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# LEGAL ANTHROPOLOGY COMES HOME: A BRIEF HISTORY OF THE ETHNOGRAPHIC STUDY OF LAW

*John M. Conley\**  
*William M. O'Barr\*\**

## I. INTRODUCTION

Anthropology is a relative newcomer to the ranks of the social sciences. It began to emerge as an autonomous field in the second half of the nineteenth century when a diverse array of scholars and speculators converged around such issues as the defining characteristics of humanity and the nature and origins of human society. In the topics they chose to pursue, the way they framed their questions, and the strategies they used to find answers, these nascent anthropologists were strongly influenced by the disciplines from which they had come.

An early and significant example of this interdisciplinary influence is the famous Cambridge Anthropological Expedition to the Torres Straits of 1898.<sup>1</sup> The expedition was organized by Alfred Cort Haddon, a zoology professor who had a brief and unsuccessful career in his father's printing business.<sup>2</sup> Its purpose was to comprehensively survey the physical characteristics, language, culture, and thought patterns of the inhabitants of the straits separating New Guinea and Australia. Haddon's principal colleagues—W.H.R. Rivers, a trained psychologist, and C.G. Seligman, a physician—both became major figures in cultural anthropology.<sup>3</sup>

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1. The official history of the expedition is found in UNIVERSITY OF CAMBRIDGE, REPORTS OF THE CAMBRIDGE ANTHROPOLOGICAL EXPEDITION TO TORRES STRAITS (1901-1935). This six-volume work is divided into such topics as general ethnography, physiology, psychology, linguistics, arts and crafts, sociology, magic, and religion.

2. For Professor Haddon's personal version of the expedition, see ALFRED C. HADDON, HEAD-HUNTERS: BLACK, WHITE, AND BROWN (1932).

3. A. HINGSTON QUIGGIN, HADDON THE HEAD HUNTER 95-107 (1942). Professor Haddon embarked with six investigators. In addition to Drs. Rivers and Seligman, the expedition included S.H. Ray, an elementary school teacher who was an expert in Melanesian languages, Anthony Wilkins, an experienced photographer, and two students of Dr. Rivers: C.S. Myers, an accomplished musician, and W. McDougall, later a professor of psychology at Duke University. Professor Haddon noted with Victorian pride that "for the first time psychological

The work of the expedition bore the mark of its members' backgrounds. Haddon's zoological training is evident in the extraordinary detail with which the expedition observed, measured, catalogued, and classified the various aspects of material and cultural life. The medical influence can be seen in the expedition's interest in physical measurement, or anthropometry, and in the relationship between the physical and the cultural.<sup>4</sup> Rivers, the psychologist, developed an abiding interest in kinship terminology. He eventually formulated an elaborate theory that sought evidence of real events in a society's past in its scheme for classifying kin.<sup>5</sup>

Each of the disciplinary influences reflected in the work of the expedition subsequently emerged as a major theme in anthropology. Until recently, for example, significant numbers of anthropologists dedicated themselves to defining races and trying to make cultural sense of physical differences.<sup>6</sup> The patient empiricism—the hallmark of modern anthropological fieldwork—owes a debt to Haddon's zoological training. And Rivers's emphasis on the relationship between mental process and social fact clearly influenced the development of the structural-functionalist school of British social anthropology in the 1940s and 1950s.<sup>7</sup>

## II. ANALYSIS

### A. *Law and Anthropology in the Evolutionary Era*

No discipline had a greater influence on the birth and growth of anthropology than law. Some of the first works recognized as anthropology were written by lawyers and dealt with legal topics. In 1861 Sir Henry James Sumner Maine, an Oxford and Cambridge jurisprudence lecturer who had served as a legal official in India, published *Ancient Law*.<sup>8</sup> Imbued with the evolutionary thinking that dominated nine-

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observations were made on a backward people in their own country by trained psychologists with adequate equipment." *Id.* at 97.

4. See generally 2 UNIVERSITY OF CAMBRIDGE, *supra* note 1.

5. W.H.R. RIVERS, KINSHIP AND SOCIAL ORGANIZATION (1914), reprinted in 34 LONDON SCH. OF ECONOMICS, MONOGRAPHS ON SOCIAL ANTHROPOLOGY 37 (1968).

6. See, e.g., STEPHEN J. GOULD, THE MISMEASURE OF MAN 3-145 (1981).

7. Functionalist theory, which dates to the 1920s, analogized a society to an organism, with each of its components contributing to the survival of a whole. See *infra* notes 31-32 and accompanying text. Thus, kinship classification might be seen not merely as a mental process, but as a mechanism for reinforcing a thought pattern that was useful to the society in other ways. During the 1940s and 1950s, a more elaborate version of the theory known as structural-functionalism dominated the study of cultural anthropology in the British universities. Perhaps the most enduring work in the structural-functionalist tradition is E.R. LEACH, POLITICAL SYSTEMS OF HIGHLAND BURMA (1954).

