Complexity, Contingency, and Change in Law's Knowledge Practices: An Introduction

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While theology has often served as a public arena for the playing out of disputes about how and where to seek the truth, in the present day and especially in secular societies, law has become a privileged site in which people either seek the truth themselves or comment on the truth-seeking efforts of others. This dimension of law is not always acknowledged. . . . But if power works through knowledge, it should prove useful to undertake an examination of some legal events and processes that highlights the knowledge dimension.

—Mariana Valverde, *Law's Dream of a Common Knowledge*

Reflecting on the production of evidence in court cases, we recognize that legal practitioners, no less than scientists, are professional fact-makers, who weave objects, images, and rhetoric into narratives designed to compel assent from their intended audiences.

—Sheila Jasanoff, "The Eye of Everyman: Witnessing DNA in the Simpson Trial"

When citizens think about law's ways of knowing and about how legal officials gather information, assess factual claims, and judge people and situations, they are often befuddled, confused by the seemingly arcane and constrained quality of the information-gathering, fact-evaluating procedures that legal officials employ or impose.[1] Yet law's ways of knowing are as varied as are the institutions and officials who populate any legal system. And relatively few of them are highly ritualized and rule bound.[2] Most of the others are embedded in a distinctive bureaucratic culture or are entirely idiosyncratic and personal. Few are specialized and esoteric; most are rather ordinary.

All of law's ways of knowing are historically specific, evolving in response to developments both internal and external to law itself.[3] In some contexts, those procedures seem odd, artificial, and divorced from cultural common sense. In others, the ways law knows seem all too common, too reliant on quotidian assumptions and

cultural stereotypes. With respect to the former, we often want law's ways of knowing to be less distant, less artificial, and more grounded in the familiar; with respect to the latter, we worry that law's ways of knowing are insufficiently removed from prevailing assumptions. We can get an initial picture of the variability of law's ways of knowing and of our reactions to them by comparing the rules of evidence in a criminal trial with racial profiling by the police.

Rules of Evidence in a Criminal Trial

Anyone who has ever served on a jury or watched a trial on television can no doubt attest that inside the courtroom, law's ways of knowing seem strange, out of touch, disconnected from the usual ways in which people acquire information or make decisions.[4] Criminal trials follow a specialized set of rules and conventions governing the admissibility of evidence, the testimony of witnesses, and what counts as a proven fact.[5] These rules and conventions are designed to keep from the jury information that is not relevant to a material fact in the case, information that, while relevant, is more prejudicial than probative, is deemed unreliable, or might distract the jury from the case at hand.

Prohibitions on hearsay and on character evidence, for example, are intended to seal off the trial from ways of knowing that people depend on to make sense of the world beyond the courtroom.[6] The former serve to exclude allegedly unreliable information, information that cannot be subject to cross-examination;[7] the latter keeps out of court knowledge that might lead the jury to make false inferences.[8] Hearsay is defined as "'second-hand' information. It occurs when a witness testifies not about something they personally saw or heard, but testifies about something someone else told them or said they saw. Hearsay usually involves an attempt to get some crucial fact entered into evidence that cannot be admitted by any other means. The constitutional due process danger that this represents is that it deprives the other side of an opportunity to confront and cross-examine the 'real' witness who originally saw or heard something."[9]

Another trial procedure forbids the use of evidence of other crimes, wrongs, or acts "to prove the character of a person in order to show action in conformity therewith."[10] Thus, in a sexual assault trial, this rule generally forbids the admission of evidence of prior assaults by the same defendant to prove that he committed the offense for which he is currently being tried.[11] What in our ordinary lives would be a plausible inference is, in the distinctive world of the trial, forbidden.

For jurors, these prohibitions and this sealing off of the trial from conventions may seem artificial and be quite frustrating. Reflecting on his experience of having served on a criminal jury, William Finnegan says, "Serving on the jury had been gratifying in its way, but it had also been profoundly irritating. I wanted to learn more about the real story, the fuller, truer tale that we jurors, with a man's freedom hanging on our judgment, had been forced to guess at lamely."[12]

Moreover, the effort to seal off the criminal trial, to constrain what jurors hear and the ways jurors obtain information, is only partially successful at best. Jurors bring to their service a full stock of folk knowledge. By folk knowledge, we mean the everyday, taken-for-granted understandings that shape people's perceptions, thinking, actions, and reactions to events and situations. As de Certeau remarks, citizens often make of "rituals, representations and laws imposed on them something quite different from what their . . . [originators] had in mind."[13] Thus, folk knowledge sometimes pushes against, as it pushes into, the domain of state law. It domesticates the arcane rules that police what can be said and known in trials. It is itself integral to state law, both constitutive and sometimes critical of it.[14]

When rules of evidence or trial procedure conflict with folk knowledge or belief, the former generally bend to the latter. Reporting on the way the jury on which he served interpreted and dealt with the trial judge's instructions, Finnegan writes, "We started discussing the alibi and were soon busily contravening Judge Berman's instruction that we 'must not, under any circumstance, indulge in speculation or guesswork, nor are you to consider anything outside the evidence.' We guessed and speculated about the lives and motives of the alibi witnesses, trying to put 'the evidence' into some narrative context that made sense. . . . Meanwhile the impossibility of considering only 'the evidence' was so obvious it was hardly mentioned."[15]

Racial Profiling by the Police

If the rules of evidence governing criminal trials are specific to law, frustrate convention, and defy folk knowledge, the world of policing seems to embrace convention and folk knowledge. Despite the requirements of the rules of criminal procedure, police depend on and deploy ways of knowing that bridge the gap between official and social worlds.[16] They depend on a set of social assumptions built up and transmitted through their own organizations and responsive to the distinctive

demands of their work.[17] Reporting on his participant-observation study of police, Jerome Skolnick argues that officers organize their knowledge practices in such a way as to highlight situations of threat or danger.[18] "The policeman," Skolnick notes, "because his work requires him to be occupied continually with potential violence, develops a perceptual shorthand to identify certain kinds of people as symbolic assailants, that is, as persons who use gesture, language, and attire that the policeman has come to recognize as a prelude to violence."[19] Police, Skolnick argues, "respond to the vague indication of danger suggested by appearance. . . . [A] young man may suggest the threat of violence to the policeman by his manner of walking or 'strutting,' the insolence in the demeanor being registered by the policeman as a possible preamble to later attack."[20]

