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Mariana Valverde: Law's Dream of a Common Knowledge

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CHAPTER ONE

Introduction

◆ IF KNOWLEDGE is power, so, too, are power relations also knowledge relations, truth relations. 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 particularly in largely secular multicultural 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. Law students are told, for example, that law is only interested in particular truths—who committed this crime, how the liability for this accident ought to be allocated—and are enjoined not to waste time on the philosophical or scientific frameworks for truth seeking that characterize more academic enterprises. But in courts of law, as in murder mysteries, looking for the local truth about an event usually involves both participants and spectators in theorizing about general truths, and even about whether truth can ever be found. Just as mystery writers use the pursuit of particular truths as a vehicle to propound general truths about the nature of evil, sex, or our “mean streets,” so, too, do law’s personnel, from police officers to high court judges, often make explicit and implicit assumptions about truth as such while going about their daily business. This is undoubtedly a reason for the popularity of law- and justice-oriented entertainment: spectators as well as participants use legal arenas to engage in both “a daily moral workout” (Katz 1987) and a daily truth workout.

Law is usually examined by critical legal studies and socio-legal scholarship as a key site for the reproduction and contestation of various forms of power relations. But if power works through knowledge,¹ it should prove useful to undertake an examination of some legal events and processes that highlights the knowledge dimension—the constitution, contestation, and circulation of truth in law or in respect to law.

Knowledge production can, of course, be studied in a number of

¹ Michel Foucault drew a distinction between brute force and “power,” stating that “force” is one-sided violence exercised simply for the sake of control, whereas power seeks the acquiescence of the ruled and to that extent always leaves some room for counterstrategies (Foucault 1988, 84). But Foucault’s work also supports the Nietzschean view used here, namely, that, unlike sheer force, power works through truth claims and justifies itself with knowledge.

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ways and at many sites: anthropological studies of how ordinary people think about law and deal with law, for example, are crucial contributions to our understanding of the formation of knowledges² about justice in particular situations. While informed and inspired by legal anthropology, this book does not study what ordinary citizens think about either law or justice except indirectly. It is thus closer to the sociology of law than to legal anthropology, since its main concern is the formation and the contestation, within legal arenas, of a certain set of truths—about vice and virtue, normality and indecency, urban order and disorder—in and through the work of state officials, lawyers, and judges. But it is more a sociology of law in action than a sociology of law in the books: it pays just as much attention to how morality-squad officers testify about indecent performances as to what courts have said about indecency, and devotes more space to how liquor inspectors and licensing officials make determinations of drunkenness than to the case law on what counts as evidence of intoxication.

The quest for moral and social truth that is the moving force and the objective of lowly legal actors such as police detectives and municipal inspectors—a quest that like all other discovery efforts is usually more of a production or invention than it is the discovery of a previously existing inert object—has rarely engaged the attention of those who study the formation of knowledges. Sociological studies of knowledge practices have begun to examine legal arenas, especially courtrooms, with much success; but they have focused their attention almost exclusively on scientific knowledges. They have rarely examined the nonexpert knowledges of right and wrong, order and disorder, and virtue and vice that are the everyday currency of legal discussions and adjudications.³

Similarly, studies pursued by Michel Foucault and by the many scholars now using some of Foucault's insights and methods are much more informative about the development and use of what I call "high-status"

² Scholars influenced by Michel Foucault talk about "knowledges," even though the dictionary does not recognize a plural for "knowledge," in order to stress that European scientific knowledge is but one of many knowledges. Similarly, in contrast to Max Weber's famous analysis of "rationalization," Foucault and his followers speak about competing "rationalities."

³ Sheila Jasanoff, a leading student of scientific knowledges in law, shows that even in "toxic tort" lawsuits, in which science is unusually influential, courts tend to favor the evidence of general practitioners who have seen the plaintiff to the more causally relevant evidence of epidemiologists (Jasanoff 1995). This contradicts the claim of some law-and-culture theorists that statistical knowledges and logics have become dominant in law (e.g., Murphy 1997). Another recent study showing that legally successful knowledges are not always the most scientific is Simon Cole's history of forensic identification techniques (Cole 2001).

knowledges—psychiatry, psychology, clinical medicine, statistics, epidemiology—than they are about the low-status knowledges that are used not only by ordinary people in their “popular” pursuits but also by countless state and private-sector employees in the pursuit of a variety of regulatory and administrative tasks. Understanding how classifying people and objects by means of science, medicine, sociology, or economics has made certain forms of modern governance possible is, of course, hugely important, and without the prior production of both Foucaultian analyses and other work in the history of science this book would not have been possible. Nevertheless, not all fields of human endeavor have been successfully “medicalized” or otherwise monopolized by professionals wielding expert knowledges. This is more than an empirical point. This book suggests not only that expert domination is limited but also, more fundamentally, that it would be more useful for socio-legal scholars to abandon the unidirectional models provided by “professionalization” and “medicalization” theses in favor of more dynamic and flexible frameworks that do not assume there is a single logic that can be studied across fields and across situations, either to prove its dominance or to show that it fails to dominate. There are many, heterogeneous, unsystematizable reasons why both popular and hybrid knowledges continue to flourish in many fields. In some cases these knowledges directly compete with science and expertise, successfully or unsuccessfully; but in other situations there is no overt contest, only various patterns of peaceful coexistence. The research done for this book, in other words, does not support the thesis that law is becoming increasingly technical or scientific: but neither does it support the opposite view (expressed through such offhand remarks as “judges cannot be replaced by computers, you know”) that there is some essence of law as such that makes it impervious to scientific knowledges. The epistemological workings of law, I suggest, cannot be reduced to any one general thesis. Different fields and situations exhibit different logics.

Since among the variety of knowledge processes that exist in law, the one that has received the most attention is the process by which scientific knowledges have been deployed for legal purposes, it seemed useful to focus not on science but rather on the circulation of nonscientific knowledges in legal contexts. And, not coincidentally, the fields of law with which I was already familiar from previous work (sexual regulation, the legal regulation of sexual speech, the legal and therapeutic regulation of alcohol) turned out, when looked at from the new point of view of knowledge production, to be fields or sites in which expert knowledges of any kind continue to be remarkably scarce. I returned then to these fields, asking new questions and doing new research. I also attempted to explore, however tentatively, other areas of law within

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which questions about vice and virtue, order and disorder, are front and center. Thus the study of how people—especially officials—come to know what is vice and what is disorder, and how they explain and justify their knowledge to legal authorities, became the focus of this book.

How various intellectual tools that are available were found to be useful or not so useful for the task just named is a question that needs to be addressed in any introduction, even one eschewing traditional discussions of “methods” and “theory.” This I will do in the second half of the introduction. First, however, the general question we opened with—law’s will to truth—needs to be addressed more directly.