8. HENRY SUMNER MAINE, ANCIENT LAW (London, John Murray 6th ed. 1876).

teenth-century European intellectual life,<sup>9</sup> Maine set forth a grand theory to account for the development of law and governance from the origins of human society to his own Victorian England. His comparative history was limited by the scarcity of data available to him, and the rigid evolutionary model he followed ultimately fell into disrepute. Nonetheless, Maine made a lasting contribution by identifying a fundamental distinction between societies in which legal rights and responsibilities depend on social status, and those in which they result from contractual arrangements among individuals.<sup>10</sup>

Maine's contemporary and fellow evolutionist, American lawyer and railroad entrepreneur Lewis Henry Morgan, aspired to explain even more. Raised in upstate New York, Morgan acquired an avid amateur's interest in the Iroquois Nation, and published a study of its history and culture in 1851.<sup>11</sup> In the late 1850s, Morgan's success in law and business allowed him to take up the life of a scholar. After years of comparative study of kinship terminology, he formulated a comprehensive theory of the evolution of the human family and, ultimately, human society itself.<sup>12</sup> Morgan's most famous work, *Ancient Society*, published in 1877, analogized the stages of human cultural evolution to geological strata.<sup>13</sup> Morgan divided human cultural history into three stages: savagery, barbarism, and civilization.<sup>14</sup>

Morgan's grand evolutionary scheme, like Maine's, suffered from a lack of reliable data; both depended heavily on inferences drawn from classical literature and from unscientific accounts of isolated contemporary societies. Both schemes were also deeply flawed by the racism and the "gospel of wealth"<sup>15</sup> that characterized the times. But Morgan must be credited with one of the earliest attempts to understand human cul-

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9. Maine's contemporaries included Charles Darwin, whose *Origin of Species* appeared in 1859, and political theorist Herbert Spencer, whose *Social Statics* had publicized in 1850 the misnamed concept of "social Darwinism." Victorian evolutionists were also influenced by the essentially evolutionary work, THOMAS MALTHUS, AN ESSAY ON THE PRINCIPLE OF POPULATION (London, J. Johnson 1803) (1798).

10. MAINE, *supra* note 8, at 169 ("Starting . . . from a condition of society in which all the relations of Persons are summed up in the relations of Family, we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of Individuals.").

11. LEWIS H. MORGAN, LEAGUE OF THE HO-DE-NO-SAU-NEE OR IROQUOIS (Herbert M. Lloyd ed., Dodd, Mead & Co. 2d ed. 1904) (1851).

12. LEWIS H. MORGAN, SYSTEMS OF CONSANGUINITY AND AFFINITY OF THE HUMAN FAMILY (Washington, D.C., Smithsonian Inst. 1870).

13. LEWIS H. MORGAN, ANCIENT SOCIETY (New York, Henry Holt & Co. 1877).

14. *Id.* at 1.

15. GEORGE B. TINDALL, AMERICA: A NARRATIVE HISTORY 761, 802 (1984). The phrase "gospel of wealth" was coined by Andrew Carnegie, who borrowed the ideas of Charles

tural differences comprehensibly and systematically. His training and experience in legal thought processes were surely relevant to this effort.<sup>16</sup>

The legal backgrounds of these and other early anthropologists greatly impacted the relationship between law and anthropology. Since anthropology's inception, practitioners have been interested in law. In modern times, it has been taken for granted that law is a core cultural element that an anthropologist should study; virtually every classic ethnography has "Law" as a chapter heading.<sup>17</sup> Although this seems self-evident, it need not: Why should anthropologists have been predisposed to look for law in societies without explicit rules, courts, or police? Additionally, the early preeminence of Maine and Morgan helped legitimize legal training and experience as relevant to the background of an anthropologist. As we shall see, this association has helped keep law in the forefront of substantive topics of interest to anthropologists; it has also influenced the methodology of modern anthropology.<sup>18</sup>

But if law had a lasting impact on anthropology's origin, early anthropology has exerted little influence on legal scholarship. Maine and Morgan remain significant, although dated, figures in anthropology today; however they are largely forgotten by the law. Even the most liberally educated legal scholars are rarely aware of who they are or what they did. While law has retained its interest in Maine's comparativism, legal scholarship quickly forgot, and has only recently rediscovered, the more fundamental point that law is sometimes best studied not in isolation but as an element of a complex cultural milieu.<sup>19</sup>

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Darwin and Herbert Spencer to declare that economic competition was good because it ensured the survival of the fittest. Of course, wealth was the best indicator of "fitness." *Id.*

16. A final and ironic note on Morgan: Notwithstanding Morgan's great personal success as a capitalist, *Ancient Society* drew the attention of Karl Marx and Friedrich Engels and became part of the early Marxist canon. Engels cited *Ancient Society* as an independent source of the materialist view of history that he and Marx espoused. FRIEDRICH ENGELS, *THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY AND THE STATE* 35-37 (Penguin Books 1985) (1884).

17. See, e.g., E. ADAMSON HOEBEL, *THE CHEYENNES: INDIANS OF THE GREAT PLAINS* 49-56 (Holt, Rinehart & Winston 1978) (1906); *NOTES AND QUERIES ON ANTHROPOLOGY* 152-58 (British Ass'n for the Advancement of Science ed., 5th ed. 1929).

