Blue Jeans, Rape, and the "De-Constitutive" Power of Law

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Italy's Supreme Court recently overturned a rape conviction on the grounds that the woman was wearing blue jeans at the time. The Court reasoned that blue jeans cannot be removed "without the active cooperation of the person who is wearing them," and therefore sexual intercourse must have been consensual. The decision was met with outrage by media commentators, political leaders, and ordinary Italians in a range of civic organizations. I argue here that this case and others like it are conspicuously inconsistent with a constitutive perspective that sees law and everyday normative orders as mutually embedded, or at least reciprocally reinforcing, and that focuses on law's hegemonic potential. In this revisiting of the constitutive approach, I propose that the concept of legal hegemony be elaborated to include the counterintuitive possibility that law can sabotage the very ideologies it invokes. For when an authoritative source such as law is so out of step with the evolving normative order, the shocking discrepancy exposes not only the fallibility of law but also the foolishness of the outdated moral vision it is caught endorsing. Finally, I suggest that it may be during "unsettled cultural periods" (Swidler 1986) that such "de-constitutive" moments are most likely.

Introduction

On 10 February 1999, Italy's highest court of appeals overturned the conviction of a driving instructor who had allegedly raped his 18-year-old student (*Cassazione Penale* 1999:2194–96). The Corte di Cassazione reasoned that the young woman was wearing blue jeans at the time, so the sexual intercourse must have been consensual. The Justices proclaimed, "It is impossible to take off jeans . . . without the active cooperation of the person wearing them" (*Cass.* 1999:2195). The decision set off a wave of protest across the political spectrum in Italy and around the world. Alessandra Mussolini, deputy of the right-wing National Alliance Party and granddaughter of former dictator Benito Mussolini, expressed outrage at the decision and organized a rally of female legislators—all symbolically clad in blue jeans (*Il Messag-*

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gero 1999a[1]; Guarnieri 1999). Left-leaning Prime Minister Massimo D'Alema went on record as "in solidarity" with the protestors (Guarnieri 1999).

A vast literature addressing the constitutive power of law has recently emerged among law and society scholars (Yngvesson 1988, 1993; Simon 1988; Starr & Collier 1989; Hunt 1993; Sarat & Felstiner 1995; Sarat & Kearns 1993; Lazarus-Black & Hirsch 1994; Ewick & Silbey 1998). Building on concepts put forward by social theorists as diverse as Durkheim, Weber, Gramsci, and Foucault, this work "analyze[s] the mutual construction of legal and social orders" (Starr & Collier 1989:6). A central concern of these constitutivists is how "law contributes to the making of everyday consciousness and practice" (Hirsch & Lazarus-Black 1994:20), reinforcing particular ideologies through the power of its own legitimacy and its ongoing affirmation of the taken-for-granted social reality. From this perspective, although law may occasionally be one step *ahead* of dominant understandings in a shifting normative order and thus may advance a morality that is not yet taken for granted (the desegregation cases in the United States beginning with *Brown v. Board of Education* are a good example), such precocious law is nonetheless "constitutive" in that it reinforces the emergent reality that it affirms.

The Corte di Cassazione decision and the angry response it provoked are difficult to explain from this constitutive perspective. Indeed, the widespread backlash—and the anachronistic nature of the decision itself—appears to contradict the view of law and the everyday normative order as of one piece, or at least as mutually constituting. Rather than reinforcing the normative order it represents, the decision further undermines it. Nor, I will argue here, are they compatible with the related notion of the "dialectic of [legal] hegemony," that is, the understanding that "the hegemonic qualities of law manufacture protest at the same time as they subtly manufacture consent" (Vincent 1994:121). Though the rapidly accumulating literature on resistance offers powerful insights into this dialectic (Scott 1985; Abu-Lughod 1990; Comaroff & Comaroff 1991; Sarat & Kearns 1993; Lazarus-Black & Hirsch 1994; Ewick & Silbey 1998), the present case invites a reexamination both of legal hegemony and of the nature of the resistance it is said to evoke.

Briefly, I propose that a straightforward constitutive perspective implicitly and inadvertently reifies "the law," attributing to it a coherence and a unity that is both empirically elusive and theoretically at odds with the otherwise "everyday" focus of the approach. As we will see, although much of the constitutive litera-

[1] All references to *Il Messaggero* refer to *Il Messaggero* Online, the internet version of this Rome daily newspaper. Instead of page numbers, *Il Messaggero* Online uses descriptive indicators, such as "prima pagina" (front page), "primo piano" (up front), and "interni" (internal affairs). All other citations to Italian newspapers refer to the hard copy version.

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ture at one level emphasizes the multiplicity of law, its decentered nature, and the plurality of ways that law and social meaning interact, this insight is accommodated uncomfortably in a theoretical perspective that highlights the constitutive dimension of this interaction. I argue here that the constitutive quality of law is an empirical question. In this regard, the Italian rape decision and its aftermath affirm the importance of Hunt's (1985:12) assertion, "Its [legal ideology's] effects are regularly taken for granted when they should be treated as problematic." Specifically, I suggest that the concept of the "dialectic of legal hegemony" be opened out to include the counterintuitive possibility that law sometimes sabotages the very ideologies it embraces. And, finally, I propose that it may be during "unsettled cultural periods" (Swidler 1986) that such "de-constitutive" moments are most likely.

In other words, legal hegemony may be vulnerable not only to opposition—or resistance—from without but also to its own ideological missteps; and, the greater the legal legitimacy, the more shocking the misstep and the greater the counter-hegemonic potential. For, when an authoritative source such as law is so out of step with the evolving normative order,[2] the discrepancy draws attention not so much to the fallibility of *law,* but to the folly of the outmoded moral vision it is caught endorsing.

This article is meant as a friendly critique and revisiting of the constitutive perspective. I intend not to debunk the approach, but to reveal the limitations of its current renditions and to build on its considerable insights. In the end, I hope not only to demonstrate how the outrage provoked by this Italian rape decision can be explained through a (modified) constitutive perspective but also to enhance that perspective theoretically by forcing us to take seriously the myriad ways that law and social meaning interact, and in particular, the possibility that law might be "*de*-constitutive." I do not mean by this merely that law may contribute to the de-constitution of particular moralities, for in its constitutive role law inevitable de-constitutes competing moral understandings. Instead, I am proposing that law and legal discourse may occasionally be de-constitutive of the very moral understandings they prescribe. It will not be news to anyone—even, perhaps especially, constitutive scholars—that legal decisions periodically produce scandal or that not all laws command respect or validate meaning or even that some legal decisions seem to provoke ideological mutiny. The point is to take these moments theoretically seriously and to try to make sense of them from the

[2] I do not mean to homogenize the "normative order." As I discuss in more detail later, particularly in complex societies and particularly on issues such as gender roles and rape, ideological divergence is the norm. Nonetheless, in the contest over cultural meaning at any given moment there is likely to be a dominant, more socially acceptable, normative understanding.