LAW’S WILL TO TRUTH

Empirical studies of the workings of law in the everyday contexts of minor lawsuits, traffic tickets, and petty crime (e.g., Merry 1990; Sarat and Kearns 1993; Ewick and Silbey 1998) suggest that while truth seeking is an important dimension of law, this is not always or even most of the time law’s overriding passion. In contrast to the drama of high-profile trials, minor crimes are often plea-bargained; people involved in minor lawsuits often decide that it is not worth losing a day’s pay to have one’s day in court; trials are postponed because crucial witnesses fail to show up; and so on. Critical scholars—sociologists, legal anthropologists, and others—have challenged law’s official will to truth by empirically studying the sordid and careless realities of everyday “justice.” Their work has been extremely important to counter the dominant images of law’s relation to Truth and Justice. However, whatever its public image, law as an institution makes no bones about the fact that legal decisions—even decisions as weighty as imprisoning, deporting, or executing someone—have to be taken without full knowledge.⁴ Investigations are carried out and evidence is presented: but the investigation is often cursory or biased, the evidence ambiguous or insufficient, and the reasoning used to generate the decision peculiar or prejudiced. These problems are compounded by the fact that neither the facts nor the reasoning are as open to public scrutiny as the ideals of Anglo-Saxon justice suggest: many people charged with minor crimes plead guilty without proper legal advice, civil cases are more often than not settled out of court without a full inquiry, and administrative tribunals are habitually invoked as threats rather than being used to adjudicate.

⁴ My thanks to my colleague, Audrey Macklin, a former immigration judge, for sharing her anxieties about having to make refugee determination decisions in conditions of “radical uncertainty” (personal communication, July 2001).

The legal system's halfhearted commitment to truth seeking nevertheless appears to enjoy tacit approval. Most of the time, the law's methods for accumulating, evaluating, and operationalizing knowledge are taken for granted by both outsiders and insiders. Scholars professionally devoted to the study of law do pay attention to law's methods, but the majority of such discussions focus on particular courts' interpretation of particular facts and rules. Those scholars who pursue more systematic inquiries, asking questions that go beyond pointing the finger at this or that judge or this or that statute, usually take the law of evidence as their object. Their studies usually begin with such questions as whether a particular means of obtaining information makes the information legally inadmissible. In general, their work is concerned with how knowledge *ought* to be deployed. This is a fundamental inquiry for legal scholars: as far back as the Enlightenment's critique of heresy trials, legal thought and law reform have been centrally concerned with the close connection between the misuse of facts in law and the perpetration and authorization of gross injustices. The use and misuse of information in the legal form of evidence has been and will continue to be a major issue for those who care about justice.

But what if we decide to take an interest in the workings of law not in order to move it closer to justice or to make it more rational or both but, less normatively, in order to study the mechanisms by which law, rather than simply *using* facts in the form of "evidence," also *produces* knowledge? The distinction drawn here is not a sharp one: as studies in the sociology of knowledge have amply demonstrated, there is no real line separating knowledge production from the dissemination and practical utilization of knowledge. Bruno Latour's influential studies of scientific laboratories have shown that even at the moment when a scientific fact is first produced—when Pasteur discovered penicillin, for example—the knowledge that the scientist thinks is being born *ex nihilo* is actually one link in a long chain of "actors," actors that include machinery, inscription devices such as charts, and live people, as well as theories and concepts.⁵ Along similar lines, feminist and Foucaultian studies of sexuality have shown that "sex"—something traditionally regarded as a brute presocial fact—is itself produced by the very processes that claim to discover and study it.

The same sociology-of-knowledge analysis can be applied to law; that is, the parties to a legal case can be said to *constitute* knowledge in the very process of "using" it, while courts and tribunals can be usefully regarded as further constituting knowledge in the process of evaluating evidence and drawing conclusions from it. "Construction," or the term

⁵ On Pasteur, see Latour 1988. More generally, see Latour 1987 and 1993.

I prefer (in part because of its rich legal connotations), “constitution,”⁶ refers to the processes that grasp some bit of the world in accordance with existing cultural codes and thus make it meaningful for a particular group. As a number of twentieth-century philosophical traditions have argued, facts do not exist in a pre-legal or pre-political world from which they can be borrowed for legal purposes: facts, as much as theories, are constituted through the same procedures that lead evidence, rebut it, and evaluate its worth and relevance. As Wittgenstein famously demonstrated, meaning does not inhere in words: it comes into existence within the particular social context in which words are used. Similarly, legal facts and legal judgments are only meaningful and effective within a network, one that connects legal decisions and statutes but also includes buildings (e.g., prisons), clothes (robes, uniforms), information codes, individuals, institutions such as legislatures, law schools, and courts, professional associations, and extralegally produced texts such as psychological reports, police notes, and scene-of-crime photographs.

To say that law constitutes knowledges is not to claim that law constructs the world by itself or out of nothing or in regal epistemological autonomy. Autopoiesis theory has drawn our attention to the ways that law manages to incorporate not only eyewitness evidence but other facts (e.g., scientific knowledge) into its own framework by transmuting such alien knowledges into legal formats and frameworks: this helpfully highlights the ways that law shapes the world that it then claims to adjudicate. The agency of law, to use a misleading phrase, is a useful site of investigation for those leftists who were brought up thinking that law was a mere side effect or superstructure of “real,” that is, socioeconomic, power structures. But we may agree with autopoiesis theorists Niklas Luhmann and Gunther Teubner that law’s epistemological creativity needs to be acknowledged without following them as they claim that “law” as such is a coherent subsystem within “society” (Luhmann 1989, 137; and see Luhmann 1990). Claims about law as an “autonomous epistemic subject” that thinks in specific ways (Teubner 1989) and becomes more differentiated from other epistemic subsystems as modernity marches forward slip from the necessary acknowledgment of law’s constitutive powers and creativity in knowledge production to a full-fledged effort to recycle the nineteenth-century quest to discern the Truth about Society by outlining certain general laws of development. Teubner’s work does acknowledge that legal epistemology is flexible rather than monolithic (Teubner 1997), but it does not break with the

⁶ Ian Hacking, usually known as a “social constructionist,” has shown that “constructionism” has become a rather messy and sometimes idealist enterprise (1999). In part for these reasons, Latour describes theorizing as “writing the constitution” (Latour 1993, 13).

fundamental society-as-system, law-as-subsystem framework of systems theory.

One can reject the depiction of law as an autonomous epistemic subject generated in the texts of autopoiesis writers and nevertheless acknowledge Luhmann and Teubner's insights into the ways that law creatively appropriates extralegal knowledges.⁷ Inquiring into law's knowledges, law's research methods, would not have been possible within the limits of the critique of ideology framework that has been so ubiquitous within progressive legal studies and sociology of law. That framework demonstrated its power in enabling a whole generation of critical legal studies, feminist legal analysis, queer legal scholarship, and critical race theory. But like all frameworks, it has its limits, and these have become more visible in recent years. The inability of this framework to see what Luhmann and Teubner see—law's active role in constituting powers and knowledges—has already been mentioned. This blind spot can be regarded as the effect of a more general problem, namely, the myth of the socioeconomic "real."

As has been pointed out by Foucaultian critics, the Marxist-inspired project to expose law and other ideologies tended to make certain realist epistemological assumptions (Rose 1987). But this assumed realism was shared across many non-Marxist schools. One can see a persistent attachment to realist epistemology in such critical projects as feminist standpoint theory as well as in certain race-critical works that suggest (often without explicitly stating) that the standpoint of the colonized generates "truthful" accounts. Indeed, the very rhetoric of denouncing statements as lies, a rhetoric dear to the heart of Critical Legal Studies, generates a truth effect: even when the speaker does not make any explicit truth claims, the format of the exposé has the effect of putting the exposé up on a higher epistemological pedestal. This implicit construction of a standpoint above ideologies can be regarded, following Nietzsche, as an unfortunate effect of language, in this case of the rhetorical form of the exposé. While it is not possible for us to avoid the truth effects of linguistic forms—just as it is not possible to avoid implicitly constructing a true self because we have no other language with which to speak about action but the language of "I"—it is nevertheless possible continually to remind ourselves that language's truth effects are just that, effects. Truth effects are, at one level, what this book is all about.