18. See *infra* notes 32-54 and accompanying text.

19. Classical legal theory treated law as a closed system. The best evidence for this proposition is legal pedagogy's assumption, unchallenged until recently, that appellate cases are both a necessary and a sufficient resource for learning law. See John M. Conley & William M. O'Barr, *Fundamentals of Jurisprudence: An Ethnography of Judicial Decision Making in Informal Courts*, 66 N.C. L. REV. 467, 469 (1988). The rediscovery of cultural context began with legal realism and continues in such diverse enterprises as law and economics, law and morality, critical legal studies, and feminist jurisprudence.

### B. *Law and the Origins of Ethnography*

As the new century dawned, a second generation of anthropologists attacked evolutionism from every direction. Led by the German-American Franz Boas and his students at Columbia University, including Margaret Mead and Ruth Benedict, these critics pointed to evolutionary theory's failure to fit the growing body of cultural data, its simplistic categorization of human societies, and its implicit racism.<sup>20</sup> In order to prove that evolutionism did not fit the facts, one had to know what those facts were. To satisfy the demand for facts, early twentieth-century anthropologists set off in force to remote corners of the world to document the diversity of human social behavior.<sup>21</sup> To ensure that this process of documentation was carried out with scientific rigor, Boas and his disciples established the standards for cultural anthropology's quintessential research method: ethnography.

While anthropology sometimes seems especially susceptible to political and intellectual fads, ethnography has changed little since Boas began to study the native peoples of the Arctic and Pacific Northwest in the 1880s. Today, ethnography is still defined as the qualitative, long-term study of a society by a researcher who lives among the people, learns their language, and strives to participate in their culture.<sup>22</sup>

Outside the United States, the most important of the early ethnographers was Bronislaw Malinowski, who was born in Poland and educated at the London School of Economics.<sup>23</sup> Endowed with prodigious linguistic skills, Malinowski spent much of World War I living among the Melanesian peoples of the islands surrounding New Guinea.<sup>24</sup> He studied

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20. See, e.g., FRANZ BOAS, *The Methods of Ethnology*, in RACE, LANGUAGE AND CULTURE 281 (1949) (collected essays of Boas); see also MARVIN HARRIS, THE RISE OF ANTHROPOLOGICAL THEORY: A HISTORY OF THEORIES OF CULTURE 250-300 (1968) (discussing historical particularism and Boasians' differences with evolutionists).

21. See, for example, the following works by Boas's students: RUTH BENEDICT, THE CONCEPT OF THE GUARDIAN SPIRIT IN NORTH AMERICA (Kraus Reprint Corp. 1964) (1923); ROBERT H. LOWIE, *The Northern Shoshone*, in 2 ANTHROPOLOGICAL PAPERS OF THE AMERICAN MUSEUM OF NATURAL HISTORY pt. 2, at 165 (1909); MARGARET MEAD, COMING OF AGE IN SAMOA (1928); A.L. Kroeber, *Decorative Symbolism of the Arafho*, in 3 AMERICAN ANTHROPOLOGIST 308-36 (F.W. Hodge ed., 1901).

22. See CONRAD P. KOTTAK, CULTURAL ANTHROPOLOGY 7-9 (5th ed. 1991). Or, to put it in more romantic terms: "Imagine yourself suddenly set down surrounded by all your gear, alone on a tropical beach close to a native village while the launch or dingy which has brought you sails away out of sight." BRONISLAW MALINOWSKI, ARGONAUTS OF THE WESTERN PACIFIC 4 (E.P. Dutton & Co. 1961) (1922).

23. Audrey I. Richards, *Bronislaw Kaspar Malinowski. Born 1884 Died 1942*, in 43 MAN 1, 1 (1943).

24. See MALINOWSKI, *supra* note 22, at 1-6, 16 (describing method and scope of his ethnographic inquiry).

their subsistence systems, participated in their rituals, and even accompanied them on some of their dramatic open-ocean trading voyages in dug-out canoes.<sup>25</sup> He published voluminously on every aspect of their culture, including the enticingly but misleadingly titled book, *The Sexual Life of Savages in North-Western Melanesia*.<sup>26</sup>

Law was among the topics to which Malinowski devoted a monograph. In *Crime and Custom in Savage Society*,<sup>27</sup> he argued that Maine's evolutionary scheme rested on a fundamental misunderstanding of the nature of governance and social control in so-called primitive societies.<sup>28</sup> *Crime and Custom's* lasting contribution was to demonstrate convincingly that legal issues are amenable to ethnographic study. Whereas Maine had written off the members of small, traditional societies as slaves to custom, Malinowski's patient ethnography uncovered a complex set of rules, both civil and criminal, and a subtle system of enforcement.<sup>29</sup>

Malinowski's ethnographic insights led him to reformulate legal anthropology's fundamental question. Instead of questioning, as Maine might have, whether a society had police and prisons, Malinowski asked what behavioral patterns controlled antisocial deviance. In *Crime and Custom*, for example, he demonstrated that witchcraft, far from being an extralegal aberration, was actually a conservative mechanism for discouraging promiscuity and excessive resource consumption.<sup>30</sup> In addition to law, he turned his "functionalist" lens on economics, ritual, kinships, and interpersonal behavior.<sup>31</sup> What emerged was a vision of society as a self-contained, self-sufficient organism, part of which could be explained in terms of its contribution to the ultimate goals of subsistence and social stability.