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point of view of a perspective that otherwise emphasizes law's constitutive quality.

Before exploring these ideas in more detail, the following section describes the Italian Corte di Cassazione case that prompts this revisiting and elaboration of the constitutive perspective.

The Italian Supreme Court, the "Scandalous Decision," and Jeans for Justice Day

The Corte di Cassazione is the highest appeals court in Italy. The appeals process operates somewhat differently in Italy than in the United States, as does the makeup of the Court. Most notably, Italy's Corte di Cassazione comprises 420 Justices (10 of whom currently are women and 410 men), who are divided between a civil court and a criminal court, and among different "sections" according to their specialty. Section Three of the Criminal Division, for example, deals with refuse and environmental issues of a criminal nature, and Sections Four and Five deal with various types of crimes against the person. Further, as a country of civil law, Italy's appeals process is based on fundamentally different principles than is the U.S. common law system of precedents and Constitutional interpretation. Among other things, the Italian Court of Appeals has some latitude to consider the merits of a case, including issues of guilt or innocence, not only questions of procedure (Canosa 1996; Guarnieri 1999).

At a more institutional-structural level, the relationship between the Judiciary and the Executive and Legislative Branches in Italy—as in most west-European countries—is quite different from that in the United States. For one thing, judges and public prosecutors are not formally distinct, as both are part of the *magistratura*. This magistratura follows bureaucratic operating procedures, in contrast to more professionally organized common law systems (Canosa 1996; Pederzoli & Guarnieri 1997). The implications of this are numerous. Most important, appointments and promotions are based primarily on seniority, thereby assuring some degree of independence of the Judiciary from the political realm. Thus, unlike in common law systems, judges and prosecutors are neither elected nor are dependent on political appointment.

When the Higher Council of the Judiciary was established in Italy in 1959 to oversee all issues relating to judicial appointments, status, and conduct, the independence of the magistratura was further enhanced. It has been argued (Nelken 1996a) that this firewall between the judicial and political branches in part made possible the aggressive crusade of Milan prosecutors and judges in 1994 and 1995 against corruption at the highest levels of government, known colloquially as Tangentopoli

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(loosely translated, "Kick-back City").[3] Ironically, the virtual "revolution" in the Italian political system (Nelken 1996b) precipitated by the corruption prosecutions, made possible by the independence of the judiciary, has been referred to as the "judicialization of Italian politics" (Pederzoli & Guarnieri 1997).

Despite these differences between the judicial system in Italy—and its independence from and influence on the political process—and those that prevail in common law countries, the Corte di Cassazione plays a role comparable in many ways to that of the U.S. Supreme Court. As Italy's highest court of appeals, the Cassazione is the most authoritative judicial body in the country and is often referred to as the Supreme Court ("Suprema Corte").

The Court's ruling in this case reversed the 1998 decision of a lower court in southern Italy that had found a 45-year-old driving instructor, Carmine Cristiano, guilty of raping his 18-year-old student and had sentenced him to two years and eight months in prison (*Cass.* 1999:2194–2196).[4] In overturning the conviction, the Corte di Cassazione reasoned that women in blue jeans must be complicit if sexual intercourse takes place. It said, "It is a fact of common experience" that tight blue jeans cannot be removed "even in part, without the active cooperation of the person who is wearing them."[5] It also registered suspicion as to why the victim waited for several hours before telling her parents of the attack and questioned why there were no scars or signs of resistance on the victim or alleged perpetrator. The Justices argued, "It is illogical to suggest that a girl would submit passively to a rape, which is a grave assault on the person, out of fear of some other hypothetical and certainly not more serious harm" (p. 2195).

The decision set off what one journalist called "an authentic political earthquake" (de Florio 1999b:primo piano). A legal scholar observed sardonically, "This decision has done what few legal decisions do: It has succeeded in making everyone agree. In opposition, unfortunately" (Iacoviello 1999:2204).[6] The normally conservative Rome newspaper, *Il Messaggero,* ran a front-page

[3] Although this separation of the branches of government may have made the aggressive prosecutions possible, what triggered them is quite another question (see generally, Nelken 1996a).

[4] The Supreme Court remanded the case to the Lower Court of Appeals in Naples for reconsideration of the facts and final adjudication (*Cass.* 1999:2196).

[5] It was important for the Justices to include the phrase "even in part," because the decision they were reversing had mentioned as part of its reasoning that the victim's blue jeans were only partially removed, suggesting in their minds that the intercourse had not been consensual (*Cass.* 1999:2195).

[6] He was exaggerating only slightly. A few observers advised caution in second-guessing the Court's judgment, and took the media to task for "distortion" and inflating the significance of the case (Fiandaca 1999:166; see also Guarnieri 1999:primo piano). But these reactions were rare, did not address the substance of the decision, were self-consciously restrained, and, in any case, were far outnumbered by the expressions of outrage described here.

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story ridiculing the decision, saying it "read like an instruction manual for aspiring rapists" (Pijola 1999:prima pagina). The same front-page article lamented that the decision "takes us back to the days when the victims of rape were put on trial instead of their offenders." It concluded sarcastically that Strauss (the legendary inventor of denim jeans) did not realize what a "versatile" garment he had created, "because from now on aspiring rapists will know to leave girls in jeans alone. . . . And designers for years have not known they had in hand the most extraordinary anti-rape invention of the century. . . . Like a chastity belt . . . in case of bad company" (Pijola 1999:prima pagina). The following day, a journalist pointed out that the decision was "considered retrograde" (de Florio 1999b:primo piano).

Virtually every newspaper and media outlet ran the story for days, often on the front page, and consistently condemned the decision. Some newspapers began referring to it simply as "the shocking decision" and "the scandalous decision" (*Corriere della Sera* 1999a; *La Repubblica* 1999a; *Il Messaggero* 1999d). Politicians and labor leaders of every political stripe joined the chorus. The centrist Milan newspaper *Corriere della Sera* (1999f) noted, "From the [right-wing parties] to the [left-wing parties], regional directors are protesting the shocking rape decision." The Under-Secretary of Justice called the decision "absurd" and "curious" (quoted in Greco 1999:16). The Speaker of the House of Representatives called it "shameful" and "a disgrace" (quoted in *Corriere della Sera* 1999b), and the former Speaker of the House lambasted it as a "sick" and "troublesome" decision (quoted in *Il Messaggero* 1999c). Other political leaders called it "ridiculous" and "unreal" (quoted in Garbesi 1999:2) and "a giant step backward" (quoted in *Il Giornale* 1999b). Prime Minister Massimo D'Alema, hesitant to condemn the judicial decision directly—apparently in the interest of the separation of the branches of government—nonetheless expressed "solidarity" with those who were outraged (quoted in Guarnieri 1999:primo piano).[7]

