

## COMMENTARY

Foucault's Expulsion of Law: Toward a Retrieval

# Making a Place for Cultural Analyses of Law

Susan S. Silbey

In "Foucault's Expulsion of Law: Toward a Retrieval," Alan Hunt attempts to reconcile Foucault with Marx by focusing on Foucault's analysis of law.<sup>1</sup> Hunt advances theory in the sociology of law by forging links between scholars whose works are icons of opposing frameworks: structuralist and poststructuralist social theory. Instead of expelling law from a central role among modern apparatuses of power as Foucault seems to do, Hunt claims that errors, false moves, and incompletions in Foucault's work can be overcome by a retrieval of law. Moreover, Hunt suggests that this retrieval, made possible even within Foucault's work, establishes theoretical connections between Foucault and Marx that are now elided and untheorized. I read Hunt's essay as an invitation, and a challenge, to field researchers to provide empirical studies that can be synthesized to flesh out this developing yet incomplete theory. In this exposition of the possible connections in these heretofore divergent approaches, Hunt provides a conceptual context and authority for the proliferating literature that goes under the rubric of cultural analysis.

Foucault's analysis of law relies on an important distinction between classical and modern society. In Hunt's explication of Foucault's analysis, the premodern state symbolizes the integration of sovereignty with law through "juridical monarchy"; in the premodern era, law provides the "discursive cement" of the state. In contrast, the modern era is no longer characterized by the dominance of law, which Foucault describes as the right to command, or by the discourse of bourgeois rights that also suffused the premodern form. Instead, power in modern societies is de-

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1. 17 *Law & Soc. Inquiry* (1992).

scribed and analyzed by Foucault as a consequence of discipline, the rise of the human sciences, and processes of normalization, in which power, domination, and subordination are masked within apparently apolitical (disciplinary) discourses. Hunt claims that law is "expelled" by Foucault first by associating law with monarchy which is historically displaced by the movement to other state forms, and second by a focus not on the state and centralized power but on localized forms of power and control (disciplines).

This movement away from centralized power toward local networks of control raises a problem that Hunt identifies as central to Foucault's difficulties: "How to secure a focus on localized power without at the same time ignoring the indisputable significance of state and other forms of centralized and institutionalized power?" This is, Hunt writes, the single most important weakness of Foucault's work. In this move, Hunt acknowledges (at 3) and re-creates a continuing concern of social theory and critical theory specifically, that is, the problem of specifying the mechanisms by which structure is enacted locally, or conversely by which local action is cumulatively aggregated. It is the explication of this general theoretical problem (structure/agency), within Foucault's work that I think makes the paper a valuable contribution to sociolegal studies, especially as it focuses on the particular relevance for the place of law.

Hunt writes with energy about the dispersion of power, even within the monarchical state, arguing against an overly centralized image of power and law in premodern societies, and in particular against Foucault's notion of law as command. He suggests that theoretical advances would be achieved by employing the notion of constitutive law,<sup>2</sup> that is, law that is constituted by and helps to constitute social relations, rather than by employing the notion of law as command. With this conception of constitutive law, the sharp disjuncture between premodern and modern forms evaporates. In place of using categorical/typological distinctions for socio-historical analysis, Hunt, following Poulantzas, calls for concrete specification of the variations and particular combinations of legal forms in different historical circumstances. Here, the subject of inquiry is the variations in the relationships between state law and disciplinary authority as well as changes in the forms of law over time rather than its presence or absence, majesty or expulsion.

To take up Hunt's invitation, we must find "an adequate way of grasping . . . [the] mutual articulation and interaction" of what he loosely describes as "big power" and "little power" (at 11). The task of researchers is to make visible the mechanisms of accumulation and condensation that transform individual local actions into regular, repeated patterns, expectations, and institutions that in turn have the capacity to shape local

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2. Nicos Poulantzas, *State, Power, Socialism* (London: New Left Books, 1978).

techniques. Hunt relies on several concepts and pieces of work which he claims are the basis for this more useful approach and retrieval of law and necessary for analyses of constitutive law: hegemony, strategy, and project. I am not convinced, however, that this language alone specifies the processes by which local action is aggregated. Nor does it show how structure shapes that local action.<sup>3</sup> Obviously, the space of this commentary is insufficient for such an effort. It may be useful, nonetheless, to offer some suggestions from, and illustrations of, research that seems to address the theoretical task Hunt so carefully identifies.

