work? Kahn might respond by claiming that he is writing primarily for an audience of law professors. Others might suggest that his project is in substance different from the work of interdisciplinary legal scholarship outside law schools. They might identify the difference by noting that Kahn’s book is more philosophical in tone than is typical of others writing about law and culture, that his invitation to imagine the rule of law by considering law’s time and space, the nature of legal events, the legal subject, and the role of theory within law employs a vocabulary often quite unlike that of other proponents of a cultural study of law, or that the heart of the difference is his explicit consideration of the cultural role of law in opposition to both political action and love. Yet, whatever its cause, Kahn writes almost as if he were attempting to invent a field rather than joining an already existing one. I wholeheartedly welcome Kahn to the field, and in so doing, hope to remind him that there already is a field to which he can be welcomed.

In the remainder of this Review, I situate Kahn’s argument in this field in two different ways, first by discussing the theory/picture of law that animates The Cultural Study of Law and then by examining what Kahn means when he talks about culture. In both of these areas I will suggest that Kahn’s argument would be strengthened by a

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23. The closest he comes to dealing with that literature is when he calls attention to “legal scholars”—by which he means law professors—“who draw on the techniques and insights of the humanities.” KAHN, supra note 1, at 141 n.2. But even here his horizons are limited to law professors.

24. Kahn suggested this response to me in an email. See Email from Paul Kahn, Robert W. Winner Professor of Law, Yale Law School, to Austin Sarat, William Nelson Cromwell Professor of Jurisprudence & Political Science, Amherst College (May 5, 1999) (on file with the author).
more complete engagement with the field of interdisciplinary legal scholarship as it currently exists outside, as well as inside, law schools.

II. A CONSTITUTIVE THEORY OF LAW

We experience the rule of law not just when the policeman stops us on the street or when we consult a lawyer on how to create a corporation. The rule of law shapes our experience of meaning everywhere and at all times. It is not alone in shaping meaning, but it is rarely absent.

One of the most interesting and important features of Kahn’s book is its deep investment in a constitutive theory of law. This understanding of law is exemplified in the quotation with which this section starts. Two things stand out in this approach. First, law is assumed to have a semi-autonomous existence, and, second, law operates as much by shaping the way people understand the world as by coercing or rewarding them, that is, law’s power is primarily ideological. In bold outline, the constitutive view suggests that law shapes society from the inside out by providing the principal categories in terms of which social life is made to seem largely natural, normal, cohesive, and coherent. As Geertz suggests:

[Law], rather than a mere technical add-on to a morally (or immorally) finished society, is, along of course with a whole range of other cultural realities . . . an active part of it. . . . Law . . . is, in a word, constructive; in another constitutive; in a third, formational . . . . Law, with its power to place particular things that happen . . . in a general frame in such a way that rules for the principled management of them seem to arise naturally from the essentials of their character, is rather more than a reflection of received wisdom or a technology of dispute-settlement.

The constitutive perspective contends that social life is run through with law, so much so that the relevant category for the scholar is not the external one of causality (as the reference to effects would suggest) but the internal one of meaning. “Our gaze focuses on

25. KAHN, supra note 1, at 124.
28. See Robert Gordon, Critical Legal Histories, 36 STAN. L. REV. 57, 109 (1984); see also Christine Harrington & Barbara Yngvesson, Interpretive Sociological Research, 15 L. & SOC. INQUIRY 141 (1990). It is important to note that there are considerable differences among those I have lumped together as taking the constitutive view. For example, Barbara
meaning, on the ways . . . [people] make sense of what they do—practically, morally, expressively, . . . juridically—by setting it within larger frames of signification, and how they keep those larger frames in place or try to, by organizing what they do in terms of them."29 Similarly, meaning is crucial in Kahn's account of an emergent cultural study of law. "We need," he argues, "to bring to . . . [the study of law] those techniques that take as their object the experience of meaning."30

For more than a decade legal scholars, some inside and many outside law schools, have been developing a constitutive theory of law by examining the operation of law and of various legal institutions and actors in the generation and reproduction of structures of meaning, or what Geertz calls "webs of signification."31 Following Geertz, these scholars have deployed "interpretive" methods to study a range of legal phenomena.32 For them, as for Kahn, law is "part of a distinctive manner of imagining the real";33 it is "a mode of giving particular sense to particular things in particular

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Yngvesson's study, Making Law at the Doorway: The Clerk, the Court and the Construction of Community in a New England Town, 22 L. & Soc'y Rev. 409 (1988), draws attention to the power of legal officials in shaping the social meanings of "good neighbor" or "dutiful parent." This effect of law on social meaning, however, seems quite different from what, say, Gabel and Feinman have in mind when they contend that contract law encodes an invasive ideology, an idealized (and generally unarticulated and unexamined) way of thinking about conflicts and agreements that tends to legitimate (as natural and necessary) various oppressive socioeconomic realities. See Peter Gabel & Jay M. Feinman, Contract Law as Ideology, in The Politics of Law: A Progressive Critique 373 (David Kairys ed., 1982). In the first case, the law's effect on social meaning is relatively transparent and explicit; in the second, social meaning is engendered systemically and is, as a result, less easily detected.