A protest was organized by Alessandra Mussolini and a vast and disparate array of women in Parliament, other government officials, and even TV anchor-women, who vowed to wear blue jeans until the decision was reversed (*Il Giornale* 1999b). Mussolini and two Parliamentary colleagues from left and center-left

[7] One of the few political leaders who came out against the attacks on the decision was Tiziana Majolo, a House Representative of Forza Italia, a right-wing party founded by powerful industrialist and media mogul, Silvio Berlusconi. Majolo claimed that the protests were "a trap" and "poisonous fruit" designed to "de-legitimize the Cassazione" (*Il Messaggero* 1999d). The possibility that the venom heaped on this decision, and by implication the entire Judiciary, was at least in part orchestrated by politicians seeking retaliation for the Tangentopoli investigations, loses credibility in the face of the virtual consensus on the part of politicians of all stripes, including those not implicated in the scandals, and by the fact that this lone dissenter represents the interests of Berlusconi, a prime target of judicial investigations.

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parties stood outside the Supreme Court holding signs that read "Jeans: An Alibi for Rape," an event picked up by the BBC and CNN, as well as local media (*Il Giornale* 1999b). Women in the large northern factory of Pirelli showed up for work en masse in jeans (Guarnieri 1999:primo piano), and the women's Italian slalom ski champion expressed solidarity by wearing jeans on the slopes at the Vail Winter Olympics (*Corriere della Sera* 1999e). The following month, Italian parliamentarians, housewives, union officials, and feminist advocates of women's rights joined forces with men and women in the United States and throughout Europe to declare "International Jeans for Justice Day" (*Naples Daily News* 1999).

Italians sent e-mails to the newspaper, *Corriere della Sera* Online, expressing their anger over the decision. One woman wrote that she was "incredulous"; another said, "I do not consider myself a feminist, but feminine, and it hurts when I see our dignity and freedom disputed"; a third wrote that the decision "filled [me] with terror" (quoted in *Corriere della Sera* 1999d). A "fervent Catholic," interviewed for another article presumably to show the breadth of the hostile reaction, decried the decision as "pathological" (*Il Messaggero* 1999c).

The decision elicited a large amount of sarcasm and bitter humor. The European Federation of Housewives facetiously announced a prize for the best design for "easy-off" jeans (Guarnieri 1999:primo piano). A consumer organization claimed tongue-in-cheek that they had been swamped by angry consumers who had been sold fake "anti-rape jeans" by street vendors, adding that the original version included reinforced steel buttons (*Il Messaggero* 1999e). Mussolini added boots to her protest outfit, saying that for the Justices big boots no doubt comprised additional protection against rape when worn with jeans (Guarnieri 1999:primo piano). One article ridiculed the decision by imagining what a young Strauss would have made of it, and quoted an imaginary company executive apparently worried about the market impact of the decision, "We are convinced our jeans are easy to get on and off. . . . We have always marketed them as 'easy-care' garments, easy to use" (Santonastaso 1999:interni).

On the more serious side, the decision precipitated a debate about whether the Penal Code should be amended to disallow consideration of questions of substance at the appellate level (*La Repubblica* 1999b; *Il Giornale* 1999a). It also opened up criticism of the distribution of topic areas among the various Supreme Court criminal sections. In particular, it was pointed out that this case—like all cases of sexual assault—had been assigned to Section Three of the criminal division whose responsibilities include environmental issues, refuse, and landfills, whereas other crimes against the person are assigned to Sections Four and Five (*La*

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Stampa 1999; *Corriere della Sera* 1999e). Thus, one sarcastic headline read, "Justices 'Experts' in Garbage and Rape" (*Il Messaggero* 1999d). It also triggered discussion about the makeup of the Court. Simonetta Sotgiu, a Justice on the Corte di Cassazione—incensed by the decision that she said would "turn back history"—pointed out that of more than 400 Justices on the Court, only ten were women (quoted in De Luca 1999a:10).[8]

Of course, we have no way of knowing from these reports what many ordinary Italians thought of the decision, other than those who sent e-mails and letters to the news media and those represented by the civic associations previously mentioned. Nor is it important for the purposes of this analysis to establish that there was a complete consensus on the inappropriateness of the decision—a state of affairs that would be as difficult to establish empirically as it would be surprising. It is entirely likely that there are segments of the Italian population (just as there would be in the United States) that applauded the Court's reasoning. Indeed, it is an important thesis of much constitutive work in law and society that the "everyday" is heterogeneous, fraught with contradictions and inconsistencies, and at every moment *in process* (see, e.g., Ewick & Silbey 1998).

But the pervasiveness of the intense negative reaction across the political spectrum and throughout the mass media reveals the degree to which this decision was at odds with the gender ideology of at least these spokespeople for what, for lack of a better label, might be called the dominant culture. It may even be that some hypocrisy was present, as many of these spokespeople no doubt occasionally revert to traditional gender roles in their private lives, and perhaps privately express attitudes not dissimilar from those of the Court. What is important here, however, is that there appears to be a culturally dominant and publicly acceptable ideology that is diametrically at odds with this decision, and, as I will argue, is perhaps ironically advanced even further by it.

Italy is by no means on the forefront of evolving gender ideologies; like all Western liberal democracies it has undergone substantial transformation on issues of equality for women and on the meaning of gender (Hellman 1987; Birnbaum 1988). These transformations, which have powerfully—if inconsistently—permeated popular culture, are reflected in a number of important legal reforms in the past decades, including, e.g., a [limited] right to abortions, divorce, and equal pay for equal work. Of most relevance here, the law on sexual assaults was substantially reformed in 1996, finally redefining rape from a "crime

[8] On the counterattack, some of the Justices held press conferences or gave interviews with prominent media outlets. One Justice protested, "We are not sexists" (quoted in De Luca 1999b:3). The author of the opinion declared that "It's all a mistake," and "I am a feminist" (quoted in Ventura 1999:3).

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against morality" to a "crime against the person" (*Il Messaggero* 1999b). Implicit in that comprehensive reform was a reconsideration not only of the nature of rape but also of the nature of consent, sexuality, and responsibility. Reforms have come slowly, and Italian culture—like most contemporary Western cultures—remains permeated with gender stereotypes and structural inequalities (de Laurentis 1990); nonetheless, these legal changes illustrate a marked shift in prevailing ideologies of gender. The explosive reaction following this rape decision attests to the depth of that shift. And, although legal reforms and evolving gender ideologies have generally gone hand in hand in Italy, this Cassazione decision reveals that the mutual construction of law and cultural meaning is by no means seamless or unproblematic. In the following sections, I explore further the implications of this case—and others like it—for our understanding of the ideological power of law.