In constructing "symbolic assailants," race plays a key role. Thus, Skolnick found a high level of racial prejudice among the police he studied as well as a "broader pattern of racial and ethnic stereotyping."[21] Such stereotypes are information-gathering techniques, or rather ways in which police organize their perceptions of the world in the absence of detailed, individualized information. "They are called on in many aspects of their work," Skolnick says, "to make 'hunch' judgments, based on loose correlations."[22] Ethnic stereotypes play a substantial role in their "armory of investigation."[23]

Seen in this light, recent controversies about racial profiling may be reframed as controversies about law's knowledge practices.[24] Those who defend profiling do so on the grounds that, in some limited contexts, race is a reasonable predictor of criminal conduct and that attending to race is a rational way to gather and assess information.[25] And many of those who criticize it do so on the grounds that race is a poor surrogate for criminality; thus, the use of race in law enforcement is irrational.[26]

The term *racial profiling* has been applied to a spectrum of different police practices in which police rely on race, to one degree or another, to make inferences about criminality.[27] As Gross and Livingston define it,

> "racial profiling" occurs whenever a law enforcement officer questions, stops, arrests, searches, or otherwise investigates a person because the officer believes that members of that person's racial or ethnic group are more likely than the population at large to commit the sort of crime the officer is investigating. The essence of racial profiling is a global judgment that the targeted group—before September 11, usually African Americans or Hispanics—is more prone to commit crime in general, or to commit a particular type of

> crime, than other racial or ethnic groups. If the officer's conduct is based at least in part on such a general racial or ethnic judgment, it does not matter if she uses other criteria as well in deciding on her course of action. It is racial profiling to target young black men on the basis of a belief that they are more likely than others to commit crimes, even though black women and older black men are not directly affected.[28]

As Gross and Livingston point out,

> The range of things the government can do on the basis of racial or ethnic information is enormous. If mass imprisonment defines the high end (short of torture or execution), paying close attention may define the low end. After September 11, nobody could seriously complain about the FBI paying more attention to reports of suspicious behavior by Saudi men than to similar reports about Hungarian women—even though as a consequence many more Saudi men will set off false alarms. In between there are infinite gradations, as the government's conduct becomes increasingly intrusive, disruptive, frightening, and humiliating.[29]

In 1976, the United States Supreme Court confronted the question of the constitutionality of racial profiling in a case alleging that a Border Patrol agent investigating illegal immigration sixty-six miles inside the Mexico–United States border relied largely on ethnicity in making referrals to a secondary inspection area.[30] Ultimately, the Court found the practice constitutional.[31] Writing for the majority, Justice Powell described the governmental interest as follows: "Large numbers of aliens seek illegally to enter or to remain in the United States . . . Interdicting the flow of illegal entrants from Mexico poses formidable law enforcement problems," and argued that "the consequent intrusion on Fourth Amendment interests is quite limited. . . . It involves only a brief detention of travelers during which 'all that is required of the vehicle's occupants is a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States.'"[32]

Justice Powell upheld the practice of racial profiling by saying, "Even if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry, we perceive no constitutional violation."[33] He linked racial profiling to law's knowledge practices and found race relevant to the work of the Border Patrol. As he put it, "To the extent that the Border Patrol relies on apparent Mexican ancestry at this checkpoint . . . that reliance clearly is relevant to the law enforcement need to be served."[34]

"Trade" Knowledge

Here law's knowledge practices hardly seem governed by a set of special conventions and arcane rules. Instead, common-sense inferences, broad associations, and cultural stereotypes provide the frame within which legal officials come to know the world. Indeed, a substantial scholarly literature has analyzed the ways in which various legal officials develop what Levi and Valverde call "'trade' knowledge, knowledge learned on the job and focusing on the enforcement of particular codes in particular settings."[35]

To take but a few examples from this literature, in the case of the police, Trish Oberweis and Michael Musheno argue that such trade knowledge can take a variety of forms, almost all of which are "richly normative and contingent rather than narrowly rule driven and fixed."[36] As is the case with racial profiling, police engage in "raw forms of division": classifying citizens according to racial, gender, and age-based standards, associating weakness and innocence with women, dangerousness with minorities, and so on. What this often leads to, the authors contend, is the use of "crude notions of 'badness' in combination with broad categorizations, denying the uniqueness of individuals, and enfolding them into social categories already marked for exclusion and the invocation of coercion."[37]

But the process of knowledge acquisition deployed by police is, they contend, more complex than the usual discussion of stereotyping and profiling captures. As they put it, "the identity process works in both directions . . . Due, in part, to the many ways they identify themselves, cops connect with people as unique individuals and sometimes defy the simple coercive politics of stereotyping whole groups as 'bad.'"[38] In other words, one of the rules of the trade that governs police work is that officers bring knowledge of themselves to bear in their interactions with citizens: An officer's own racial, religious, or socioeconomic experience often influences his or her interactions with citizens of a similar stripe. This in turn is one of the reasons "cops are not uniform in the norms and primary values they use to render judgment about citizens and fellow officers."[39] The knowledge processes they employ vary with their own identities, the identities of the citizens they encounter, and the web of institutional norms in which they are embedded.

The informality and variability described by Oberweis and Musheno have, in other contexts, produced a reaction, an effort to ensure greater uniformity and predictability in law's knowledge practices. Thus, Eugene Bardach and Robert Kagan observe that, within the contemporary regulatory state, there has been a drive

to "reduce the variations" in regulation "by developing common interpretations of the rules and a unified philosophy of enforcement."[40] What this has produced, the authors suggest, is a loss of discretion: Under this new regulatory philosophy, regulators "must conduct inspections with an eye toward what is legally proper," not toward what personal experience or even commonsense might dictate. "In the most significant regulatory areas," they write, the law has been deliberately structured "to program inspectors to apply regulations strictly, to pressure enforcement officials to apply formal penalties to violations, and to adopt a more legalistic and deterrence-oriented stance vis-à-vis regulated enterprises."[41]

In this view, regulators increasingly come to acquire and employ legal knowledge in a rigid, formal way: They are "quick to apply legal sanctions against deviations from the law—but less able and willing to adapt the law to the situation."[42] Inspectors are expected to "detect, document and prosecute violations, rather than engage in an open-ended search for 'problems.'"[43] Unlike the police described by Oberweis and Musheno, their knowledge of legal problems is usually derived from a predetermined set of lapses that are enumerated in the regulations; case-specific knowledge that could be gained on a particular regulated site is rarely, if ever, used.