⁷ With a nod to Roscoe Pound, Stanley Fish argues against Richard Posner's effort to make law subject to the discipline of economics with a statement that parallels my critique of autopoiesis: "Legal autonomy should not be understood as a state of impossibly hermetic self-sufficiency, but as a state continually achieved and re-achieved as the law takes unto itself and makes its own (and in so doing alters the 'own' it is making) the materials that history and chance put in its way" (Fish 1991, 69).

The term “truth effects” may remind some people of the scary specter of “relativism.” If all truths are merely effects of certain cognitive and symbolic practices, does this mean that all statements are on the same level, that the Holocaust deniers are on the same epistemological plane as the Holocaust survivors, and so on? This is not the place for a full-fledged philosophical inquiry into the false dilemmas generated by the relativism versus humanism polemic; suffice it to say that humanistically inclined readers could nevertheless consider the proposition that it is possible to document and analyze knowledge practices and truth effects without taking a stand either for or against Truth as such. Much of the tired debate between enlightenment rationalists and poststructuralists (the so-called Habermas-Foucault debate, for instance) could have been avoided if a distinction had been drawn between small-t “truths” and the capital-T, nonspecific “Truth” that continues to haunt both philosophy and positivist science. Foucault, and others with similar epistemological analysis, such as Bruno Latour, have never claimed that all truth claims are equally fictitious or constructed. They are not what American culture-wars discourse would call “relativists.” Unlike postmodern philosophers, both Foucault and Latour have nothing but respect for the centuries-old European effort to find out how things work. And they have particular respect for the reflexive dimension of that Enlightenment project, which is the analysis of how we humans create knowledges and devise techniques for managing, classifying, and governing ourselves and our problems. For those of us who, like Nietzsche, have no trouble accepting that every human knowledge project including our own is necessarily situated and thus partial, the death of Truth (which is a necessary sequel of the death of God) does not send us into despair.

Instead of continuing to play the tired yes-or-no game that often degenerates into a playground contest (Truth exists; no, it doesn’t; Reason is important; no, it’s not [Osborne 1998]), we may do better to move sideways, as it were, and experiment with an ethical rather than a metaphysical challenge to Truth. Instead of debating like theologians, we can try to think with modesty, self-restraint, and irony. Discovering that Truth is imperialist, Eurocentric, and/or a mere effect of language does not have to lead us into philosophical nihilism. It could instead lead us out of philosophy altogether and into a more practical, embodied, and experimental habitus of mind—one that, as Pierre Hadot has shown, is not at all alien to the older, preacademic forms of philosophic praxis (Hadot 1995). Assuming such a stance—which is very different from adopting a theory—will facilitate the sort of reflexivity that has become not only a theoretical necessity but an ethical and political requirement.

In his call to carry out a reflexive anthropology of European knowledge production, Bruno Latour has argued that it is possible to use

many of the Enlightenment's tools in order to manageably reduce the scope of the empirical project without abandoning the whole project in postmodern despair. To Latour's call for a critical anthropology of European knowledge I would like to add a Nietzschean note. Those of us who can no longer believe in Truth because we believe in neither God nor Man have no choice but to refuse to adjudicate the fight between positivism and social constructionism, because recognizing ourselves as particular animals with particular, embodied abilities, we cannot lay claim to any supraterrrestrial place from which to enjoy a god's-eye view of the truth wars (Haraway 1991, 188–90). This does not take us into relativism; relativism is what Hegel would call the bad opposite of universalism, its abstract denial. It takes us rather beyond the truth wars and into the Nietzschean field that Donna Haraway calls "situated knowledges": the terrestrial, all-too-human world in which truth seeking is not abandoned wholesale, but is now guided by epistemological modesty rather than divine pretensions.

A useful technique for effecting this move toward epistemological modesty is to follow through the distinction drawn above between "truths" and Truth. It is perfectly possible to be interested in small-truth questions (Will reducing taxes increase poverty?) without thereby claiming that Truth is necessary. Even the most sophisticated of postmodern deconstructionist critics presumably evaluate claims such as the one about taxes in the course of making everyday political decisions about voting. Another way of deploying this distinction is to point out that the opposite of "lies" is not Truth but rather "truths." Outright lies are being told and disseminated in the name of justice as I write these lines, and it is certainly important for us as scholars to join the activists who are agitating to expose them as lies. But while we can and should denounce lies, it seems to me that when wearing our scholarly hats we have a specific responsibility to engage in the more ascetic exercise of telling ourselves that having discovered that "they" are lying does not mean that "we" know the Truth. For political purposes, it is sufficient to know that they are lying, and that those who have been marginalized and oppressed probably have a much better sense of how things work than they have been given credit for. This kind of pragmatic "preferential option for the poor" (as Latin American liberation theology puts it) has, in recent years, been elevated to that status of grand epistemology by left-wing academics—standpoint feminists and some critical race theorists—who believe that the only problem with the Enlightenment quest for Truth was that the wrong people were in charge. But it is not necessary to replace one set of grand theorists with another, more politically grounded set. Inspired by Foucault's modest appraisal of the role of intellectuals in political and social change, I am suggesting here that

we regard the “preferential option for the poor” as a pragmatic ethical choice, rather than as some kind of royal road to (alternative or sub-altern) Truth. In sympathy with anti-essentialist progressive critics like Paul Gilroy and Judith Butler, this book thus constitutes an ethical experiment in inquiring into the conditions for the possibility of certain legal claims without, in turn, making the claim that I or “my people” (feminists, non-Anglo-Saxons, queers, Canadians, etc.) have a privileged access to Truth.

The realist epistemology that continues to be employed by most critical students of law in its social context has had the effect of generating what one might call a “society effect.” Keen to expose and denounce formalist claims about law’s majestic sovereignty, critical legal scholars have tended to fetishize society, regarding law as an effect or a tool of social structures. However necessary it was and still is to denounce the false universalism of liberal legal practice and formalist legal theory and to document the exclusions produced by universal liberal notions, it is also important to remember that, like other complex social institutions, law has a strong constitutive ability whose effects cannot always be predicted even if we know what the generalized relations of power are in a particular context. We will see in the chapters on sexual orientation, for example, that ordinary gay people in North America have come to use the liberal legal fiction of sexual orientation as a name for an inner psychic truth that is experienced as pre-legal. This is just one example showing that law can and does change how people think of themselves and their world in ways that would not be appropriately captured by simply stating that gay people are the dupes of liberal ideology.