Before proceeding, I will play my own devil's advocate for a moment. There may be several broad objections to my framing in this way the enigma presented by the Cassazione decision. For example, it might be argued that the constitutive perspective that I reference here is spearheaded by U.S.-based sociolegal scholars, and that its application to Italy, a civil law country where law may be held in less reverence and may thus be less implicated in the social construction of meaning, is inappropriate or misleading. In this rendition, the outrage provoked by the Cassazione decision would be a straightforward illustration of law's general lack of authority.

Indeed, there is some evidence that Italians are relatively cynical regarding their political system and state power in general, provoking one observer to refer to the "nexus of anguish and politics" as "one of the most important features of the situation in Italy today" (Sapelli 1997:167). But even though Italians—bombarded by scandals and exposés—may be unforgiving realists with respect to their government, the judicial system seems to enjoy relative legitimacy, and even prestige. Prosecutors' highly publicized successes against organized crime in the 1980s, and the more recent Mani Pulite (Clean Hands) crusade against corruption by Milan judges have generally served to enhance that prestige. For a time, Antonio di Pietro, public prosecutor for the most highly visible cases of Tangentopoli, was a national hero (Pederzoli & Guarnieri 1997). The scope, intensity, and political fallout of the Mani Pulite prosecutions ultimately subjected the judges to some criticism and retaliation (prompting some to refer to di Pietro as "the giant with the feet of clay" [Cotta & Isernia 1996]); however, there is little sign that public support for the Judiciary has been significantly eroded.[9] Indeed, as Nelken

[9] In 1987, a referendum passed, curtailing judicial power and revoking the civil immunity of judges. This popular vote—taken several years before Mani Pulite—suggests an

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(1996a:192) has put it, the battle between the Judiciary and the politicians involved in Tangentopoli can be seen as a struggle between "competing legitimacies."[10]

Further, that the response to the Cassazione decision is not simply one more reaction by a cynical public to a discredited legal system is suggested by the intensity of this reaction. Not only does the intensity itself imply that there is an emotional investment in law's legitimacy but it also exceeds the intensity of reactions against other unpopular judicial outcomes (such as the release of prominent Mafia figures who have benefited from Italy's broad rights for the accused). The extraordinary intensity of this reaction suggests that this decision has hit a cultural nerve of some importance.

At a more general theoretical level, the concepts of legal legitimacy and law's hegemonic power are largely the intellectual legacy of west-European thinkers (Max Weber and Antonio Gramsci, among others) writing within a civil law tradition. As will be clear in the literature review that follows, the concepts have been used to explore the cultural-hegemonic implications of law in a wide variety of historical, cultural, and national settings. Given the European civil law origins of this theoretical perspective, and its application in multiple contexts, its apparently awkward fit in this Italian case seems all the more puzzling.

The Ideological Power of Law

Durkheim ([1893] 1933) posited that a close relationship exists between law and the "collective conscience" of a society. In this functionalist view, not only are laws the codified expression of society's values, but also legal sanctions against violators that serve to avenge the collective conscience, clarify the boundaries of acceptable behavior, and generally reinforce the normative structure of society. Durkheim's model has intuitive appeal, but the absence of power or conflict is striking and has significantly limited its use in contemporary law and society work, despite his insights about the mutually constitutive nature of law and the social order.[11]

Taking a radically different tack, Gramsci (1971) argued that power, through such institutions as the media, schools, religion, and law, is central to the crafting of normative and ideological consensus, a process he referred to as "hegemony." Gramsci's concept of hegemony forces us to reconsider not only the nature

unwillingness to leave unlimited power in the hands of the Judiciary, but it was probably more an indication of the perceived risks of such unbridled authority and unaccountability than a sign of public dissatisfaction (Pederzoli & Guarnieri 1997).

[10] For a further understanding of the dynamics of the battle between the judges and the politicians implicated in Tangentopoli, see Nelken 1996a, 1996b.

[11] On this point, see Lukes & Scull (1983:20–25).

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of "consensus" á la Durkheim, but also the dynamics of power and domination, which in Gramsci's model are all the more effective for their noncoercive nature. Hirsch and Lazarus-Black (1994:7), summarizing Gramsci, explain why coercion is rarely necessary, "Hegemony refers to power that 'naturalizes' a social order, an institution, or even an everyday practice so that 'how things are' seems inevitable."

This theme has been elaborated by Foucault (1978, 1979) and embraced by law and society scholars who focus on the hegemonic power of law not only to dictate policy but, more fundamentally, to shape discourse, cultural meaning, and social identity. Thus "[L]aw's efficacy is not in what it can get people to agree to do, but in what they will think and do un-self-consciously" (Sarat & Kearns 1993:11). As Yngvesson (1988:410) shows in her study of complaint hearings in a lower criminal court in New England, this hegemony is grounded at least in part in "the interpenetration of our most fundamental cultural assumptions with legal ones." Emphasizing the role of power in this interpenetration, Jonathan Simon (1988:798) argues that '[l]aw . . . is one of the most potent ideological structures in society." An impressive body of literature suggests that this ideological power derives not only from the specifics of what the law dictates—that is, the content of the law—but also from the form of law and the language or discourse of law.[12]

Clearly, the content of laws and legal practice have instrumental effects, ordering social relations and proscribing behaviors. More subtle, however, are the ideological effects of this ordering and proscribing.[13] For example, although a wide range of new criminal laws in 18th-century England had a substantial material impact on the poor, and to a lesser extent on wealthy landowners and merchants, their less visible, but equally powerful,

[12] As Fitzpatrick (1992:72–87) tells us, during the Enlightenment the very existence of law was thought to distinguish the European population from "savages" in the rest of the world—an ideological notion Enlightenment thinkers constructed from "old mythic themes." Thus, "many elements of the mythic origins of modern law are compressed into this [distinction]—the lawless nature of the savage, the emergence of law being associated with agriculture, the equation of law and sociality in contrast to the solitary state of the savage." Here, then, law's ideological power resides not in any specific aspect of law but in its use as a mark of distinction, separating the lawless and uncivilized savages from the lawful and rational human beings who often enslaved them.

[13] Sarat & Kearns (1993:21–22) make the distinction between an instrumental approach to law and a constitutive approach. The instrumentalist approach "takes an external stance. It posits a relatively sharp distinction between legal standards, on the one hand, and nonlegal human activities, on the other. It then explores the effects of the former on the latter." Constitutivists, instead, argue that "social life is run through with law," so much so that the relevant category is not the external one of causality (as the reference to effects would suggest) but the internal one of meaning" (Sarat & Kearns 1993:22). They may have set up a false dichotomy here, since the construction of meaning may also be an "effect" of law, as much of the work of the constitutivists makes clear. A more straightforward distinction might be that instrumentalists focus on the material effects of law, while constitutivists are interested in the reciprocal effects of law and social meaning.