Turning from police and regulators to public defenders, research documents the distinctive ways they acquire trade knowledge. For example, according to David Sudnow, after a certain amount of time on the job, a public defender (PD) acquires a sense of what constitutes a "normal crime"—and thus, a normal criminal. "In the course of routinely encountering persons charged with 'petty theft,' 'burglary,' 'assault with a deadly weapon,' 'rape,' 'possession of marijuana,' etc.," the PD gains knowledge of the typical manner in which offenses of given classes are committed, the social characteristics of the persons who regularly commit them, the features of the settings in which they occur, the types of victims often involved, and the like. He learns to speak knowledgeably of "burglars," "petty thieves," "drunks," "rapists," "narcos," and so on and to attribute to them personal biographies, modes of usual criminal activity, criminal histories, psychological characteristics, and social backgrounds.

Public defenders and similar legal actors employ a rigid categorization system—the "classificatory schema" for criminal acts—that can serve as a "description of a population of defendants."[44] The PD, in short, becomes a veritable storehouse of information, informally collecting and organizing a host of information to apply to (and acquire knowledge of) future crimes and criminals.[45] Indeed, Sudnow suggests, the "achievement of competence as a PD is signaled by the gradual acquisition

of professional command not simply of local penal code peculiarities and courtroom folklore, but, as importantly, of relevant features of the social structure and criminological wisdom."[46] This is a knowledge learned on the job, a knowledge situated somewhere between the arcane rules of evidence that govern what can be talked about in a criminal trial and the stereotypes that Skolnick describes.

In these knowledge determinations, Richard Ericson and Patricia Baranek argue that the "accused can play little or no part"; he is, in their words, "at the bottom of the 'hierarchy of credibility' and the very fact that he has committed a crime makes what he has to say discreditable, and sometimes incredible."[47] Indeed, the authors continue, the accused are almost completely dependent on other legal actors for legal knowledge; deprived of all but what his lawyer gives him, "the accused has no option but to act on faith."[48] As a "one-shot" or occasional player in the legal machine, such people do not have the time or experience to learn the intricacies of the legal process (the "recipe" knowledge that lawyers and other full-time legal actors have). This makes an accused individual especially susceptible to the procedures of lawyers and the police, who, taking advantage of the accused's helplessness, often employ tactics that would, if full knowledge were available to the accused, be recognized as illegal.

Law's Dependence on Outside Expertise

The tactics of knowledge and control described by Sudnow, Bardach and Kagan, and Oberweis and Musheno may be in the process of undergoing substantial transformation or being supplemented by new tactics and technologies. From advanced classification systems to computerized databases to drug tests, Jonathan Simon argues that knowledge strategies are ever evolving to fit a new model of "risk management" that dominates the criminal legal system.[49] Some of these methods, like drug testing, require "little in the way of discourse, communication, or explanation"; thus, unlike previous procedures we have seen, they are "part of a self-contained 'truth'-producing system that does not require interpretation of social life in the community."[50] Such a system is, in other words, disconnected from the particulars of a situation and is less dependent on the kind of trade knowledge that Valverde highlights.[51]

What this and other such penal and regulatory procedures reflect is, for Simon, the rise of mass surveillance. Almost all contemporary knowledge-acquiring methods "make use of computers and automated record analysis systems to stay on top

of a large number of individuals"; almost all "seek to attain greater predictive efficiency in knowing where to target control efforts"; and almost all "seek technical contact points that permit information to accumulate on a regular and easily assimilable basis."[52] These methods "operate by identifying categories of individuals based on their capacity for self-management and permitting individuals variable access to resources and power depending on their risk group status."[53] Like drug testing, these methods provide "standardized information" that "may be of predictive value."[54]

Simon's discussion of risk management and its knowledge-gathering protocols serves as a reminder that, in its knowledge practices, law is as often dependent as it is autonomous.[55] Law borrows; it uses knowledge, information, and expertise generated elsewhere. In various contexts—legislative, regulatory, adjudicative—legal officials seek out or depend on knowledge practices developed in other social institutions.[56] This dependence sometimes facilitates legal decision making but at other times complicates it. In some contexts, legal officials develop distinctive rules governing the receipt of such specialized knowledge.[57] In others, the penetration is seamless, easy, and virtually unnoticed. And of course, law's knowledge practices radiate beyond law's boundaries, influencing the knowledge practices of the culture in which they are embedded, certifying and credentializing, lending weight to, or undermining knowledge claims made elsewhere.[58]

From the rules of evidence to the technologies of risk management, from the practices of racial profiling to the development of trade knowledge, from the generation of independent knowledge practices to law's dependence on outside expertise, even a brief survey shows that law knows in many different ways, that its knowledge practices are contingent, responsive to context, and that they change over time.[59] The chapters assembled in *How Law Knows* provide a small sample of that diversity, that responsiveness, and the influence that law's knowledge practices have on legal outcomes and on the world beyond law.

Overview of the Chapters

The next chapter by Barbara J. Shapiro places the concept of legal "fact" in historical context, examining its evolving meaning and influence over more than three centuries. Contrary to its most common contemporary use—to denote "an indisputable or demonstrable statement of truth"—Shapiro argues that the notion of fact in the period she studied was a complex idea born of diverse influences.

Indeed, she concludes that fact in early Anglo-American law "did not carry an intrinsic connotation of truth but was rather a matter whose truth was in contestation." In this understanding, legal institutions did not aim to know some concrete and incontrovertible reality but rather sought knowledge that would "yield a satisfied conscience or understanding, or its later equivalents, moral certainty and belief 'beyond reasonable doubt.'"

Since Shapiro maintains that the concept of fact (as it applies to the activity of the courts) is "conditioned, though not entirely determined, by the general views of what passes for knowledge in the society in which the legal proceedings are embedded," she also insists that fully understanding the Anglo-American approach to fact-finding requires a "look at some of the intellectual traditions that help to shape its evidentiary practices." In tracing this evolution, Shapiro looks well beyond Anglo-American legal history; indeed, she finds the roots of legal fact in the persuasive techniques of ancient Rome's rhetorical tradition, in the influence of Scripture on witness and circumstantial evidence rules, and in the medieval approach to proof and guilt determination. After examining the ancient roots of Anglo-American fact-finding, Shapiro turns to the development of fact in two of the most prominent Anglo-American legal institutions: the jury trial and witness testimony. In a discussion of changing evidentiary standards, Shapiro considers the role of oath, witness credibility, juror conscience, and circumstantial evidence—a method of proof that was, by the eighteenth century, "widely accepted as sufficient to prove [a] fact."