I have argued elsewhere (with Nikolas Rose) that instead of personifying “law,” a move that always results in questionable generalizations and attributions of agency, it would be far more useful, and more materialist, to speak instead about “legal complexes” (Rose and Valverde 1998). “Law” is the mother of all legal fictions, the always receding specter that forever haunts lawyers and judges. As a specter it has, of course, a certain effectivity (Derrida 1994)—people do many things in the name of law. However, what people do when invoking the law or facing legal difficulties is never law as such. People interact with, and help to maintain or transform, various *legal complexes*—ill-defined, uncoordinated, often decentralized sets of networks, institutions, rituals, texts, and relations of power and of knowledge that develop in those societies in which it has become important for people and institutions to take a position vis-à-vis law. Unlike Law, which hovers beyond the reach of those who act in its name, legal complexes can be empirically investigated. We can, of course, choose to talk about law in general, for

example, by contrasting law with justice (Derrida 1992). This contrast has been productively used in critical legal theory in recent years, as I, too, have argued in occasional philosophical excursions (Valverde 1999b, 1999c). But in a book in which the proliferation of diverse modes of knowledge within legal complexes is the key problematic, the abstract term “law” has little utility.

Simply using the term “law” incites certain lines of grand questioning, among which “What is law?” is foremost. Inspired by Nietzsche and Foucault, on the one hand, and by American pragmatism, on the other, I have come to the conclusion that it is important to resist the will to ask the grand questions—“why” questions and “what” questions.⁸ In asking such questions theorists have neglected the more mundane question of how it’s all done, leaving inquiries into effects to empirical policy researchers. This book does not set out, therefore, to theorize the state of legal processes. Rather, it asks what a certain limited set of legal knowledges and legal powers *do*, how they work, rather than what they are—much less what this all means for globalization, patriarchy, or any other grand abstraction.

RESEARCHING KNOWLEDGE PRACTICES BY DOCUMENTING EFFECTS

Critical studies, in the sociology of law as in other fields, expose the myth of legal neutrality by revealing the extent to which legal operations uphold and simultaneously conceal relations of power. Feminist scholars, for example, have shown that while the rules of evidence may look gender-neutral on their face, they systematically marginalize and even revictimize women testifying about sexual assault. Critical race scholars have demonstrated not only that law is an important tool of colonialism but also that whiteness is, in part, a legal construct. This type of inquiry into the *interests* being furthered through the apparently neutral machinery of various legal institutions and texts remains politi-

⁸ Instead of asking whether God exists and, if so, what He is and why humanity is as it is, William James’s method of inquiry into religion was to document what God/religion *does*, as shown in human actions: “The whole interest of the question of God’s existence seems to me to lie in the consequences for particulars which that existence may be expected to entail” (James 1994 [1902], 567). American pragmatism has tended to inquire into “consequences” using the market as the paradigm case; William James often said that concepts had to be studied from the point of view of their “cash value.” One can, however, think of “consequences” not as “cash value” but as material, ethical, and political processes, as Stanley Fish does, and, as is undoubtedly clear, my work is more in tune with this left-wing version of pragmatism than with law-and-economics uses of pragmatism. But I agree with Posner that pragmatism has no necessary political content (Posner 1991), a point William James himself constantly repeated.

cally as well as intellectually necessary. However, I would like to argue that it does not do either our politics or our scholarship any harm, and it may do both of them some good, to add to our existing analytical repertoire tools that have been developed by critical scholars who have inquired into *effects* rather than interests.

While interests invite us to reveal them by deep analysis, being generally unavailable for direct observation, effects can be more directly documented. As Paul Veyne said in an enlightening discussion of Foucault's method, effects are "on the surface" (Veyne 1997; and see Hadot 1997). They may not be apparent to all observers, since, like Poe's purloined letter (this is my analogy, not Veyne's), they may be invisible precisely because they are so much on the surface. But whether obvious or not, documenting effects does not require making claims about structural causes. The structural style of thought, which helped to generate a great deal of early critical legal studies work, was very helpful in exposing liberal neutrality, but its more positive claims about causation were and remain rather questionable. The sort of explanation we enjoyed twenty years ago (reform X may look like an improvement, but underneath it can be shown to be the same old oppression in more modern dress) implicitly assumes that truth is underneath, behind, or beyond what can be seen and documented. To that extent, critical approaches (in sociology and in law) tend to be driven by the desire that Nietzsche diagnosed when he pointed out that science shares an original passion, a motive force, with its supposed opposite, astrology: "a thirst, a hunger, and a taste for hidden and forbidden powers" (Nietzsche 1960, 324 [bk. 4, aphorism 300]).

Foucaultian analyses break with the astrological paradigm. Foucault was able to question his own will to truth long enough to perform a radical move that has few parallels in the history of philosophy. The history of philosophy, or more narrowly the history of epistemology, can be presented as a long *fort-da* game. One group will be keen on what can be seen and become empiricists, while the next generation, or philosophers living in another country, will be uninterested in what can be seen and will be fascinated by the invisible, the transcendental. Like Nietzsche before him, Foucault refused to play this *fort-da* game. In a move one can only call deconstructive, he refused to take sides in this battle, or even to develop some kind of "synthesis" or middle ground between the two positions. Instead, he tried to find ways of analyzing events and processes that would not begin by presupposing a dichotomy between the surface and the depths, between the phenomenal and the noumenal, between the present object and the absent Being, between "appearances" and "reality."

When asked to explain Foucault's method, Gilles Deleuze observed

that a metaphor Foucault might well have used to describe his method is one drawn from Paul Valéry's remark "le plus profond, c'est la peau" (Deleuze 1990, 119). He then adds that for Foucault the "surface," the skin, is not regarded as the opposite of "the depths"—as it is in the *fort-da* game of the history of epistemology. The surface/skin is not superficial, then. But sticking to the surface helps us to avoid the ontological effects generated by any and all hermeneutic efforts, including those of critical legal studies. Foucault does not interpret: he does not claim to peer through the veil of appearance and see into the depths. "La surface ne s'oppose pas à la profondeur . . . mais à l'interprétation. La méthode de Foucault s'est toujours opposé aux méthodes d'interprétation" [The surface is not opposed to the depths . . . but to interpretation. Foucault's method always opposed interpretive methods] (Deleuze 1990, 120).

The Valéry-Deleuze metaphor of dermatology can help to explain an important difference between the approach I take in this book and the methods favored in most critical and feminist legal studies. The "dermatological" approach is not at all opposed to theory. It is not "empiricist," but it is thoroughly empirical. Within critical legal scholarship and in most versions of Marxism and of feminism, doing theoretical work seems to involve reading between the lines, looking for hidden interests and determinative structural relations. Deconstructing the surface/depth binary that has plagued both philosophy and commonsense theorizing, metaphysics as well as astrology, for many centuries now, Nietzsche's main advice on method—which I think Foucault followed—was to caution us against ascribing the deeds and events studied by the human sciences to transcendental entities such as the free will or to invisible forces such as structural causation. What people do should be studied neither as acts of the individual's Kantian will nor as the product of relentless natural necessity but simply as a set of effects.⁹ And effects, though not necessarily observed by either participants or scholars, are always observable. Edgar Allan Poe, in a brilliant discussion of the good detective, points out that the skill involved in observing the effects of crime and tracking down the individual who done it is a hybrid one, combining intuition about human motivation, some science, and some cold logic. The analytical mind, as he dubs what in chapter 3 we will call the forensic gaze, is closer to that of a good checkers or card player than to the mathematically powerful brain of the chess

⁹ Nietzsche's main enemies were Christianity and Kantian philosophy, so he spent much time critiquing the myth of the individual human self, occasionally resorting to somewhat vulgar scientism in order to refute the assumptions of Kant's moral philosophy; but in our own days we can use Nietzsche's tools to critique the determinism of sociological functionalism, which posits transcendental entities ("society," "community") construed as more real than the processes and practices that make them up.

player. As Auguste Dupin put it, in a passage that is thoroughly Deleuzian: “There is such a thing as being too profound. Truth is not always in a well. In fact, as regards the more important knowledge, I do believe that she is invariably superficial” (Poe 1998 [1845], 59–60).