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effect was to reinforce emerging notions about the sanctity of private property (Hay et al. 1975). As Hay and his co-authors (p. 13) describe this period, "[T]he ideology of the ruling oligarchy, which places a supreme value upon property, finds its visible and material embodiment above all in the ideology and practice of the law."[14]

Abel (1990) addresses the instrumental and ideological consequences of U.S. tort law, which he argues "commodifies" injuries by assigning them a monetary value, and in other subtle and not so subtle ways reaffirms capitalist social relations and breaks down community. Similarly, Gabel and Feinman (1998) speak to "contract law as ideology." Feminists such as Taub and Schneider (1998), Smart (1989), Bredbenner (1998), and MacKinnon (1993), expose the ideological implications of laws that exclude women from the workforce, limit their citizenship and political rights, restrict their sexuality, and/or deny them reproductive choice. Critical race theorists (Delgado & Stefancic 1989; Williams 1991; Bell 1987, 1992; West 1993) similarly trace the ideological role of law in subordinating people of color. And Calavita (1996) addresses the symbolic and ideological impact of the California initiative that attempted to bar undocumented immigrants from public schools and health services. These works differ substantially in terms of the historical periods they explore as well as the methods they employ and their theoretical purpose, but they all point to the ideological implications of specific statutes, policies, and legal decisions, and the recursive relationship between the content of law and social and cultural meaning.

Other works explore the ideological effects of the *form* of law. For example, Simon (1988, 1993) has argued that the shift to an actuarially inspired risk-management system of criminal justice has led to a redefinition of the offender from bad or sick to simply "dangerous," or, as Young (1999a, 1999b) maintains, "difficult." At a more general systemic level, Weber (1978) long ago discussed the legitimacy and authority—the ideological infrastructure for hegemony—that accrue to formal-rational legal systems. Brigham (1987) and Teubner (1993) point to similar legitimative effects of "the cult of the court" and law's "autopoietic" nature, respectively.

The discursive power of law is at least as important as its content or form. To the extent that the language of law "conveys or transmits a complex set of attitudes, values, and theories about aspects of society," it is "ideological" in that "these attitudes, values, etc. are ones that reinforce and legitimize the existing social order" (Hunt 1993:25). In an analysis of the use of legal lan-

[14] Hall (1935) alludes to a similar point regarding the emergence of the modern concept of theft beginning with the *Carrier* case in 15th-century England, although his analysis focuses on legal change as a reflection of shifts in cultural values without regard for the ways these shifts reflect the material interests of the "ruling oligarchy."

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guage to affect the rights of native peoples to land ownership in the United States and South Africa, Mertz (1988:661) says of the power of language, "[W]e capture ideology in the making as we examine the language in which courts and legislators speak of history, land, and people. At the same time, we see the impact of existing social structures and power in the language of the law." From a different angle, Conley, O'Barr, and Lind (1978) and Conley and O'Barr (1990; see also O'Barr & Conley 1985) have traced the role of language in the courtroom in reinforcing the subordination of the powerless by devaluing their speech patterns, a theme picked up by Lucie White (1990) in her now-classic story of Mrs. G. Also, Sarat and Felstiner (1995) speak to the myriad ways that legal interactions, in this case conversations between divorce lawyers and their clients, contribute to the ongoing constitution of social hierarchies and meaning.

Collectively, this body of work leaves little doubt that law is a powerful force in the construction of social meaning, identity, and everyday consciousness, as well as in the more material production of social ordering and relations of power to which these ideological props contribute.[15] Gutterriez (1998:237) summarizes this approach, "Constitutivists view the relationship of law and the everyday as one in which law is constitutive of the relationships, meanings, and self-understandings of legal subjects." The reverse is also the case; therefore, "the law must be viewed as a socially constructed system of action" (Silbey 1985:18–19). This hypothesized interpretation has led some observers (Sarat et al. 1998:2) to argue that "many contemporary scholars . . . question the very nature of 'law' and 'society' as separable and distinct entities."

This diverse literature includes discussion of law's constitutive powers at a variety of levels and posits more than one "constitutive" relationship between law and society. With regard to law's constitutive powers, the impact of law may be instrumental, shaping social and economic relations through its mandates and orders; or, its impact may be more symbolic/ideological, shaping culture, opinion, and attitudes not only through the material effects of its official orders but through its language and form. With regard to the different constitutive relationships posited between law and society, some emphasize their mutual embeddedness, while others foreground the hegemonic power of law and its ability to "constitute" society by validating particular sets of moral meaning while disrupting others.

[15] Some, such as Moore (1978), argue that the hegemonic effects of law have been exaggerated. Moore insists that law—at least at the level of courts and judicial decision-making—is relatively tangential to most people's lives, although she makes a case for the relatively greater impact of everyday legal practices such as those emanating from administrative regulations.

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Modifications and elaborations of this perspective have further enhanced its explanatory power and intuitive appeal. Sarat and Kearns (1993:55–56), for example, critique constitutivists for continuing in the "law-first approach," which, they argue, derives from their historical connection to legal realism. This law-first approach places law at the center of analysis and then almost inevitably assumes that "law's story can be told in terms of the effects of legal doctrine or practices on a relatively stable, placid, nonlegal 'other'" (p. 56). To avoid privileging law in this way, Sarat and Kearns recommend an analytic and empirical focus on the "everyday": "By inviting legal scholarship to focus on everyday life, rather than on legal doctrine, we seek to bring into view, if not give primacy to, the lively normative resources of the everyday. These, no doubt, are resources powerfully shaped by law; but they are resources on which law itself deeply depends" (p. 56). The move is a subtle one, and Sarat and Kearns remain fundamentally "constitutive," with an emphasis on the reciprocal and ongoing quality of the relationship between law and everyday consciousness and practice. As Gutterriez (1998:238) describes it, "Underlying this shift [to a focus on the everyday] is a belief in the existence of a normative movement of the everyday independent of law's." A vast literature attests to the fruitfulness of this analytical focus on the quotidian (de Certeau 1984; Geertz 1983; Greenhouse 1986, 1988; Yngvesson 1993; Ewick & Silbey 1995, 1998; Hartog 1993; Merry 1990).

Scholars who speak to the "dialectic of hegemony" (Vincent 1994:121) and the myriad forms of resistance to which law may give rise and which it periodically must accommodate take seriously this notion of the relative autonomy of the everyday. By focusing on the oppositional, this approach avoids over-privileging law either analytically or in terms of its hegemonic power. Although they do not deny the hegemonic potential of law, these scholars foreground the counter-hegemonic resistance to law and the social order it helps constitute. Drawing from Scott (1985), Abu-Lughod (1990), Comaroff and Comaroff (1991), and others who have analyzed the efforts of the disempowered to fashion tools of resistance out of the instruments of oppression, this literature notes that law is a particularly potent arena for such resistance (Lazarus-Black & Hirsch 1994). Not only does law provide a venue in which the dispossessed can pursue social change or secure some tactical advantage (Seng 1994; Hirsch 1994; Merry 1990) but also, by giving expression to specific ideologies and normative orders, it may invite counter-hegemonic visions (Hunt 1990; Coutin 1994; Vincent 1994).

