

# Loyalty and Betrayal: Cotterrell's Discovery and Reproduction of Legal Ideology

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ROGER COTTERRELL, *The Sociology of Law*. London: Butterworths, 1984.  
Pp. 409.

*The Sociology of Law* is a rich and provocative text that has become, since its publication seven years ago, justly celebrated for its incisive and powerful account of law as ideology. Cotterrell surveys the major theoretical statements and empirical studies on the role of law in society to develop, locate, and justify this ideological perspective. Although he specifically disclaims any desire to propound a new or original legal theory, Cotterrell nonetheless wants to provide the elements of a reasonably consistent analytical framework for explaining legal phenomenon (at viii). He attempts to advance the field by demonstrating how an appreciation of law as an ideological formation overcomes limitations in traditional theories and deepens understanding of the place of law in society. Cotterrell's text is an important work for this fact alone—that it articulates a claim and stimulates research based on the cogency of viewing law as ideology.

*The Sociology of Law* is, however, perhaps even more important as one of the relatively few efforts to synthesize the recent generations of empirical research and theory about law and legal behavior.<sup>1</sup> In this respect, it is

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1. Although there are several other such efforts, few attempt the theoretical advance

not merely a useful but a masterful text. It is especially serviceable for students because of its readability, thoroughness, and careful integration of both classical and contemporary research.

Nonetheless, *The Sociology of Law* disappoints. Having discovered through careful analysis and argument the utility of viewing law as ideology, Cotterrell then produces a traditional account of the usual topics and subjects of legal scholarship. What first appears as an innovative and critical integration ends up reproducing the typical story of lawyers, courts, and administrative agencies. In its excellence, Cotterrell's work illustrates a limitation inherent in the project of synthesizing a field: how the ambition to produce a critical yet synthetic interpretation may simultaneously contribute to normalizing its subject.

In the essay that follows, I illustrate how Cotterrell's effort to rewrite the sociology of law from a critical perspective is undermined by an insufficiently developed critique of his subject and the role of scholarship in shaping that subject. Because I recognize my own ambitions and preoccupations in this text,<sup>2</sup> I am particularly sympathetic to both Cotterrell's project and the text's problems. Perhaps it is because I share both his conspicuous delight in sociological theory and his commitment to transformative politics that I also recognize the difficulty of achieving those goals and the frustrations so often associated with such ambitions. I have been trained in the same traditions and have been caught up in similar struggles. We come to our political positions from experiences of subordination and denial, but we operate in politics from positions of authority and privilege. The slippage from action to representation, from experience to theories of experience, from the concrete to the abstract sometimes does its own violence to just those subjects we seek to empower. Because I want to join with Cotterrell's project, I approach this essay as a

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that Cotterrell seeks, and fewer still locate their effort politically. See William M. Evan, *Social Structure and Law* (Beverly Hills, Cal.: Sage Publications, 1990); Lawrence M. Friedman, *Law and Society: An Introduction* (Englewood Cliffs, N.J.: Prentice Hall, 1977), and *id.*, *The Legal System* 2d ed. (New York: Russell Sage Foundation, 1977); Robert Kidder, *Connecting Law and Society* (Englewood Cliffs, N.J.: Prentice Hall, 1983); Herbert Jacob, *Law and Politics in the United States* (Boston: Little, Brown, 1986); Richard Lempert & Joseph Sanders, *An Invitation to Law and Social Science* (New York: Longman, 1986); Edwin M. Schur, *Law and Society: A Sociological View* (New York: Random House, 1968); Roman Tomasic, *The Sociology of Law* (Beverly Hills, Cal.: Sage Publications, 1985); Steven Vago, *Law and Society*, 2d ed. (Englewood Cliffs, N.J.: Prentice Hall, 1990). Interpretive readings with theoretical and political ambition are more often found in articles, but here few attempt to synthesize the full historical and empirical breadth of the research.

2. See, e.g., 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 Publishing, 1989); Susan S. Silbey & Austin Sarat, "Critical Traditions in Law and Society Research," 21 *Law & Soc'y Rev.* 165 (1987); *id.*, "Reconstituting the Sociology of Law: Beyond Science and the State," in David Silverman & Jaber Gubrium, eds., *The Politics of Field Research: Beyond Enlightenment* (Beverly Hills, Cal.: Sage Publications, 1989); Austin Sarat & Susan S. Silbey, "The Pull of the Policy Audience" 10 *Law & Pol'y* 97 (1988).

relatively self-conscious confrontation with the limitations of one's own work, and in a spirit of constructive collaboration.

Cotterrell's text provides the opportunity to identify items high on an agenda for a new sociology of law: loyalty and betrayal; the class, race, and gender biases of Western sociology; the distinction between critique and criticism; the relationship between synthesizing and canonizing; and the tensions among science, authority, and critical theory. Although I cannot specify in this space the implications of each of these themes, I will begin by suggesting the kind of argument and perspective that can be developed by mobilizing these concerns. I will follow these remarks with an exposition of Cotterrell's text, marking some of the places and moves that shape his rhetorical strategy and limit its critical potential. I conclude by noting how Cotterrell's aspiration to an outsider position nonetheless creates another set of marginalized outsiders.

### DEVELOPING A CRITIQUE OF THE SOCIOLOGY OF LAW AND A STANDPOINT/PERSPECTIVE FOR THE CRITIC

For nearly a quarter-century now, one after another aspect of cultural life has been challenged for excluding the perspectives, voices, experiences, interests—each word suggests a difference in theoretical framing—of subordinated populations. Feminists, people of color, and others have argued persuasively concerning the ethnocentric—Eurocentric, male chauvinist, white supremacist—biases of what has claimed to be and often has been passing as value-free, universal, scientific scholarship. Few cultural fields or academic disciplines have been free from compelling analyses of their colonization by white, male, and European biases. In reading Cotterrell's remarkably sympathetic text, however, it occurs to me that the particular perspective of Western sociology, also primarily white and male, is better characterized as an instance of betrayal than as a witting, complacent, or even unintended exclusion or domination.

Although the biases of most disciplines can be seen to be consistent with dominant interests in Western cultures, sociology claimed for itself the role of observer rather than participant, and in this ambition set itself outside the common assumptions and power arrangements of 19th- and 20th-century Western societies. As a sociologist of law, Cotterrell also claims a position as outsider. "The sociologist," he writes, "remains a relatively uncommitted observer," scientifically seeking systematic and comprehensive knowledge (at 5). To the degree, however, that sociology and sociologists reproduce in their accounts the organization and entitlements of conventional social life, they seem to betray the calling and capacity for critique. Here I deploy the notion of critique as historically informed and

politically transformative analysis; it puts power and history at the center of sociological inquiry to reveal both the multiplicity of power relations and the socially constructed nature of the present arrangement, "implying that [the present] can be transformed by conscious political strategy."<sup>3</sup> To the degree that the sociologist's claim to be an uncommitted observer betrays a loyalty to sociology, I question whether being outside also betrays critical ambition.