The break with the structuralist—or more generally sociological—habit of looking for truth in a well does not mean, in Foucault’s work or in mine, what it might mean for postmodern theorists who declare that there are no causes, that everything just happens, that we live in a meaningless flow. It is only if you expect explanations to be metaphysical that you then feel that the world has fallen into meaningless fragmentation if such explanations are shown to be mythical or arbitrary (as Nietzsche said of the nihilists). That everything is a meaningless flow of ephemeral events is itself a metaphysical statement: it is atheistic in respect to conventional epistemology, whereas my own position is closer to agnosticism. To put it differently: I do not think that a rejection of causality as such is necessary or desirable. The approach I use in this book simply refuses to look for causes underneath events: it refuses to assume that what we cannot see is somehow more real and more true than what is on the surface. Just as Deleuze has speculated that we may do well to think of the inner self as the inward folding of the surface, we can simply say that what is cause and what is effect is a matter of context and perspective. It is not that causes do not exist—that would itself be a major metaphysical claim. It is rather that what is an effect or a cause depends on what one is asking and from what perspective. Or, if one adopts Deleuze’s “fold” metaphor, what is inside and what is outside is a matter of perspective.

Thus I do not think that learning from Nietzsche compels us to reject causality as such. It involves, however, unlearning the metaphysical habit of regarding certain processes, codes, or laws of motion as somehow more real than events. Inquiries about effects are necessarily inquiries about the particular effects of particular practices. Rather than using hermeneutical tools to speculate about the meaning of this or that general social relation (the meaning of aboriginality, of addiction, of sexuality, or of pleasure), I am interested in documenting the particular effects of the techniques used by various organizations and institutions to organize, sort, classify, relate, and explain.

That knowledge tools that appear to be socially neutral, such as double-entry bookkeeping, the bell curve, the police report with aggregate crime data, or the chart, can have important social effects is the general theme of the literature on historical epistemology (Barry 1996; Daston 1988; Forrester 1996; Hacking 1975, 1991; Poovey 1998; Rose 1989; Osborne 1996). This theme will be explored in this book in legal contexts. Legal arenas and situations are excellent sites for the exploration

of knowledge in action partly because, unlike science, law admits openly that the accumulation of knowledge is always practical, always aimed at generating a decision, and thus law is institutionally less committed to epistemological unification. It is law's pragmatic logic that grounds the existence, in legal complexes, of a large number of different local epistemologies. What counts as a proper fact depends on the specifics of the particular legal arena: something may be admitted as evidence in a civil suit that would not be admissible in a criminal trial, to give only the most obvious example.

While at one level this is known to every law student, the implications of law's epistemological pluralism have not been explored even in the literature on legal pluralism. A further complication, particularly important in common-law jurisdictions, is that facts, once introduced, are arranged and related to one another through a number of heteronomous knowledge forms and operations—the precedent, the statute, the rule, and so on. Legal arenas thus demonstrate that what counts as a fact and what counts as a valid way of organizing, assessing, and deriving conclusions from these facts are questions that have many different answers.

THEORIZING THE VICE SQUAD: VICES AS BAD HABITS

The questions about knowledge practices described thus far could be pursued across a large number of legal arenas, situations, and institutions. The particular areas that I have chosen as sites for both legal and empirical research have a certain affinity with one another: they all involve human activities that have been traditionally regarded, in the West and more particularly in largely Protestant nations, as morally problematic but not as major sins or crimes. Murder has no public advocates, and judges do not spend any energy justifying the laws against murder. But activities such as drinking, working as a stripper, enjoying the stripper, or selling liquor to someone regarded as vulnerable to alcohol owing to his or her racial identity exist in a large gray area whose boundaries are not clearly marked either in law or in most moral codes.

One way of designating the field from which the empirical studies in this book have been drawn is to remember that, even in today's "crime management" world, there are still specialized squads called "morality squads" or "vice squads." Every social and legal theorist since Durkheim has pointed out that criminal codes are all about morality; but the "morality" squad does not go after murderers or rapists. Vice squads and morality squads spend their time instead on prostitution, stripping, gambling, and liquor infractions. (Drugs are usually subject to specialized policing.) How might we understand how these quite diverse

activities are lumped together in policing work? Whereas “crime” has been the object of much theoretical reflection, the “vice” of “vice squad” has escaped critical attention.

One would be hard pressed to find a definition of “vice” in either legal textbooks or ethical treatises. Ethical treatises are eloquent about virtue (especially in these days of “virtue ethics”), but vice exists merely as a foil for virtue. As for law, it studiously avoids the term “vice,” or rather it shares with ethics a preference for using “vice” in a merely negative fashion, as in when we are told that not all private vices are public crimes. In elaborating this distinction the focus is always on “crime” and its proper scope, never on that shadowy but constitutive Other, vice. The category “vice” is constitutive of the criminal law, at least in areas such as “offenses against public morals.” Despite its theoretical importance, it has received very little scholarly attention.

A vice is something less than a crime—although it can lead to or be coterminous with criminal activity. A vice is also something different from a sin. A sin is a particular act that is definitely wrong according to a particular moral code. Vices are similar to sins in that they are the opposite of virtues. But they are often regarded as faults rather than major transgressions; and, most important, they do not consist of isolated acts. To have a vice is to have a tendency, a habit. Smoking one cigarette may be seen either as bad or as harmless, but either way it is not a vice. Only when one reaches the status of being a smoker does one become a person who has the vice of smoking.

Vices inhabit a shadowy realm located somewhere between the isolated “act” governed by criminal law or by the Ten Commandments, on the one hand, and the disciplinary world of the modern deviant “identity,” on the other. Modern deviant identities—the delinquent, the alcoholic, the homosexual—recuperate and revive older notions of vice, but, as against some interpretations of Foucault, it is important to note that the new deviant identities do not completely erase or supersede the classical vices. The language of vice and habit is still in use, perhaps because it allows us to focus on longstanding patterns of behavior without psychologizing, without assuming the deep self of modern scientific psychology (Rose 1989, 1996). We can experiment with ways of reforming our exercise habits or our wine-drinking habits in ways that do not incite us to label ourselves “addicts.”

The superficial logic of habit is important not only in the sphere of consumption (smoking, drinking) but in other socio-legal spheres. As I argue in chapters 4 and 5, developments in human rights law, particularly in Canada but also in the United States, suggest that the modern homosexual identity, whose history has been traced by Foucault and by numerous historians, may be in the process of fragmenting. The crimi-

nal law, particularly in the United States, still relies on and constructs the “homosexual identity” even when claiming to govern only conduct, not status. But human rights law has seen the emergence of a different discourse, one focusing neither on the isolated act nor on the deep-rooted essential identity: this is the discourse of “lifestyle” and “community.” When we look to see how the ubiquitous and vague terms “lifestyle” and “community” are provided with some content, we see that in both legal and popular discourse gay life appears as constituted through a series of group *habits*. In cases concerning individuals who are criminally charged or who are making a claim of specific discrimination, the individual is usually defined in terms of either acts or deep identities or both. But in situations in which communities are at issue, as in the battles about the visibility of urban gay villages (see chapter 5), neither particular acts nor individual psychic identity are at issue. Like ethnic communities, the gay community is regarded as characterized by a collective preference for certain urban spaces, for certain types of consumption and certain kinds of civic habits. What is often derisively called “the gay lifestyle” — and is usually called the gay community or the gay village by its members — is made up of philanthropic, political, and aesthetic habits.

