# A Sociological Interpretation of the Relationship between Law and Society

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The announcement of this conference begins with the observation that although the "crisis in law" is perennial, it is nonetheless real and urgent. It is possible, the text continues, that "law itself has become morally lawless. That is, the connections between law and moral legitimations have increasingly been severed." In this essay I suggest that the problem should be more generally stated and that it is captured in the title of the conference itself, "Law and the Ordering of Our Life Together." What is in crisis and what is at stake in the perennial debate about the moral authority of law is the relationship between community and law; that relationship and the ways in which law contributes to the ordering of social life have constituted a principal focus of "law and society" research.

I begin by juxtaposing two visions of the relationship between law and society: the natural-law tradition and the sociological perspective. The sociological perspective describes law instrumentally. In this view, law makes available tools, resources, symbols, and languages useful in the construction of social order. In contrast, natural-law theories deny human agency a principal role for ordering social life and instead seek guidance and instruction in the morality of a universal, ahistorical "natural" law. After describing a sociologist's perspective on the relationship





between law and society, I will present a brief survey of what the sociology of law tells us about legal practices and how people use legal resources. Research from the sociology of law suggests that natural-law arguments are a form of idealism—perhaps a dangerous idealism, because they are unresponsive to and ignore the ways legal systems operate. I illustrate this with a propositional inventory of findings from the sociology-of-law tradition.

In section three, I offer a critique of the sociology of law suggesting that as the sociology of law exposes the idealism of the natural-law tradition, it may create in its own place a false or partial idealism. I try to characterize the "crisis in law" as it is expressed in this research tradition. I suggest that it has portrayed lawmakers as benign and law as relatively ineffective by focusing on state legality to the exclusion of law in its more pervasive and perhaps more salient dimensions. Finally, I urge attention to the role of scholars in contructing and deconstructing legality.

## I

The history of this discussion has an ancient lineage, traceable from classical natural-law treatises to contemporary debates about literary and legal interpretation.[1] Two visions characterize the poles of this discourse.

The first vision understands law as a moral mirror reflecting ways of being, social relations, and conceptions of value and right the sources of which lie outside the law. In this vision, the distinction between law and society is less essential than the hierarchical relationship between law and moral values. For example, in its classical and modern incarnations, natural-law theory stipulates that there exists a set of universal, eternal, and immutable priniciples of social action and order that guide human interaction. These knowable patterns describe the preferred and essential character of human life. Although for some time it was

1. For a strong version of natural-right theories, see Leo Strauss, *Natural Right and History* (Chicago: University of Chicago Press, 1953). For an example of contemporary debates, see Ronald Dworkin, "Law as Interpretation," *Texas Law Review* 60 (1982): 527; and Stanley Fish's reply to Dworkin in "Interpretation Symposium," *Southern California Law Review* 58 (1985).

understood that natural justice was distinct from law and insufficient in and of itself for the governance of human societies, it eventually evolved into a standard by which to measure man-made law and to which positive law was accountable.

For example, Hadley Arkes's recent treatise on the relationship between morals and law is a contemporary attempt to locate the sources of law in a set of first principles. Citing both Aristotle and Kant, Arkes tries to show that particular moral and legal judgments on controversial questions of policy can be extracted from a set of first principles describing the human capacity for reason. It is possible to make judgments and oblige others to obedience, he argues, because the law is the collective embodiment of that human rational capacity. Following Kant, Arkes maintains that only a rational being could conceive the idea of law, a "moral rule which may be in conflict with his own self-interest." He further argues that law, which is the embodiment of collective social life, is necessitated by the existence of morals and "the nature of a being who [has] the capacity for morals."[2]

The alternative vision is distinctly modern. Premised on a separation between law and society, it emphasizes the problematic nature of an instrumental relationship between the two and views the relationship between morality and law as a version of the problematic relationship between law and society. This vision has roots in the political struggles of eighteenth-century Europe, a context in which a distinction between law and society was used to try to limit the power of the state.[3] Because the merger of law and society seemed an excuse for hierarchical oppression, liberal reformers tried to separate the two as part of an effort to end, or at least discipline, political control by the few. In the European context, law carries the historical burden of being part of hierarchy. For Americans, however, the rule of law was linked from the outset to the notion of the separation of law from state and society; matters of hierarchy and oppression were not significant issues. Instead, there is a persistent notion of external but neutral regulation and a conception of rationalized ordering. Law is viewed as something that has been produced by the state while

2. Arkes, *First Things* (Princeton: Princeton University Press, 1986), p. 8.

3. See John Locke's *Of Civil Government* (1690).



yet being able to control the state. This vision focuses less on the sources or morality of law than on its instrumental utility.

Out of the political upheavals of the eighteenth and nineteenth centuries and the social transformation we associate with the Enlightenment, there emerged a vision of an organic social order composed of an interactive web of contractual relationships. In response to a growing perception of the fragility of this social order and in an effort to shore up the sagging legitimacy of the European communities, which had been seriously shocked during a century of revolutionary transformation, scholars began to study, systematically and scientifically, the structures and processes of collective social life. The classical works of social science produced in the late nineteenth and early twentieth centuries gave a prominent place to analyses of legal phenomenon and the claims of various forms of legality.[4] During this century, scholarship produced in this tradition—under the various labels of sociological jurisprudence, American legal realism, and law and society research—has lent abundant support to the vision of an instrumental legal order.

Although the sociological tradition begins with ambivalence about locating morality in law, and thus emphasizes the law as a multipurpose device, it is nonetheless possible to read in the research a normative vision of legality. I will describe in thematic form some observations from the sociology of law before characterizing the moral vision of that sociology and what an alternative vision might look like.