29. GEERTZ, supra note 27, at 232.
30. KAHN, supra note 1, at 2. Yet Kahn does well to acknowledge that law operates on the human body as well as human consciousness. As a result, he contends that even a cultural approach must take law's violence seriously. See id. at 95. See also Austin Sarat & Thomas R. Kearns, A Journey Through Forgetting: Toward a Jurisprudence of Violence, in The Fate of Law 209 (Austin Sarat & Thomas R. Kearns eds., 1991).
32. As Trubek argues, interpretivists understand the world in terms of . . . structures of meaning . . . [A]n interpretivist does not split action into a soft and arbitrary core of individual volition and a hard shell of external constraint. Rather, he sees action as the result of socially constructed systems of meaning which constitute the individual, providing the grounds for behavior and defining the channels of conduct.
Trubek, supra note 26, at 604.
33. GEERTZ, supra note 27, at 184.
As Kahn understands it, law is inseparable from the interests, goals, and understandings that shape or comprise social life. Law is part of the everyday world, contributing powerfully to the apparently stable, taken-for-granted quality of that world and to the generally shared sense that as things are, so must they be. Kahn's book suggests that law is not only more ubiquitous than instrumentalist or policy-focused scholarship would suggest, but that it is already an integral part of that which it regulates, and thus has effects that, because they are hard to detect, are often overlooked entirely. In this view, legal thought and legal relations influence self-understanding and the understanding of one's relations to others. We are not merely pushed and pulled by laws that exert power over us from the "outside." Rather, we come, in uncertain and contingent ways, to see ourselves as law sees us; we participate in the construction of law's "meanings" and its representations of us even as we internalize them, so much so that our own purposes and understandings can no longer be extricated from them. We are not merely the inert recipients of law's external pressures, but law's "demands" tend to seem natural and necessary, hardly like demands at all. As Trubek puts it:

[S]ocial order depends in a nontrivial way on a society's shared "world view." Those world views are basic notions about human and social relations that give meaning to the lives of society's members. Ideals about the law—what it is, what it does, why it exists—are part of the world view of any complex society. Law, like other aspects of belief systems, helps to define the role of an individual in society and the relations with others that make sense. At the same time that law is a system of belief, it is also a basis of organization, a part of the structure in which action is embedded.

Thinking about legal processes in terms of the meanings generated and conveyed by them requires the scholar who adopts Kahn's view to attend to the links between law and society at the level of networks of specific legal practices, on the one hand, and clusters of

34. Id. at 232. See also David Trubek & John Esser, Critical Empiricism in American Legal Studies: Paradox, Program, or Pandora's Box, 14 L. & SOC. INQUIRY 3 (1989).
35. See KAHN, supra note 1, at 36.
37. Trubek, supra note 26, at 604.
It requires recognition that meaning is found and invented in the variety of locations and practices that comprise the legal world and that those locations and practices do not exist outside the webs of signification that, in turn, make them meaningful. Yet when Kahn speaks about the way law shapes citizens’ understandings and gives meaning to their lives he speaks globally, treating law as if it were a unified and consistent whole. In so doing he ignores the fact that law’s meanings are advanced and resisted strategically, though neither the meanings advanced nor the goals purportedly served in advancing those meanings exist independently of one another. Law’s power does not exist in the abstract, nor does law operate as a unified whole. Instead, law’s power is found in the countless negotiations of shared understandings that take place every day in various domains of law, and in the evasions, resistances, and inventions that inevitably accompany such negotiations. To acknowledge that law has meaning-making power then is to acknowledge 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.


39. Law is not only constitutive in shaping our understandings of institutions like property, the family, and the state as well as the nature of individuals and the relationships between them, but law is also involved in the constitution of its own meaning, in creating and sustaining the meaning of its own operations. See SARAT & FELSTINER, supra note 31, at 85.