Despite its pretension to disinterested scientific pursuit of knowledge, the profession is implicated in the very world it seeks to describe. From its beginnings, sociology was and remains more than a passive outsider. Simply by making visible underlying latent social forces, sociology constituted a challenge to the taken-for-granted quality of social life and the accompanying myths that legitimated and sustained relationships between dominant and subjugated groups.<sup>4</sup> The systematic attention to social variation and unintended yet consequential social processes produced a sociology that had, from the point of view of social elites and despite its claims to scientific disinterest, a particular bias. Solely by describing social variation, sociology recognized and illuminated the roles of less powerful social groups and interests, and to that degree at least implicitly contested elite hegemony.<sup>5</sup>

Following this line of argument one need not ignore the conservative work of many early sociologists, including Durkheim and Weber, or the origins of American sociology in elite-supported social work, to remark as well on the latently adversarial posture developed by these same people. Durkheim and Weber sought a pure, objective science of sociology, quite different from Marx's normative science. And in spite of the fact that sociology seems to have grown more in the spirit of Durkheim's positivism than Marx's critique, latent within Durkheim's work was also a critique of modernity, a sense of distance from and critique of the social conditions of the 19th century. Even though he ultimately produced a science that froze social reality, confirming and objectifying it, his distant and reflective stance was, at one level, subversive.<sup>6</sup>

Some interpretations of this traditional mission claim that sociological criticism consists primarily of the outsider's observations, of an unmasking process in which social forms are, in a sense, held accountable to

3. Nikolas Rose, "Beyond the Public/Private Division: Law, Power and the Family," 14 *J.L. & Soc'y* 61 (1987).

4. Berger & Berger, *Sociology: A Biographical Approach* (New York: Basic Books, 1972), describe sociology as a response to historical crises that challenged the taken-for-granted quality of Western society during the 19th century.

5. See Anthony Giddens, *An Introduction to Sociology: A Critical Perspective* (New York: Norton, 1991).

6. I want to thank my colleague Tom Cushman for helping me to understand the contradictory potentials in early sociological theory. See Mark Wardell & Stephen J. Turner, *Sociological Theories in Transition* (Boston: Allen & Unwin, 1986).

an implicit set of standards or law-like principles (e.g., the consistency between manifest normative claims or purposes and latent functions; relationships between norms, values, and social structure). However, others, Horkheimer for example,<sup>7</sup> argue that the full development of sociology as *critique* demands more than fidelity to its unmasking, truth-telling mission. Simply revealing what is partially hidden, categorizing what is revealed, and labeling what is sorted does not necessarily shape the direction of change or the uses to which that revealing, categorizing, and naming is put. Indeed, for many years, the inclusion of gender, race, and class variables among standard descriptors in traditional sociological research veiled sociology's own vulnerability to challenges from marginalized and subordinated populations ostensibly included within those variables. Moreover, by developing systematic processes for describing social groups, it furthered the project of classifying and containing them. Not only did sociology become part of the surveillance apparatus, its status as independent, objective, and thus legitimate knowledge helped privilege expert power against local knowledge.<sup>8</sup> Failing to recognize that *critique* requires more than *criticism* or being outside, would-be critics too often betrayed sociology's critical capacity and became handmaidens to power in the guise of pursuing professional scientific knowledge and public service.<sup>9</sup>

The effort here is to distinguish *critique* from *criticism*. Koval, following Horkheimer, suggests:

Critique is not to be confused with pure and simple criticism. Where criticism employs the internal standards of a discipline (along with general considerations of logic and truthfulness, etc.) to evaluate a work, a critique goes one step further. It uses the means of criticism, but adds to them a superordinate benchmark, namely, a consideration of the historical forces to which a work is subjected as well as the historical role which the work is to play. Critique considers a work not only by internal standards or abstract criteria, but more funda-

7. "Traditional and Critical Theory," in Max Horkheimer, ed., *Critical Theory: Selected Essays*, trans. M. J. O. O'Connell et al. (1937; reprint, New York: Herder & Herder, 1972) ("Horkheimer, 'Traditional and Critical Theory'").

8. See Michel Foucault, *Discipline and Punish* (New York: Pantheon, 1977); *id.*, *The History of Sexuality*, Vol. 1: *An Introduction* (New York: Pantheon, 1978); *id.*, *Power/Knowledge*, ed. Colin Gordon (New York: Pantheon, 1980); Nancy Reichman, "Managing Crime Risks: Toward an Insurance Based Model of Social Control," in Steven Spitzer & Andrew Scull, eds., *8 Research in Law, Deviance and Social Control* (Greenwich, Conn.: JAI Press, 1986); Jonathan Simon, "The Ideological Effects of Actuarial Practices," *22 Law & Soc'y Rev.* 771 (1988); Sarat & Silbey, *10 Law & Pol'y*; Piers Beirne, "Adolphe Quetelet and the Origins of Positivist Criminology," *92 Am. J. Soc.* 1140 (1987); *id.*, "Heredity versus Environment," *28 Brit. J. Criminology* 315 (1988); Stephen Pfohl, "Criminological Displacements: A Sociological Deconstruction," *33 Soc. Probs.* 94 (1986); cf. George Canguilhem, *On the Normal and the Pathological*, trans. Carolyn Fawcett (1904; reprint, Dordrecht: D. Reidel Publishing Co., 1978).

9. Horkheimer, "Traditional and Critical Theory." Cf. A. Wildavsky, *Speaking the Truth to Power* (Boston: Little, Brown, 1979).

mentally according to the interests it serves. Therefore, critique is directed against the notion that scholarly and intellectual work is a pure and dispassionate pursuit.<sup>10</sup>

Simply put, a critical theory "wants to explain a social order in such a way that it becomes itself the catalyst which leads to the transformation of this social order."<sup>11</sup> Forms of sociology and social science, including explanatory theories, can perform the function of critique to the degree that they offer more than enlightenment. "Liberation requires that a group not only come to understand itself in a new way, but that it galvanize itself into revolutionary activity."<sup>12</sup> This is indeed a double-edged sword. Engaged writing creates both a transformed sociologist and an empowered audience, and more importantly, it seeks emancipation as a result of that empowerment. To the degree, however, that sociology rests content with enlightenment, it risks its role as outsider and, more importantly, actively collaborates in the very order it claims to observe and explain.<sup>13</sup>

Once we recognize the potential for betrayal in the promise of criticism, we can also see that *critique* and liberatory knowledge require more than being outside; they require loyalty to outsiders' positions and interests. The critic is not merely a nonparticipating observer but the source of an analysis that has foci centered elsewhere.<sup>14</sup> Here, critique depends not on accurate, disinterested yet self-reflective reporting but on loyalty to subordinate persons and groups and, in particular, the acknowledgment and recognition of the critic's social location and identity.

In making a claim for acknowledging the critic's standpoint, I do not wish to assert its singularity, nor its universality. Instead, I wish to argue that politically engaged critique requires oppositional consciousness and to emphasize that this opposition is experienced and known through particular forms of denial and subordination. While critique seeks to explore social practices and to identify the structures of subordination in order to engage them for liberatory purposes, it must not, however, submerge fractured identities and multiple experiences in an effort to create a unitary

10. Joel Koval, "A Critique of DSM-III," 9 *Res. L., Deviance & Soc. Control* 127, 127-28 (1988).

11. Brian Fay, *Critical Social Science: Liberation and Its Limits* 27 (Ithaca, N.Y.: Cornell University Press, 1987).

12. *Id.*

13. See Jaber Gubrium & David Silverman, eds., *The Politics of Field Research: Beyond Enlightenment* (Beverly Hills, Cal.: Sage Publications, 1989), for discussions of the limitations of enlightenment as a goal of fieldwork.

14. See bell hooks, *Feminist Theory: From Margin to Center* (Boston: South End Press, 1983); Sandra Harding & Merrill B. Hintikka, eds., *Discovering Reality: Feminist Perspectives on Epistemology, Metaphysics and Philosophy of Science* (Dordrecht: D. Reidel Publishing Co., 1983); Sandra Harding, ed., *Feminism and Methodology* (Bloomington: Indiana University Press, 1987); cf. Linda J. Nicholson, *Feminism/PostModernism* (London: Routledge & Kegan Paul, 1990); Seyla Benhabib & Drucilla Cornell, *Feminism as Critique* (Minneapolis: University of Minnesota Press, 1987).

account of social life.<sup>15</sup> Rather, I argue that the authority<sup>16</sup> of the accounts produced by sociology will depend on the ability to construct reports that sustain multiple perspectives; at the same time, sociology's contribution to social critique will also depend on its ability to locate those accounts within historical and political analyses that provide the context that gives them purpose and meaning.