The group habits that are thought to constitute “the gay lifestyle” are at one recent transformation in the long genealogy of “governing out of habit” (Valverde 1998b). Studies of sexual orientation and the law — and to a lesser extent studies of drinking and the law — have tended to take for granted the act-identity opposition (or, in American legal terms, the conduct/status opposition). Habit, lifestyle, and community have not been taken seriously as descriptive terms that do a lot of work despite — or because of — an intrinsic vagueness (Cotterrell 1995). Just as courts in the 1960s asked whether one should penalize drunk drivers for having chosen to drink or treat them because they were helpless alcoholics, courts in the 1990s oscillate between the language of “acts” and the expert discourses on identities, and this binary opposition is reproduced in the studies of law in action. Having concluded, in earlier work on drinking, that a great many activities and situations with ethical implications are governed as habits, rather than as either acts or identities, I would like to explore here how law engages with and addresses the shadowy, in-between world of “habit” and “lifestyle.”

The way that gay identity becomes a lifestyle under certain political and socioeconomic conditions is not unique. Chapter 8 considers racially specific legal prohibitions on drinking, targeting what Canadian law used to call “the Indian style of life.” Being an Indian can, of course, be an identity; it can also be a distinct legal act, as when someone is added to the official list of band members who are “status In-

dians.” But when Canadian courts, in the years before 1985, were asked to rule on a “selling alcohol to Indians” charge, they had to decide not only if person X was a status Indian but also if person X “followed an Indian style of life.” The determination of this issue brought into being knowledge of the Indian “lifestyle” in the form of a judicial amateur anthropology of collective habits: “Did Mr. X wear moccasins?” This question, actually asked by a Canadian judge, really meant, “Is Mr. X in the habit of wearing moccasins?” since whether he wore them on the occasion of Mr. Y selling him alcohol was not the issue.

The lifestyle question has plagued American political and military authorities: Can armed forces personnel be dismissed for one or two gay acts? Or is it a gay lifestyle that is the problem? If so, how can one operationalize “lifestyle” for legal purposes? Examining one important area in which lifestyle was crucial in law many decades before the emergence of “lifestyle politics”(aboriginal-specific drinking prohibitions) leads us from the more currently fashionable term “lifestyle” to an older term such as “habit.” And when legal knowledge processes turn their attention to the habits and lifestyles of groups and communities—as well as the site-specific, temporary lifestyles of particular urban spaces, such as pubs on weekend evenings, discussed in chapter 6—expert scientific knowledges are almost never determinative.

THE “ANALYTICAL MIND” OR FORENSIC GAZE

Socio-legal scholarship on police work has tended to emphasize the growing importance of scientific and technical facts, and scientific tests and information formats. It is undoubtedly important to understand how the task of finding the truth about crime has changed as a result of new techniques and formats. And yet, if we are to avoid generalizing about the domination of science, it is necessary actually to investigate the knowledge relations created when high-tech information is “translated into” (Latour 1987) a context—a court of law, for example—in which scientific logics do not dominate. As Sheila Jasanoff’s careful study of how police officers presented the DNA evidence in the O.J. Simpson criminal trial shows, a scientific fact becomes something rather more hybrid when a court has to consider not only the validity of the fact but also the credibility—and hence the moral character—of the witness who introduces the evidence (Jasanoff 1998; Lynch and Jasanoff 1998). And what science-and-technology studies of law do not even consider is the ways in which scientific “truths” coexist, in legal arenas, with such nonscientific facts as what the reasonable person ought to have known.

Legal knowledges of truth depend crucially on the knowledges introduced by way of evidence. In the case of inquiries into sexual vice, an inquiry rarely thought to demand scientific knowledges, police testimony is particularly important. Examining two trial transcripts to map out the knowledge relations constituted in the interchanges among police witnesses, prosecutors, and judges (chapter 3) leads to the conclusion that sexual vice is constituted as a legal object largely through what Edgar Allan Poe called “the analytical mind” (Poe 1998 [1845]) and I here call “the forensic gaze.” A brief discussion of the famously stained blue dress worn by Monica Lewinsky shows that the “analytical” mind that works with some scientific knowledge but mostly with directly observable, particular clues is an epistemology that is by no means exclusive to detectives or forensic technicians. The study of the world’s clues has been marginalized from science ever since the Scientific Revolution cast aspersions on the “correspondences” and “affinities” of Renaissance cosmology, but the quest for clues-based truth is by no means extinct. It persists and indeed flourishes both in popular culture and legal arenas—and is even used for such high purposes as deciding whether a president ought to be impeached. By contrast with the better-known medical gaze and with the equally renowned actuarial gaze of statistics, the forensic gaze has received very little scholarly attention (exceptions are Thomas 1999 and Cole 2001). Nevertheless it continues to fascinate not only its practitioners but also all of us who vicariously participate in searching for moral clues.

DISORDER AS THE VICE OF CERTAIN SPACES: ADMINISTRATIVE KNOWLEDGES

Chapters 2, 4, and 8 investigate how various officials and legal authorities claim to know personal vices (indecency, drinking.) By contrast, chapters 5, 6, and 7 are also concerned with moral order and vice but focus on situations in which questions about the utilization of urban space figure more prominently than questions about personal vices. In chapter 5 some Canadian human rights cases involving local Lesbian/Gay Pride celebrations allow us to consider how a certain type of gay community has been constituted as a legal and political agent with a certain “lifestyle”; this issue is also explored in the context of the failed Colorado constitutional Amendment 2, which sought to forbid localities from passing the urban-specific human rights laws thought to further not universal rights but the “special” interests of the community of white urban gay yuppies. Moving from sexual to drinking lifestyles, in chapter 6 we consider the question of “urban disorder” and the threat drunkenness poses to it from the point of view of the sociology of legal

knowledges. My examination of British pub licensing law and policy argues that, contrary to what legal historians usually claim, the United Kingdom does have a strong tradition of “police powers” — powers usually exercised by municipalities and magistrates. These powers are in their practice enabled through the deployment of what I here call “administrative knowledge,” a category that includes the “police science” of eighteenth-century administrative and legal reformers (Knemeyer 1980; Small 1909) but is somewhat wider.

Administrative knowledge cannot be subsumed either under science or under “everyday” lay knowledge: it is an in-between, hybrid epistemological category. Like indecency and like drunkenness, urban disorder is at one level a matter of “common knowledge”; but, unlike in the case of drunkenness, an entity that law assumes is always already known, in the case of disorder in public spaces certain officials have a privileged authority to find and to manage the ill-defined objects of indecency and disorder. Hence, although much “administrative knowledge” consists of the sorts of facts and causal links that are in the domain of “commonsense,” it is nevertheless a separate category in the sociology of legal knowledges, since certain administrators are empowered to give opinions that are not expert opinions in the legal sense but that override the testimony of customers or passersby.