40. For an important discussion of this conception of legal rules as purposive instrumentalities, see Susan Silbey & Egon Bitner, The Availability of Law, 4 L. & Pol’y Q. 399, 400 (1982). As these authors write, “[n]either the purposes nor the uses of any specific law are fully inscribed upon it. Therefore, the meaning of any specific law, and of law as a social institution, can only be understood by examining the ways it is actually used.” Id. at 400.

41. See SARAT & FELSTINER, supra note 31, at 18. While Kahn notes, in one place, that “[t]he meanings of events, as well as the appropriate course of future actions, are contested not just in their particular features . . . but also in the large scale frames of reference through which we construct their meanings,” KAHN, supra note 1, at 66, analysis of such contestations is by no means central to his concerns.

42. In other kinds of scholarship, law and lawyers are treated as “tools” whose power consists in their ability to realize certain goals and advance the interests of certain people or groups. See, e.g., DOUGLAS ROSENTHAL, LAW AND CLIENT: WHO IS IN CHARGE? (1974). In this view, rules and legal processes are used or avoided in the everyday world to facilitate the accomplishment of various ends, goals, or purposes whose origins tend to be treated as substantially independent of law itself. In this sense, law and the lawyering process become, in James Boyd White’s words,

reducible to two features: policy choices and techniques of their implementation. Our questions are “What do we want?” and “How do we get it?” In this way the conception of law as a set of rules merges with the conception of law as a set of institutions and processes. The overriding metaphor is that of a machine.

One source of work to which Kahn should be sympathetic is found in Critical Legal Studies (CLS). However, Kahn quickly, I think too quickly, dismisses CLS as just another, albeit a more radical, project of law reform or as too interested in identifying "true belief and ... discard[ing] the false." Indeed some critical scholars do exactly what Kahn himself seems to advocate, examining legal doctrines not to identify a better rule but instead to decode the meanings about social life that they convey. Those scholars suggest that in different areas (1) law reifies social life, conveying the message that prevailing social relations are natural, normal, inevitable, and just, and (2) the meanings contained in legal doctrine are rigorously indeterminate and contradictory. They have analyzed the constitutive effect of law and its power to manufacture necessity as well as to assist in the creation of consciousness; they believe that social knowledge should explicate "the deep structures of law and demonstrate the relationship between these structures and action ... in society." Like Kahn, these scholars generally endorse the claim that, at a global level, law, like other pervasive social institutions such as religion, education, and the family, shapes how individuals conceive of themselves and their relations with others. The underlying proposition is that social institutions are actualized through a set of assumptions, categories, concepts, values, and vocabularies that we internalize so that we are not consciously aware of how they have

conception. See Kahn, supra note 1, at 2.
43. See Trubek, supra note 26, at 589.
44. Kahn, supra note 1, at 24.
46. For a summary, see Mark Kelman, Critical Legal Studies (1987). However pervasive the consciousness-setting capacity of social practices, at the level of conventional social arrangements, the constitutive nature of law is perhaps most clearly seen in the case of subordinated groups such as women, people of color, and the handicapped. See Gordon, supra note 28, at 103-04. A generation ago handicapped people, for instance, were immobilized by a world that made no concessions to their difficulties in transport or access to basic needs beyond their homes. Without any special legal protections such as those since created in the federal Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1995), they were routinely assumed to be under-skilled, unreliable, and virtually unemployable. Imagine, then, the effect that this pre-1990 legal regime, which had turned its back on such people, had on their self-definition and self-respect and how they were viewed and treated by their families as well as by public officials. Imagine, too, the changes that have been produced in these attitudes and behaviors by laws that have required society to spend hundreds of millions of dollars simply to assure that handicapped people can move about the world reasonably easily, laws that extend the same employment guarantees to the handicapped as to the traditionally protected classes. See Engel, supra note 36, at 138-46.
47. See Gordon, supra note 38, at 289.
48. Trubek, supra note 26, at 601.
affected our ideas and behavior, with the result that we tend to think and act as if no alternatives were available.49

Kahn also shares with critical legal scholars a tendency to reify law even as he calls attention to its constitutive power. "Law's rule," Kahn says, "carries forward a past that makes a meaningful claim upon us . . . . We must approach law's rule from the perspective of the subject who finds herself already within the practice . . . ."50 Kahn's argument, like the arguments often found in writing by critical legal scholars, is relentlessly abstract. Law acts, law rules. There are no people, no actors, no agency. As a result, Kahn fails to attend to the interactive, dynamic, and strategic quality of meaning-making in law and legal institutions.