Without acknowledging the standpoints that characterize the social observer, critique degenerates into abstract and undirected criticism. Objectified accounts that speak without voice or location seem to claim for sociology a place outside social life, begging a special status removed from

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15. Nikolas Rose, 14 *J.L. & Soc'y* at 61, 71 (cited in note 3), suggests that we need to distance ourselves from the tendency within critical thought to mistakenly simplify and unify power into relatively rigid structures and to project contemporary radical wisdom onto the past. Following Foucault, he suggests that we must abandon the preoccupation with demonstrating the function of false explanations and conceptualization and instead work to "fragment, disturb, and disrupt some of the central explanatory categories of critique." There is not, he argues, a unified and internally coherent entity that is the locus of all social power and a single determinative social agent; rather, power is fragmented, regulation dispersed, and techniques and objectives contradictory.

This argument can be illustrated by contrasting what Sandra Harding calls the "feminist standpoint" perspective from "postmodern feminisms." Sandra Harding, *The Science Question in Feminism* (Ithaca, N.Y.: Cornell University Press, 1986). The feminist standpoint can provide, it is argued, more accurate and fuller descriptions of social life than can the uncommitted observer of supposedly disinterested science. Unlike the points of view of dominant members of society, which are "partial and perverse understandings," self-referential and self-serving, the understandings of social situations by subordinated populations are often more detailed and reliable because knowledge of the powerful other is necessary for survival. "Postmodern feminisms" build on the feminist standpoint's recognition of plural realities—e.g., the different understandings of master and slave, superordinate and subordinate—while giving up (1) science's goal of "one true story" and (2) the feminist standpoint claim that the perspective of women is general and universal, thus providing a "morally and scientifically preferable grounding for our interpretations and explanations of nature and social life" (at 194). Instead, postmodern feminisms share a profound skepticism about the possibilities of universal claims or perspectives. Postmodern feminists, according to Harding, deny any universal experience that is woman that does not also vary in terms of racial, class, national, ethnic, or tribal identity. See Elizabeth V. Spelman, *Inessential Woman* (Boston: Beacon Press, 1989). Thus postmodern feminists, according to Harding, seek to ground descriptions and understandings of social life in the "fractured identities modern life creates." Here the feminist standpoint becomes one of the many groundings and identities that needs to be kept alive in the effort to sustain the multiple stories describing the complex contradictory threads of modern life. From this postmodern perspective, the feminist standpoint can "only be whatever emerges from the political struggles of 'oppositional consciousnesses'—oppositional precisely to the longing for 'one true story' that has been the psychic motor of western science." Harding, *The Science Question in Feminism* at 193.

16. Authority is clearly a heavily loaded word in this context. I employ it self-consciously to acknowledge the noticeable social and political influence of professional discourses and specifically to suggest that questions of method are often questions of authority. Sociology's claims to scientific reliability and validity are a source of its authority. As "reliable" information with "valid" descriptive measures, sociology enters the category of objective knowledge rather than subjective opinion. See Ernst Nagel, *The Structure of Science: Problems in the Logic of Scientific Explanation* (New York: Harcourt Brace, 1961). For a challenge to the claim of professional authority, especially among ethnographers, see, e.g., James Clifford, "Anthropological Authority" in *id.*, ed., *The Predicament of Culture* (Cambridge, Mass.: Harvard University Press, 1988).

interest, organization, and power. Moreover, by failing to ground analysis in social position or experience, the would-be critic not only undermines the possibilities of critique but sabotages the possibilities of change. Most important, the critic makes criticism acceptable, something that can be absorbed without transforming the fundamental structures of knowledge and power. Criticism can unmask and even produce inversions without undoing the framework of interpretation and power; sociology can mobilize its observations and discoveries in a fashion that not only reproduces the organization of social power but legitimates and enhances it as well. Like the latent functions of deviance, and the dynamics of repressive tolerance, a little bit of criticism can subvert a whole lot of critique, thus supporting and strengthening the status quo. It is in this sense of sanitizing or inoculating us that sociology can betray its critical mission.<sup>17</sup>

Cotterrell's text, *The Sociology of Law*, illustrates well the dilemma of unsituated criticism, unlocated writing without voice. It seems to be a case in point of the ways in which critical ambition can be betrayed by too much loyalty to the abstraction of profession and science and too little loyalty to persons and experiences.<sup>18</sup> Cotterrell's text raises issues of betrayal because one is struck by how standard professional perspectives are reproduced through seemingly unintended complicity. The variety of orientations toward law is submerged within only slightly masked reverence. Privileging the professional authors, students, and users of law, it neglects the perspectives of the subjects and nonprofessional users of law—those for whom the law may be suffocating, or irrelevant. For some persons, law may constitute a welcome and accessible field of play, but for others it may be immorally seductive or inescapable rather than desired. Although some minimal homage may be an irresistible residue of professional involvement with a subject—a psychologically protective mechanism—Cotterrell's work suffers from what appears to be too much professional commitment to his subject. The work's critical potential is undermined by a search for sociological authority and by claiming authority for that sociological critique in science.

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17. I want to thank Martha Minow for offering me the term "inoculation" for this function of criticism.

18. For Habermas, the social scientist cannot escape the role as social actor: "he cannot get outside his object domain to contemplate it like a star. . . . The very attempt betrays what is itself a value, an implicit judgment in favor of technical solutions to social problems which might otherwise be addressed practically through the formulation of rational consensus." Rick Roderick, *Habermas and the Foundations of Critical Theory* 49 (New York: St. Martin's Press, 1986). The task, Habermas suggests, is to develop a social theory with the rigor of science without relinquishing the practical involvements, character, and virtues of classical conceptions of politics. For Habermas, social theory need not be mired in distinctions between objectivity and subjectivity but should seek, instead, to create the possibilities of transprofessional emancipatory knowledge. See Jurgen Habermas, *Theory and Practice* (Boston: Beacon Press, 1973); cf. Richard Bernstein, *Beyond Objectivism and Relativism* (Philadelphia: University of Pennsylvania Press, 1985).



## CAPTURING THE CENTER BETWEEN DOCTRINE AND CULTURE: LAW AS IDEOLOGY

The concept of law as ideology emerges as Cotterrell attempts to identify the role of law in society, mark its boundaries, and describe the relationship between law and other social phenomena. As an intellectual strategy, this ideological perspective becomes a means of resolving the tensions between doctrinal and cultural conceptions of law, both of which characterize, while moving in opposing directions, Cotterrell's efforts to specify the social bases of law.

Cotterrell adopts the notion of ideology to describe the pervasive polymorphous functions of law because it is "both broader in scope and more specific" than notions of societal consensus or social symbol. Ideology, and legal ideology in particular, provides a

framework of thought within which individuals and social groups interpret the nature of the conflicts in which they are involved and recognize and understand the interests which they seek to promote. . . . Ideology provides the context in which social symbols are interpreted. It fixes their meaning and significance. The symbols of law and government do not exist in isolation but as part of wide currents of understanding about the nature of society and individual life. The manipulation of social or political symbols relies on existing ideology and at the same time contributes to sustain and direct it. . . . Legal ideology can be thought of, then, not as legal doctrine itself but as the "forms of social consciousness" reflected in and expressed through legal doctrine. (At 122)

This ideological perspective highlights the capacity of legal doctrine and ideas to shape consciousness and, in particular, to inscribe arbitrary and varied cultural forms with the aura of the natural and inevitable.<sup>19</sup> It accentuates the capacity of law to forge authoritative and powerful accounts of social relationships and understandings of the social world. Although ideologies can be said to distort and mystify experience, to falsely portray unity, and to conceal class relations, it is not "the truth"—an immutable natural reality knowable through positivist science—that is concealed. Rather, ideology, and particularly law in its ideological capacity, masks the possibilities of alternative understandings and accounts of social relations, alternative constructions forged from divergent experiences and competing visions.