### C. *Legal Anthropology: Modern and Postmodern*

The breadth of the generalization may offend some, but we believe that most legal anthropology through about 1980 can be fairly character-

25. *Id.* at 1-27.

26. BRONISLAW MALINOWSKI, *THE SEXUAL LIFE OF SAVAGES IN NORTH-WESTERN MELANESIA* (Routledge & Kegan Paul Ltd. 3d ed. 1957) (1929).

27. BRONISLAW MALINOWSKI, *CRIME AND CUSTOM IN SAVAGE SOCIETY* (Littlefield, Adams & Co. 1967) (1926).

28. *Id.* at 56.

29. *Id.* at 55-59.

30. *See, e.g., id.* at 86 ("[B]lack magic acts as a genuine legal force, for it is used in carrying out the rules of tribal law, it prevents the use of violence and restores equilibrium.").

31. BRONISLAW MALINOWSKI, *The Functional Theory, in A SCIENTIFIC THEORY OF CULTURE AND OTHER ESSAYS* 145, 145-76 (University of N.C. Press 1944) (1939) (collected essays of Malinowski).

ized as the pursuit of Malinowski's agenda. To be sure, legal anthropologists marched under different theoretical banners. Some, like Malinowski himself, perceived the individual society as a static, self-contained system of functionally interdependent parts.<sup>32</sup> Others placed greater emphasis on history, contact, and change.<sup>33</sup> Beginning in the 1960s, many legal anthropologists shifted their focus from day-to-day conflict management to the processes by which various cultures maintain stability over time. Their emphasis was less on creating an elegant portrait of a society as an organic whole and more on identifying the strategies that members of the society use to keep the organism working. The idealized portrayal of static social harmony gave way to a more realistic consideration of conflict as an important and normal element of a long-term, dynamic equilibrium.<sup>34</sup>

Notwithstanding these differences, legal anthropologists continued to ask Malinowski's question: What behaviors perform the functions that we in the industrialized West call "legal"? Moreover, they sought the answer in much the same way that Malinowski did. They conducted ethnographic fieldwork with intensive participant observation at its core. And they did the fieldwork with the belief that the consistent application

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32. Several instances of this approach are included in *AFRICAN POLITICAL SYSTEMS* (Meyer Fortes & E.E. Evans-Pritchard eds., 1940), a classic collection of functionalist essays on law and politics in British colonial Africa. See, e.g., Meyer Fortes, *The Political System of the Tallensi of the Northern Territories of the Gold Coast*, in *AFRICAN POLITICAL SYSTEMS*, *supra*, at 239; Siegfried F. Nadel, *The Kede: A Riverain State in Northern Nigeria*, in *AFRICAN POLITICAL SYSTEMS*, *supra*, at 165; Isaac Schapera, *The Political Organization of the Ngunato of Bechuanaland Protectorate*, in *AFRICAN POLITICAL SYSTEMS*, *supra*, at 56.

33. In a highly influential paper written late in his career, renowned British functionalist E.E. Evans-Pritchard took his colleagues to task for neglecting history. E.E. EVANS-PRITCHARD, *Anthropology and History*, in *SOCIAL ANTHROPOLOGY AND OTHER ESSAYS* 172 (1962) (collection of essays and lectures by Evans-Pritchard). Evans-Pritchard accounted for this ahistorical bias in terms of midcentury anthropology's justifiable reaction against early evolutionary theories. However, he suggested that the evolutionists should have been challenged "not for writing history, but for writing bad history." *Id.* at 173. He then recounted the unfortunate consequences that both disciplines had suffered as a result of the artificial separation. *Id.* at 176-84. He concluded that "anthropology must choose between being history and being nothing," while "history must choose between being social anthropology or being nothing." *Id.* at 190.

34. The former approach has been labeled "rule-centered," and the latter "processual." JOHN L. COMAROFF & SIMON ROBERTS, *RULES AND PROCESSES* 5 (1981). For examples of works in the processual tradition, see F.G. BAILEY, *STRATAGEMS AND SPOILS* (1969), and MAX GLUCKMAN, *POLITICS, LAW AND RITUAL IN TRIBAL SOCIETY* (1965); see also Ralph W. Nicholas, *Rules, Resources, and Political Activity*, in *LOCAL-LEVEL POLITICS* 295, 297-98 (Marc J. Swartz ed., 1968); Arthur Tuden, *Ila Property Relations and Political Processes*, in *LOCAL-LEVEL POLITICS*, *supra*, at 95, 103-05; and Victor Turner, *Mukanda: The Politics of a Non-Political Ritual*, in *LOCAL-LEVEL POLITICS*, *supra*, at 135, 137-38.



of rigorous methods would yield sturdy data, which could then be subjected to objective analysis.