An interest in hybrid, in-between knowledges deployed in regulatory and administrative law leads inevitably to research sites located in the realm of “the state” rather than in the field of everyday life. Unlike the more exalted, usually national sites studied by political science and legal scholarship, regulatory sites have historically appeared as “too mean” to merit scholarly consideration (as Adam Smith said about municipal governance; see chapter 6). One of this book’s secondary aims is to question the scholarly habit of immediately turning to the federal level when thinking about state power. Our societies, and our cities in particular, teem with a kind of personnel that has been hitherto largely invisible to both mainstream law scholarship and to grassroots-oriented law-and-society literature. Liquor inspectors, whose actions and opinions are recorded in minute detail in the voluminous, Jeremy Bentham-like files of the Liquor Licensing Board of Ontario, are a case in point: despite an unusual wealth of data, there is no scholarly study of this type of regulatory work. Other jurisdictions and other regulatory bodies lack the detailed data; nevertheless, given the large amount of discretion involved in, say, refusing a publican a license, it is curious that there is virtually no scholarship documenting how British magistrates have used these powers. Again, in the case of indecency law, there are case comments on some key cases and, at the other end, much generalizing about law and sexuality; but we have no sustained socio-legal study of the

process by which particular erotic behaviors are said to be “indecent,” or, for that matter, “sexual,” in the interaction between police, municipal officials, and prosecutors that leads to charges being laid. The privileging of bureaucratic files and lower-court transcripts does not mean one can afford to neglect the traditional source of data of legal study, namely, court decisions; thus many judicial decisions were read, especially for chapters 2 and 8, which in some sections come close to traditional legal analysis. But in contrast to the literature that investigates the scientificity or nonscientificity of legal reasoning (e.g., Brewer 1998), my interest throughout, even when reading cases, is not on the principles of law. Rather, I focus on the deployment of knowledges within and in relation to law, wherever that occurs, prioritizing questions of epistemological authority and sidelining doctrinal questions.

IMPERATIVE KNOWLEDGE: THE DUTY TO KNOW

Chapter 7 uses two studies of alcohol and law to reflect on the ways that knowledge, regarded by sociologists as a resource or even a form of “capital,” is in many legal contexts a duty rather than a resource. While sometimes the duty to know brings with it rewards and status (e.g., in the case of licensed professionals), in the case of drink, those on whom the duty to know is imposed by law get no reward, even symbolic status, for actually having the kind of knowledge that courts call “common knowledge.” While said to be “common” by contradistinction with the special knowledge of expert witnesses and the particular factual knowledge of eyewitnesses, common knowledge is nevertheless not necessarily common in the empirical sense. Whether the people held responsible for knowing exactly when someone is too impaired to drive actually know this is a question that does not concern law. That common knowledge, like “the reasonable person,” is a necessary legal fiction is, of course, not a novel claim; but the implications of the persistence of the curious imperative epistemology of “the duty to know” are explored here in ways that may prove fruitful for subsequent studies in the sociology of legal knowledges.

These implications become clearer when the different forms of knowledge documented in this book are considered together. For example, neither the “common knowledge” demanded of waitresses and drivers (chapter 7) nor the administrative knowledges of vice and disorder documented throughout the book have any specific content. If the “common knowledge” imputed to people by law, however effective in judicial decision making, is as a form of knowledge nothing but a dream—a dream that is necessary in order to make citizens, officials, and employees monitor and manage some of the risks of disorder—so, too,

administrative knowledge is always open-ended, in process, unfinished. Urban reformers and police officers may know that broken windows are a sign of decay and vice; but there is no exhaustive list of indicators of vice, much less a clear checklist of indicators of virtue, order, and decency. Lacking a definite content, these creative, dynamic, hybrid, open-ended knowledges that move so powerfully through legal and political arenas are held together, I have concluded, through a certain common logic: the easy juxtaposition of commonsense, job-based knowledge, and (very occasional) borrowed bits of science. Creative hybridity (Moore and Valverde 2000) is the name of the knowledge game, in regulatory and administrative arenas as well as in certain processes within criminal law. As a contribution to the sociology of legal knowledges, this book thus opens up the study of areas outside the binary opposition of expertise versus everyday knowledge—the study of what, for lack of a more precise term, I refer to here as “low status” knowledges.

BODIES OF LAW: A NOTE ON CULTURAL STUDIES

Many of the issues and legal questions studied in this book, particularly those pertaining to “the sexual,” have received much attention recently from feminist and other critical scholars working in the legal regulation of the body. Judith Butler, Davina Cooper, Janet Halley, Alan Hyde, Les Moran, Kendall Thomas, and Alison Young are just a few of the authors whose works have amply demonstrated that examining law’s constitution of bodies is crucially important not only for gender studies but also as a way of revealing some important “truths” about law more generally. Cultural studies—defined broadly to include most feminist and queer legal theory—has proven to be the most important resource for these studies; indeed, many of them are explicitly labeled as “law and cultural studies.”

One way to begin to explain (or rather constitute) the difference between my approach and that of most work in cultural studies is to note that within cultural studies the focus tends to be on meanings. How meanings are constructed, disseminated, revised, challenged—this is the central question of the literature on law, sexuality, and desire produced within cultural studies. As Austin Sarat and Jonathan Simon have recently put it, “treating law as a cultural reality means looking at the material structure of law to see it in play and at play, as signs and symbols, fantasies and phantasms” (2001, 19). Signification is, of course, a crucial dimension of sociality and the *sine qua non* of knowledge production.¹⁰ My approach, however, seeks to highlight two di-

¹⁰ One reason for my caution about cultural studies of law is that there is some slippage

mensions or aspects of the power/knowledge nexus that are not usually studied in “law as culture” work: (1) epistemological authority; and (2) the formatting of knowledge.

One of the book’s key concerns is the distribution of epistemological authority. Who is authorized to interpret acts and representations and situations for legal purposes? Why are expert witnesses thought to be appropriate in some cases not involving technical matters but inappropriate or inadmissible in very similar cases? What is the status of testimony that lies somewhere between “fact” and “expert opinion”? These questions address the relation between bodies of knowledge and the human bodies that appear in court, a relation often neglected by those who do “discourse analysis” or textual deconstruction. The rules of evidence make it very clear that knowledges are always site-specific (as one sees, for example, in the process by which expert witnesses are qualified each time they offer testimony, even if they do it often). A tight link is thus made between a person, a witness, and a body of knowledge, a link that distinguishes law from arenas such as scientific peer review, in which the personal character of the person presenting facts is precisely that which is excluded. The studies undertaken for this book show, as a whole, that legal epistemological authority is constituted through several uncoordinated processes which, to make matters more complicated, do not work the same way for all categories of actors. The issue of epistemological authority, therefore, cannot be investigated with any one method or approach or any set combination of methods; different situations call for different types of investigation and different sources.