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19. For a brief introduction and alternative formulations of the ideological perspective, see "Special Issue: Law and Ideology," 22 *Law & Soc'y Rev.* No. 4 (1988), and the citations there. I thank the Amherst Seminar and in particular Patricia Ewick for the formulation of the ideological perspective used in this paragraph.

Of course, by rejecting alternative interpretations, ideologies also deny that they are themselves creations. By naturalizing the social world, ideologies deny their generative, creative power. In short, ideologies do not proclaim themselves as such. For example, the ideologies of meritocracy, competitive individualism, desert and fairness simultaneously construct and deny systems of structured inequality. Therapeutic professionalism, founded on the rhetoric of diagnosis and intervention, denies its role in creating pathologies of mind and body it then seeks to treat.<sup>20</sup>

Cotterrell launches his analysis by questioning what he claims is the lawyer's conventional conception of an autonomous legal terrain. Following the work of Sumner, Savigny, and especially Ehrlich, Cotterrell develops a cultural critique of law that challenges the vision of enacted, legislated law operating within a bounded, distinct, and separable "cluster of institutions and professional practices" (at 17). He recounts Sumner's notion of the law as a fully integrated aspect of social life that "grows, or should grow out of the mores" of a society (at 20). Law is part of the collective effort to specify social goods, but it has a dimension beyond mores; it is backed by the force of the state. In this formulation Sumner provides a sociological account or explanation for traditional "common law assumptions about the deep social roots of law and the slow process of legal evolution" (at 21). In Savigny's work the conception of law expands even further beyond a collection of rules or norms backed by force or judicial precedents. Savigny understands the law as an expression of the spirit of a people or a nation, an encapsulation of its history and collective experience as a group. "The law of such a people or nation written down at any given time is no more than a static representation of a process which is always continuing: the evolution of culture" (at 23). In this sense, "law embodies important cultural assumptions" that in turn are "an important aspect of its influence in society" (at 26). Legal concepts such as reasonableness, equality, negligence, or injury can be understood only within the specific contours of particular societies. "Everything about law's institutions and conceptual character," Cotterrell argues, "needs to be understood in relation to the social conditions which have given rise to it. In this sense law is indeed an expression of culture" (at 26).

Ehrlich's polemic against positivism pushes the analysis of law as culture even further and provides the heart of Cotterrell's discussion of the social foundations of law. Ehrlich's analysis rests on the observation that the lawyer's business—legal resolution of disputes—is a very small part of

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20. This quote comes from an unpublished essay written collectively by the Amherst Seminar, 24 May 1988. See Thomas J. Scheff, *Being Mentally Ill* (New York: Aldine Publishing, 1984); Peter Conrad & Joseph W. Schneider, *Deviance and Medicalization: From Badness to Sickness* (St. Louis: Mosby Publishers, 1980).

social life. The rules that govern that business, what Ehrlich calls the "rules of decision," are also a small part of the rules that govern social life generally, what he called the "living law." Lawyers make a mistake, Ehrlich argues, in thinking that the rules of decision actually govern social life. The "living law" is "far wider in scope than the norms created and applied by state institutions" (at 29). That living law "generally operates to prevent disputes and, when disputes arise, to settle them without recourse to the legal institutions of the state" (*id.*).

Although Cotterrell is unwilling to endorse Ehrlich's more sweeping suggestions that social life might continue relatively undisturbed without the particular coercion of the state,<sup>21</sup> he does agree that "extremely powerful systems of normative regulation distinct from the 'official' or lawyer's law govern important areas of social life with little or no reference to the norms for decision" (at 31). Illustrating Ehrlich's analysis, Cotterrell describes the ways in which membership in the various forms of association that constitute sociality create modes of thought, interaction, compliance, and resistance. The living law, he notes, is not something imposed but lived as social interaction in groups.

The associations of social life . . . include voluntary societies (for example, clubs), occupational groups, contractual bonds, social classes, political parties, ethnic groups, religious affiliations, the family, and the nation or state. Law is the inner ordering of these associations. It consists of the rules which assign to every member of the association his position within it and the rights and duties attaching to that position. Law is thus not something imposed externally but arises from the modes of thought that underlie the associations. So the *real* sanctions of law arise from the fact that in general no one wants to be excluded from the associations of life—from the ties of citizenship, family, friends, profession, church, business community, etc. (At 32)

Cotterrell illustrates the strength of the claim that law should be understood as a plurality of interlocking legal orders with examples from contemporary Britain.

Numerous institutions, organizations and social groups develop their own formal rules for self-regulation. This process is to a considerable extent incorporated in, and accepted by, the state's legal order, through a general supervisory jurisdiction of the courts and through enforcement of contracts within this legal order. Thus the state legal system oversees, for example, decisions of professional disciplinary bodies or the interpretation and application of rules governing trade unions. Commercial and industrial companies function on the basis

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21. Eugen Ehrlich, *The Fundamental Principles of the Sociology of Law*, trans. W. L. Moll, at 71 (New York: Arno Press, 1975).

of rules contained in their articles of association which may be interpreted by the courts. Codes of practice in industrial and other spheres, collective agreements, constitutional conventions, rules of parliamentary procedure, codes governing or guiding the exercise of official discretion in various fields: all of these constitute regulatory schemes of great importance. (At 29)

Thus Cotterrell begins with an appreciative treatment of cultural perspectives but quickly shrinks from their expansive, "breathtaking range and generalization" (at 27).<sup>22</sup> Having opened the terrain beyond enacted legal rules, and having challenged the adequacy of positive law as the whole, or even the heart, of legal phenomena, Cotterrell seeks, nonetheless, to narrow the field. He wishes to develop a working definition or provisional model of law that will permit "open-minded inquiry" and yet make it "possible to think of law independently of other forms of social control, or, at least, as in some respects distinctive" (at 41). Very clearly, Cotterrell seeks a middle ground between "a thoroughgoing legal pluralism" (at 42), in which "law can be distinguished from other social norms only in vague terms" as exemplified in Ehrlich's work (at 41), and a too narrow, too simple conception of state law.<sup>23</sup> In developing a middle ground, Cotterrell considers three centering devices, or analytic foci, for identifying the legal aspect of social life: rules/doctrine, dispute processing, and coercion/sanction. He eventually settles upon an expanded notion of institutionalized doctrine as a first working definition or provisional model of law and as an organizing concept for the book.

Cotterrell uses institutionalized doctrine as a heuristic, ideal type. Although he wants to emphasize the place of rules as the core of law, and the fact that rules imply limitations on "arbitrariness and a degree of normative control of official discretion" (at 45), he insists that no special value need attach to those rules, to legality as rule following, or to any particular legal values.

In its most open form this approach merely implies that law can be interpreted, learned and applied as a body of doctrine. Law thus consists of social rules importing or implying certain cognitive and evaluative principles and concepts. As long as law is distinguished from

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22. Cotterrell is concerned to keep the sociology of law within a specified boundary that will prevent it from becoming so general as to no longer be the sociology of law but the sociology of everything, or life. Cf. Jeffrey Fitzgerald & Richard Dickins, "Disputing in Legal and Non-legal Contexts: Some Questions for Sociologists of Law," 15 *Law & Soc'y Rev.* 681 (1980-81). Cotterrell seems to be experiencing some similar sense of disciplinary anomie.