In the past ten or so years, postmodernist critics have challenged this positivist faith in scientific methods.<sup>35</sup> Concepts like rigor and objectivity have been challenged as Western conceits.<sup>36</sup> The discipline of anthropology has taken what has been called a "reflexive" turn: Anthropologists have begun to turn away from their traditional objects of study to look critically at themselves.<sup>37</sup> There has been a renewed scrutiny of anthropology's perceived wisdom and an unprecedented focus on its epistemology and its conventions for portraying other societies. The researcher has become the subject—the "other"—as anthropologists focus less on the rest of the world and more on what their work reveals about themselves and their own cultures.<sup>38</sup>

The application of the reflexive critique to legal anthropology can be illustrated by examining two ancient conventions in the field: the use of the case method and the tradition of reporting native speech in accounts of legal problems. These instances demonstrate both the strengths and weaknesses of the postmodernist position. On one hand, blind adherence to these conventions has surely lulled legal anthropology into a false sense of objectivity. But on the other, like so many other conventions that postmodernism would abolish, they are probably more useful than any alternative for the purpose of understanding law in a cross-cultural context.

Throughout the history of legal anthropology, there have been debates over such issues as whether all societies have law,<sup>39</sup> how the legal

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35. For a succinct introduction to postmodernist thought, see ERNEST GELLNER, *POSTMODERNISM, REASON AND RELIGION* (1992).

36. JOHN COMAROFF & JEAN COMAROFF, *ETHNOGRAPHY AND THE HISTORICAL IMAGINATION* 3-48 (1992). The Comaroffs observed that "generations of journeyman anthropologists . . . have struggled with the contradictions of a mode of inquiry that appears, by turns, uniquely revelatory and irredeemably ethnocentric." *Id.* at 7.

37. For an introductory treatment of reflexivity in anthropology, see KOTTA, *supra* note 22, at 30-31.

38. See, e.g., COMAROFF & COMAROFF, *supra* note 36. The Comaroffs argue that "we require ethnography to know ourselves," *id.* at 6, and that "we [should] estrange our own culture, treating its signs and practices as we would theirs," *id.* at 45.

39. See, e.g., KARL N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* 41-63 (1941); MALINOWSKI, *supra* note 22, at 2-5. *The Cheyenne Way* is essentially an extended argument that even societies with institutions that are minimal and utterly unfamiliar to Western observers can have "law" in the Western sense. This outlook—the belief that law can thrive in the unlikeliest of places—undoubtedly influenced Llewellyn's work on the Uniform Commercial Code. For example, § 1-205(2)'s definition of "usage of trade" is foreshadowed by *The Cheyenne Way's* mention of "unspoken primitive stuff within the very gears of our own elaborated legal scheme." LLEWELLYN & HOEBEL, *supra*, at 62.

systems of stateless societies differ from those associated with states,<sup>40</sup> and whether the concept of private property is universal.<sup>41</sup> Regardless of the different positions particular anthropologists have taken on these issues, they all relied on cases as the basic unit of analysis. Ethnographies of law usually discuss substance and procedure in terms of illustrative cases from which more abstract principles are generalized.<sup>42</sup> The differences of opinion among legal anthropologists about cross-cultural similarities or dissimilarities have never involved questioning the case as the basic unit of analysis. Even the proponents of extreme faithfulness to local cultural ideas have adopted without comment this unit of analysis<sup>43</sup> which, in the Anglo-American legal tradition, is the basis of the system of precedent, as well as the primary mechanism of teaching law. This focus on cases has in turn led to asking legal questions in other societies that are parallel to those asked in the Anglo-American world: questions about winning and losing, the role of precedent, and the law and facts at issue. In particular, a postmodernist critique would observe that the choice of the case as the unit of analysis shifts attention away from routine compliance with law and toward deviant and otherwise extraordinary behavior, away from concord and toward conflict. The question becomes whether this focus reflects a universal human understanding, or is simply the projection of Anglo-American legal values onto others.

Not only have legal anthropologists selected cases as the units of analysis, they have reported them in an Anglo-American legal format that delineates the "facts," the respective positions of the parties, and the decision and reasoning of the tribunal.<sup>44</sup> All reports of cases—whether in appellate opinions, media reports, or accounts given by one person to another—are necessarily interpretations of what is at issue. These accounts are never verbatim, but rather highlight the details that the reporter considers essential for the particular circumstances of the case.

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40. See, e.g., Morton H. Fried, *On the Evolution of Social Stratification and the State*, in 2 READINGS IN ANTHROPOLOGY 463 (Morton H. Fried ed., 2d ed. 1968). For a brief overview of the differences between states and nonstates, see KOTTAK, *supra* note 22, at 131-32.

41. See T. SCARLETT EPSTEIN, CAPITALISM, PRIMITIVE AND MODERN: SOME ASPECTS OF TOLAI ECONOMIC GROWTH (1968); MARVIN HARRIS, CULTURAL ANTHROPOLOGY 173-74 (3d ed. 1991).