But besides tracing the history of the legal fact, Shapiro describes the *influence* of legal knowledge and fact-finding methodology on other discourses, including philosophy, history, religion, and science. Her conclusions in this vein may once again seem contrary to the contemporary understanding of what constitutes fact (since she argues that "fact and methods of establishing facts were first developed in the legal setting and only later adopted by other disciplines and intellectual endeavors"). But, Shapiro contends, such conclusions are of the utmost importance: "Lack of attention to the role of law in the development of the concept fact has obscured the importance of law in traditions of knowledge-making and the legitimizing of empirical approaches to knowledge."

When it comes to philosophy, she notes that "legal traditions of fact-finding influenced philosophical exploration at the same time that legal writers began to insist that legal approaches to evidence rested on sound epistemological and logical foundations." In addition, Shapiro sees an easy link between legal fact-finding

and historical scholarship because facts "for the historian as for the lawyer had to be supported by convincing evidence." The concept of fact was also useful for the religious writers of the seventeenth and eighteenth centuries because, as Shapiro notes, it provided "rational grounds" for belief in Christian scripture and other theological doctrines. Finally, legal fact-finding methodology had perhaps the greatest impact on natural science. Shapiro contends that after Francis Bacon, "[c]arefully witnessed facts by credible witnesses . . . became as central to empirical investigation of nature as they did to legitimate decisions in the courtroom." Indeed, like "legal facts, scientific facts were to be evaluated on the basis of credible witnesses who had the opportunity to observe and possessed the requisite ability, probity, skill, fidelity, status, experience, and reputation." And it is on this note—stressing the role that legal concepts of fact played in "shaping modern empirical thought"—that Shapiro ends her chapter.

The next chapter, "Theoretical and Methodological Issues in the Study of Legal Knowledge Practices," by Mariana Valverde, presents another kind of historical analysis set in the Anglo-American world: an examination of the lineage and influence of pragmatist legal theory. From Oliver Wendell Holmes to Roscoe Pound to Stanley Fish, Valverde traces some of the more important shifts and developments in law's pragmatic tradition. Although these writers differ in important respects, Valverde maintains that it is possible to "sweep those differences under the rug and speak of a pragmatist temperament or habitus that runs throughout English-language legal theorizing and that is compatible with a number of philosophical models and with a variety of political stances."

Although contemporary English and American law may not be "essentially" pragmatic, Valverde argues that there is a kind of "silent dialectic" between pragmatism and antipragmatism at work in recent legal decisions. This pragmatic habitus, as she calls it, is not easily defined "but is easily described": "It is a stance that is concerned more with effects than with formal elegance and coherence. It is also one that takes law as an ever-changing formation that is deeply embedded in a complex world that can never be adequately captured in static theoretical models."

Valverde has no general objection to pragmatism, but she argues that it "does not take us very far at all." Just how, she asks, "are we then to document the very striking differences that quickly arise when legal actors . . . go on to actually examine and count the relevant effects?" Valverde contends that pragmatism doesn't offer a compelling answer to this question, and for her, this is an important point of difference between legal pragmatists and sociolegal scholars—a difference that

lies in what Valverde calls "the scope of the inquiry." Valverde argues that the former set of writers "share an a priori knowledge move, a move that excludes anyone other than legislators and judges from the lawmaking function and that therefore confines pragmatic inquiries into effects to investigations of the formal legal system of discourse." Sociolegal scholars, on the other hand, "have for a long time now stressed that lawmaking has deep roots in social struggles and in economic conflicts." Too often, she believes, the "society" part of "law and society" is much more rigorously researched than the "law" part. And although it is not selectivity that is the problem, Valverde claims that an unreflective selectivity that is driven by nothing more than one's own training or one's institutional location does present problems for sociolegal research. For Valverde, the relationship between law and knowledge is broad and complex, and she is interested in avoiding the pigeonholing quality of either the pragmatic or sociolegal account.

A tendency for what she calls "sociological reductionism" leads Valverde to call for new kinds of analysis of law's knowledge practices—"new studies that resist the temptation of waving the flag of 'society' as against 'law.'" In searching for a possible means by which to conduct these studies, she turns to the actor network theory (ANT) and science and technology studies (STS) of scholars such as Bruno Latour. A key insight of Latour and others, Valverde contends, is the methodological decision that "much is to be gained by treating one's research site as if the distinction between human and nonhuman could be bracketed."

It is exactly such binary distinctions that Valverde wants to avoid: distinctions between things and people, between animate and inanimate, between legal text and lawyer, and so on. ANT and STS provide means for doing so in a new concept of "actor," which is "always relational" and has "little or no link with the sociological concept of 'agency.'" In this view, almost anything—including "persons, devices, rules, laboratory animals, chemical reagents, and knowledge bits"—can be designated as an actor as long as it is involved in a relational network of claims and interests. By operating under a theory that displaces, to some extent, "human actors," Valverde argues that the use of ANT and STS analysis diminishes the reductionism that tends to mark sociological work as a whole. Such an approach, when applied to law, would have a certain satisfying and original unity at the level of theory/method. It would show that certain features of the legal power/knowledge systems are visible in different and new ways if one sets aside the distinction between things and people and between the textual and the social.

After providing a broad outline ANT/STS analysis, Valverde moves on to explore, in broad outline, particular legal "knowledge moves" to which it might be applied. She examines several moves, the first of which she designates "anonymous allusion," a procedure in which general references are favored over specific citations: "studies show . . ."; "expert evidence supports . . ."; and so forth. The second knowledge move used by legal actors is "exemplary excerpting," in which cited passages are pulled out of their original context to add weight to a particular position. A third knowledge move is "epistemological sidelining," in which studies relevant to a particular work are marginalized "rather than accepted or rejected or distinguished." Additional moves include what Valverde calls "transmuting jurisdiction into knowledge" and "responsibilization through imputed knowledge."

Valverde concludes by suggesting that legal jurisdiction is frequently transmuted into a knowledge claim (city councilors, for example, might be presumed to "know" the city streets), and by exploring how legal officials often "impute" knowledge to hypothetical persons (Mr. X should have known), relationships of responsibility are created between actors. By no means exhaustive, Valverde's discussions are offered in "the spirit of experimentation and dialogue" and in the hopes that they might foment new and creative methodologies for conducting sociolegal research. Because legal knowledge is created by a multiplicity of sources and methods, Valverde wants to begin the search for a descriptive methodology that can do justice to complexity, contingency, and change in how law knows.