## II

The sociologist views law as a social institution, not something given in nature or deduced from first principles but rather created

4. See the following works by Max Weber: *Max Weber on Law in Economy and Society*, ed. Max Rheinstein (Cambridge: Harvard University Press, 1966); *Economy and Society: An Outline of Interpretive Sociology*, ed. G. Roth and C. Wittich (Totowa, N.J.: Bedminster Press, 1968); *Theory of Social and Economic Organization* (New York: Free Press, 1949). And see the following works by Emile Durkheim: *The Division of Labor in Society* (1893; New York: Free Press, 1964); *The Rules of Sociological Method* (1895; New York: Free Press, 1964); and *Professional Ethics and Civic Morals* (London: Routledge & Kegan Paul, 1957).

from patterns of human interaction. In this view, humans are the authors of all social arrangements, including law and the study of law; the social order and legality are "ongoing human production[s]."[5] Once constructed, however, a social institution takes on a life of its own, and becomes not only acted upon—that is, something in production—but something which acts upon its authors. It is perceived as external to humans, as an objective and controlling reality, something that is out there, that affects us and to which we respond. This controlling character, this ability to affect us, "is inherent in institutionalization as such": that is what we mean by the word *institution.* The control exists "prior to or apart from any mechanisms of sanction . . . [that may be] set up to support an institution" or define it, as in the case of law. The primary social control, or ability to regulate behavior, derives from the categories we routinely develop in interactions with others to typify and name events, persons, and things. Because these categories seem to exist independent of the persons who develop and use them, they are useful to the degree that they are shared. These typifications, by the very fact of their existence, control human conduct by identifying habituated "patterns of conduct, and . . . channel[ing] it in one direction rather than any of the many others that would be theoretically possible."[6] Through a dialectical process, humans produce a social world which they then experience as something other than human. Consequently, the institutional world thus produced "requires legitimation, that is, ways by which it can be 'explained' and justified" to each new generation that encounters it as made rather than in the making.[7] From this point of view, the law is a fundamental social institution, providing legitimations for the social order or stories that explain our lives to ourselves.

By setting forth the human invention of social institutions, the social constructivist perspective not only stands in marked contrast to natural-law theory but enables the empirical study of

5. The description of the sociological perspective in terms of socially constructed realities borrows from what has become the canonical formulation provided by Peter L. Berger and Thomas Luckmann in *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (Garden City, N.Y.: Doubleday, 1966), p. 49.

6. Berger and Luckmann, *The Social Construction of Reality,* p. 52.

7. Berger and Luckmann, *The Social Construction of Reality,* p. 58.



those institutions, including the sociological study of law. Reviewing the research from this perspective, I have generated at least six generalized observations about the ways in which people create and use legal resources. These observations describe law as an institutionalized mechanism for the use of authorized force in social groups. The ways in which this authority is used are situationally determined, characteristic of the organization of the task, and mobilized on the basis of socially constructed typifications. Although the uses and mobilization of law are situationally structured, it is possible to see cumulative consequences that reflect and reproduce larger social structural variables. This perspective describes law as a resource or tool for achieving an authoritative resolution of situations of discord or violence. It also suggests that we may expect too much from law, too much from rules. The following six observations are not mutually exclusive but collectively describe general features of legal behavior and institutions.

1. *As both institution and practice, the law consists of historically and culturally developed activities regulating and legitimating the use of force in social groups.*[8] Although legal activity may rarely involve

8. Regarding the concept of law as both institution and practice, see Alasdair MacIntyre, *After Virtue* (Notre Dame, Ind.: University of Notre Dame Press, 1981). MacIntyre advances the concept of practice as a social activity "through which goods internal to that form of activity are realized in the course of trying to achieve . . . standards of excellence" that define and characterize the activity. At the same time, practices generally extend human ability. MacIntyre locates practices within institutions and also makes a point of distinguishing between the two: institutions serve specific interests and norms (external goods), he says, while practices are primarily concerned with internal goods. But he notes that it is possible to conceive of law both as institution and as practice. For a discussion of the appropriateness of the concept of practice for the sociology of law, see my "Ideals and Practices in the Study of Law," *Legal Studies Forum* 9 (1985): 7. For an extended, more critical and related discussion of praxis, see Richard J. Bernstein, *Beyond Objectivism and Relativity* (Philadelphia: University of Pennsylvania Press, 1985).

The notion of law as regulation of the use of force in social groups should not be overstated so as to ignore resistance to law or its inability to regulate completely. Llewellyn's succinct description of law in *The Cheyenne Way* (Norman, Okla.: University of Oklahoma Press, 1941) begs that we recognize that "law exists also for the event of breach of law

the use of force, as Robert Cover puts it, the elaborate system of rules, decisions, and interpretations, and the activities associated with producing these nonetheless "takes place in a field of pain and death." In an article published in 1986, just after his death, Cover describes the relationship between legal practices and violence as follows:

> A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life. Interpretations in law also constitute justifications for violence which has already occurred or which is about to occur. When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence.[9]

Legal systems serve a range of functions in addition to regulating and legitimating force. These functions are often also performed by alternative institutions, however—often private associations; moreover, law is often redundant, exercising its

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and has a major portion of its essence in the doing of something about such breach" (p. 20).

For discussions of the relationship between law and the use of force in social groups, see the works of Max Weber cited in note 4 herein; see also Oliver Wendell Holmes, *American Banana v. United Fruit Co.*, 213 U.S. 347, 356 (1908); and *Holmes Pollock Letters*, vol. 2 (Cambridge: Harvard University Press, 1941), p. 212. There is a rich literature distinguishing the concept of law as a body of rules *guaranteed by* force from the concept of law as a body of rules *about* force. See Karl Olivecrona, *Law as Fact* (London: Oxford University Press, 1959), p. 134; Hans Kelsen, *General Theory of Law and State* (Cambridge: Harvard University Press, 1949), pp. 25, 29; and Alf Ross, *On Law and Justice* (London: Steiner & Sons, 1958), p. 134. See also H. L. A. Hart's *The Concept of Law* (New York: Oxford University Press, 1976) for the view that force or coercion is a means for the realization of law rather than an essential feature of the concept of law itself. But if in fact law is not a body of rules guaranteed by force but a body of rules about force or rules that regulate coercion, as has been argued by Kelsen, Olivecrona, and Ross, a simplicity and elegance of formulation is achieved which seems to avoid recurrent problems of legal theory and raises the notion of law as the regulation of force to exalted status. A most concise and persuasive argument for law as a system of rules about force is found in Roberto Bobbio's "Law and Force," *The Monist* 48 (1965): 321-41.

9. Cover, "Violence and the Word," *Yale Law Journal* 95 (1986): 1601.



authority where it is inconsequential.[10] There is a great deal of interpenetration between private and public arenas in the formulation of law and the performance of such basic functions as resolving disputes and maintaining order, because those who regularly interact in valued long-term relationships usually form semiautonomous social fields, so that distinctions between public and private tend to disappear in practice.[11]

2. *In doing legal work, officials respond to particular situations and demands for service rather than general prescriptions or recipes of the task.* In this respect legal work is no different than other work: it is constituted by particular situations rather than general principles, and it proceeds on a case-by-case basis. This is certainly evident in the construction of law through litigation and the creation of precedent through decisions in individual cases;[12] it is also true in terms of law enforcement.