42. See, e.g., COMAROFF & ROBERTS, *supra* note 34 (studying logic of disputing processes in two African chiefdoms); MAX GLUCKMAN, THE JUDICIAL PROCESS AMONG THE BAROTSE OF NORTHERN RHODESIA (2d ed. 1967) (discussing numerous Barotse cases as examples of general adherence to Lozi law); LLEWELLYN & HOEBEL, *supra* note 39.

43. See, e.g., PAUL BOHANNAN, JUSTICE AND JUDGMENT AMONG THE TIV (2d ed. 1968). Bohannan's work is discussed *infra* notes 45-54 and accompanying text.

44. See BOHANNAN, *supra* note 43, at 108-09; COMAROFF & ROBERTS, *supra* note 34, at 37-52; GLUCKMAN, *supra* note 42, at 37-52.

By following essentially similar reporting conventions, the Anglo-American judge writing an opinion and the anthropologist writing a summary of a dispute in a distant society impart a similar bias to their respective reports. Because it gives voice to some concerns, while excluding others, this bias shackles the reader of the report with the decisions of the reporter, however unwittingly made.

A second example of the same problem concerns legal anthropology's conventions for representing the members of other societies and their perspectives of the world. In reporting the cases they analyze, ethnographers have traditionally allowed litigants and witnesses to speak for themselves to a greater or lesser degree. Since Malinowski, anthropological case reports have been rich in quotations and close paraphrases. The positivist assumption has been that this is a transparent process—the work of translating and editing is a neutral enterprise, such that in the end the participants really do speak for themselves.

This assumption, like so much else in anthropology, is now under attack. To illustrate the critique, we turn to one of the classics in the field, Paul Bohannan's *Justice and Judgment Among the Tiv*.<sup>45</sup> This ethnography focuses on the procedures for dispute settlement in both the imposed colonial courts and the indigenous moots of the Tiv. In his investigation of law in this Nigerian society, Bohannan uses the case method to uncover the substantive issues that disrupt social life and occasion legal accusations. He takes great care to "report accurately the ideas and institutions of the people."<sup>46</sup> Consequently, Bohannan makes considerable use of native terms that are not easily translated into simple English, but which he explains richly and discursively.<sup>47</sup> Some anthropologists, most notably Max Gluckman, considered Bohannan's emphasis on native terms overly cautious and an impediment to comparative analysis.<sup>48</sup> But Bohannan has been persistent and, within the discourse

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45. BOHANNAN, *supra* note 43.

46. *Id.* at 4.

47. Perhaps the best example of this is the Tiv word *tar*. According to Bohannan, "the first meaning of *tar*—and I believe it can be said to be the 'basic meaning'—is the notion of a territory associated with a social group." *Id.* at 2. As Bohannan elaborates on the word's meaning, however, it becomes clear that *tar* also refers to the intangible sense of solidarity felt by the members of the social group. Hence, the Tiv talk of "spoiling the *tar*" by an action that disrupts social cohesion. Conversely, "repairing *tar*" can refer to the functions of government or to a religious ceremony intended to atone for a disruptive act. *Id.* at 2-3. Similarly, *jir* can refer both to a local tribunal and to a case before that tribunal. After a lengthy explanation, Bohannan concludes, "I cannot translate *jir* by one English word; to translate it with several is to dissipate its force and truth." *Id.* at 8. Our best approximation would be the medieval English "assize."

48. Gluckman and Bohannan debated the issue at a conference in Austria in 1966, and their remarks were published three years later. See Paul Bohannan, *Ethnography and Compar-*

of legal anthropology, stands for the effort to present the culture from the point of view of its participants.<sup>49</sup> In describing the legal system of the Tiv, it was his goal to depict both the substantive issues and the procedures for adjudicating them as understood and described by the Tiv themselves. Thus, one might assess Bohannan's role in the tradition of legal anthropology as emphasizing the need to give voice to the indigenous perspective on these matters.

Accordingly, we reexamine how Bohannan, champion of the natives' perspective, recorded and represented their voices in his ethnography. We gain some important background information from Bohannan's explanation of his method for recording disputes in the field:

Our method of working was that [my assistants] took their notes and then did reconstructions in narrative form. Both the notes and the reconstructions were worked over, and I usually but not always made translations. In the *jir* itself, I took down as much direct quotation as the effort of following the cases allowed me to do. I took this part of my notes entirely in Tiv. The 'continuity' I wrote in English, usually in shorthand.<sup>50</sup>

But what form does this information take in the reports of cases that constitute a substantial part of *Justice and Judgment*? We have excerpted Text 1 from one of Bohannan's case summaries, which he is careful to call a *jir*, the Tiv word, rather than a case. This is his report of a witness's testimony, given in quotations and thus presented as an English rendition of the words she actually spoke. Text 1 contains all of the testimony that Bohannan quotes in his summary of this case:

'My co-wife, Ierun, and I often go to Tarkighir's compound. It is near our farms, and we go there to rest. We sit in the reception hut and talk. On this day, Tarkighir asked Ierun to go into his hut with him. I was shocked and surprised that

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*ison in Legal Anthropology*, in *LAW IN CULTURE AND SOCIETY* 401 (Laura Nader ed., 1969); Max Gluckman, *Concepts in the Comparative Study of Tribal Law*, in *LAW IN CULTURE AND SOCIETY*, *supra*, at 349.