23. For some authors the law is the "regulation established, interpreted and applied by state institutions" (at 41), although for others the state is itself an expansive concept and the law-as-state-regulation remains theoretically open until the state is better defined and understood.

social rules in general—for example, by specifying that legal rules depend upon the existence of definite institutions or procedures employed specially for their creation, interpretation, or enforcement (but not necessarily for all three functions)—this is a useful concept. (*Id.*)

By emphasizing the importance of special institutional arrangements for the enactment and interpretation of doctrine, the processing of disputes, and the systematic enforcement of social order, Cotterrell follows very traditional sociological definitions.<sup>24</sup> He nonetheless puts special emphasis on the conjunction of institution and doctrine and in this merger seeks to establish a distinctive approach. Institutionalized doctrine as a working concept of law is particularly useful, according to Cotterrell, because it (1) avoids the narrowness of positive conceptions in which rules are seen as transparent and clear, (2) acknowledges the existence of discretion within doctrine, and (3) from a sociological standpoint, echoing Holmes, insists on the significance of the processes for making, interpreting, and adjudicating rules as much as the content of the rules themselves.

In this institutionalized doctrinal approach, which he develops into the notion of ideology, Cotterrell attempts to mark out a limited conceptual space between competing definitions of law as culture and law as official, enacted rule. He plays back and forth with these ideas in several chapters, reporting on the research that explores law as an instrument of social change and law as a mechanism of social integration. In the chapter on social change, he reveals the limitations of positivist instrumental visions of law. Most of the literature on law and social change reflects the optimism of progressive political movements, and thus stresses, although it does not demonstrate, the law's capacity to promote change; this research consequently "diverts attention from the extent to which the [law] prevents change" (at 69). By viewing law as an "instrument for inducing widespread change in citizens' behavior patterns and beliefs or attitudes," law is conceived of as "an autonomous agent acting upon social and cultural conditions," created by the state for this purpose (at 71). However, studies repeatedly illustrate the incapacity of law to effect social change and the ineffectiveness of law to alter social relations or to make people behave in better, moral ways. The repeated observations of law's ineffectiveness demonstrates, according to Cotterrell, the inadequacy of this instrumental and positivist vision of law and the folly of ignoring cultural and social forces shaping both law and its reception.

Unsatisfied with the naive instrumentalism of the law and social change studies, Cotterrell surveys functionalist analyses of law. Instead of

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24. See, e.g., Max Rheinstein, ed., *Max Weber on Law in Economy and Society* (New York: Simon & Schuster, Clarion Books, 1954); Paul Bohannon, "The Differing Realms of the Law" or *The Ethnography of Law*, American Anthropological Association, 67 *Am. Anthropologist* 33 (1965).

conceiving of law as transparent and autonomous, with immediate and obvious purposes, functionalist research attends to the contributions—often unintended, latent, and structural—that law makes to the maintenance of existing social and economic institutions. Rather than focusing on the capacity for change, functionalist research concentrates on the ways in which law promotes continuity and stability. Describing the work of Pound, Durkheim, Llewellyn, and Parsons, Cotterrell lays out various models of social cohesion and the role of law in promoting and sustaining social solidarity and integration. He offers the familiar criticisms that functional theories are ahistorical, emphasize structure to the exclusion of agency, ignore power inequalities, offer no explanations for variation in ways in which functions are actually performed, and in direct contrast to instrumental conceptions, are biased toward stability and against change. Nonetheless, he finds that functional approaches offer insight toward understanding how it is “possible for law to act as an apparently autonomous agency in society at the same time as it depends upon and reflects particular social and cultural conditions” (at 100).

Cotterrell claims that law’s autonomy and cultural specificity can be explained by viewing it, as functionalist approaches do, as a means of integrating the diverse elements of collective life. For example, in Parsons’s work, law emerges as a “distinct element of normative structure” integrating the various social subsystems (economic and political) by articulating shared social values. In Durkheim’s writings, which do not develop a concept of law that is clearly distinct from morality or social values, law nonetheless also achieves a certain autonomy as the integrative mechanism of organic solidarity. Where shared values are somewhat problematic, “law becomes a moral agency to substitute for them” (at 100). Thus, while law reflects the particular and distinct values of each culture, it performs that articulating integrative function within each society in a “relatively” autonomous manner.<sup>25</sup>

It is unclear, however, how law works at the microsociological and cognitive levels to integrate social relations or produce social solidarity. Cotterrell suggests that the critical intervening mechanisms are unspecified in these functionalist models. To some degree, law promotes stability and integration by regularizing and formalizing relationships so as to make them “solid.” But Cotterrell is skeptical about the extent to which reliance upon regularization, stability, and integration can be achieved without coordination and, in turn, how much coordination assumes societal

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25. Cotterrell is somewhat skeptical about the formulation of the “relative” autonomy of law because, he says, it merely ignores the problem of specifying the relationship between law and economic structure. He does appreciate, however, Bernard Edelman’s formulation of both law and ideology as arenas of political struggle, *Ownership of the Image: Elements for a Marxist Theory of Law*, trans. E. Kingdom (London: Routledge & Kegan Paul, 1979) (“Edelman, *Ownership*”).

consensus on values. There always seems to be a missing explanatory agent. Furthermore, even if legal doctrine is seen as articulating or elaborating shared values, what is the source of those values, what sustains them, and what does law contribute to the maintenance or development of those values? He also questions the presumption of neutrality that seems to attach to the functionalist models of law whereby law serves to integrate social relations without participating in the struggles for power characterizing those relations. Finally, he worries about how to understand the role of coercion as the central feature of state law. Can one describe law as a neutral mechanism of social integration, articulating and elaborating shared values while at the same time acknowledging its coercive force and the degree to which state power, through law, permeates social relations?

Cotterrell negotiates these waters with elegance and ease, slowly seducing the reader to a comfortable and almost inevitable acceptance of his conception of law as ideology. He carefully chips away at the excesses of the functionalist claim of shared values. He mentions studies that have attempted to document the extent and degree of shared values within particular societies, studies that have either documented consensus at such high levels of abstraction that enormous differences are nonetheless contained within the stipulated consensus, or studies that have rendered the entire notion of societal consensus problematic. He cites the work of Michael Mann, who concluded after surveying a wide number of such studies that (1) although there is some measurable consensus among the middle classes, "society wide consensus does not exist to any significant degree," (2) there is more consensus among the middle class than among the working class, (3) "the working class is more likely to support values antagonistic to the maintenance of the existing order if those values are related to everyday experience,"<sup>26</sup> and (4) middle-class individuals show more internal consistency in their values than do members of the working class (at 106).

From this and similar research, Cotterrell suggests that although consensus writers usually claim much more, the "idea that members of a society share a common outlook may mean no more than that they are influenced by elements of common culture or experience which—whatever their relative positions within the society—differentiate them from members of some other societies" (at 104). Simply, the notion of consensus suggests that there are "dominant ideas or values which consistently influence law and government more powerfully." For Cotterrell, however, the shared values that law embodies and mobilizes as a means of integrating social relations may represent only the consensus of an influential minority

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26. Here Cotterrell, citing Michael Mann, "The Social Cohesion of Liberal Democracy," 35 *Am. Soc. Rev.* 423 (1970), describes a more European, even British, phenomenon than one universally observed.

or a number of elites. Cotterrell thus salvages the notion of consensus, which becomes important to his notion of ideology. He does so, however, without claiming any universality for that consensus, by emphasizing instead that power and influence may attach to some values rather than others. Indeed, it is the influence of some values that establishes their status as components of a societal consensus.