## Cultural Analyses

There is a growing body of empirical literature that, like Hunt's theoretical effort, describes the mediating processes through which local practices are aggregated and condensed into systemic institutionalized power. I have in mind research that emphasizes the role of consciousness and cultural practice as communicating factors between individual agency and social structure. Like Poulantzas, and Hunt, some cultural analysts also adopt a constitutive perspective that argues that law does more than reflect or encode what is otherwise normatively constructed; in the constitutive perspective, law is a part of the cultural processes that actively contribute in the composition of social relations. Cultural analysts address the central problematic that Hunt raises, how local power is aggregated into systemic institutionalized power, by abandoning deterministic views of structure, action, and practice and probing within what is often the end product of alternative analyses. Thus for example, as Hunt writes, while the concept of hegemony is often deployed as an explanation, the end result, we need to understand "the processes through which different discursive elements are put together in constituting hegemony" (at 33). That is the task of cultural analysts.

Working within a Gramscian framework, cultural analysts take up this challenge, attempting to describe how discourses are produced, enacted, and reproduced. They document situations in which local processes recursively reproduce state institutions and macro social structures and, at the same time, provide openings for creativity in reshaping those structures.<sup>4</sup> In addition, researchers notice the opportunities for resistance in

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3. I should state explicitly that Hunt makes no claim to have sufficiently delineated either these concepts or the processes they are meant to name. Thus, he provides a discussion of the notion of structural coupling (at 34–36) to illustrate the ways in which the concept of hegemony needs to be better specified and the constitutive processes delineated. Also, Hunt refers (at 31) to Woodiwiss's notion of transposition as a conceptual advance that helps to describe one of the ways in which law helps to constitute social relations by changing the social positions of objects and thus also channeling or denying access to other social positions and resources.

4. See, e.g., works from the "Birmingham School" of cultural studies: Dick Hebdige,

the same processes that also contribute to structural reproduction.<sup>5</sup> With increasing accumulations of such studies of legal consciousness and practice, it may be possible to begin to specify the variable conditions that contribute to either reproduction, resistance, or innovation. This is a task for theoretically informed field studies.<sup>6</sup>

Studies of legal culture, as a subset of cultural studies in general, also illustrate the constitutive perspective Hunt advocates, and can also be mobilized to aid the development of sociological theories of law. In particular, cultural analyses of law attempt to describe the processes by which law contributes to the articulation of meanings and values in daily life. Attention is directed to the local contests over signification within different and competing discourses that extend to the most mundane areas of life.<sup>7</sup> In these analyses, however, one observes both the orchestration of the local contest and the systematic (structural) outcome. For example, Stuart Henry's work *Private Justice* describes this process in work situations, specifically the interaction between industrial discipline and formal state law.<sup>8</sup> In this work, Henry shows how disciplinary policies and practices are shaped both by the structure in which they occur and the semi-autonomous individuals who participate in them and who enact the policies. He describes the ways in which local disciplinary practices are partially shaped by government legislation and case law as well as by government-supported arbitration and mediation services. But these local disciplinary practices are also produced by specifically distinguishing local policies from state processes. Henry illustrates how the control forms, state and local, mutu-

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*Subculture: The Meaning of Style* (London: Methuen, 1979) ("Hebdige, *Subculture*"); Graeme Turner, *British Cultural Studies* (Boston: Unwin Hyman, 1990); Stuart Hall & T. Jefferson, *Resistance through Rituals: Youth Subcultures in Post-War Britain* 40 (New York: Holmes & Meier Publishers, 1976) ("Hall & Jefferson, *Resistance through Rituals*").