49. Bohannan argued for the necessity of making one's best effort to describe the legal practices of another culture in that culture's own terms:

It is my opinion that every ethnographer owes it to himself, the people he studies, and his colleagues not to blunt the edge of his material. He must, of course, translate as much as possible; he must gauge the point at which difficulty of reading becomes impossibility of reading. But there is an analogous point at which the gloss method leads to even greater difficulty, because it simulates understanding through the use of a familiar word. Such simulation leads—almost inevitably, I think—to an assumption of comparability of everything called by the same word—and this is a difficulty that is almost impossible to correct.

Bohannan, *supra* note 48, at 403.

50. BOHANNAN, *supra* note 43, at xii.

Ierun did so.' . . . 'I sat in the reception hut. Tarkighir was in his sleeping hut with Ierun. After they had been there a long time, I became uneasy and went and rapped on the door.'

Chenge interrupted to ask, 'Was the door shut?'

. . . [S]he replied, 'Yes, the door had been pushed to. I rapped on the door and told my co-wife to come out and that we should go. Ierun came out, and we went to our farms. That is all I know.'<sup>51</sup>

As it turns out, this is one of two cases that Bohannan analyzes for more than one purpose in *Justice and Judgment*. In a second summary of the same case within a discussion of marriage and divorce, he reports the woman's testimony in an entirely different way. Text 2 contains the excerpt from the second case summary that pertains to her testimony:

She stated that she and Ierun often went to Tarkighir's compound to rest while working on their farms, which were nearby. On this particular day he had asked Ierun to go into his hut, and she did. After some time, she (Girgi) had rapped at the door and told Ierun to come out, so that they could go back to their farms.<sup>52</sup>

Examining these alternative reports in light of the skepticism and concerns of contemporary anthropology and Bohannan's explanation of how he took notes, how are we to understand his choice to paraphrase and thus interpret Girgi's testimony in Text 2? Why are her words so clear in one report and not the other? Is this difference merely accidental, or does it convey some deeper sense of the anthropologist's own entanglement in the interpretive process?

We get some clues from yet another version of the testimony quoted in Texts 1 and 2. In Text 3, Bohannan's purportedly verbatim report of Girgi's testimony is presented along with his commentary—perhaps the "continuity" to which he refers in the passage quoted above about the manner in which she spoke:

'My co-wife, Ierun, and I often go to Tarkighir's compound. It is near our farms, and we go there to rest. We sit in the reception hut and talk. On this day, Tarkighir asked Ierun to go into his hut with him. I was shocked and surprised that Ierun did so.' She looked about her and back at the ground, as if she were ashamed of what she was saying. 'I sat in the reception hut. Tarkighir was in his sleeping hut with Ierun. After

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51. *Id.* at 45.

52. *Id.* at 85.

they had been there a long time, I became uneasy and went and rapped on the door.'

Chenge interrupted to ask, 'Was the door shut?'

With a look that indicated that she disliked him greatly both for having made her swear (and thus to tell the truth) and for asking this particular question, she replied, 'Yes, the door had been pushed to. I rapped on the door and told my co-wife to come out and that we should go. Ierun came out, and we went to our farms. That is all I know.'<sup>53</sup>

When the ethnographer's report of Girgi's testimony is read in progressive stages as we present it here, his practices of reporting, of representing the native's viewpoint, and of giving voice take on a new significance. We are given what purports to be an English version of the actual Tiv words as spoken in the hearing, enabling us to interpret their meaning for ourselves. However, we cannot but be influenced by the ethnographer's evaluative comments on the witness's style and the import of what she says. We are led in turn to question what limits are placed on our understanding of Girgi's voice by the way Bohannan permits us to hear it.<sup>54</sup>

The representation of the speech of others, whether orally or in writing, is an ancient practice. Students of Latin, for example, cannot read Julius Caesar's *Commentaries on the Gallic Wars*<sup>55</sup> without learning the different grammatical conventions for representing discourse directly and indirectly. Similar grammatical markings in other languages have at-

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53. *Id.* at 45.

54. Bohannan himself was limited by the technology of his time. He commented on the advent of tape recording in his preface to the first edition of *Justice and Judgment*:

By other techniques, such as sound recording, it would have been possible to get fuller transcriptions of the cases. I am not sure that it would be desirable, for I have found, in trying to use it, that gadgetry so absorbs the attention of the field worker that it is very easy for him to forget that he must gear his life to the people he is studying, not to his gadgets. He is introducing a false note into the flow of social life much more strident than his own mere presence: he soon begins to 'produce' and 'direct' the social action and the actors to comply with the limitations of his gadgets. The only sensible gadget for doing anthropological field research is the human understanding and a notebook. Anthropology provides an artistic impression of the original, not a photographic one. I am not a camera.