Next, in Donald Braman and Dan M. Kahan's "Legal Realism as Psychological and Cultural (Not Political) Realism," the emphasis shifts to more general questions of law and epistemology, as the authors explore how legal decision makers, like judges and jurors, come to know the law and the facts in the cases they decide. Their chapter rejects "mainstream accounts [that] cast jurors and judges either as strategic political actors or as faithful and politically inert servants of legal authority wielded by others." In their view, neither realism nor formalism provides an adequate account of how legal actors know. They argue for an account of legal knowledge that is "grounded in the social and cognitive mechanisms that we know guide human belief formation and decision making more generally."

These mechanisms are found in what they call "cultural cognition," or cultural commitments that are prior "to factual beliefs on highly charged political issues." Culture is prior to fact, Braman and Kahan argue, in "the cognitive sense that what citizens believe about the empirical consequences" of policies "*derives* from their

cultural worldviews." As a result, "even citizens who earnestly consider empirical policy issues in an open-minded and wholly instrumental way will align themselves into warring cultural factions."

Drawing on the anthropological work of Mary Douglas, Braman and Kahan go on to substantiate this claim with empirical evidence of their own: "Modern sensibilities and perceptions of danger" ("it is dirty and dangerous to leave shoes on the table"), for example, "are artifacts of our commitment to distinctive cultural orderings" ("shoes are not an item traditionally associated with tables"). But unlike Douglas, Braman and Kahan proceed to ask a further question: *Why* is this the case? Their answer lies in "several overlapping psychological mechanisms" that undergird and shore up the culturally cognitive biases. By combining this social psychology with the anthropological work of Douglas, Braman and Kahan come to the broad conclusion that "various mechanisms of belief formation identified by contemporary social psychology are likely to generate risk perceptions skewed along cultural lines."

What does this mean for the relationship between law and knowledge? First and foremost, Braman and Kahan argue that "law knows in the same way that ordinary democratic citizens know." For legal officials and citizens, cultural values provide a framework within which facts are apprehended. Those values orient judges and jurors "in determining what outcome is dictated by the law and evidence at hand." Because the "most important cultural norms are structured along predictable dimensions," legal decisions themselves can appear to be quite predictable as can the lines of conflict which produce those decisions and which those decisions engender. Individuals "don't mechanically accept new information; rather, they evaluate each new piece of evidence based on its conformity with prior beliefs." Because seemingly empirical debates over all manner of public policy will be guided be the invisible hands of conflicting cultural worldviews, knowledge of legal effects is linked to culture prior to considerations of rightness and wrongness or desirability and undesirability. Moreover, Braman and Kahan maintain, cultural cognition can be used to show why framing legal debates in consequentialist terms so often fails: Because citizens disagree about what the consequences of a given policy actually are, it makes little sense to talk only about what consequences are good or bad, right or wrong.

After outlining cultural cognition and its application to legal knowledge in general, Braman and Kahan apply it to the two dominant positions in the academic debate over cultural conflict: the "culture war thesis" and the "end of ideology thesis."

Both positions, they conclude, are fatally flawed—the former for not doing justice to the influence of culture in shaping beliefs and the latter for giving too much credence to the relationship between culture and belief. Indeed, Braman and Kahan's point is not that cultural values *motivate* particular political opinions; rather, they "merely *orient* it through a complex set of interrelated social and cognitive mechanisms." The effect is filtering, not controlling.

Throughout their chapter, Braman and Kahan seek to take up the challenge of providing an empirically accurate and verifiable account of the knowledge practices of judges and jurors that will do the work that legal realism once set out to do, but do it without the flaws of the realist accounts. Realist accounts fail because they do not attend to "the subtle orientation of the mind to facts and arguments that cohere with the 'background and philosophy' " of the judge or juror. Attending to these orientations of the mind suggests that the decisions of courts are seldom likely to "resolve the controversy over norms that brought the case to court in the first place."

In "How Law Knows in the American Trial Court," Robert P. Burns emphasizes the contingency of law's knowledge practices and again focuses on questions of knowledge in particular legal institutions. Following Valverde's advice to avoid the announcement of the arrival of a postmodern legal regime, one without unified metanarratives, and concentrate our efforts, at least for now, on finely grained descriptions of what we actually do in a range of legal contexts, Burns offers descriptions of knowledge practices in the trial court in the United States. He starts by asking how decision makers at the trial level know the rules governing the case—a question that he thinks begs another question: *Who* knows the rules in the court?—Burns's preliminary answer is fairly simple: lawyers and judges.

For lawyers, knowing the rules involves following a "shifting and informal set logic based on the semantic meaning of the legal rules and the ways in which the situation may be fairly given a description and the relationship between them, supplemented by notions of the 'purposes' of various enactments." And for judges, there is another set of "professionally prescribed ways" through which knowledge is obtained. In particular, this is done through a "set of legally authoritative commonplaces available to judges for the interpretation of constitutions, statutes, and case law"—a set of "canonical justifications that can be offered more or less artfully to justify a particular subsumption of the facts." And although there is a "continuum" in how these justifications are used, Burns still finds restraint in the "screening function" played by the norms embedded in legal rules.

Matters get more complicated when the relationship between legal knowledge and the jury is considered because, Burns maintains, the jury cannot know the law in the same way that judges and lawyers can. Juror instructions might seem to indicate some kind of professionalized knowledge, but Burns argues, social scientific studies show that "juror comprehension of jury instructions is quite low." As Finnegan's description of his own jury service shows, what juries have, instead of a formalized legal understanding, is an "approach to evidence" that is "equitable" rather than "rule-based": "they are insensitive to many of the distinctions the law makes; their life-world values affect even the fact-finding process; the norms implicit in the narrative structure of the trial are of greater significance than the rules embedded in the instruction." And the jury's eclectic approach to legal knowledge, Burns says, influences knowledge moves in the trial as a whole: Lawyers, for example, are likely to construct cases with a "double helix" of norms—some from "within the practices of the jurors' life world" and others from within what is implicit in the legal rules of which the lawyer must at least be wary.

Depending on one's perspective, this eclecticism has its advantages and disadvantages, but no matter what position one takes, Burns argues that it connects trial court procedure with another important element of the story of how law knows: narrative. For Burns, narrative pervades the trial court, most notably, perhaps, in a lawyer's opening statement: an evaluative, fully characterized narrative of the kind the jury is asked to decide between. Narrative is present elsewhere as well, including evidentiary proceedings; after all, all kinds of stories can be told that are fair to the facts and stretch out toward human purposes. But, Burns argues, the trial is not only about deft storytelling. Indeed, much of the trial is wrapped up with "never completely resolved tensions" that it creates: tensions between varieties of narrative and tensions between narrative substances (legal, moral). This analysis leads Burns to the conclusion that trial court juries "know" by "relying on different levels of *constrained* narrative to build the latter toward their understanding of the case." Narrative is important for the construction of legal knowledge during the trial, but it is not without its complexities. "All of the narrative, rhetorical, and dramatic devices of the trial tend to invite a response of the whole personality to the trial itself."