5. E.g., Patricia Ewick & Susan S. Silbey, "Conformity, Contestation, and Resistance: An Account of Legal Consciousness," *New Eng. L. Rev.* (forthcoming 1992); Kristin Bumiller, *The Civil Rights Society* (Baltimore: Johns Hopkins Press, 1988); James Scott, *Domination and the Arts of Resistance* (New Haven, Conn.: Yale University Press, 1991); George Lipsitz, *Time Passages* (Minneapolis: University of Minnesota Press, 1990); Barbara Yngvesson, "Making Law at the Doorway: The Clerk, the Court, and the Construction of Community in a New England Town," 22 *Law & Soc'y Rev.* 409 (1988). See also Thomas Cushman, "Glasnost, Perestroika, and the Management of Oppositional Popular Culture in the Contemporary Soviet Union," *Current Perspectives in Social Theory* (forthcoming 1992), and *id.*, "Rich Rastas and Communist Rockers: A Comparative Study of the Origin, Diffusion and Defusion of Revolutionary Musical Codes," 25 *J. Popular Culture* 17 (1991).

6. This discussion of theoretically informed field studies and cultural analysis borrows from ongoing work in collaboration with Patricia Ewick, "Varieties of Legal Consciousness: The Place of Law in the Lives of Ordinary Americans" (research proposal, September 1991).

7. See, e.g., David Engel, "Law, Time and Community," 21 *Law & Soc'y Rev.* 605 (1987); Carol Greenhouse, *Praying for Justice: Faith, Order and Community in an American Town* (Ithaca, N.Y.: Cornell University Press, 1986); Thomas Kearns & Austin Sarat, *Law in Everyday Life* (Ann Arbor: University of Michigan Press, forthcoming).

8. Stuart Henry, *Private Justice* (London: Routledge & Kegan Paul, 1983) ("Henry, *Private Justice*").

ally interact and how they are re-created through discursive practices that “constitute each control form by juxtaposing one with the other.”<sup>9</sup>

For example, Henry provides examples of particular linguistic borrowings from law into local disciplinary processes which point to the similarity between the local administrative apparatus and the state courts but also convey legitimacy to the local form. At the same time, even as local managers contrast and differentiate local processes from state forms, the appropriation of legal concepts and abstractions permeates the discourse. In this way legal abstractions and linguistic formulations (e.g., “witness,” “appeals,” “defense,” “evidence”) are affirmed and reified, even as the formal legal process is resisted; this affirmation and reification nonetheless obscures the agent’s active role in its creation, reproduction, and legitimation. “Although the representations of this disciplinary control are at variance with those of the law or courts, nonetheless the same concepts are the medium for discussing issues of control.”<sup>10</sup> Rather than weakening state control, the local processes invest in them as they seek their distance.

Henry provides concrete historical analysis of how local discursive practices recursively constitute systemic patterns of control and power. He also identifies forms of disjuncture and discontinuity. Rather than different forms of organization containing correspondingly different forms of control, as much anthropological literature had for many years argued, Henry concludes that “different kinds of organizational structure accommodate aspects of the whole range of theoretically identifiable forms of private justice.”<sup>11</sup> Thus, he emphasizes the existence of constraint and the possibilities of change. But that change, he suggests, demands attention to the mutuality and integration between local and state forms and understanding of the semi-autonomous agency that creates as well as reproduces those social forms.

Here, social structure refers to the constraints operating in situations to channel and limit the play of practice. Structure is not simply *inserted* into situations; it is *constituted* through active social practice. Connell, for example, uses an early 1960s study by Young and Willmott to illustrate this constitutive understanding of social structure. Young and Willmott described a matrifocal kinship structure among residents in Bethnal Green, East London. Although the Bethnal Greeners have no concept of “matrifocality” and are unlikely to use anthropologists’ analytic terminology, “daughters and mothers pop in and out of each others’ houses up to twelve times a day; they exchange services like care in sickness, and negoti-

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9. Stuart Henry, “The Construction and Deconstruction of Social Control: Thoughts on the Discursive Production of State Law and Private Justice,” in John Lowman, Robert Menzias, & T. S. Palys, eds., *Transcarceration: Essays in the Sociology of Social Control* 100 (Aldershot, Hants, England: Gower, 1987) (“Henry, ‘Construction and Deconstruction’”).

10. *Id.* at 103.

11. Henry, *Private Justice* 220.

ate about other family relationships—including the daughter's marriage."<sup>12</sup> The Bethnal Greeners create, re-create, acknowledge, and value matrifocal kinship minute by minute, hour by hour. Here, social structure is not abstracted from practice; instead it is created through daily activity.<sup>13</sup> It is enacted and encoded in regular, seemingly uneventful, and routinized experiences. Being present in every situation, however, structure is also vulnerable to major changes of practice. Thus structure can be shaped and reshaped, enacted and created, while past practices nonetheless constrain that daily creation.