For example, police work is primarily reactive rather than proactive. With the exception of attempts to control sumptuary and so-called victimless crimes such as prostitution and drug dealing, police work begins with calls for help or citizen reports of crime or trouble.[13] Police do not patrol the streets with a vision of the criminal code in their minds, periodically checking to see whether the social scene is consistent with the requirements of law. Rather, police patrol with a vision of what is normal for this

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10. See Patricia Ewick, "Redundant Regulation," *Law and Policy* 7 (1985): 421.

11. For a discussion of the basic functions and methods of law, see Lawrence Friedman, *The Legal System* (New York: Russell Sage Foundation, 1975).

Concerning the relationships that develop among those involved in the formulation and use of the law, see Sally Falk Moore, *Law as Process* (London: Routledge & Kegan Paul, 1978).

Concerning the distinctions between public and private arenas in this context, see Stewart Macaulay, "Law and the Behavioral Sciences: Is There Any There There?" *Law and Policy* 6 (1984): 145; and "Private Government," Disputes Processing Research Program Working Paper, 1983-86.

12. See, for example, Edward Levi, *An Introduction to Legal Reasoning* (Chicago: University of Chicago Press, 1961).

13. See Donald Black, "The Mobilization of Law," *Journal of Legal Studies* (1973): 125; and "The Social Organization of Arrest," *Stanford Law Review* 23 (1971): 1087.

neighborhood and respond to or intervene in situations, prompted by what they perceive to be unusual in this place or by calls for help signaling other definitions of the unusual. The police response to cases or calls is better characterized as handling the situation than as enforcing the law.[14]

This is also true in civil law enforcement and the regulation of business generally. Agents typically work on a case-by-case basis and create legal rules in response to particular demands for service. When coping with a never-ending flow of cases and when demands for service are a central part of law enforcement, case management becomes a critical skill of legal actors, often the defining characteristic of the work.[15]

Because legal action is situationally responsive rather than rule bound, it involves decisions and procedures of an extralegal nature. Legal actors operate with discretion. For example, the response to crime and the regulation of business by authorized officials involves decisions and procedures that are neither authorized nor described by law.[16] Faced with the decision of whether to arrest suspects in misdemeanor cases, police are influenced by the suspect's demeanor, deference, and responsiveness to their inquiries as much as or more than they are by the evidence that the suspect has violated the law.[17] In the mediation of family and juvenile disputes, court-appointed mediation agencies will not only provide a setting and process for consensual resolution

14. See Egon Bittner, *The Functions of the Police in Modern Society* (Washington: U.S. Government Printing Office, 1970); and "Police on Skid Row: A Study of Peacekeeping," *American Sociological Review* 32 (1967): 600.

15. In a study of the enforcement of consumer protection regulations in a state attorney general's office, I documented the processes by which case management produced substantive law. See Susan S. Silbey, "Case Processing: Consumer Protection in an Attorney General's Office," *Law and Society Review* 15 (1980-81): 849; see also Suzanne Weaver, *The Decision to Prosecute: Organization and Public Policy in the Antitrust Division* (Cambridge: MIT Press, 1977).

16. See Jerome Skolnick, *Justice without Trial* (New York: John Wiley, 1967); and my "Case Processing."

17. See Wayne LaFave, *Arrest: The Decision to Take a Suspect into Custody* (Boston: Little, Brown, 1965); and Irving Pilliavin and Scott Briar, "Police Encounters with Juveniles," *American Journal of Sociology* 70 (1964): 206.



of differences but will organize a range of therapies, provide ad hoc counseling, channel peripheral legal problems through other agencies, and become spokespersons for individuals and families with other official agencies, schools, and employers.[18]

The discretion that characterizes law work derives from conflicting mandates, resource constraints, and the inability to fully encapsulate experience in formulas or rules.[19] These restrictions create a need for space within the law for interpretation, innovation, and elaboration. Although statutes set theoretical limits to official action, they cannot determine how things are done within those limits. By choosing among courses of action and inaction, individual law enforcement officers become agents of clarification and elaboration of their own authorizing mandates.[20] They sometimes become moral entrepreneurs, not merely enforcing the rule but creating rules and extending their reach.[21] Bureaucrats become lawmakers, freely creating what H. Laurence Ross has referred to as a third aspect of law beyond written rules or courtroom practices,[22] This "law in action" arises in the course of applying formal rules of law in private settings and public bureaucracies; it is the interpretation or working out of authorizing norms through organizational settings.

3. *The characteristics of legal work inhere in the organization of the particular tasks, not the personalities of the actors.* For example, some hold that the police are socially divisive, that law enforcement is a tainted occupation, and that the police force tends to impose peremptory solutions on complex problems. But the

18. See Susan S. Silbey and Sally E. Merry, "The Problems Shape the Process: Interpreting Disputes in Mediation and Court," paper presented at the Law and Society Association Annual Meeting, 1987, and currently on file with the author.

19. See Kenneth Culp Davis, *Discretionary Justice* (Baton Rouge: Louisiana State University Press, 1969); and Mortimer H. Kadish and Sanford H. Kadish, *Discretion to Disobey* (Stanford: Stanford University Press, 1973).

20. See Kenneth Culp Davis, *Administrative Law Text* (St. Paul: West Publishing, 1972), p. 91; and Jeffrey Jowell, *Law and Bureaucracy: Administrative Discretion and the Limits of Legal Action* (New York: Duellen Press, 1975), p. 14.

21. See chapter 8 of Howard Becker's *The Outsiders* (New York: Free Press, 1963).

22. Ross, *Settled out of Court* (Chicago: Aldine, 1970).

problems being addressed by criticisms of this sort derive from the nature of the task the police must perform rather than from the individuals who constitute the police force.[23] Similarly, when services are denied to handicapped children, it is more often a result of the organization of schools than a reflection of the attitudes of teachers.[24] It is not for want of care alone that those in need are not provided for; the recognition of need and the responses available are shaped by organizational and cultural factors that incorporate and respond to, but are not determined by, individual personality.

Along the same lines, the failure of regulatory agencies to perform their mandated mission is more often a product of the endlessness of the task and responsiveness of the agency than dereliction of duty or malfeasance.[25] Agents in "street-level bureaucracies" are expected to interact with clients regularly, but their work environments are pressured and stressful.[26] Resources are limited, and mandates are too frequently ambiguous or conflicting. The clients are the lifeblood of the organization, but they are not the primary reference group for decision making. As a result, it is difficult to assess and reward job performance. Agents cope with these stresses by developing routines and simplifications that economize on resources. They invent definitions of effectiveness that their procedures are able to meet.[27] In

23. See Egon Bittner, "Florence Nightingale in Pursuit of Willie Sutton," in *Potential for Reform of Criminal Justice,* vol. 3: *Criminal Justice Annals,* ed. H. Jacobs (New York: Russell Sage Foundation, 1974).