The second dimension of my inquiries, and one that also goes beyond “culture,” is that of knowledge formats (Ericson, Baranek, and Chan 1991). When a liquor inspector performs a routine inspection, how does he write up his report? Using a form with preset categories that can be checked off, which is what is done today, has different socio-legal as well as epistemological consequences than writing a narrative, as was done in former times. It is also noteworthy that the voluminous files on each bar and restaurant in Ontario compiled by the liquor licensing authority contain no quantitative information or aggregate data (e.g., gallons of beer served, average number of customers per night). Other sources of information about vices and risks contained in other

in Sarat and Simon’s argument (and in other works along similar lines) between the more modest empirical aim of analyzing the semiotic dimension of legal institutions and the programmatic claim that studying law as culture is more important than other approaches: “As the logics of governance in the late modern era turn from society to culture, legal scholarship itself should turn from society to culture as well, and more fully embrace cultural analysis and cultural studies” (Sarat and Simon 2001, 7). It is difficult to see why “culture”—rather than postmodernity, the risk society, and so on—has somehow replaced “society.”

government department archives, however, are full of numbers and statistics. Historians of scientific formats, such as Ian Hacking, Lorraine Daston, and Mary Poovey, have shown that how one collects and presents information is as significant as the conceptual content. This insight, well developed in the literature on social studies of science, has very rarely been utilized within cultural studies.

To give an example, a Canadian court was recently told that the children's rhyme, "finders keepers, losers weepers" is a common-law maxim. The unusual knowledge format is not unique to this case: a Lexis search reveals that there are sixty-five documented uses of "finders keepers" in U.S. case law, along with several deployments of Jack and the beanstalk and a couple of the old woman who lived in a shoe.¹¹ Now, semiotic analyses (law-as-culture) analysis could enlighten us about the content of the rhymes—the cultural meanings associated with old women or with shoes, for instance—but would contribute little to an analysis of the differential distribution of various knowledge formats. To inquire into the use of children's rhymes and other sources of "common" knowledge may prove as interesting as launching psychoanalytic or semiotic inquiries into the myths imported through the figure of the old woman. Why would a court use a children's rhyme to trigger "common knowledge," rather than invoking "the principles of natural justice," "time immemorial," or some other unwritten authority? We can address that kind of question if we pay close attention to format.

The question of format is closely related to the question of epistemological authority, since certain formats have a built-in tendency to empower certain knowers. Numerical charts tend to empower technicians, health-risk statistics tend to empower epidemiologists, and so forth; and nonscientific formats authorize a variety of personages, including that of "the reasonable man." Nevertheless, the link between format and authority, which structuralist discourse analysis would read as hard-wired, is flexible and variable. Particular uses of certain formats have to be studied in the context within which they occur. Knowledge formats—like narrative genres—do not always generate the same epistemological or ontological effects to the extent that all knowledge production and dissemination (as Bakhtin showed long before the rise of sociology of knowledge) is always dialogical, and hence context specific.

MOVING OBJECTS: BODY, DESIRE, FLESH

As a final prefatory note, a word is in order here about why I tend to avoid speaking about "the body" even though I am centrally concerned

¹¹ I thank Ron Levi for having the idea of doing such a search and giving me the results.

to map the ways in which law and other regulatory tools construct bodily behaviors and moral dispositions. Feminist and queer analyses of legal processes are often written from the standpoint of the body. Most of these works focus on—and hence reproduce—the category of desire, with desire being thought of as inhering in bodies, whether or not a psychoanalytic framework is assumed. Analyses of the ways in which gendered, racialized, and sexed bodies and desires are investigated and constituted through legal processes have enabled us to gain numerous insights into the way that legal complexes use and rework particular representations of bodies, sorting them, evaluating them, and adjudicating desires along the way. Sex and race have been the main categories of analysis in this diverse and quickly expanding literature on “law and the body.” There are signs, however, that in the future more attention will be paid to body parts, substances, and bodily entities and attributes not reducible to the preexisting logics of race, gender, and sex. Alan Hyde’s *Bodies of Law* (Hyde 1997) is exemplary in this respect: it manages to incorporate the insights of feminist and other critical studies of law and sexuality into an analysis of the legal constitution of bodies that radically de-centers “sex.” Hyde shows that legal truths about bodies are not always sexual or racial: lawsuits that involve ascribing a value to certain body parts or bodily functions, for example, provide Hyde with a rich site on which to analyze legal mechanisms for naming and evaluating those aspects of embodied existence that are neglected by psychoanalysis, feminism, and postcolonial studies. Hyde’s work shows that feminist and queer legal analyses that persist in talking about “law and *the* body” are misleading in two ways: they homogenize law, and they have the effect of reproducing the myth that sexuality—and/or race—is *the* truth about *the* body. The human body is not one, to misquote Irigaray. The ways that race, sex, and other abstractions circulate through and constitute the meaning of a particular body in a particular legal situation cannot be predicted in advance from any one theory about “the body”; they must be empirically investigated (see also Bentley and Flynn 1996).

While sharing Hyde’s interest in documenting aspects of bodily constitution that have been largely invisible to feminist, queer, and postcolonial studies, this book differs from Hyde’s in not taking “the human body” as its primary object of study. The body is not the only or even the main entity constituted and governed by what I might call, speaking quasi-metaphorically, “the vice squad.” As I have shown elsewhere, excessive drinking is usually regarded as neither a strictly physical condition nor a mental defect but rather as a disease of that ontologically hybrid or liminal entity, “the will” (Valverde 1998a). The will is supposed to link mind to body, reason to passion, and for that reason it is

not exactly in or of the body. Along the same lines, when studied at the level of the individual, bad habits, whether caused by a weakness of the will or by lack of training, always have a bodily existence, but they are not solely “of” the body. And when studied at the level of the group or collective, bad habits—and, for that matter, harmless, quaint, culturally specific habits—are physically visible, but they are more than physical. What is at issue in many of the cases I highlight is not the body but rather the habits of the community or, in contemporary parlance, certain “lifestyles.” And while the habits and preferences of Blacks and women, as has been amply shown in the feminist and critical race theory literatures, have been thought of as inscribed directly on the body, for groups that, unlike Blacks or women, include many individuals whose affiliation is ambiguous or invisible, habits become an all important source of information for outsiders. You may not always be able to spot Indians or gays by sight, since their bodies do not always appear as already distinguished from those of whites or heterosexuals; but by their habits ye shall know them. The issues of collective identity raised by human rights and other legal processes cannot be fully analyzed if one limits the discussion to the abstraction of “the body” or even to the field of “bodies.”

CONCLUSION: TOWARD A NONDICHOTOMOUS JURIDICAL FIELD

In an important analysis that opened new avenues for the sociological study of law as a set of knowledge practices, Pierre Bourdieu argued that “the juridical field” is constituted mainly by the professionalization of knowledges not only of law but even of justice (Bourdieu 1987b). In our particular present, however, continuing to oppose “science” and “expertise” to experience and democracy is inappropriate in respect to the study of law—especially for common-law jurisdictions. The knowledges that are constituted in and circulate through law are rarely so coherent and bounded as to allow classification into one of the two traditional categories (expertise or experience). Some scientists aspire to create “pure” scientific knowledge; some ethical philosophers dream of a purely rational knowledge of norms. Legal actors and institutions, however, care little about epistemological purity and derive great benefit from being epistemologically creative. The study of the epistemological creativity and hybridity displayed not only by judges but by both ordinary citizens and lowly officials engaged in the negotiation of legal truths may thus make an indirect contribution to the work of those who take a more normative approach than I do. Those activists and politi-

cally active academics who are attempting to devise knowledge strategies with democratic effects may find it useful to know that the social study of legal knowledges shows that there are many in-between practices of power/knowledge that take us beyond the dichotomy of science versus experience.