Borrowing a provocative illustration from marine biology, Henry offers a succinct statement of this conception of structure, what Neurath describes as the process of rebuilding a boat plank by plank while still keeping afloat,<sup>14</sup> what Anthony Giddens calls structuration, and yet others call co-determination.

It has been observed by marine biologists, that whale songs have a characteristic form for each school of whales; that if whale songs are recorded on one day and then another, the same school has the same song. However, when biologists return to record that school's song say one year later, the song is completely different. The explanation for this change is that the characteristic song is the result of individual whales hearing and sharing in singing each other's song; each rendition is shaped by the social structure that is the whale song. But at the same time each individual has enough autonomy to add small variations and innovations to the main theme; the continuously produced whale song is a resource and medium through which each individual and unique whale can creatively reproduce the song. This creative interpretation and selection is not enough to completely transform the song, that is and remains the total medium, but it is enough to change the song just a little. Other whales in the school pick up the general song, incorporating as it now does, the slight modifications of those whales who have been singing. The result is that after a period of time the micro-contributions of the individual whales transform the very totality of the whale song which has given and continues to give shape and general direction to their individual action.<sup>15</sup>

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12. R. W. Connell, *Gender and Power* 93, 95 (Palo Alto, Cal.: Stanford University Press, 1987), citing M. Young & P. Willmott, *Family and Kinship in East London* (London: Harmondsworth, Penguin, 1962).

13. For an extended discussion see Jean Comaroff, *Body of Power: Spirit of Resistance* pt. 1 (Chicago: University of Chicago Press, 1985); also Timothy Mitchell, "Everyday Metaphors of Power," 19 *Theory & Soc'y* 545 (1990); Anthony Giddens, *Central Problems in Social Theory* (Berkeley: University of California Press, 1979); *id.*, *The Constitution of Society* (Berkeley: University of California Press, 1984).

14. O. Neurath, "Practical Sentences," in A. J. Ayer, ed., *Logical Positivism* (New York: Free Press, 1959).

15. Henry, "Construction and Deconstruction" at 98. Henry is paraphrasing and quoting from David Attenborough, "Animal Language" (BBC, 1982).

Cultural analyses also attend, in addition to processes of struggle and reproduction, to the particular substantive values and meanings that are produced and articulated through legal discourse.<sup>16</sup> The term “legal consciousness” is used in this literature to refer to these values and meanings, specifically the ways people make sense of law and legal institutions, that is, the understandings that give meaning to experiences and actions. Just as this research abandons a static and deterministic view of structure, the cultural-constitutive perspective necessitates a similar abandonment of consciousness and hegemony as static disembodied sets of ideas—meanings and values—that are simply absorbed by members of a culture. If hegemony describes the ways in which dominant alliances of social groups exert total social authority over subordinate groups through a noncoercive process of the manufacture of consent among those groups,<sup>17</sup> hegemony is “not universal and ‘given’ to the continuing rule of a particular class. It has to be won, reproduced, and sustained. Hegemony is, as Gramsci wrote, a ‘moving equilibrium’ containing relations of forces favourable or unfavourable to this or that tendency.”<sup>18</sup> Thus cultural-constitutive analyses describe consciousness, like structure, “generated in and changed by social action,”<sup>19</sup> “less a matter of disembodied mental attitude than a broader set of practices and repertoires available for empirical investigation.”<sup>20</sup>

But these meanings and values are neither fixed, stable, unitary, nor consistent. Thus, for example, the ideas, interpretations, actions, and ways of operating that collectively represent a person’s legal consciousness may vary across time (to reflect learning and experience) or across interactions (to reflect different objects, relationships, or purposes). And to the extent that consciousness is emergent in social practice and forged in and