After laying out this framework, Burns takes a step back to ask how we "*know* when the trial really knows." Context might seem like one possibility, but Burns has trouble with the idea of placing the trial in a "broader context of practices" for

two reasons: He doesn't think there is any generalizable standard by which one can select the practices that *compose* the context; and more fundamentally, he doesn't think such an account can be given in a language that is "as rich as the language of the trial"—a language, in other words, that would do justice to it. In contrast to Valverde's push for new and more expansive ways of examining legal institutions, Burns argues that because a question of *how* law knows necessarily involves a normative consideration of when law "*succeeds* in *knowing*," a different kind of account is needed—an account that illuminates how the trial "can succeed and the forms of understanding germane to that success." For Burns, the knowledge produced in a legal trial is distinctive and, as such, deserves a unique examination. For him, the trial functions in much the way as does a work of art. It allows us to see something that could not be seen any other way.

In "Fact-Finding in Constitutional Cases," David L. Faigman shifts gears from the trial court to the Supreme Court to examine the relationship between legal doctrine and fact-finding in a constitutional setting. Since the earliest days of constitutional law, Faigman reminds us, "the Supreme Court has consistently relied on facts to inform its constitutional jurisprudence." But there is, Faigman notes, a danger in using facts to set constitutional norms: Facts are "highly indeterminate and they inevitably destabilize the sought-after stability of fundamental constitutional values." This tension, a tension between the generally dynamic quality associated with fact-finding and the allegedly stable character of constitutional doctrine, is the focus of Faigman's chapter. It is a tension, he argues, that reveals a need for balance because courts must develop a constitutional jurisprudence that allows doctrine to evolve in light of contemporary circumstances but which remains faithful to settled constitutional norms.

Faigman suggests that the Supreme Court has never developed an intelligible constitutional fact jurisprudence: It is, in his words, "one of the great silences in constitutional law." Moreover, this silence extends to more than just one constitutional realm because, he argues, fact-finding "is an essential component of both constitutional interpretation and constitutional adjudication." But Faigman notes that writers like Ronald Dworkin have attempted to avoid the malleable, indefinite character of constitutional fact jurisprudence through the idea of "interpretive facts"—facts that don't (or no longer) require empirical substantiation and can simply be applied in legal interpretation. Dworkin's argument is not without its problems, but interpretive facts do, Faigman says, play a "steadying role" in

constitutional jurisprudence. This is because factual premises, in Faigman's words, "petrify" when they become repeatedly upheld as acceptable precedent. Over time, actually proving a factual predicate of a particular decision ceases to be important: It is simply accepted as law independent of its actual empirical merits. Thus, because "constitutional facts are 'interpreted' and not 'found,' justices can employ them with little fear that future researchers might call into question the premises of their handiwork."

Faigman then moves on to "set forth a proposed taxonomy of constitutional facts that furnishes the foundation on which a coherent jurisprudence of constitutional facts might be built." Drawing from the work of Kenneth Culp Davis, he identifies two main varieties: "legislative facts," which "do not usually concern the immediate parties but are general facts that help the tribunal decide questions of law and policy and discretion," and "adjudicative facts," which are "facts particular to the dispute." A key difference between them, Faigman argues, is "the level of decision making at which the asserted facts are relevant": the former are broad and recurring; the latter are limited and specific. But legislative and adjudicative facts are not, Faigman contends, the only kinds, and so he also explores another distinction in constitutional facts: "constitutional rule-facts" versus "constitutional review-facts." The former, he says, are advanced to substantiate a particular interpretation of the Constitution, whereas the latter are used to meet the pertinent constitutional rule. Faigman's intentions at this point are descriptive, not normative, and although he concedes that the lines between these categories are often haphazard and blurry, he believes the categories are nonetheless useful for examining the court's knowledge-gathering efforts.

The *process* by which the court decides on the facts—the process by which it defines "the kinds of facts that are relevant"—raises a number of "procedural issues"; most centrally, it raises the issue of deference. Since courts are not the only institutions determining the facts, they must decide how much deference they owe to another institution's, or to another court's, constitutional fact-finding. This in turn brings Faigman to a difficult question: "When, if ever, can a lower court distinguish (and thereby decline to follow) higher court precedent on the basis that the facts supporting that precedent have changed or that our knowledge of them has changed?" Faigman's answer is that it depends on the kind of fact involved. For Faigman, the really contentious cases involve "constitutional review-facts," a group that includes, among other things, factual questions such as when the fetus becomes viable and the effects of segregation on black children.

But, he continues, lower courts should have the ability to reevaluate the factual premises used, even here, for a number of reasons. First, Faigman contends that such reevaluations will enhance legitimacy by keeping the Court "in line with contemporary knowledge of the facts underlying constitutional decisions." Second, he argues that lower court review will lead the Supreme Court to use facts more carefully because "the knowledge that lower courts might revisit factual premises for their holdings should lead the justices to be more careful in explaining the reasons for their decisions." Third, Faigman believes factual reevaluations will benefit the legal system more broadly because they will "facilitate the introduction of new information into the law." Finally, Faigman stresses that such reevaluations would be used sparingly because they would require "enough empirical ammunition to overwhelm the opposing precedent." Constitutional law depends on facts, and facts, Faigman stresses, should be taken seriously. But calling attention to the dynamism and complexity of law's knowledge practices, he concludes, should not leave facts free from review; employing facts well depends on their occasional reevaluation.

Whether offering a historical examination of legal fact or a broad philosophical account of how legal knowledge practices can or should be studied, whether describing the social-psychological mechanisms through which any set of legal actors know the world or the knowledge-gathering techniques of particular legal institutions, taken together the chapters in *How Law Knows* emphasize complexity, contingency, and change. Doing so reminds us that law knows in many ways—some strange, others familiar, some highly ritualized and formal, others informal and grounded in social practice. Broadening the agenda of legal scholarship to compare the varieties of its knowledge practices allows us to understand law as an arena in which knowledge is both acquired and produced, in which knowledge is both absorbed from, but also radiated back into, the social and cultural world in which law is embedded. It allows us to understand mechanisms through which law seeks to maintain its autonomy and through which it sacrifices its autonomy. Examining law's various ways of knowing over time and in response to different philosophical traditions allows us to see how the work of law plays out in the social and cultural worlds in which law is made and remade. Today, we can no longer adequately understand that work (if we ever could) unless we undertake more of the kind of careful, contextually sensitive analyses of how law knows of the kind presented in the chapters that follow.