Moreover, legal meanings are not simply invented and communicated in a unidirectional process. Because they are produced in concrete and particular social relations, meaning and the materiality of law are inseparable. Litigants, clients, and others bring their own understandings to bear; they deploy and use meanings strategically to advance interests and goals.51 They press their understandings in and on law and, in so doing, invite adaptation and change in the practices of judges, lawyers, and other legal officials.52 Law thus exists as "moving hegemony."53 This concept, as Yngvesson explains, allows us to recognize the "coexistence of discipline and struggle, of subjection and subversion and directs attention toward a dynamic analysis of what it means to be caught up in power."54

Many accounts of the dispersed and interactive nature of law's meaning-making have emerged in scholarship in the social sciences and humanities,55 scholarship that Kahn ignores almost completely. That scholarship looks at courts as crucial cultural institutions as well as institutions to resolve disputes and allocate tangible resources. It characterizes litigation as a process of contesting meanings and adjudication as the choice and imposition of one structure of

49. The constitutive nature of social institutions is not limited to the pillars of social life such as law, the family, religion, and education. As Pierre Bourdieu has pointed out, there is "the gentle invisible form of violence which is never recognized as such, and is not so much undergone as chosen, the violence of credit, confidence, obligation, personal loyalty, hospitality, gifts, gratitude, piety." PIERRE BOURDIEU, OUTLINE OF A THEORY OF PRACTICE 192 (Richard Nice trans., Cambridge Univ. Press 1977) (1972).
50. KAHN, supra note 1, at 45.
51. See SARAT & FELSTINER, supra note 31, at 26-31; EWICK & SILBEY, supra note 31, at 38.
54. BARBARA YNGVESSON, VIRTUOUS CITIZENS, DISRUPTIVE SUBJECTS: ORDER AND COMPLAINT IN A NEW ENGLAND COURT 121 (1993).
55. See, e.g., GREENHOUSE ET AL., supra note 31.
Contests over meaning in courts or communities thus become occasions for observing the play of power. Meanings that seem natural, or taken-for-granted, are described as hegemonic, but because the construction of meaning through law is, in fact, typically contested, scholars show the many ways in which resistance occurs. Because he pays no heed to scholarship on courts and communities, nor to most of the other empirical research on the cultural lives of law, Kahn, I think, misses much of the conflictual and dynamic quality of power in the construction of meaning, as well as the fact that the meanings that are constructed are contradictory, but no less powerful for being so.

Here I will briefly describe two examples of work already being done that, had Kahn attended to it, might have altered his understanding of the way law's meanings help constitute social life. The first, by Sally Engel Merry, focuses on the management of interpersonal disputes in criminal, juvenile, and small-claims courts in eastern Massachusetts. It begins by echoing Geertz: “Law,” Merry argues, “consists of a complex repertoire of meanings and categories understood differently by people depending on their experience with and knowledge of the law.” She describes the litigation process as one in which litigants quarrel over interpretations of social relationships and events. Parties raise competing pictures of the way things are as each strives to establish his or her own portrayal of the situation as authoritative and binding. Third parties also struggle to control the meaning—and hence consequences—of events through their distinctive forms of authority. Law represents an important set of symbolic meanings for this contest.

Merry calls her project a study of “processes of cultural domination” exercised over people who bring their personal problems to court, where language is the key medium and where the focus is on what officials and litigants say to each other.

Like Merry, Yngvesson's description of show-cause or complaint

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56. See Sally Engel Merry, Concepts of Law and Justice Among Working Class Americans: Ideology as Culture, 9 LEGAL STUD. F. 59 (1985).


58. See EWICK & SILBEY, supra note 31, at 51.


60. Id. at 6.

61. Id. at 9.

62. This cultural domination is reflected in what Merry calls “legal consciousness,” that is, “the way people conceive of the ‘natural’ and normal way of doing things, their habitual patterns of talk and action, and their commonsense understandings of the world.” Id. at 5.
hearings in the district courts of two Massachusetts communities focuses on "the negotiation of meaning in neighbor and family conflicts."63 Analyzing exchanges between complainants and the clerks who handle their complaints, Yngvesson found that "the clerk plays a dominant role by controlling the language in which issues are framed. . . . He silences some interpretations and privileges others, constructing the official definition of what constitutes order and disorder in the lives of local citizens."64

According to Yngvesson:

[L]aw creates the social world by "naming" it; legal professionals are empowered by their capacity to reveal rights and define wrongs, to construct the meanings of everyday events (as just or unjust, as crime or normal trouble, as private nuisance or public grievance) and thus to shape cultural understandings of fairness, of justice, and of morality.65