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16. See, e.g., Richard L. Abel, “Torts,” in David Kairys, ed., *The Politics of Law* (New York: Basic Books, 1982; 2d ed. 1990) (“Kairys, *Politics of Law*”); Gerald Frug, “The Ideology of Bureaucracy in American Law,” 94 *Harv. L. Rev.* 1277 (1984); Mary Joe Frug, “Re-reading Contracts: A Feminist Analysis of a Contracts Casebook,” 34 *Am. U. L. Rev.* 1065 (1985); Kairys, *Politics of Law*; Duncan Kennedy, “Form and Substance in Private Law Adjudication,” 89 *Harv. L. Rev.* 1685 (1976); L. LaRue, “A Jury of One’s Peers,” 33 *Wash. & Lee. L. Rev.* 841 (1976); Martha Minow, *Making All the Difference* (Ithaca, N.Y.: Cornell University Press, 1990); Fran Olsen, “Statutory Rape: A Feminist Critique of Rights Analysis,” 65 *Tex. L. Rev.* 387 (1984); J. Singer, “The Legal Rights Debate in Analytical Jurisprudence,” 1982 *Wis. L. Rev.* 975; Patricia Williams, *The Alchemy of Rights and Race* (Cambridge, Mass.: Harvard University Press, 1991).

17. Hebdige, *Subculture* 16 (cited in note 4).

18. Hall & Jefferson, *Resistance through Rituals* 40 (cited in note 4).

19. Gordon Marshall, “Some Remarks on the Study of Working Class Consciousness,” 12 *Politics & Soc’y* 263 (1983).

20. Rick Fantasia, *Cultures of Solidarity* 14 (Berkeley: University of California Press, 1988); cf. Ann Swidler, “Culture in Action: Symbols and Strategies,” 51 *Am. Soc. Rev.* 273 (1986); Pierre Bourdieu, “Cultural Reproduction and Social Reproduction,” in Jerome Karabel & A. H. Halsey, eds., *Power and Ideology in Education* (New York: Oxford University Press, 1977); Bourdieu, *Outline of a Theory of Practice* (Cambridge: Cambridge University Press, 1977).

around situated events and interactions (a dispute with a neighbor, a criminal case, a plumber who seemed to work few hours but charged for many), a person may express, through words or actions, a multifaceted, contradictory, and variable legal consciousness.

Although consciousness may be, according to this perspective, emergent, complex, and moving, it nonetheless has shape and pattern. The possible variations in consciousness are limited, that is, situationally and organizationally circumscribed. Rather than talking about meaning making as an individualized process, cultural analysis emphasizes the limited number of available interpretations for assigning meaning to things and events within any situation or setting. Similarly, access to and experience within the situations from which interpretations emerge are differentially available. Here attention to consciousness emphasizes its collective construction and the constraints operating in any particular setting or community as well as the subject's work in making interpretations and affixing meanings.

For example, in an analysis of the movement to create alternatives to law through a variety of forms of "informal" dispute processing, Silbey and Sarat describe how localized discourses, rooted in the legal profession, social science theorizing, and community organizing, contributed to a general institutional production. Specifically we describe how divergent social groupings adopted shared linguistic formulations, definitions of the situation, and proposals for action.<sup>21</sup> Despite what appeared to be competing political values and professional interests, a consensus emerged around a stable image of law and legal processes as cumbersome, slow, unaccessible, and unhelpful, exacerbating social ruptures rather than healing them. Just as Henry noted among industrial disciplinary policies, the movement to create alternatives to law nonetheless mobilized legal values and images even as it attempted to market alternatives. In addition, we noted the influence of additional professional discourses, including the helping and therapeutic professions. Thus, this work describes a successful movement to create a new market of dispute resolution services by adopting and articulating values and images already accepted and legitimated elsewhere. The "new" market—dispute processing and dispute resolution—was thus conceptually enabled and eventually institutionalized by both its borrowings and its distinctions from other institutions. These common articulations, for example, "dispute," "voluntary," "hearing," "complaint," "resolution," contribute to the legitimation of an innovation, the consequences of which are obscured by apparently commonplace, already accepted language and interests.

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21. Susan S. Silbey & Austin Sarat, "Dispute Processing in Law and Legal Scholarship: From Institutional Critique to a Reconstitution of the Juridical Subject," 66 *Denver L. Rev.* 437 (1988).