24. See Bonnie S. Hausmann, "Mandates without Money: Negotiated Enforcement of Special Education Regulations" (Ph.D. diss., Brandeis University, 1985).

25. See my essay "Responsive Regulation," in *Regulatory Enforcement,* ed. Keith Hawkins and John Thomas (The Hague: Kluwer Nijoff, 1984).

26. Michael Lipsky coined the phrase "street-level bureaucracy" to describe public offices serving clients' needs. Salient features of the settings and characteristic coping mechanisms of public bureaucracies apply to certain private agencies as well. See Lipsky, *Street-Level Bureaucracy: Dilemmas of the Individual in Public Services* (New York: Basic Books, 1980). See also Ross, *Settled out of Court.*

27. On this, see the President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Police* (Washington: U.S. Government Printing Office, 1967), p. 15; Herman Goldstein, "Police Discretion: The Ideal versus the Real," *Public Administration Review* 23 (1963): 140; LaFave, *Arrest,* pp. 102ff.; James G. March and Herbert Simon, *Organizations* (New York: John Wiley, 1958), p. 142; Victor Thompson, *Modern Organization* (New York: Alfred A. Knopf, 1961), pp. 14–15; Martin Shapiro, *The Supreme Court and Administrative Agencies* (New York: Free Press, 1968); Aaron Wildavsky, *The Politics of the Budgetary Process* (Boston: Little, Brown, 1964); Ira Sharkansky, *The Routines of Politics* (New York: Van Nostrand, Reinhold, 1970); and Thomas Anton, *Politics of State Expenditure in Illinois* (Urbana: University of Illinois Press, 1966).



so doing they may alter the concept of their job, redefine their clientele, and effectively displace the mandate of their organization and the law.[28]

4. *Legal actors respond to cases on the basis of typifications developed not from the criteria of law or policy but from the normal and recurrent features of situations.* These "folk" categories are used to typify the variation in an organization's workload and to signal appropriate responses, which are determined by the salient features of situations encapsulated by these categories. David Sudnow has described a public defender's understanding of the "normal" features of particular crimes in terms of the ways in which events "usually occur and the character of persons who commit them (as well as typical victims and typified scenes). . . . For example burglary is seen as involving regular violators, no weapons, low-priced items, little property damage, lower class establishments, largely Negro defendants, independent operators, and a non-professional orientation to the crime."[29]

Court personnel also make sense of and respond to cases through typifications of the relationships between the parties to a case.[30] Often these categories reflect the attention of the legal actors to the pacification of troubled situations rather than the identification and resolution of questions of interest or right, legal guilt or innocence. What the court refers to as a "barroom brawl" will have been a fight between strangers or acquaintances but not close friends. A "neighborhood" case will involve people who live in close proximity, although not necessarily in adjacent dwellings, and

28. See Robert Merton, "Bureaucratic Structure and Personality," *Social Forces* 18 (1940): 560.

29. Sudnow, "Normal Crimes," *Social Problems* 12 (1965): 255.

30. See Sally E. Merry and Susan S. Silbey, "The Problems Shape the Process."

it will often involve issues of space, noise, and children's behavior. A "friends" case may well involve people who live near one another, but the focus will not be the physical environment or children—although it may include a wider network of individuals, as is sometimes the case in neighborhood cases. Labeling an incident a "friends" case highlights the enveloping network of relationships that links the parties involved and draws others into the situation of conflict. A "barking dog" case is usually a neighborhood case that, as the label indicates, is regarded as relatively uncomplex, with limited ramifying relationships; moreover, this label indicates almost from the outset what the solution or outcome of the case will focus upon. A "girlfriend-boyfriend" case usually involves teenagers or other people living in their parent's household where parental disapproval of the emotional relationship between the couple is a major feature of the problem. In contrast, a "lovers" case typically refers to a more adult relationship, or at least one in which the parents of the principles are not involved.

There is a pointed reluctance among court personnel to stigmatize defendants by typifying them in criminal categories. Court staff believe that criminal records change relationships, and they are reluctant to create those records. In the lower courts, one rarely finds a case discussed or typified in terms of its legal designation, and if a case is talked about in legal categories, the implication is quite unambiguous: this is a serious matter. Much of the court's work falls into a very general category—"garbage"—which is used to distinguish minor interpersonal disputes from serious crimes, the latter being crimes that involve personal injury or costly property damage or use of a gun.[31] The general typification and sorting of cases as serious or garbage pervades case-processing organizations; it is not limited to courts.[32]

5. *The legal system reflects and reproduces the encompassing social structure.*[33] Law is costly, and the costs are distributed differentially according to social class, status, and organizational positions.[34] Whether in the eighteenth or twentieth century, rates of grievance and litigation reproduce patterns of class, ethnic, and gender stratification.[35] There are differential barriers not only to invoking law but also to complying with law and to passing along the costs of compliance to others. Sometimes legal regulation "operates as a kind of regressive taxation, burdening the have-nots far more than the haves."[36]

31. For a discussion of what constitutes a serious case, see Malcolm Feeley's discussion of what a case is worth in the lower courts in *The Process Is the Punishment* (New York: Russell Sage Foundation, 1979). For a discussion of case worth in a distinctly different setting, see Stanton Wheeler, Austin Sarat, and Kenneth Mann's *Sentencing White Collar Offenders* (New Haven: Yale University Press, 1988).

32. See Claire Larracey Lang, "Good Cases, Bad Cases: Client Selection and Professional Prerogative in a Community Mental Health Center," *Urban Life* (1981): 289.



Although the uses of law may be situationally structured, the responses and behaviors of legal actors cumulate, with the result that they come to reflect a wider array of social forces than the facts of specific incidents. For example, the ways in which law is mobilized and made available by the police is shaped by the community beyond the enforcement agents, for example.[37] Similarly, federal law 94-142 was designed to provide public services for handicapped children, but it has been used to provide private education at public expense for middle-class children seeking personalized education.[38]

The mobilization of law reflects not only class differences but different norms and values as well. Research on the mediation of family and juvenile disputes suggests that the principal

33. See Marc Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change," *Law and Society Review* 9 (1974): 95; and "Afterword: Explaining Litigation," *Law and Society Review* 9 (1975): 347.