Like Merry, she argues that the way law names the world and the way legal professionals construct meanings is hegemonic, but she insists that hegemony assumes plurality:

[I]t does not just passively exist as a form of dominance. It has continually to be renewed, recreated, defended, and modified. It is also continually resisted, limited, altered, challenged by pressures not at all its own. . . . The interpretation of key symbols . . . is contested, while the dominance of a particular structure of differences in society is left unquestioned.66

Plurality, resistance, and contestation establish the dynamic as well as the fragile quality of the power that Yngvesson nonetheless labels "dominant." Indeed, although Yngvesson does not provide any indication that when legal officials try to impose their values on their "social inferiors," these values are accepted,67 she nevertheless alleges that "the hearings thus become arenas where particular notions of order and rights are articulated and reinforced."68
Similarly, Merry suggests that contests over meanings provide important sites for the examination of power. For her power is exercised at the level of culture and consciousness. Courts are powerful because they convey hegemonic ideologies. She argues that courts work not just by the imposition of rules and punishments but also by the capacity to construct authoritative images of social relationships and actions, images that are symbolically powerful. Law provides a set of categories and frameworks through which the world is interpreted. Legal words and practices are cultural constructs which carry powerful meanings not just to those trained in law . . . but to the ordinary person as well.69

In Merry's view, law influences the way that ordinary people imagine life; where legal categories speak to interpersonal affairs, they are decisive. The social world is understood according to the legal order that circumscribes its potential and limitations. But in Merry's own study law is "polyvocal"; it speaks in three different discourses, which she labels "legal," "moral," and "therapeutic."70 These discourses "weave in and out of the discussions of particular problems"71 in the courts that she studied. This polyvocality suggests that the meanings that are constructed in legal institutions may be contradictory and elusive, that law's words may be an amalgam of discourses that do not sit easily together.

Unlike Kahn, Merry and Yngvesson draw our attention to meaning-making that is "locally" constitutive. Law and legal processes are said to play important roles in creating or reinforcing the way the local world in which they are situated is understood or interpreted. Legal activity is part of the process of creating, substantiating, spreading, or protecting specific views about social life that, by virtue of officials' behavior, come to be shared by the people subject to legal action.72 Locally constitutive meanings are

many of the abstractions from her data seem to be about the consequence of those meanings. For instance, she states that the courthouse is transformed into an arena "for constituting what the local community is." Id. at 420 (emphasis added). Also, she claims that the way that the issues were defined by the clerk "required a transformation in the world of each [disputant]." Id. at 426 (emphasis added). She explains that the clerk's "participation actively involved the courthouse in what Bourdieu has called 'the practical activity of worldmaking,'" id. at 426 (emphasis added) (citing Pierre Bourdieu, The Force of Law, 38 HASTINGS L.J. 805, 834 (1987), and she refers to the clerk's use of "the complaint procedure for maintaining a moral order." Id. at 443 (emphasis added).

69. MERRY, supra note 59, at 8-9.
70. Id. at 111-12.
71. Id. at 112.
72. See id. at 209; Yngvesson, supra note 52, at 1694. Merry's statement of the localized version of the constitutive power of law is powerful, elegant, and immediately intelligible. However, most of the cases that she analyzes, including those that she claims "illustrate the
case specific; they evolve in the context of a specific legal matter and, unreported and unpublished, they reach only the participants in that matter. Had Kahn analyzed Merry or Yngvesson's work, or others like it, his perspective on law's constitutive power might have been more grounded, concrete, and attentive to the contingencies that shape law's cultural life.

III. WHAT IS CULTURE?

[Each culture] has its own founding myths, its necessary beliefs, and its reasons that are internal to its own norms.73

The Cultural Study of Law is an important reminder that law and legal studies are relative latecomers to cultural analysis.74 As Robert Post explains:

We have long been accustomed to think of law as something apart. The grand ideals of justice, of impartiality and fairness, have seemed to remove law from the ordinary, disordered paths of life. For this reason efforts to unearth connections between law and culture have appeared vaguely tinged with exposé, as though the idol were revealed to have merely human feet. In recent years, with a firmer sense of the encompassing inevitability of culture, the scandal has diminished, and the enterprise of actually tracing the uneasy relationship of law to culture has begun in earnest.75