Notes

1. See, for example, Sally Merry, *Getting Justice and Getting Even: Legal Consciousness Among Working-Class Americans* (Chicago: University of Chicago Press, 1990), 142.

2. See Mariana Valverde, *Law's Dream of a Common Knowledge* (Princeton, NJ: Princeton University Press, 2003).

3. See Barbara J. Shapiro, *A Culture of Fact: England, 1550–1720* (Ithaca, NY: Cornell University Press, 2000). On the historical contingency of fact in another context, see Mary Poovey, *A History of the Modern Fact: Problems of Knowledge in the Sciences of Wealth and Society* (Chicago: University of Chicago Press, 1998).

4. As Ewick and Silbey note, "People often experience the law as a space outside of everyday life. Law and everyday life are seen in juxtaposition and possibly opposition rather than connected and entwined. The distance between law and everyday life is a chasm through which mundane and personal matters pass and become transfigured in awesome but also costly ways." See Patricia Ewick and Susan Silbey, *The Common Place of Law: Stories from Everyday Life* (Chicago: University of Chicago Press, 1998), 76. Also D. Graham Burnett, *A Trial by Jury* (New York: Knopf, 2001).

5. As Robert Burns puts it, "The American trial is a highly rule-bound form of rhetorical practice. . . . The law of evidence provides the 'grammar' of the trial. Only those truths that can be said 'grammatically' can become part of the legal world." See Robert Burns, *A Theory of the Trial* (Princeton, NJ: Princeton University Press, 1999), 74, 86. As Burns notes, in what he calls "The Received View" of the trial, "the law of evidence seeks to ensure that the material from which the jury builds up its value-free narrative of what occurred is reliable," p. 19.

6. Burns correctly points out that recently there has been a strong shift "toward admissibility in the law of evidence." *A Theory of the Trial*, 31.

7. For a discussion of the importance of cross-examination in ensuring reliability, see *California v. Green*, 399 U.S. 149, 158 (1970).

8. See Sherry F. Colb, "'Whodunit' Versus 'What Was Done': When to Admit Character Evidence in Criminal Cases," 79 *North Carolina Law Review* (2001), 939, 946. As Colb explains, "Supporters of the character rule argue that, notwithstanding its relevance, we should exclude character evidence because jurors tend to give it undue weight. Such jurors might convict on a flimsy factual record because of a defendant's prior criminal history." See also Edward J. Imwinkelried, "A Small Contribution to the Debate over the Proposed Legislation Abolishing the Character Evidence Prohibition in Sex Offense Prosecutions," 44 *Syracuse Law Review* (1993), 1125, 1138: "In sum, there is a risk that the lay jurors will overestimate the probative value of character as a predictor of conduct."

9. See "The Hearsay Rule and Its Exceptions," http://72.14.207.104/search?q=cache:_CsVmo3VrKoJ:faculty.ncwc.edu/toconnor/405/405lect11.htm+hearsay&hl=en. "At common law, there were five well-established exceptions to the hearsay rule, and these exceptions have been a part of the hearsay rule from the beginning. Today, there are almost three

times as many exceptions (10–20 depending upon how you do the counting), and it's not that hearsay exceptions are a growing area of evidence law, but only that more practical reasons exist making it necessary to add more exceptions. The hearsay rule, its exceptions, and hearsay evidence are some of the most defining features of Anglo-American criminal justice."

10. Under this rule, evidence of prior bad acts or crimes is generally not admissible "unless it is substantially relevant for some purpose other than to point out the defendant's criminal character and thus to show the probability that he acted in conformity therewith." *State v. Biby*, 366 N.W.2d 460, 463 (N.D. 1985). The rule acknowledges the inherent prejudicial effect prior bad act evidence may have on the trier of fact. *State v. Micko*, 393 N.W.2d 741, 744 (N.D. 1986). The rule does not authorize automatic admission merely because the proponent advances a proper purpose for the evidence; instead, the relevance and probative value of the evidence must be demonstrated. *Dahlen v. Landis*, 314 N.W.2d 63, 70 (N.D. 1981). Such evidence "may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial." See *State v. Osier*, 1997 N.D. 170, 171 (1997).

11. Andrew E. Taslitz, *Rape and the Culture of the Courtroom* (New York: New York University Press, 1999), 129. See also, Joan L. Larsen, "Of Propensity, Prejudice, and Plain Meaning: The Accused's Use of Exculpatory Specific Acts Evidence and the Need to Amend Rule 404(b)," 87 *Northwestern University Law Review* (1993), 651.

12. William Finnegan, "A Reporter at Large: Doubt." *The New Yorker* (January 31, 1994), 56.

13. Michel de Certeau, *The Practice of Everyday Life*, trans. Stephen Rendell (Berkeley: University of California Press, 1984), xiii.

14. Folk knowledge, however, is not all of a piece, not strictly uniform in its articulation or in its presence. In the first instance, it may take the form of general beliefs people hold as a matter of cultural intuitions and sensibilities or the form of specific cultural "facts" or realizations that make up its concrete "truths." Additionally, there will be variations in the prevalence or consensus on such beliefs or factual claims. Some general beliefs or specific claims may be broadly held throughout society, while others are confined to distinct subgroups, and still others are dispersed among a less identifiable or socially concentrated minority in society.

15. Finnegan, "A Reporter at Large," 51. On the importance of interpreting facts in appellate courts, see Kim Lane Scheppele, "Facing Facts in Legal Interpretation," 30 *Representations* (1990), 42.

16. See, for example, Edward Conlon's description of policing in *Blue Blood* (New York: Riverhead Books, 2004).

17. William Muir, *Police: Streetcorner Politicians* (Chicago: University of Chicago Press, 1977).

18. Jerome Skolnick, *Justice Without Trial: Law Enforcement in Democratic Society*, 2nd ed. (New York: John Wiley, 1975), chap. 3.