34. See Ewick, "Redundant Regulation."

35. See David Trubek, Joel Grossman, Bert Kritzer, William Felstiner, and Austin Sarat, *Civil Litigation Project Final Report*, Disputes Processing Research Project, 1983 (Madison: University of Wisconsin Law School); "Litigation in America," *UCLA Law Review* 31 (1983): 72; Richard C. Kagan, *Lawsuits and Litigants in Castille, 1500-1700* (Chapel Hill, N.C.: North Carolina University Press, 1981); and Leon Mayhew and Albert Reiss, Jr., "The Social Organization of Legal Contacts," *American Sociological Review* 34 (1966): 309.

36. Stewart Macaulay, "Law and the Behavioral Sciences," p. 152; and Galanter, "Why the 'Haves' Come Out Ahead."

37. See Donald Black, *The Behavior of Law* (New York: Academic Press, 1976); "Crime as Social Control," *American Sociological Review* 48 (1983): 34.

38. See Bonnie S. Hausmann, "Mandates without Money."

impact on family conflict lies not in its ability to resolve disputes but in its influence on habits of handling conflict.[39] Echoing Foucault's studies of medicine, asylums, and sexuality, researchers suggest that mediation provides a mechanism for distributing middle-class modes of interaction—discussion, negotiation, and bargaining—to groups in society who have typically handled conflict in different ways. Mediation appears to be a mechanism for inculcating process values rather than resolving particular conflicts.[40]

A study of victims of discrimination suggests that the costs of law extend to far more than just financial and class issues; indeed, law seems to come at the price of the ability to define and manage the presentation of self. In a study of individuals who had reported suffering some form of discrimination on the basis of age, sex, or race, Kristin Bumiller notes that her respondents refused to turn to law to redress their grievances because they wanted to avoid the tendency of the legal process to individualize grievances and to require them to speak through a professional, a lawyer.[41] Bumiller argues that these tendencies and requisites rob victims of a sense of being in control of their own lives and isolate them at a time when they are most in need of support. Her respondents claim a double victimization—first in becoming an "object of discrimination" and second in becoming "a case" in law. The capacity of the legal process to objectify individuals and situations—to construct them as examples of a general rule—is typically assumed to be a strength, but those who are objectified experience it as oppressive.

In an unrelated study of lower courts, I observed a similar phenomenon. Although defendants did not undergo social degradation (i.e., fall in public position or status) as had been predicted for courtroom interactions, they nevertheless experienced something unpleasant.[42] Most particularly, they experience the loss of control and autonomy—negative associations and impressions that seem to attach irrespective of outcomes of guilt or innocence.[43] Having to go through the process that involves what Erving Goffman might have called "personal defacement" seems to be the issue. Defense becomes the assertion of self, an attempt to deny the law's effort to distance the individual through mortification and stripping of the self and to construct the individual through an abstracted and formally orchestrated process.[44] Legal settings are unpleasant and humiliating because they are public encounters in which some participants lose their ability to manage the presentation of themselves.[45] This somewhat ironic observation suggests that defendants can lose their autonomy and privacy without necessarily losing their social status—because for the regular defendants and witnesses in lower court proceedings, privacy and autonomy are already lacking. The research provides support for notions of class that include access to and management of one's autonomy and privacy as defining variables.[46]

39. See Sally E. Merry and Anne Marie Rochleau, *Mediation in Families* (Cambridge: Children and Family Services, 1985).

40. See Susan S. Silbey and Sally E. Merry, "Mediator Settlement Strategies," *Law and Policy* 8 (1986): 7; and *Politics of Informal Justice*, ed. Richard Abel, 2 vols. (New York: Academic Press, 1981-82).

41. See Bumiller, "Anti-Discrimination Law and the Enslavement of the Victim," Working Paper 1984-86, Disputes Processing Research Program, University of Wisconsin; and *The Civil Rights Society* (Baltimore: The Johns Hopkins University Press, 1988).



42. Harold Garkinkel has defined a degradation ceremony as "any communicative work between persons whereby the public identity of an actor is transformed into something looked on as lower in the local scheme of social types" ("Conditions of Successful Degradation Ceremonies," *American Journal of Sociology* 61 [1956]: 420); he has suggested that the effectiveness of status degradation devices will vary according to their situational organization and operation. He hypothesizes that courts might exercise a fair monopoly over status-degradation ceremonies because degradation has become an occupational routine.

43. See Feeley, *The Process Is the Punishment*.

44. See Goffman, *Stigma* (Englewood Cliffs, N.J.: Prentice Hall, 1963); *Interaction Ritual* (Chicago: Aldine, 1967).

45. For a provocative discussion of the management of presentations of self in legal settings, see Austin Sarat and William Felstiner, "Law and Strategy in a Divorce Lawyer's Office," *Law and Society Review* 20 (1986): 93.

46. Obviously, socioeconomic status affects one's ability to manage a balance of the public and private spheres (using these terms in their conventional, nontheorized form). Poverty, for example, leads to a lack of privacy in crowded and noisy living conditions; conversely, great wealth sometimes calls forth unusual public notice. The problems of poverty are exacerbated, however, when an individual tries to obtain help from public officials or agencies. The person must reveal informa-

The assertion that law and courts are mechanisms of social control is neither theoretically nor empirically surprising; neither is the assertion of a relationship between social control and social structure.[47] These assertions are interesting, however, in the face of repeated efforts to "reform" the law in the name of neutrality or objectivity—because the assumption of such objectivity would seem to be controverted by the law's status as a socially constructed phenomenon[48] and the fact that it serves as a multipurpose device.

6. *Law is a resource used by citizens and legal actors for handling situations and solving problems.* Law is a culturally variable phenomenon, and each society, culture, and subculture makes of it something that belongs to that grouping. With this observation,

tion about himself or herself to the clerks in the Social Security office, to social workers, to medical or school personnel. In local community courts, social workers, welfare officials, and school and court personnel are an integrated part of the lives of their clientele, some of whom are regular participants in court. Such individuals' ability to manage the presentation of self to others is severely limited, although they certainly develop strategies of adaptation and resistance. But in the end, those for whom the court experience is novel, those who are unconnected to legal institutions or other participants in the process, those without developed strategies of resistance, and in general players inexperienced in the ways of public agencies will be humiliated.

In a heterogeneous and complex society with little consensus on substantive values, privacy and autonomy may be better indicators of power and class than occupation or income. It is well understood that privacy is inextricably connected with power relationships, with the vertical organization of society: individuals and institutions with greater power force those with less power to divulge information. We know that variation in perception of courts is also related to class and occupation and may also be related to the ability to demand and control one's privacy. Much of the apparent class variation in the use and effect of the legal process, especially the criminal process, may also reflect the ability of some participants to control what is exposed and who has access to information about oneself. Because the lower classes enter the courts with relatively little of this autonomy, obviously the courts can remove relatively less of it from them. They are exposed in court, and they may be humiliated, but they do not see or experience social degradation to the extent that those who occupy higher social positions do.