Thus in the last fifteen years, first with the development of CLS, then with the rise of the law and literature movement, and finally with the growing attention to legal consciousness and legal ideology in socio-legal studies, many legal scholars have come regularly to attend to the cultural lives of law and the ways law lives in the domains of culture.76 Where once the analysis of culture could neatly be assigned arguments of the book as a whole,” MERRY, supra note 59, at 150, suggest that law is weak, ineffective, and unpersuasive and operates most frequently by retreat rather than conversion. The key to the constitutive power of law is found in citizens' reactions to court redefinition of their problems. If the people who apply to the court for legal relief and see their problems in legal terms come to view their problems in the moral or therapeutic terms favored by the court, then law in these instances has played the transformative role claimed for it by Merry. If they do not, then it has not. The data, and Merry’s own characterizations of it, suggest that the transformation rarely occurs. “Plaintiffs resist [the court's] cultural domination by asserting their own understanding of the problem, usually by insisting on talking about it in legal discourse.” Id. at 147.

73. KAHN, supra note 1, at 1.
76. See Susan Silbey, Making a Place for a Cultural Analysis of Law, 17 L. & SOC. INQUIRY 39 (1992). See also Anthony Chase, Historical Reconstruction in Popular Legal and
to the respective disciplines of anthropology or literature, today the study of culture is pervasive; it refuses disciplinary cabining and forges new interdisciplinary connections.\footnote{Annette Weiner notes about the discipline of anthropology and its relation to the idea of culture that "[t]oday... 'culture' is increasingly a prized intellectual commodity, aggressively appropriated by other disciplines as an organizing principle." Annette Weiner, Culture and Our Discontents, 97 AM. ANTHROPOLOGIST 15, 15 (1995).}

Kahn's book is but one example of this fact. Yet the concept of culture on which Kahn would ground a new disciplinary understanding of law is troublingly vague and, at the same time, hotly contested, vaguer and more contested than Kahn himself allows. Moreover, law's relation to culture is as complex, varied, and disputed as the concept itself.

To talk about culture is, in the first instance, to venture into a field where there are almost as many definitions of the term as there are discussions of it,\footnote{Some believe that the concept of culture is analytically useless. Exemplifying such claims are the following: "Like 'ideology' (to which, as a concept, it is closely allied) 'culture' is a term that is repeatedly used without meaning much of anything at all, a vague gesture toward a dimly perceived ethos." Stephen Greenblatt, Culture, in CRITICAL TERMS FOR LITERARY STUDY 225 (Frank Lentricchia & Thomas McLaughlin eds., 1990). Or, as Mary Douglas has said about the concept of culture, "never was such a fluffy notion at large... since singing angels blew the planets across the medieval sky or ether filled in the gaps of Newton's universe." Mary Douglas, The Self-Completing Animal, TIMES LITERARY SUPPLEMENT, Aug. 8, 1975, at 886.}
and where inside as well as outside the academy arguments rage.\footnote{As Renato Rosaldo puts it, "[t]hese days questions of culture seem to touch a nerve." RENATO ROSALDO, CULTURE & TRUTH: THE REMAKING OF SOCIAL ANALYSIS at ix (1989).} In recent years these arguments have come to play a progressively more visible role in our national life. Identity politics has merged with cultural politics so that to have an identity one must have a culture.\footnote{See id.; see also Joan Scott, Multiculturalism and the Politics of Identity, in THE IDENTITY QUESTION 3 (John Rajchman ed., 1995) ("questions of culture... quickly become anguished questions of identity").} As a result, it seems as if almost every ethnic, religious, or social group seeks to have its "culture" recognized. Yet advocates of multiculturalism and cultural pluralism acknowledge a danger in politicizing the taken-for-granted assumptions of shared values and common identities.\footnote{"[D]oes it makes any sense," Etienne Balibar asks, "to speak of identity in the field of culture when... the suspicion can be raised that the very notion of 'culture' designates less a definite object than a place or a function that remains indeterminate?" Etienne Balibar, Culture and Identity (Working Notes) (J. Swenson trans.), in THE IDENTITY QUESTION, supra note 80, at 182, 182.} This is the danger that the possession of culture will mark social groups as "exotic" or that it will become the consolation prize of the marginal and the disadvantaged. As
Rosaldo puts it, "in 'our' own eyes, 'we' appear to be 'people without culture.' . . . [F]ull citizenship and cultural visibility appear to be inversely related. When one increases, the other decreases. Full citizens lack culture, and the most culturally endowed lack full citizenship."

Nonetheless, the backlash against the proliferation of cultures and identities, and what is called the "politics of recognition," has been vehement. Politicians proclaim "culture wars" in an effort to reassert both the meaning and centrality of certain allegedly transcendent human values. Debates about the significance of culture become arguments about "civilization" itself in which acknowledgment of cultural pluralism and the accompanying decanonization of the "sacred" texts of the Western tradition are treated as undermining national unity, national purpose, and the meaning of being "American."