One of the best illustrations of this approach is the edited volume by Lazarus-Black and Hirsch (1994), *Contested States: Law, Hegemony, and Resistance.* In this volume, contributors explore a wide range of resistance movements and their historical and cul-

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tural contingency. As Hirsch and Lazarus-Black (1994:20) note in the Introduction, the authors "demonstrate that law and legal practices are constitutive of a variety of powers—political, economic, symbolic—and that, cross-culturally, the power of law is at once hegemonic and oppositional."

The insights of the constitutive approach are undeniable, as it speaks not only to the mutual penetration of law and society but also to the role of law in advancing the moral orderings it represents. Law may reinforce prevailing understandings, or anticipate emerging ones, but in either case, it is "constitutive." The resistance literature shares this paradigm, revealing not only the interpenetration of law and the social order but also the dialectical quality of hegemony itself. Despite its considerable appeal and its current paradigmatic dominance in law and society scholarship, the perspective has been subjected to its share of criticism. Most notably, Fitzpatrick (1997, 1998) takes social constructionism (of which he considers constitutivism a branch) to task for a number of logical problems. Not the least of these is that we are "plunged into circularity . . . if we purport to explain something as constructed and say it is constructing of that which has constructed it" (1997:157). Fitzpatrick also argues that the duality of power on one hand and resistance on the other are not successfully overcome in this approach that locates resistance and agency at the level of the local, the particular, and the everyday, and that positions power as structural (1997, 1998). As a result of this focus on resistance as local practice, Fitzpatrick (1997:156) contends, "[R]esistance by itself comes from and goes nowhere. It is allowed neither enduring structure nor effective history." Finally, in a section he entitles "Deconstructing Constructionism," Fitzpatrick notes that constructionism requires an assumption that the analytical observer can somehow remove herself from the constructed universe of her analysis. Quoting Fuller (1994:89), Fitzpatrick explains, "[T]he interpreter is 'somehow estranged' from what is being interpreted" (1998:191).

It is not my intention to respond to these criticisms here. Instead, I want to address a different limitation of the concept of resistance and its relationship to law in the constitutive approach; for the only fissure in law's hegemonic edifice consistently recognized in this literature is that which attaches to the concept of resistance. What I explore in the remainder of this article is the possibility—most dramatically suggested by the Cassazione rape decision—that law not only "provides room for challenge" (Sarat & Kearns 1993:61) but also that law and legal discourse may occasionally backfire, and backfire badly, as apparatuses of hegemony. As we examine this possibility, we will encounter the "lively normative resources of the everyday" of which Sarat and Kearns speak (1993:56).

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Ideological Blunders and the "De-Constitutive" Power of Law

The Italian Corte di Cassazione rape decision, and the impassioned reaction to it, force us to revisit the constitutive perspective, for such an approach seems ill-equipped to account for cases in which legal doctrine and discourse are not only strikingly out of sync with dominant normative understandings but backfire as a constitutive force. Although the constitutive perspective ostensibly leaves room for variation and contingency,[16] it emphasizes theoretically the normative consistency between law and the taken-for-granted social reality, or, in the case of evolving moralities, law as a trendsetter, ahead of its time perhaps, but laying the groundwork for the emerging ideology which it thus helps constitute. But, as this case makes plain, and as constitutive scholars themselves have on occasion demonstrated, there is nothing *inevitably* constitutive about law, which after all consists of the decisions and voices of individual jurists whose actions collectively comprise legal practice.

The conceptualization of power (and law) as in a unidimensional relationship of domination to those thereby subjugated was set to rest by Foucault (1978, 1979), and, more recently, by the resistance literature I previously cited. But law and society scholars still have an implicit tendency to reify law. Kidder (1979:296), paraphrasing Medcalf (1978), explains, "[O]ur attention to law as an object of study has caused us to reify, and in some sense mystify, what is first and foremost a process of conflict, a set of relationships among people, groups, and institutions."[17] Constitutive scholars often are attentive empirically to this "process of conflict"; however, the insights derived from their close analysis of the everyday and the processual in law tend not to get incorporated theoretically into the constitutive model, the principal theme of which is the mutual construction of meaning.

Legal realism taught us that law is the product of human beings with distinct tastes, political ideologies, personality makeups, and class positions. Critical legal studies took up the mantle, demystifying law by exposing both its hegemonic function and its inability to live up to its promise of autonomy. But, in emphasiz-

[16] As Sarat & Kearns (1993:9) put it, "[T]he play of law in the everyday world is stratified and culturally specific," varying "across time and in the different domains of the everyday." As I argue in this article, however, this notion of contingency and variability has not been taken to its logical conclusion by constitutivists.

[17] There are interesting parallels between this tendency to reify law and the earlier reification of the state by structuralists (Althusser 1971; Poulantzas 1969, 1973), who have been roundly criticized for their depiction of the state as a coherent whole, possessing virtual omnipotence and omniscience. I do not want to over-draw this comparison, for there are obvious differences between these structuralists and the constitutive scholars discussed here—particularly those whose empirical focus is on the everyday and the local.

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ing law's hegemony, we may have inadvertently contributed to its continued reification as somehow *above the fray,* a tendency that constitutivists—even those who emphasize the importance of focusing on the everyday and the concrete—often share.

Some scholars consciously struggle against this reified view of law as a coherent ideological force. Thus Hunt (1993:7) maintains that "a more refined conception of 'legal ideology'" among Marxist thinkers has meant that "no longer is ideology conceived as being produced in the specialized texts of the appellate courts and from this point of production disseminated into the wider society. Rather legal ideology is conceived as a complex of distinct discourses at increasing distances from doctrinal discourses."[18] Additionally, Ewick and Silbey (1998:17) urge us to "abandon an understanding of the law as a single, coherent entity. If we set to one side for a moment the emblematic imagery of unity and consistency as hallmarks of law, we see that the law is a complex structure. The law . . . refers to a host of official actors and organizations—ranging from the Supreme Court to the local building inspector—each operating with different purposes and with vastly different material and symbolic resources." They point out that law thus "has neither the uniformity, coherence, nor autonomy that is often assumed" (1998:34).[19]

Nevertheless, there is a simmering tension between the constitutive notion that "law" is "an embedded and an emergent feature of social life" (Ewick & Silbey 1998:22) that confers meaning and ultimately ideological hegemony and the decentralization of law as a "complex of distinct discourses" (Hunt 1993:7). And, to the extent that constitutivists emphasize the discursive and ideological power of law and its permeation of, and embeddedness in, everyday consciousness, they neglect—and are largely incapable of explaining—legal discourse such as that contained in the Italian rape decision, which not only diverges sharply from dominant normative understandings but also subjects the normative order it affirms to self-inflicted ideological wounds.