47. On this, see Black, *The Behavior of Law.*

48. See Gary Peller, "The Metaphysics of American Law," *California Law Review* 73 (1985): 1152.



the sociology of law reveals the natural-law tradition to be a particular culturally developed vision or ideal; some may even view it as a pernicious ideal on the grounds that it denies other culturally developed ideals in the name of being the one natural and universal law.

The uses of law can be distinguished in terms of experienced and inexperienced users. Nonprofessional disputants turn to law to resolve situations that they are no longer able to resolve by themselves. Although the recourse to law can be regarded as a strategic move, one of several that are possible to resolve particular troubles, the mobilization of legal resources frequently requires overcoming normative constraints against such action, which is itself seen as a form of "making trouble." Any calculation of the utility of law or its alternatives has to take account of the cultural context and meanings attached to dispute-resolution mechanisms as well as the availability and efficiency of those devices.

In a study of the cultural context of disputing, I found that disputants prefer to handle interpersonal problems by themselves, through talk or avoidance.[49] Only when talk or avoidance fails do parties in conflict turn to an outside agency. So long as they seek a voluntary and congenial discussion with the other party, disputants feel that resorting to outside help and uninvolved parties is morally repugnant. When they are willing to turn to others for help with their problem, the parties no longer wish to settle their dispute by discussion and negotiation. At this point they no longer consider their problem a conflict of interest in which they have limited and negotiable goals; they have come to view it as a principled grievance for which they seek an authoritative and binding solution. It is in precisely those cases that have developed to the point where they seem unavoidable, incessant, and intractable that the grievance becomes principled and the grievant can justify going to an outside agency. When they reach this point, disputants often turn to law, seeking a third party to make a definitive and binding judgment about right and wrong. At this point, disputants want vindication, protection of their rights (as they perceive them),

49. The following discussion is based on research reported in Sally E. Merry and Susan S. Silbey, "What Do Plaintiffs Want? Reexamining the Concept of Dispute," *Justice System Journal* 9 (1984): 151ff.

an advocate to help in the battle, or a third party who will uncover the "truth" and declare the other party wrong. Observations of legal processes suggest that courts rarely provide what the disputants are looking for, particularly to parties in complex interpersonal cases—but inexperienced plaintiffs do not know this. They turn to law for an advocate and to get justice. They are frequently disappointed in situations that more experienced court users can manipulate deftly.[50]

For experienced and professional legal actors, law provides a multipurpose device for problem solving.[51] In litigation, police work, defense, prosecution, and judgment, the outcome is frequently determined before an appropriate or applicable legal procedure is invoked.[52] For example, in the enforcement of consumer protection law, agents frequently invoke infractions of a variety of other laws in the course of resolving consumer complaints.[53] They have this flexibility because laws, in general, are imperfectly enforced, and there is a likelihood that those whom they are seeking to charge with violation of consumer protection law will also be guilty of violation of such things as safety and building codes, zoning or license rules, tax laws, and other infractions only remotely related to consumer protection, if at all.

Legal ambiguity, or at least the potential for ambiguity, is located not simply in language or abuse of law but in the domain of legitimate use. Every provision of law, once set loose, is a candidate for all manner of uses. Laws have histories within which their meaning and use change, often quite radically. The work of legal historians provides rich illustrations. For example, Chambliss has described how vagrancy laws changed from being a means of

50. See Sally E. Merry, "Going to Court," *Law and Society Review* (1979): 891; and "Working Class Ideology and Law," *Legal Studies Forum* 9 (1985): 59.

51. For a discussion of the distinction between experienced and inexperienced players, see Galanter, "Why the 'Haves' Come Out Ahead."

52. For a discussion of the processes of legal reasoning and writing, see Karl Llewellyn, *The Bramble Bush* (Dobbs Ferry, N.Y.: Oceana Press, 1969). In this collection of introductory lectures, Llewellyn urges his law students to read cases as a post hoc justification of the decision, not as a description of how that decision was made.

53. See Susan S. Silbey and E. Bittner, "The Availability of Law," *Law and Policy Quarterly* 4 (1982): 399-434.



securing a labor force in the fourteenth century after the Black Death decimated the English population to a means of controlling vagabonds and rogues engaged in criminal activities on the highways in the sixteenth century.[54] The action of replevin, devised in medieval England to protect agricultural leaseholders from landlords who detained their cattle, was resurrected in nineteenth-century Wisconsin by landlords to use against leaseholders engaged in lumbering.[55] And, as is well known, the imposing edifice of our federal drug control laws was erected on the foundation of a tax measure.[56]

This activity, whereby law becomes a tool that shapes social situations, feeds back upon the law so that the uses to which it is put eventually come to shape the content and substance of the tool, the law itself. It is a dialectical process in which the law is the raw material that legal actors create and work upon at the same time they use it to handle whatever matters demand.[57] The uses of law are not entirely predictable—but neither are they unlimited. While law is available for all sorts of uses, the ways in which it is put to use are constrained by sets of practices, conventions, ways of doing things within a society; in this culture those practices relate to courts, lawyers, litigation, claims of right, precedent, evidence, and judgment, not to ballet dancing, playing chess, marketing, or running for office.

In other words, while the law is more varied than a formalistic and mechanical view would have us believe, the variation is neither indeterminate nor completely determined by external variables. Law is not only a set of doctrines; neither is politics the only reality. The way law is practiced, or what is done in the name of law, is constrained by a world of its own creation,

54. William J. Chambliss, "A Sociological Analysis of the Law of Vagrancy," *Social Problems* 11 (1964): 66.

55. See J. W. Hurst, *Law and Economic Growth* (Cambridge: Harvard University Press, 1964), p. 345; and F. Pollock and F. W. Maitland, *History of English Law*, vol. 2 (Cambridge: Cambridge University Press, 1968), pp. 577-78. See also J. Hall, *Law, Theft and Society* (Boston: Little, Brown, 1935).

56. See A. R. Lindensmith, *The Addict and the Law* (Bloomington, Ind.: University of Indiana Press, 1967).

57. See Doreen McBarnett, "Law and Capital," *International Journal of the Sociology of Law* 12 (1984): 231-38.

which interacts with itself, its ways of doing things, so that what is possible is limited. The law is a social institution as well as a set of practices characterized by the distinctive features of the legal form, the role of cases, and decision making in concrete and particular situations. This is what E. P. Thompson meant when he described law as a mediating instrument reinforcing and legitimating, masking and mystifying social relations and class rule.[58] Politics may also mediate and mask social relations, but law does so differently. The difference—what we recognize as the legal form and the central focus of the institution—is what is interesting to the practitioner of the sociology of law and what must be considered in any attempt to connect law with other social phenomena—community, justice, or morality.