Here, Cotterrell opens the possibility of penetrating the moral claim of consensus. He also makes a space for plural values without, however, identifying competing standpoints or significant disruptions. Much more importantly, however, Cotterrell emphasizes the role that a *belief* in consensus, rather than the *fact* of consensus, may play in mobilizing support for law. Instead of shared values shaping the law, law may actively shape attitudes and beliefs, specifically by claiming to articulate what already exists rather than emphasizing law's formative and creative power. In this move from law articulating value to law shaping value by claiming to articulate, Cotterrell transforms functional theories into a conception of law as ideology.

Drawing on the work of Thurman Arnold, Cotterrell suggests that law may function as an integrative mechanism despite the diversity of beliefs, attitudes, and values among individuals and classes, just because it creates the illusion of unity and consensus.

Thus, for Arnold, law is primarily a way of thinking about government. . . . [It is] a reservoir of emotionally important symbols—of freedom of contract, equality before the law, personal and political liberty, sanctity of property, “law and order,” equity and fairness, moral responsibility—many of them mutually inconsistent if applied in practice with the meaning that they possess as symbolic ideals. . . . [It] is through the art of law—its mystificatory brilliance—that abstract ideals are manipulated to disguise the impossibility of realizing them in practice. . . . Law holds up mutually contradictory ideals like a beacon around which otherwise divided elements in society rally. “And herein lies the greatness of law. It preserves the appearance of unity while tolerating and enforcing ideals which run in all sorts of opposing directions” (Arnold, 1935:247). (At 108)

Developing his concept of legal ideology as a synthetic perspective, Cotterrell also incorporates elements from conflict theories. He draws on those aspects of conflict theories that underscore the formative, shaping power of law along with its integrative and reflective functions. Instrumental Marxist theories in particular emphasize the way law both shapes and reflects social relations by operating as an instrument of repression, promoting the interests of certain classes at the expense of the interests of other classes. Structural Marxist theories stress that at the same time as



law organizes social relations, it also shapes the climate of thought.<sup>27</sup> Legal doctrine offers sets of explanations for those relations—for example, for the sanctity of property or for particular conceptions of equality. Those accounts, explanations, and justifications encourage voluntary conformity to existing social patterns and rules. Because compliance is voluntary, the law contributes, according to Marxist theorists, to class oppression by reducing “direct repression through law to a minimum” (at 112). In this sense, it is the stories that law produces that make the enforcement of law less necessary. Thus, studies of legal implementation can regularly document law’s ineffectiveness, and at the same time can document the class-based consensus on legal values. Critical theorists thus explain that law contributes to social solidarity and integration by encouraging subordinate classes to voluntarily comply with the means of their own oppression.

Again, however, Cotterrell is rejecting any naive, overly empiricist instrumental version of Marxist theory, and any overly deterministic structural versions, by emphasizing that the “main thrust of Marx’s analyses is that the capitalist state is not the direct servant of the capitalist class but an institution which emerges to maintain the order and stability of the dominant mode of production in society” (at 115). Moreover, the class essence of the state, embodied in the relations of production, is usually hidden, only appearing in times of crisis. Like the state, which is often described as a neutral umpire mediating class relations, the law also appears “neutral, serving the interests of all, maintaining equality before the law” (at 115). This is, according to Marxist theorists, the story law tells that encourages voluntary compliance; it is the vital, ideological function of law. Because it is possible to read multiple stories in the law, not a singular story, let us say, of individualism triumphant and collective community subordinate,<sup>28</sup> one can see law not as a direct instrument of particular interests but as a terrain in which interests and classes compete.<sup>29</sup> Rather than being a simple reflection of class rule or a direct agent of state power, the “law . . . is, itself, a prize: the ‘site and stake of the class struggle’ ” (at 118).<sup>30</sup>

Cotterrell concludes that “law is a major (but by no means the sole) instrument for the organization and extension of power relations in contemporary Western societies. Insofar as it protects the powerless it does so not by removing the sources of power exercised over them, but by directing this power, to some extent, into relatively predictable forms” (at

27. See, e.g., Nikos Poulantzas, *State, Power and Socialism*, trans. P. Camiller (London: New Left Books, 1978); Louis Althusser, *For Marx*, trans. B. Brewster (London: New Left Books, 1969); Edelman, *Ownership*.

28. See, e.g., Mary Jo Frug, “Re-reading Contracts: A Feminist Analysis of a Contracts Casebook,” 34 *Am. U.L. Rev.* 1065 (1985); Duncan Kennedy, “Form and Substance in Private Law Adjudication,” 89 *Harv. L. Rev.* 1685 (1976).

29. E. P. Thompson, *Whigs and Hunters* (New York: Pantheon Books, 1976).

30. Quoting Edelman, *Ownership* 134.

120). Law is both an expression of power and a means for formalizing and regularizing relations of power. As it regularizes and formalizes power, it also makes visible and accessible those relations; at the same time, the law makes itself a "more valuable and reliable agency of stability" (*id.*). It does all this—regularize, formalize, and make visible and predictable relations of power—according to Cotterrell, by producing and reproducing "currents of thought and belief—or ideology—influencing 'haves' and 'have-nots' alike" (*id.*). By inculcating and formalizing forms of understanding and ways of interpreting social relations, law becomes the medium of social power.

### ON THE MARGINS OF THE OUTSIDE

Cotterrell offers a skillful synthesis of classical and critical theories with contemporary empirical research. He weaves a wide range of materials into a thematic whole, showing the place of each major perspective within a complex but unified tapestry entitled law as ideology. The chapters on social change and functional theories demonstrate well his adroit and demanding scholarship, as do the ones that follow, elaborating the ideological conception of law. Halfway through the book, I felt that I had been sequestered with an intelligent and sensitive man engaged in an intense labor to make personal sense of the sociology of law. After several readings, my admiration grew for this erudite work.

And yet, I kept feeling put off, almost lonely in a work I was admiring and a territory I cherished. I wanted to know how the pieces work. Are the stories the law tells about women the same as the stories it tells about men? How are the law's accounts of labor different from its accounts of property? How has discrimination law constructed persons as victims rather than as warriors? What is it like to invoke the law? Is it the same for people of color as for others? How do the popular conceptions of law compare to the mandarin discourses? Although Cotterrell's analysis invited these concerns, there was a persistent sense of abstraction and distance from the experiences of law. There were no people in these accounts; and I, too, kept feeling not there, outside, as if he was not speaking to me. Of course he was speaking to me as a professional sociologist studying law, he was just not speaking about me as a historically located woman. As I read and thought about this book, I recognized my familiar passion for the subject, the theories, and the nuances of subtle conceptualization; and yet I seemed to be simultaneously isolated from that which I wanted to engage. It reminded me of my first visits to the Supreme Court. The awe and majesty excited desire at the same time as they conveyed the message that this was not a place I was expected to be.

If ideology points to the capacity of ideas to shape consciousness, to

inscribe varied cultural forms with an aura of necessity, to claim universality or unity where there is variation, is it possible to view this work itself as an ideological production? Although it does not claim necessity, and certainly celebrates the self-critical and self-revising mission of science, it is a very particular construction of the sociology of law that celebrates openness while it very obviously excludes and denies the presence and role of less authoritative and powerful voices in the shaping of law and the study of law. My complaint is simple: this ambitious and powerful work establishes the cogency of viewing law as ideology but offers a partial, limited, and too unified conception of the sociology of law.<sup>31</sup> The work applauds consistency and eschews contradiction, seeks unity as it silences plurality, venerates professional discourse as it neglects the voices and practices of the subjects of law, and finally, commemorates general theory as it forgets historical specificity. The sociology of law is itself presented as a series of gentlemanly debates, a slowly evolving synthesis woven from stern if unlike threads: there is struggle, but the disruptions and challenges are not portrayed as threatening penetrations as much as welcome contributions to a gently simmering stew.