These culture wars are also being fought within universities. There the history, meaning, and utility of culture as a category of analysis in the humanities and social sciences are all up for grabs. The Cultural Study of Law seems quite distanced from this ferment. Writing as if culture were itself untroubled, Kahn seeks to appropriate it and make it the basis of legal study. Here again, while I am sympathetic to his effort, I think that his argument should address the trouble that today attaches itself to any effort to take culture seriously.

Traditionally the study of culture was the study of "that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society." This definition, in addition to being hopelessly vague and inclusive, treats culture as a thing existing outside of ongoing local practices and social relations and unaffected by global forces.

82. RO Saldo, supra note 79, at 198.
84. See CULTURE WARS: OPPOSING VIEWPOINTS (Fred Whitehead ed., 1994).
85. See ROSEMARY COOMBE, CONTINGENT ARTICULATIONS: A CRITICAL CULTURAL STUDIES OF LAW, in LAW IN THE DOMAINS OF CULTURE, supra note 22, at 21, 41-42.
In addition, by treating culture as acquired capabilities and habits, it was made into a set of timeless resources to be internalized in the “civilizing” process through which persons were made social. Finally, culture was identified as containing a kind of inclusive integrity, parts combining into a “whole.”

While Kahn’s treatment of culture bears traces of each of these elements, today this conception of culture no longer has pride of place within the academy. Critiques of the traditional, unified, reified, civilizing idea of culture abound.90 It is now indeed almost imperative to write “against culture” (to quote Lila Abu-Lughod’s influential essay91) or, in the face of these critiques, to “forget culture.”92 In one example, James Clifford focused on a suit filed by the Mashpee Indians of Cape Cod in 1977, and examined the way culture stood up in a context where the very idea of cultural authenticity was on trial. Culture, he said,

was too closely tied to assumptions of organic form and development. In the eighteenth century culture meant simply “a tending toward natural growth.” By the end of the nineteenth century the word could be applied not only to gardens and well-developed individuals but to whole societies.... [T]he term culture retained its bias toward wholeness, continuity, and growth. Indian culture in Mashpee might be made of unexpected everyday elements, but it had in the last analysis to cohere, its elements fitting together like parts of a body. The culture concept accommodates internal diversity and an “organic” division of roles but not sharp contradictions, mutations, or emergences.... This cornerstone of the anthropological discipline proved to be vulnerable under cross-examination.93

Culture, Clifford concluded, is “a deeply compromised idea.... Twentieth-century identities no longer presuppose continuous cultures or traditions.”94 Or, as Luhrmann observed recently, the concept of culture is “more unsettled than it has been for forty years.”95

Yet in this unsettled moment in the life of the concept of culture

90. For a particularly useful summary of these critiques, see Brightman, supra note 87, at 509.
92. Brightman, supra note 87, at 509.
94. Id. at 10, 14.
efforts are underway to rehabilitate and reform it, efforts with which Kahn again does not engage. Among such efforts, contemporary cultural studies has played an especially important role. Cultural studies has had a bracing impact in giving new energy and life to the study of culture, freeing it from its homogenizing and reifying tendencies. It has done so by radically extending what counts in the analysis of culture beyond the realm of "high culture." It invites study of the quotidian world. Film, advertising, pop art, and contemporary music, these and other products of "popular culture" have been legitimized as objects of study. They are as important to our understanding of law's cultural lives as they are elsewhere, yet one would never know this from reading The Cultural Study of Law.

This is regrettable because, in addition to this liberating expansion in the objects of study, cultural studies has also linked the study of culture to questions of social stratification, power, and social conflict, issues in which Kahn proclaims his interest. "[C]ultural processes," as Richard Johnson notes,

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

Thus, culture, Johnson continues, can be understood as "historical forms of consciousness or subjectivity, or the subjective forms we live by, or . . . the subjective side of social relations." Treating law as a cultural reality means looking at the material structure of law to see it in play and at play, as signs and symbols, fantasies and phantasms. In the tradition of cultural studies, cultural analysis of law rejects "the dichotomy between agency and structure. . . . Treating consciousness as historical and situational,

96. For an example of the contribution of cultural studies to a rethinking of the meaning of culture, see CULTURAL STUDIES (Lawrence Grossberg et al. eds., 1992).
101. Id. at 43.
102. For a general discussion of the materiality of cultural life, see RAYMOND WILLIAMS, PROBLEMS IN MATERIALISM AND CULTURE: SELECTED ESSAYS (1980).
cultural analysis also shifts attention to the constitution and operation of social structure in historically specific situations. It insists on examining the ways that the cultural lives of law contribute to what Johnson calls “asymmetries in the abilities of individuals and social groups to define and realize their needs.”