## III

Sociological studies of law have traditionally been pursued outside of the mainstream of legal discourse, participating at a remove while offering an alternative epistemology and jurisprudence. In this, it has been a critical enterprise, its focus decentering, concerned not with what the law *is*—the concern of legal elites—but with what the law *does*—a concern of users and receivers of law.[59] Although this tradition encompasses a vision of a socially constructed reality, it pays less attention to its own role in constructing that reality, and in particular to the role of social scientists in creating legality.

Sociological inquiry began with a broad but simple claim that institutions, including legal institutions, cannot be understood apart from the context of the entire social environment. At the same time as sociologists have insisted on bringing sociology to law, we have done less well attending to the forces that frame our descriptions of legal institutions and their environments. We have not done very well at promoting a sociology of the sociology of law. The rich and extensive literature describing how legal systems work not only describes what is done through law but

58. Thompson, *Whigs and Hunters* (New York: Random House, 1975).

59. See David Trubek, "Where the Action Is: Critical Legal Studies and Empiricism," *Stanford Law Review* 36 (1984): 575.



defines what is possible in law. The descriptive research becomes a variable in the construction of legality because the narratives we create provide plausible understandings that simultaneously limit and constrain what is imagined as possible. As sociological studies of law expose the illusions of the natural vision, they simultaneously create their own illusions.

What is the vision of legality that has been constructed through our empirical studies of law? It has been shaped by a number of choices we made.

First we moved from a concern with the relationship between community and law to an investigation of the relationship between law and society. In this move, we abstracted the social relations that constitute both law and morality from the particular situations and environments in which they were created. We produced a discourse of universality in which there are not communities but a *society*, in which there are not laws but *the law*.[60]

Second, we accepted the political formulation of the distinction between law and society without characterizing that relationship as problematic. Social scientists recognized that society was problematic but failed to characterize as problematic the idea of law itself. We looked for connections between law and society as if the two were separate. They are not. In this tradition, law became either a symbol or artifact, a dependent variable created by social forces or an independent variable, "determin[ing] what is possible in politics."[61] Neither of these positions is sufficient in itself; they end up reifying both society and law rather than conceiving of them as mutually constitutive.

Third, having accepted and reified the distinction between law and society, we set about studying the effectiveness of law in this relationship. Scholars explored the consequences and implementation of law and found, much to their surprise, the ineffectiveness of law, a gap between law on the books and the

60. This argument is based upon a more extensive analysis by Susan S. Silbey and Austin Sarat in "Critical Traditions in Law and Society Research," *Law and Society Review* (1987): 165; and Austin Sarat and Susan S. Silbey, "The Pull of the Policy Audience," *Law and Policy* (1988): 97.

61. John Brigham, *Civil Liberties and American Democracy* (Washington: Congressional Quarterly Press, 1984).

"law in action."[62] By focusing on the administration of law, researchers were drawn to hard cases—that is, to instances in which law attempts to alter social arrangements and is most likely to fail. The research paints pictures of a legal system struggling to retain what seems like a tenuous grasp on the social order. It portrays legal officials as vainly struggling against great odds to do law's bidding and thereby effaces the overwhelming reality of lawfulness, of law's contribution to the reproduction and maintenance of existing social relations and practices. Too few studies have focused on this more normal pattern of legal life. Sociolegal research has done little to investigate or demonstrate how law works when it does work, and little to show how problematic both the forms and the consequences of effective legal regulation can be.[63]

Often research is based on the premise that law could and should be made more effective. Like the early American legal realists, sociologists of law often become advocates for legal intervention and promoters of effective legal regulation. What starts out looking like critique almost inevitably ends up in apology. The law itself is seldom questioned. We become technicians for the existing social order, and we help rationalize policy by providing both legitimacy and technical planning.[64]

Thus sociologists of law, perceiving themselves to be marginal or ineffective in the world of legal policy,[65] nonetheless work to maintain the existing legal order. Rarely questioning the basis or adequacy of existing legal institutions and arrangements, researchers act as if the solution for legal problems is to be found within law itself, eagerly participating in what Lenore Weitzman

62. See Malcolm Feeley, "The Concept of Laws in Social Science," *Law and Society Review* 10 (1976): 497; Richard Abel, "Redirecting Studies of Law," *Law and Society Review* 14 (1980); David Nelken, "The 'Gap' Problem in the Sociology of Law," *Windsor Access to Justice Yearbook* 1 (1981): 35; and Austin Sarat, "Legal Effectiveness and Social Studies of Law," *Legal Studies Forum* 9 (1985): 23.

63. See Silbey and Bittner, "The Availability of Law."

64. See Herbert Gans, "Social Science for Social Policy," in *The Use and Abuse of Social Science*, 2d ed., ed. Irving Louis Horowitz (New Brunswick, N.J.: Transaction Books, 1975).

65. See Lawrence Friedman, "The Law and Society Movement," *Stanford Law Review* 38 (1986).



has called a continuous process of correction and refinement.[66] Sometimes this leads to calls for more law, as for example in Laura Nader's work on consumer protection,[67] and sometimes it leads to calls for less law, as in Eugene Bardach and Robert Kagan's work on the enforcement of health and safety regulations.[68] It should be noted, however, that although Bardach and Kagan call for less law, they do so out of a concern for state legality: they argue that justice and efficiency would be better served if we lowered our expectations about what law can do.

By accepting the values and assumptions of state legality, scholars ignore the role of law in the organization of social power and as a result fail to investigate the law as field for the play of social power.[69] By attending narrowly to the relative effectiveness of regulation, they overlook the ways in which regulation that fails to achieve its stated purpose (e.g., to make the workplace safer) may nevertheless influence relations between workers and managers, consumers and businessmen by providing resources, strategies, and arenas for contests among groups or interests. Indeed, the focus on effectiveness masks, as it neglects, the contribution of particular laws to the construction of social practices and culture.

If the study of the moral authority of law is to be successful, it will have to proceed on a different path and from another place. Instead of studying the effectiveness of law where it is actively in-

66. See, for example, Weitzman's *Divorce Revolution* (New York: Free Press, 1985). In her research on the consequences of "no-fault" divorce in California, Weitzman describes herself as surprised that it has done great damage to women and children and that it has contributed in a significant way, as she puts it, to growing gender inequality and the feminization of poverty. She sees the effects as unanticipated and unintended and therefore wants to help correct the error of past policies. She describes herself as engaged in a "continuous process of correction and refinement," helping policymakers achieve their allegedly benign and admirable objectives. For a more elaborate discussion of this perspective, see Austin Sarat and Susan S. Silbey, "The Pull of the Policy Audience," *Law and Policy* (1988): 97.