Similarly, there is a potential conflict between the core insight of legal realism—that law does not reside in an autonomous sphere disconnected from the personal idiosyncrasies, political interests, and class positions of the human beings who make legal decisions—and the notion that law is inevitably constitutive of, and constituted by, the prevailing normative order. Brigham

[18] Despite this decentralization, Hunt (1993:9) argues that "there is a strongly centralizing force that gives reality to the common-sense unity of the legal order, captured by such signifiers as 'the Law' and 'the legal system'."

[19] McCann's *Rights at Work* (1994) is an excellent example of this contingent approach. McCann explores the variety of constitutive roles law has played in the pay equity movement over time and across locations, for example as a "catalyst" or a "club" or as a symbol against which (or towards which) people may mobilize. As he (1996:466) describes this work, "My approach . . . aims . . . to increase our understanding about the complex, contingent, indeterminate ways that law matters in social life."

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(1987:4) cites a Supreme Court intern who told him that, once he had been "behind the scenes" at the Court, he "could never teach constitutional law with a 'straight face' again. This insider argued that the reality of Chief Justice wearing his slippers inside the Court demystified the Constitution." Just as the *Constitution* is likely to be demystified by such insider experiences (as legal realists would predict), so must the *constitutive* power of law be demystified by empirical encounters with its wide-ranging practitioners—some of whom, like the Justices of the Corte di Cassazione cited here, are wearing metaphorical "slippers."

I do not want to be reductionist. There is indisputably an institutional realm, an emergent quality of law, that extends beyond the practices of individuals. However, these individual practices should not be dismissed or relegated to the "microlevel" of theoretical insignificance. After all, they are the only tangible instantiation of the law available to us. It is in this context that the Italian rape decision can teach us something. It is no doubt true that over time and collectively legal decisions and discourse permeate and are permeated by everyday consciousness and normative understandings, as more than two decades of research and theory have indicated.[20] At the same time, the Corte di Casszione decision forces us to recognize that the "distinct discourses" (Hunt 1993:7) of law's human practitioners render both law and its relationship to normative understandings in any particular case essentially indeterminate.[21]

We can go one step further. For, not only does this decision deviate from dominant cultural understandings, and is therefore inconsistent with a strict constitutive view of law, but I would argue that it *backfires* as a hegemonic force. By referencing an ideological worldview—relating to assumptions about gender, consent, and rape—that has been largely superseded (at least by an important segment of the dominant culture), the Corte di Cassazione has actually hastened the demise of that ideology. Far from shoring up the legitimacy of its ideological vision, this legal decision has exposed it to ridicule—an emblem of the foolishness of the normative order of yesteryear.

Hunt (1985:13), in an important essay examining the concept of ideology as it relates to law, "use[s] the concept to explore the connection between ideas, attitudes, and beliefs, on the

[20] See Fitzpatrick's (1997:155, 154) criticism cited earlier, relating to this principle of mutual embeddedness, which he evocatively calls a "promiscuity of relation" in which "[t]he constructed and the constructor evoke even provoke each other." I am less troubled than Fitzpatrick by this mutuality—comprising the classic chicken-or-the-egg problem—which is after all the fundamental premise of most interactive systemic approaches.

[21] Hunt (1985:33,32) points out that "the ideological analysis of flaw must be understood as operating at a number of different levels," from the "abstract" to the "more concrete." The point here is that analysis of the concrete and specific—which is the only level at which we can operate empirically—can help us avoid the twin pitfalls of overgeneralization and reification and can lead the way for the elaboration of theory.

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one hand, and economic and political interests, on the other." While recognizing the importance of the latter, he refutes the notion that "every ideological element has a necessary class designation" (1985:6). This is because "ideology is not a unitary entity," or, quoting Therborn (1980:77, 103; emphasis in original), "Ideologies actually operate in a state of *disorder* . . . competing, clashing, affecting, drowning, silencing one another." Hunt (1985:16) concludes, "This view of ideology is particularly salutary in the field of legal analysis since it counsels us not to assume the coherence and consistency of legal discourse." Indeed, as Ewick and Silbey (1998, 1999) have shown us with their study of legal consciousness, legal ideology may be powerful precisely *because* it is replete with contradictions.

Swidler (1986:279) suggests that "[t]here is a continuum from *ideology* to *tradition* to *common sense*." "Common sense . . . is a set of assumptions so unselfconscious as to seem a natural . . . part of the structure of the world," and "traditions . . . are articulated cultural beliefs and practices, but ones [that are] taken for granted so that they seem inevitable parts of life" (1986:279). But "ideology" is more "self-conscious"—"a phase in the development of a system of cultural meaning" (p. 279). During what Swidler calls "unsettled cultural periods" (p. 273), "explicit, articulated" ideologies challenge entrenched ways of thinking and doing (including "tradition" and "common sense"). "Over time," she says, "as an ideology establishes itself, it may deepen its critique of the existing order and extend its claims increasingly into taken-for-granted areas of daily life" (p. 279).

I want to return here to a theme emphasized earlier, that is, that "the normative resources of the everyday" are multiple, diverse, and always shifting, sometimes subtly and at other times more radically. To talk of "everyday normative understandings" of gender as I have here, I do not mean to imply that there is only one such "understanding." Indeed, to use Swidler's (1986) terminology, all historical periods are no doubt to one degree or another "unsettled." At the same time, however, it may be possible to discern culturally dominant ideologies, just as it is possible to identify struggles between and among those ideologies. It might be useful then to think of law as one site of contestation for the construction of moral meaning. What the Italian decision reveals is that not only are there multiple moral meanings in a struggle for primacy but also *the law may undermine its own interests in that struggle.*

Comaroff and Comaroff (1991:26) similarly argue that ideology is a phase on the way to hegemony. Thus, they contend, one aspect of hegemony is to make ideology "disappear." They propose that hegemony is complete to the extent that ideological worldviews appear inevitable and natural; when once-taken-for-granted and invisible moral codes are revealed as ideology, this

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signals a rupture in the hegemonic process. We might think of cases such as the one reported here as "de-constitutive"[22] or counter-hegemonic in that they expose law and the worldview it affirms as ideological. It seems likely that such de-constitutive moments are most apt to occur—indeed, may only be possible—during unusually "unsettled cultural periods" (Swidler 1986) when an ascendant ideology is in the process of establishing itself.[23]

At such moments, not only is law's ideological nature exposed, but the outdated moral vision appears as a caricature of an old normative order and a symbol of its folly. Much as deviance in Durkheim's functionalist model highlights the boundaries of acceptable behavior by subjecting the offender to ostracism and other forms of social finger-pointing, such judicial gaffes—and the consternation they provoke—serve as a reminder of the absurdity of the waning ideology and the relative superiority of the ascendant moral vision.