## Conclusion

It is possible to abstract common processes from these examples. Thus one might read in these studies evidence of the important role language plays in creating interlocking networks of power and influence. Linguistic codes serve as an interchangeable and collective vehicle for diverse interests and purposes, sometimes competing or resistant interests; nonetheless these opposing forces are cabined within sometimes very limited categories and formulations that are differentially shaped and mobilized by local agents.<sup>22</sup> Reading these examples in this way would contribute to the project Hunt identifies—of specifying the mechanisms of accumulation and condensation of local power—by adding linguistic codes to a growing inventory of processes such as structural coupling and transposition. However, it is possible to argue that these examples also illustrate something very different.

Cultural-constitutive analyses begin by rejecting, I believe, the dichotomy between agency and structure that is reproduced in the effort to specify mechanisms of accumulation or points of condensation. Treating consciousness as historical and situational, cultural analyses also shift attention to the constitution and operation of social structure in historically specific situations rather than macro-sociological, transhistorical processes. These analyses reject the dualisms implied by recurrent debates about the relative role of structure and agency in shaping the work and focus instead on the role of consciousness in (re)producing the social world.

In effect, cultural analyses specify accumulation only in theory; structure must be understood, self-consciously, as a theoretical device or coda used to analytically distinguish what is experientially indistinct. To the degree that we insist on specifying processes of accumulation or condensation, we enable and authorize a micro-macro split, as well as a material/ideological distinction. Instead, we might cease to reproduce these dichotomies; we might take seriously the notion of structure enacted daily, repeatedly, locally.

Timothy Mitchell also describes this refusal to distinguish local action from social structure. He notes, however, that various and particular ac-

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22. In an important early work, Isaac Balbus, "Commodity Form and Legal Form: An Essay on the Relative Autonomy of Law," 12 *Law & Soc'y Rev.* 571 (1977), offers a related analysis in which he contends that the generalized categories of liberal law constitute one of its primary mechanisms of domination. He suggests that the specific form of liberal law reproduces the essential characteristics of capitalism in what he calls the commodity form of law. He suggests that, in both capitalism and liberal law, generalized mediums of signification and exchange (e.g., money, individuals, rights) are used to obscure and distort the variation within those categories. One might consider, generally, the similarity between linguistic coda and legal concepts for obscuring the particularities of their use, as well as mobilizing investment in the categories.

tions combine to produce common effects, "new modes of power," which by their repetition,

their apparent origin outside local life, their intangibility, their impersonal nature, seem to take on an aspect of difference, to stand outside actuality, outside events, outside time, outside community, outside personhood. Hence they appear, not as something given . . . but rather as something other, something non-particular and unchanging—as a framework that enframes actual occurrences. *Although it is constituted, like the rest of the world, out of particular practices, this framework appears as somehow non-particular and non-material, that is, as something ideal, and comes to seem as though it were its own, transcendental dimension of reality.* (My emphasis)

Working through the techniques of enframing, power will now appear as something essentially law-like. It will seem to be external to practice, as the fixed law that prescribes a code against which changing practices are then measured. This transformation occurs, moreover, at precisely the point when power in fact becomes most internal, most integral, and continuously at work within social and economic practices.<sup>23</sup>

Cultural analyses challenge the notion that something is added from the outside. Power does not insert itself; structure does not determine local action. The constitutive perspective insists instead that the *assertion* of externality itself is integral to the effects of power; this is evident when we speak of "the law," or "the state," as though it were somehow something external that shapes and determines people and things.<sup>24</sup> In this understanding, the very idea of structure becomes a face of power, one in which the scholar/analyst colludes. Scholars' insistence on the analytic distinction between structure and agency itself contributes to the ongoing processes of constituting social reality. The desire to specify the mechanisms of accumulation of power reproduces the dichotomy. Structural theorizing becomes part of the ideological process of reaffirming structure as distinct, powerful, and determining, and in need of description and explanation.

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23. Mitchell, 19 *Theory & Soc'y* (cited in note 13).

24. See Susan S. Silbey, "A Sociological Interpretation of the Relationship between Law and Society," in Richard John Neuhaus, ed., *Law and the Ordering of Our Life Together* (Grand Rapids, Mich.: Eerdmans Publishers, 1989), and Susan S. Silbey & Austin Sarat, "Critical Traditions in Law and Society Research," 21 *Law & Soc'y Rev.* 165 (1987).