67. See Nader, *No Access to Law* (New York: Academic Press, 1980).

68. See Bardach and Kagan, *Going by the Book* (Philadelphia: Temple University Press, 1982).

69. See Dennis Wrong, *Power: Its Forms, Bases, and Uses* (New York: Harper & Row, 1979).

tervening in people's lives, we should look to where it is least visible, where legal culture is being transmitted and learned in such ways that it quietly but routinely channels and shapes attitudes and behavior. Moreover, we should begin by noticing that lawyers have got hold of only part of the law—the part where there is trouble or the anticipation of trouble. The domain of law that lies outside the professional's grasp is what the German legal theorist Eugen Ehrlich calls the living law, what we recognize daily in our untroubled transactions as legal relationships, whether or not they constitute the substance of what lawyers spend much of their time doing.[70] Ehrlich places at the core of legal life those behaviors that lie behind the screen of legislation and decision but actually govern society, though only periodically becoming enacted in formal rules. These norms define the taken-for-granted world of legal practices and legitimacy.

Ehrlich underscores the point that a court trial is an exceptional occurrence in comparison to the innumerable contracts and transactions that are consummated in the daily life of the community. In light of the fact that only small morsels of life come before officials charged with the adjudication of disputes, he argues that we must go beyond the "norms of decision" laid down for adjudication to the "norms of organization" that originate in society and determine actual behavior of the average person who becomes enmeshed in innumerable legal relations.

The law, as Ehrlich understands it, is subjugated to social forces but also serves to shape social forces. Law is both a tool and the raw material of legal actors, a resource that needs to be understood in the wider context of the social relations of which it is merely a part. As a rule, "one pays one's debts and renders to one's employer the performance that is due";[71] one pays the shopkeeper for a tube of toothpaste, and the title is thereby transferred. It is not the threat of adjudication or compulsion by the state that routinely induces a person to perform these duties, although that is certainly a part of the situation. More is at stake than the performance of legally enforceable obligations. Legal forms are constitutive of the forms that social relations and practices take. Law is so embedded in those relations and practices that it is virtually invisible to those involved. It is this invisibility, this taken-for-grantedness, that makes legality and legal forms so powerful.

70. Ehrlich, *Fundamental Principles of the Sociology of Law*, trans. Walter L. Moll (New York: Arno, 1975).

71. Steven Vago, *Law and Society* (Englewood Cliffs, N.J.: Prentice Hall, 1981), pp. 40-41.



From this perspective, the dominant views of law as an instrument of state power, the outcome of political and legal struggles, or a complex and historically evolving set of rules and expectations are one-sided and insufficient. In each, the law is impoverished, considered merely an ineffective instrument or a professional technique; the conventional practices and constitutive aspects of law are disregarded. In order to paint a richer, more complex picture, some scholars have begun to view law as a set of cultural and symbolic languages.[72] As a cultural system, "law offers a set of symbols and meanings, stories, rituals, and world-views that people use in varying configurations."[73] It provides a tool kit of habits, skills, and tactics from which people construct strategies of action as well as belief.

## IV

In conclusion, let me reiterate my perspective on legal research and attempt to specify the crisis in law. By critiquing the sociological project, I am not suggesting that I wish to reject empiricism or return to a world of idealism. In affirming the social construction of social relations, however, I wish to emphasize the consequences of those constructions and the relations that limit what is possible. I wish to emphasize that the sociology of law is one of those social constructions—as is the natural-law perspective—that limits and contrains what is understood about and possible in law.

Often we sociologists of law write as if we were describing

72. See John Brigham, *Constitutional Language* (Westport, Conn.: Greenwood Press, 1978); Timothy O'Neill, "The Language of Equality in a Constitutional Order," *American Political Science Review* 75 (1981): 626; Timothy O'Neill, *Law as Metaphor* (forthcoming); Carol Greenhouse, "Nature Is to Culture as Praying Is to Suing," *Journal of Legal Pluralism* 20 (1982): 20; and "Interpreting American Litigiousness," paper presented at the Law and Society Association annual meeting, San Diego, June 1985.

73. Ann Swidler, "Culture in Action: Symbols and Strategies," *American Sociological Review* 51 (1986): 273.

an objective but nonetheless manipulable world of social relations; indeed, this is what we mean by "social reality."[74] But the task and the interest of scholarship are to observe (and perhaps critique) the processes of constructing that world, including the construction of legality. The goal of social research is not, I think, to take the perspective of the actor as the standard of inquiry but to make that perspective and epistemology the subject of inquiry. This distinction emphasizes the difference between technocratic and critical research. It requires that we observe our own participation in that process. It demands that we explore the politics that have been embedded in the traditions of legal studies—the focus on the state, the benign view of lawmakers, and the refusal to evaluate legal goals.

One of the claims I have made is that studies of law should move from both the natural-law vision and the instrumental sociological vision of law to something more akin to Erhlich's notion of the living law, to the ways in which law constitutes social life rather than works to alter or change it. It is very possible that in this perspective I have overestimated the effectiveness and stability of legal forms, just as social scientists have heretofore overstated the ineffectiveness of law. It would be more appropriate, then, not to look solely at either the efforts of legal instrumentality and change or at the hegemonic realm of conformity but rather at the ways in which issues, people, and problems move from one domain to the other. With renewed attention to the role of intellectual resources, the stock of established expertise, and the symbols available to citizens as well as to agents of the state, we can observe the struggles to move from one arena to the other. My word of caution, however, is that we must also take care to note the role that we as scholars and scientists play in this movement, in the social construction of law and legality.

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74. People commonly assume the existence of an intersubjectively known yet external and accessible world in their "natural attitude" as competent members of society. See Alfred Schutz, *On Phenomenology and Social Relations* (Chicago: University of Chicago Press, 1970); and Berger and Luckmann, *The Social Construction of Reality*. Melvin Pollner has said that the notion of "one single world" knowable by any competent person is the "incorrigible assumption" of social life ("The Very Coinage of Your Brain: The Anatomy of Reality Disjunctures," *Philosophy of the Social Sciences* 5 [1975]: 411).

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# Law and the Ordering of Our Life Together

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*and*
*The Story of an Encounter by*
Edwin A. Rodriguez

*Edited and with a Foreword by*
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