Law also plays and has played a large role in regulating the terms and conditions of cultural production. Here again Kahn’s book is silent. He does little to unpack what Coombe calls the distinctive combination of “the signifying power of law and law’s power over signification.” The regime of copyright, to take a prominent example, has protected and promoted certain kinds of expression and discouraged others; it has tethered the life of signs to the fortunes of capital, and contributed importantly to the linkage of artistic value with ideas of originality, authenticity, and “ownership of the image.” Through doctrines of “personality rights,” law “authors the celebrity” and, in so doing, gives a particular shape to the practices of “popular culture.”

Most importantly, The Cultural Study of Law does not draw our attention to the fact that law’s cultural lives cannot escape the forces that, at the start of the twenty-first century, afflict and transform cultural life everywhere. The cultural lives of law are located in the emergent crisis of representation as well as contemporary changes in the organization of symbols and the rhythms of symbolic construction. Postmodernity and postcoloniality present new

103. Silbey, supra note 76, at 47.
104. Johnson, supra note 100, at 39.
106. Coombe, supra note 89, at 46.
109. Michael Trouillot says:

The acknowledgement that there is indeed a crisis of representation, that there is indeed an ongoing set of qualitative changes in the international organization of symbols does not require a postmortem.... [T]he postmortem inherent in the postmodern mood implies a previous world of universals. It implies a specific view of culture and of cultural change. It implies, at least in part, the Enlightenment and nineteenth-century Europe.

MICHAEL ROLPH TROUILLOT, SILENCING THE PAST: POWER AND THE PRODUCTION OF
challenges to the cultural lives of law as boundaries collapse and the circulation of legal meanings becomes more fluid. As a result, attending to the cultural lives of law requires that we attend to complex cultural borrowings, importations of new meanings, and new points of resistance. What do these facts mean for an analysis of the culture of the rule of law in the United States? Do they reinvigorate the cultural forms that they inevitably challenge? How is the culture of the rule of law implicated in the extension of America's global hegemony? Readers looking for answers to these questions regretfully will not find them in The Cultural Study of Law.

IV. CONCLUSIONS

Paul Kahn has made an important contribution to an ongoing debate about the place of legal scholarship in law schools, or more particularly, to the debate about what kind of scholarship should be welcome in professional schools. He is right to warn of the limiting and distorting effects of an alliance between those whose vocation it is to understand law and those whose vocation is the reform or improvement of law. Moving away from policy-focused legal scholarship, Kahn suggests, allows scholars to take a broader view of the role of law in culture and society. Breaking away from the policy audience may encourage research that begins, not with an already defined legal policy, but with the social and cultural processes in which legality is embedded and in which legality operates. As we examine those processes we will be able to see how and where law's power operates from the bottom up. We may find some cultural forms fully colonized by legal understandings, and others in which law's presence is barely visible.

Kahn is also right to envision law as an academic discipline, not just an adjunct to legal practice. However, if that enterprise is to mature and succeed, it needs to reach beyond the comfortable confines of the law school, crossing the boundaries of intellectual traditions, drawing together scholars in the social sciences and humanities who study law's cultural life.

This Review suggests that Kahn's work would be even more powerful if it were less insulated from developments in interdisciplinary legal scholarship that have been ongoing inside and

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110. See STEVEN CONNOR, POSTMODERNIST CULTURE: AN INTRODUCTION TO THEORIES OF THE CONTEMPORARY 22 (1989).
111. See CULTURE, POWER, PLACE: CRITICAL EXPLORATIONS IN ANTHROPOLOGY (James Ferguson & Akhil Gupta eds., 1997).
outside law schools for more than a generation. His call to examine law’s constitutive effects and its cultural lives should and would be even more persuasive if it were less reified and abstract, more alive to contestation and contingency, more attentive to the distinctive ways in which socially situated actors inside and outside formal legal institutions improvise, resist, and remake law, and more in touch with the social, political, and academic ferment surrounding the concept of culture. Had Kahn’s book acknowledged and taken on the existing field of interdisciplinary legal scholarship, it would have made even more of a contribution to the development and flourishing of that field. I urge him and others in law schools who share his vision of a cultural study of law to join their allies in the social sciences and humanities who are already working to articulate a new understanding of legal scholarship.