19. Ibid., 45.

20. Ibid., 46.

21. Ibid., 82.

22. Ibid., 83.

23. Ibid.

24. See Frederick Schauer, *Profiles, Probabilities, and Stereotypes* (Cambridge, MA: Harvard University Press, 2003). Also Bernard E. Harcourt, "Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally," 71 *University of Chicago Law Review* (2004), 1275, 1279. According to Harcourt, "The specific conditions under which race can legitimately and constitutionally be considered in policing can be specified as follows: racial profiling for purposes of police searches is a narrowly tailored policing technique that promotes the traditional law enforcement interest in fighting crime if (1) racial profiling reduces the amount of profiled crime while (2) maintaining or increasing the efficient allocation of police resources, without (3) producing a 'ratchet effect' on the profiled population. A ratchet effect occurs when racial profiling produces a supervised population disproportionate to the distribution of offending by racial group." See also Chet K. W. Pager, "Lies, Damned Lies, Statistics and Racial Profiling," 13 *Kansas Journal of Law & Public Policy* (2004), 515; Nelson Lund, "The Conservative Case Against Racial Profiling in the War on Terrorism," 66 *Albany Law Review* (2003), 329; and Michelle Malkin, *In Defense of Internment: The Case for Racial Profiling in World War II and the War on Terror* (New York: Regnery Publishing, 2004).

25. Heather MacDonald, "The Myth of Racial Profiling," *City Journal* (Spring 2001). Found at http://www.city-journal.org/html/11_2_the_myth.html. See also Schauer, *Profiles, Probabilities, and Stereotypes*.

26. See, for example, Brandon Garrett, "Remedying Racial Profiling," 33 *Columbia Human Rights Law Review* (2001), 41.

27. See Samuel R. Gross and Debra Livingston, "Racial Profiling Under Attack," 102 *Columbia Law Review* (2002), 1413.

28. Ibid., 1415.

29. Ibid., 1426.

30. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). Recent decisions on racial profiling are discussed by Kathryn R. Urbonya, "Rhetorically Reasonable Police Practices: Viewing the Supreme Court's Multiple Discourse Paths," 40 *American Criminal Law Review* (2003), 1387.

31. For defenses of this decision, see Anthony C. Thompson, "Stopping the Usual Suspects: Race and the Fourth Amendment," 74 *New York University Law Review* (1999), 956,

1006–1007; and Ronald J. Sievert, "Meeting the Twenty-First Century Terrorist Threat Within the Scope of Twentieth-Century Constitutional Law," 37 *Houston Law Review* (2000), 1421, 1453–1456.

32. *United States v. Martinez-Fuerte*, 557–558.

33. Ibid., 563.

34. Ibid., 564, n. 17. The Court reiterated its ruling of a year earlier in *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). Although Latino ethnicity could not itself create the reasonable suspicion required for a roving patrol stop, "the likelihood that any given person of Mexican ancestry is an alien is high enough [in an area near the Mexican–U.S. border] to make Mexican appearance a relevant factor." Ibid., 886–887.

35. Ron Levi and Mariana Valverde, "Knowledge on Tap: Police Science and Common Knowledge in the Legal Regulation of Drunkenness," 26 *Law & Social Inquiry* (2001), 819, 821. The significance of such trade knowledge has been recognized in many official decisions and pronouncements. See, for example, *People v. Ojeda*, 225 Cal. App. 3d 404, 406 (1990). In this case, the court said, "It is hardly surprising that police officers who deal daily with intoxicated persons become expert at recognizing the physical effects of intoxication, and that they learn to perceive effects somewhat more subtle than those apparent to the amateur."

36. Trish Oberweis and Michael Musheno, "Policing Identities: Cop Decision Making and the Construction of Citizens," 24 *Law & Social Inquiry* (1999), 898.

37. Ibid., 918.

38. Ibid.

39. Ibid.

40. Eugene Bardach and Robert Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* (Philadelphia: Temple University Press, 1982), 31.

41. Ibid., 57.

42. Ibid., 72.

43. Ibid., 102.

44. David Sudnow, "Normal Crimes: Sociological Features of the Penal Code in a Public Defender's Office," 12 *Social Problems* (1965), 255, 259.

45. As Andrew Green notes, "Knowledge contained in criminal cases is produced by the exercise of power which encounters and overcomes resistance, thus revealing facts that could not be known in any other way." See Andrew Green, "How the Criminal Justice System Knows," 6 *Social & Legal Studies* (1997), 6.

46. Sudnow, "Normal Crimes," 261–262. What this amounts to is, in the author's words, a set of "unstated recipes" for dealing with criminals; a PD dealing with a burglar might, for example, employ "his conception of typical burglars against which the character of the present defendant is assessed." Ibid., 266.

47. Richard Ericson and Patricia Baranek, *The Ordering of Justice: A Study of Accused Persons as Defendants in the Criminal Process* (Toronto: University of Toronto Press, 1992), 22.

48. Ibid., 77.

49. Jonathan Simon, *Poor Discipline: Parole and the Social Control of the Underclass, 1890–1990* (Chicago: University of Chicago Press, 1993), 69–71.

50. Ibid., 189.

51. Ibid.

52. Ibid., 196.

53. Ibid.

54. Ibid., 197.

55. On the nature of legal autonomy, see Stanley Fish, "Law Wishes to Have a Formal Existence," in *The Fate of Law*, Austin Sarat and Thomas R. Kearns, eds. (Ann Arbor: University of Michigan Press, 1991).

56. See Valverde, *Law's Dream of a Common Knowledge*.

57. For one discussion of such rules, see Sheila Jasanoff, *Science at the Bar: Law, Science, and Technology in America* (Cambridge, MA: Harvard University Press, 1995). Also Edward K. Cheng and Albert H. Yoon, "Does Frye or Daubert Matter? A Study of Scientific Admissibility Standards," 91 *Virginia Law Review* (2005), 471; Sheila Jasanoff, "The Eye of Everyman: Witnessing DNA in the Simpson Trial," 28 *Social Studies of Science* (1998), 713; Tony Ward, "Law, Common Sense and the Authority of Science: Expert Witnesses and Criminal Insanity in England, ca. 1840–1940," 6 *Social & Legal Studies* (1997), 343.

58. See Jennifer Mnookin, "Scripting Expertise: The History of Handwriting Identification Evidence and the Judicial Construction of Reliability," 87 *Virginia Law Review* (2001), 1723.

59. Mariana Valverde, "Authorizing the Production of Urban Moral Order: Appellate Courts and Their Knowledge Games," 39 *Law & Society Review* (2005), 419, 452. Valverde emphasizes the blurring of categories in the way law knows, with citizens deploying highly legalistic ideas and legal officials often deploying nonlegal reasoning, and the highly dynamic quality of law's knowledge practices.