In the process, law itself does not lose legitimacy. Conley and O'Barr (1990), in their study of litigants who were not satisfied with the process and outcome of their litigation, found that, rather than altering their perceptions of the legal system as a whole, the unsatisfactory experience was blamed by the litigants (when they did not blame themselves) on the individual judge who presided over the case. As Ewick and Silbey (1998, 1999) demonstrate, law's power and its place in public consciousness survive such disappointments and signs of its fallibility virtually unscathed—and in their analysis, even reinforced.

I would argue that the very legitimacy of law confers on it the potential both to reinforce hegemony and to dramatically expose the fault lines of the necessarily incomplete, and always transitioning, hegemonic view. To use a musical metaphor, the close relationship between law and social reality—the taken-for-grantedness of the worldviews that law generally affirms and to which it contributes—constitute the harmonic pattern from which the discordant note deviates, and stands out so sharply. In other words, it is *precisely* because the law is generally authoritative and hegemonic that it has such shock value when it is discordant with the currently accepted wisdom.

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[22] This term is admittedly awkward. For one thing, it implies that I have isolated one dimension of constitutivism—the role law is said to play in constructing social meaning and advancing hegemony—neglecting the less deterministic and more general mutual embeddedness of law and social reality that the broader constitutive concept advances. Nonetheless, what is potentially powerful about this term "de-constitutive" is that it forcefully draws attention to the possibility that law can on occasion contribute to the *deconstruction* of the sociocultural meanings it embraces.

[23] Extending Swidler's (1986) logic, it may be that the ideological—rather than "common sense"—nature of the ascendant vision contributes to the passion with which it is defended. In other words, its relative precariousness may help explain the emotional vigor with which it is protected.

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Whatever the cumulative role of law and legal practice in shaping cultural understandings over the long run, it is apparent that the "lively normative resources of the everyday" are by no means coterminous with legal morality, nor inevitably constituted through, or constitutive of, that moral vision. Indeed, as we have seen here, the moral codes and meanings advanced by law may so conflict with everyday understandings that they are held up to ridicule, their retrograde sensibility shockingly exposed in the glare of public scrutiny.

Discussion

I began this project curious about how to make sense of the apparently anachronistic Corte di Cassazione rape decision, and the vociferous and widespread public reaction against it, from the perspective of constitutive theory. It would be mundane simply to point out that not all legal decisions are received favorably and that some elicit impassioned criticism. But, taking seriously the theoretical import of such cases—particularly those that provoke such widespread and intense negative press—from a constitutive perspective forces us to reconsider how (and if) they can be accommodated within a theory that generally focuses on the mutual construction of law and social meaning. Far from shoring up the ideology expressed in the decision through the presumed symbolic force of law's cultural authority, as a constitutive law and society scholar might expect, this decision held that ideology up to derision and disgust, if anything, hastening its demise. In that sense, it might be thought of as "de-constitutive."

It seems reasonable that law may be both constitutive and deconstitutive—just as it is both "hegemonic and oppositional" (Hirsch & Lazarus-Black 1994:20)—for "law" is not of one piece. There is, of course, an institutional, structural, and emergent realm, but law in the concrete is necessarily decentralized, diffuse, and made up of myriad "distinct discourses" (Hunt 1993:7), some of which may be startlingly at odds with everyday understandings and cultural meanings.

An important question remains: How common are these deconstitutive moments, these instances of legal ideology's self-incrimination? There is reason to believe, given the decentralized and "disordered" (Therborn 1980:77) nature of ideology and the quotidian, that they are not uncommon—at least not so uncommon as to make them theoretically uninteresting or insignificant. It may be, for example, that the infamous Simi Valley decision in the Rodney King case (see *U.S. v. Koon,* 34 F.3d 1416[1994]; McMillan 1992:A35), in which four white police officers were acquitted in the videotaped beating of an unarmed black man, could be interpreted from this perspective. The decision not only unleashed a massive urban rebellion by people of color but has also

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served as a potent symbol of the permeation of racism in the criminal justice system, and more to the point here, a lightning rod for debates about the pernicious efforts of racism more generally.[24]

As the resistance literature has so effectively shown, and as conflict theorists and legal pluralists have argued for years, hegemony is never complete (just as Durkheim's "consensus" is conspicuously elusive). It may be that law is best at shoring up hegemonic worldviews that are already near-airtight, when legal decisions affirm the already taken-for-granted and invisible social reality. To borrow once again from Swidler (1986) and Comaroff and Comaroff (1991), perhaps law is most potent in its hegemonic role when "ideology" is most absent. The fundamental notions of contract, private property, harm, and other such sociolegal principles come to mind. As Kairys (1998:4) says, "Often a particular rule or result can be relatively predictable and appear to be 'sensible' or 'correct,' but this occurs when the issue or circumstances are not controversial in a specific period or context. . . . A relative societal consensus or a lack of controversy regarding particular values, issues, or results can create a false sense of determinacy."

On issues of potential controversy, law may have the effect not of resolving the conflict nor of achieving hegemony, but of crystallizing the sides of the conflict, and even escalating it. Similarly, when a legal decision, like the one discussed here, references an ideological framework that is on its way to cultural extinction, that action may actually contribute to its undoing by holding (what are now perceived as) the garish features of that moral vision up to public ridicule. Rather than delegitimizing law itself, such unflattering exposure delegitimizes further the receding worldview. Although some might argue that it thus indirectly strengthens the ascendant ideology, it is by no means therefore "constitutive" or "hegemonic" in the usual sense. To the contrary, it undermines the very ideology the law endorses.

The principal vulnerability previously ascribed to law's hegemony in the constitutive literature relates to the concept of resistance. But law's legitimacy and the expectation that it is consonant with prevailing or ascendant social relations and norms may ironically expose it to a different sort of vulnerability. In this

[24] There are, of course, numerous instances in which law evokes noncompliance rather than respect. One of the most frequently cited cases is Prohibition in the United States (*U.S. Const.,* Amendment XVIII, 1920), but there are numerous other examples ranging from laws against marijuana use to statutes forbidding under-age drinking and laws restricting gambling. Similarly, a considerable literature speaks to the disconnect between the laws of colonialist powers and the everyday practices of those on whom they were imposed (Lazarus-Black 1994; Merry 1998; Comaroff & Comaroff 1991). But I am not speaking here merely of laws that provoke resistance in the form of disobedience, or even revolt. Instead, I am using the term "de-constitutive" to refer to those laws or legal decisions that seem to act counter-hegemonically to undermine their own ideological foundations.

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twist on the "dialectic of hegemony," law's oppositional force may emanate from within, not from those who would engage in resistance to its mandates, but from its own ideological blunders.

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