Although Cotterrell acknowledges limits to his inquiry, he means it to be a reliable accounting of the subjects within his stipulated boundaries. To the degree, however, that he describes what is partial as general, he does more than meet practical limitations. Cotterrell self-consciously restricts the work to an exploration of "theory and empirical research bearing on law in the contemporary industrialized societies of Western Europe and North America" (at vi). He specifically notes the exclusion of material on law between states and literature on crime, deviance, punishment, and penal policy that might be relevant but that he has nonetheless decided to exclude. He does not acknowledge, however, that the description of law within North American and European states is itself partial or that it excludes experiences and interpretations of members of those societies to the degree that they fail to contribute to "general concepts, theoretical issues and sociological hypotheses which reflect legal developments common to these advanced Western industrialized nations" (at vii).

Of course, works are always partial, and one can always fault an author for not including some topics in preference to others. The pattern of partiality and exclusion is nonetheless noteworthy. *The Sociology of Law* is pretty much what Cotterrell calls it: an exploration of "various theoretical analyses of the sociological significance of legal ideas in Western societies and of some conditions which have contributed to the formation of particular modes of legal thought in these societies" (at 188). It is in addition an

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31. Cf. David Kairys, *The Politics of Law* 2d ed. (New York: Pantheon Books, 1990) ("Kairys, *Politics*"), for an alternative effort—one that specifically acknowledges the fractured texture of legal discourse; its focus, however, eclipses empirical studies of law.

exploration of the three "clusters of institutions" that tend to be associated with law, whatever concept is adopted and in whatever society one studies: institutions focused on (1) the resolution of disputes, (2) the guardianship of legal knowledge and expertise, and (3) the enforcement of regulation. Three long chapters comprising one third of the text describe research on these institutional clusters. Except the text is also more than these topics name. It proclaims the boundaries of significant interest for students of the sociology of law. Specifically, it confines relevant legal sources and experiences to legal doctrine and these three institutional clusters; it thereby excludes the contributions available outside mandarin legal thought and the official, organized, and state-sanctioned legal fora. The particularity of legal thought in these societies is thus determined not solely by comparison with other legal systems but also by exclusion within these Western societies.

Although Cotterrell does not make big claims for his work, and he more than succeeds by the criteria he establishes, his loyalty to even this limited ambition ultimately betrays the critical potential of his substantive theoretical contribution. Although he "does not set out to propound a new and original legal theory" (at viii), he nonetheless offers an innovative, provocative, and synthetic account of law as ideology. On the other hand, because he also intends to "sketch and develop a consistent image of the nature of law in contemporary Western societies" (at viii; emphasis added), he proffers a standard picture of legal activities and "relevant" social relations. The ideological conception of law he develops highlights the power of historically and situationally circumscribed narratives to shape meanings and constrain practice.<sup>32</sup> Rather than seeking unity in legal thought that would implicitly eliminate all but one right resolution and that makes that resolution appear inevitable and necessary, the ideological perspective opens legal discourses to investigation of the multiple meanings and possibilities they contain. Nonetheless, Cotterrell fails to apply his analysis of the ideological and constitutive capacities of legal discourse to his own contribution to legal knowledge. He reproduces the customary picture of "relevant" legal institutions and activities (lawyers, judges, courts, and administrative agencies) under the rubric of a theory that exposes the ways in which law helps to shape customary understandings and interpretations. He seeks consistency where convention is surely plural, fixed accounts where multiple possibilities abound. By drawing a line between his theoretical apparatus and his description of major institu-

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32. In general, see 22 *Law & Soc'y Rev.* No. 4 (1988); for particular attention to history, see Elizabeth Mertz, "The Uses of History: Language, Ideology, and Law in the United States and South Africa" (at 661); Brinkley Messick, "Kissing Hands and Knees: Hegemony and Hierarchy in Shari'a Discourse" (at 637).

tional clusters, Cotterrell inadvertently participates in the reproduction of orthodox legal ideology.

He consistently tries to walk a middle road; he states this intention explicitly (at viii, 42), and he achieves it well. He steers a course between an original theory and a simple repetition of the myriad of existing theories; he attempts a middle ground between what he experiences as radical legal pluralism, a view of law as culture, and the vision of a mechanistic, autonomous legal domain. He seeks order where there is disruption, and containment where there are possibilities. What is missing in this judicious effort, however, is a recognition of the contributions of ordinary citizens in the construction of legal thought and institutions. What is also missing is sufficient attention to the forms of resistance to legal authority and hegemony. By this inadequate notice, Cotterrell privileges the authority of official legal institutions. Like the complicity of sociology in the construction and legitimation of professional authority, it is not important that this participation is unintended or complacent. What seems important is its betrayal of both its own ambition for "disinterested" science and its capacity for critique.

To some extent, inattention to less powerful players in the struggle to shape the terrain of law simply reflects differential access to the means of shaping that terrain. Despite their claims, and Cotterrell's allegiance, sociology and social science generally are little better at unearthing, listening, and giving space to the quieter participants in the legal process than are the official institutions. True, relatively less research exists on the experiences and from the perspectives of victims, women, and people of color than on the experiences and from the perspectives of white upper-class men, business users, lawyers, judges, and enforcement agents. One might justifiably argue that there is a paucity of research that Cotterrell could have drawn on to document the legal experiences of the less powerful and the contributions of "unofficial" actors in the construction of law. Nonetheless, research that does exist suggests that experience of law is more varied and the hegemony of legal ideology less complete than this picture of the "legal developments common to these advanced Western industrialized nations" (at vii) would have us believe.<sup>33</sup>

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33. Cf. John Brigham, "Rights, Rage and Remedy: The Construction of Legal Discourse," 2 *Stud. Am. Pol. Dev.* 303 (1987); Kristen Bumiller, *The Civil Rights Society* (Baltimore: Johns Hopkins University Press, 1988); David Engel, "Cases, Conflict and Accommodation: Patterns of Legal Interaction in an American Community" 1983 *A.B.F. Res. J.* 803; *id.*, "The Cultural Context of Law: Rights, Difference and the Education for All Handicapped Children Act" (manuscript, SUNY-Buffalo, 1990); *id.*, "Law in the Domain of Everyday Life," in A. Sarat & T. Kearns, eds. *The Law in Everyday Life* (Ann Arbor: University of Michigan Press, forthcoming); Patricia Ewick & Susan S. Silbey, "Negotiating Subjectivities: Conformity, Contestation and Resistance in Narratives of Legal Consciousness" (presented at Law and Society Association annual meeting, Amsterdam, 1991); Lawrence Friedman, *Total Justice* (Boston: Beacon Press, 1985); Carol Greenhouse, *Praying for Justice: Faith, Order and Community in an American Town* (Ithaca, N.Y.: Cornell University Press,

The text's strong emphasis on doctrine is a large part of the problem. It surely seems right headed and in some ways a welcome antidote to overly behaviorized versions of legal practice. But the emphasis on doctrine seems to be a consequence of Cotterrell's effort to stick to a middling position. His emphasis on rule-sanctioned practices attempts to draw the line between cultural, "boundless" conceptions of consciousness and positivist autonomous notions of law, but it leads to problems. A doctrinal starting point ends up privileging official state law, and as a consequence, the sociologist ends up worshiping at a temple from which he is excluded. This marginalization of the outsider is illustrated by Cotterrell's sanctification of doctrine as the cornerstone of his analysis—offered, however, without any substantive analysis of doctrine. The heretic enters the temple but does not read the prayer book.<sup>34</sup>

The emphasis on doctrine also empowers writing over experience, privileging access to canon institutions in which writing takes place and is preserved. Here the written word, the state law, is made the law's focus, and the sociologist is relegated to descriptions of the "para-legal" practices surrounding that writing. An alternative approach looks at institutional constructions of doctrine—for example, the practices and challenges out of which varying conceptions of property emerge and that doctrine silences.<sup>35</sup> State law or official versions of legal doctrine produce the account of law of the winners; the winning position is described in the opinion—no longer as a prize of battle but as self-evident, necessary, transcendent. Attention to institutional constructions of doctrine would not begin with power, the state's law, but with an account of alternatives, paths not taken, challenges and resistances.

Finally, Cotterrell's commitment to social "science," to what is general not partial, to what is consistent not contradictory, leads him to construct relatively singular accounts of legal institutions, ignoring variation and silencing differences.<sup>36</sup> He holds to a lively middle position through-

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1986); Sally E. Merry, *Getting Justice and Getting Even* (Chicago: University of Chicago Press, 1990); Sally E. Merry & Susan S. Silbey, "What Do Plaintiffs Want? Reexamining the Concept of Dispute," 9 *Just. Sys. J.* 151 (1984); Austin Sarat, "In the Belly of the Beast: The Legal Consciousness of the Welfare Poor" (on file with the principal investigators; prepared for presentation at Law and Society annual meeting, June 1989); Susan S. Silbey, "Child's Play: A Cultural Analysis of American Adolescents' Legal Consciousness," *Droit et Société* no. 19 (1991); 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).

34. For some heretical critical readings of doctrine, see Kairys, *Politics*.

35. John Brigham, *Constitutional Language* (Westport, Conn.: Greenwood Press, 1978); *id.*, *Civil Liberties and American Democracy* (Washington, D.C.: Congressional Quarterly Press, 1984); and *id.*, *The Cult of the Court* (Philadelphia: Temple University Press, 1987).

36. This emphasis is noted in the text. For example, Cotterrell begins the text by announcing his hope to overcome partial perspectives: "The possibility of ultimately describing and analyzing the social reality of law, as the embodiment of knowledge which transcends partial perspectives, is the possibility of science" (at 4, emphasis in text). The

out that seeks scientific accountability but also acknowledges science as a perpetually constructive inquiry, never absolute, always skeptical. But the middle road, he claims, is on the outside, looking in, disinterestedly observing, reporting, and analyzing. From the margin gazing to what he has constructed as the center—institutionalized legal doctrine—he forgets to notice that he sits in the center of an alternative universe and thus fails to notice its margins. This is not an account of infinite regress but an image of a kaleidoscope refracting positions that cannot be subsumed within a unitary conception of law or sociology. The structure of a particular historically located kaleidoscope can, however, be described.

The preface of the book establishes a context for interpreting Cotterrell's enthusiasm for scientific authority and sociology. The text begins by celebrating the recent proliferation of social scientific research on law. Although "rigorous theoretical and empirical study of law as a social phenomenon serving social ends has a long history" (at v), Cotterrell claims that the contemporary increase in attention to the duality of law as a mechanism of social regulation as well as a body of ideas and doctrines is noticeable and appropriate. It is evidence, he suggests, of a serious quest among legal scholars for rigorous scientific explanation. This is a change and perhaps a challenge to the practitioner's more conventional pursuit of helpful hints for better implementation of public policy. It is, moreover, "the beginning of a long overdue confrontation" (*id.*) between the insights of social science research and traditional jurisprudence. Cotterrell welcomes this confrontation because the law is a matter of both experience and logic, rendering the legal scholar's customary search for its meaning within doctrinal tomes inadequate. The meaning and consequences of law can, however, be discovered in social situations and relationships, the particular and general subjects of sociological inquiry. Cotterrell argues that the sociology of law can provide what legal scholars and practitioners want and require: a reliable account of the place of law in society, its doctrinal body, the writing practices shaping that doctrine as well as the ways in which it both behaves and is understood.

Elsewhere, Cotterrell elaborates the significance of this confrontation; he describes it as a social conflict, a struggle for power and authority between competing discourses and professions.<sup>37</sup> Confrontations between disciplines, he counsels, may "not merely add to knowledge but ultimately

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description of courts begins by saying, "Our concern in this chapter will be to try to identify, in the light of the theory and concepts discussed in earlier chapters of this book, general characteristics of courts and of judicial work which are relatively constant in contemporary Western societies despite differences in the organisation and traditions of the legal systems in these societies" (at 217-18).

37. "Law and Sociology: Notes on the Constitution and Confrontation of Disciplines," 13 *J.L. & Soc'y*, Spring 1986, at 9, 13.

transform the terms in which knowledge is sought and conveyed,"<sup>38</sup> thus opening intellectual spaces for advances in knowledge. Intellectual advances may be quite modest, simply revealing the taken-for-granted character of disciplinary practices. But in whatever shape, successful confrontations give rise to alternative examples of exemplary practice and alternative forms of disciplinary authority.

Cotterrell is engaged, explicitly, in such a confrontation on behalf of sociology. He wields the sociological sword before the heathen legal science; he admires sociology's "inherent critical and subversive tendencies."<sup>39</sup> He, like Durkheim and Weber, believes that the "sociological study of law involves, in its confrontation with legal discourse and its consideration of the social foundations and effects of legal ideas, the most fundamental questions of social theory" and critique.<sup>40</sup> He acknowledges, however, that his is a less self-confident and more vulnerable enterprise than is legal science in its relatively closed and inaccessible, self-referential, and esoteric forms, and in this confrontation sociology may succumb to the professionalizing impulses of legal science. Political and professional interests of lawyers and policymakers may overwhelm sociology's claim to offer enlightenment or the pursuit of scientific knowledge unbounded by policy needs.<sup>41</sup>

It is an important struggle Cotterrell wages on behalf of science, the pursuit of knowledge, and democratic enlightenment. He seeks a sociology of law freed from "the disciplinary preconceptions of both law and sociology,"<sup>42</sup> in which sociological insight interrogates legal discourse and in which both are recognized as social constructs. If sociology succeeds, he writes quoting John Barnes, its insights become commonplace truisms. Unlike legal science, which is insulated by its professional guardians and self-referential discourse and thus protected from public penetrations, sociology, and by extension the sociology of law, is "necessarily subject to appropriation by and criticism from an 'informed laity.'"<sup>43</sup> It is an open terrain, vulnerable on all fronts by its ambition and by its achievements.

Cotterrell's worries about how confrontation with legal science may engender too great an interest in policy-oriented professional sociology seem admirably self-reflexive. Engagement on behalf of the sociology of law in its internecine struggles with traditional legal science sends Cotterrell off in search of scientific authority, where he locates himself in the "context of no context."<sup>44</sup> By seeking sanctuary in the authority of sci-

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38. *Id.* at 13.

39. *Id.* at 24.

40. *Id.* at 27.

41. *Id.* at 26.

42. *Id.* at 28.

43. *Id.* at 25.

44. *Within the Context of No Context* is the title of a book by George Trow (Boston:



ence, Cotterrell displays his loyalty to professional sociology, thereby frustrating both his commitment to "transform the terms in which knowledge is sought and conveyed" and to liberatory practices on behalf of the disempowered and silenced subjects of law. Loyalty to sociology's critical aspiration is hobbled by its own ambitions.

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Little, Brown, 1981) about postmodern cultural production and what appears to be the dissociation of signs from social structure. I have appropriated the title here to suggest that the claim to objective outsider status as a basis for social scientific authority is unsustainable.