*Id.* at xiii. In a discussion with us in 1988, Bohannan pointed out that when he conducted his study of Tiv law in 1953, the use of a tape recorder would have required a gasoline or diesel generator. The noise it made would probably have rendered the tapes useless. See JOHN M. CONLEY & WILLIAM M. O'BARR, *RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE 195-96* (1990).

55. C. IULI CAESARIS, *DE BELLO GALLICO* (T. Rice Holmes ed., 1979) (1880).

tracted the attention of many twentieth-century linguists.<sup>56</sup> However, only recently have sociolinguists and anthropologists begun to ask about the significance of variations in reporting the speech of others.

Various hypotheses have been advanced. These include: (1) Using direct quotations displaces responsibility because the authority of reported speech resides with the attributed source;<sup>57</sup> (2) Direct quotations, especially when performed, are more dramatic and engaging;<sup>58</sup> (3) Using direct quotations demonstrates that the reporter was present at the reported event;<sup>59</sup> and (4) Direct quotations identify those aspects of an account that the reporter seeks to present as more reliable.<sup>60</sup>

These suggestions are helpful in considering what reported speech may mean in various contexts. Postmodernism, however, is less interested in analyzing the range of practices available for reporting speech than in asking why particular reporters made the choices they did. In Bohannan's case, why does he employ three different means for reporting the same event? Why does he quote Girgi on one occasion, paraphrase her on another, and evaluate her on yet another? How does the reader respond to such differences? What are the consequences of Bohannan's choices?

Postmodernism's ultimate point is that the ethnographer's ability to make such choices is a form of power. By their exercise of this power,

56. See, e.g., DIRECT AND INDIRECT SPEECH (Florian Coulmas ed., 1986) (collection of analyses of reported speech in several languages); Leonard Bloomfield, *Literate and Illiterate Speech*, 2 AM. SPEECH 432, 438 (1927) (discussing grammatical rules for reporting hearsay in Menomini language).

57. Richard Parmentier suggests that the words of God reported in the Bible carry more weight when quoted directly rather than in a paraphrased form. Richard J. Parmentier, *The Political Function of Reported Speech: A Belauan Example*, in REFLEXIVE LANGUAGE: REPORTED SPEECH AND METAPRAGMATICS 261 (1993).

58. Linguists and folklorists refer to reports of speech as "performed" when the narrator takes on the persona or voice qualities of those whose speech is reported. See DELL HYMES, "IN VAIN I TRIED TO TELL YOU": ESSAYS IN NATIVE AMERICAN ETHNOPOETICS 79-91 (1981).

59. According to Charles Briggs, "[D]irect discourse has an important evidential function . . . in so far as it is used in demonstrating that one was present at the events that gave rise to the dispute." Charles L. Briggs, *Disorderly Dialogues in Ritual Impositions of Order: The Role of Metapragmatics in Warao Dispute Mediation*, in 30 ANTHROPOLOGICAL LINGUISTICS 448, 452 (1988). In some conflict resolution forums, according to Briggs, testimony is criticized unless there is evidence that the reporter is giving an eyewitness account. *Id.*

60. Susan Philips argued, in her study of reported speech in American trials, that directly quoted testimony tends to be reserved for evidence that is directly relevant to the most critical issues in the case. Susan U. Philips, *Reported Speech as Evidence in an American Trial*, in 1985 GEORGETOWN UNIVERSITY ROUNDTABLE ON LANGUAGES AND LINGUISTICS 1, 13-19 (Deborah Tannen ed., 1986). Anglo-American law displays its general concern about the significance of reported speech in the hearsay rule, which prohibits the reporting of speech except in circumstances where the report is deemed especially reliable. *Id.*

Western ethnographers have shaped the ways in which generations of educated people in the West have seen and understood the rest of the world. They are, in subtle but significant ways, not reporters at all, but rather creators. What they have created, the argument concludes, is a vision of the "other" that is more reflective of the Western imagination than of any objectively verifiable reality.<sup>61</sup>

For legal anthropology, as for anthropology generally, the question is what to do with these insights.<sup>62</sup> What, for example, is the future of the case method? Do its obvious liabilities require that it be jettisoned? If so, what will replace it?<sup>63</sup> In a society without statutes, courts, and lawyers, how can one understand social control except through the analysis of what Llewellyn and Hoebel called "cases of hitch or trouble"?<sup>64</sup> And where does our critique of Bohannan lead us? Surely any summary account is necessarily contaminated by the reporter's judgment. But if one accepts the proposition that there can never be a fully accurate retelling of a speech event,<sup>65</sup> then every account must be similarly contaminated. Is legal anthropology to abandon the analysis of reported forensic speech?

There are two alternatives. One—in which much of cultural anthropology seems to be degenerating—is a kind of disciplinary solipsism. With much anguish, anthropologists revisit, revile, and reject their received learning, ultimately concluding that all we really know is the impossibility of knowing. The second alternative is a new species of positivism, sensitized to the self-delusions of the past. While it may be unable to avoid the errors of the past, this modified positivism acknowledges them. It merges the traditional and the postmodern by redefining the object of study to include both the analyzed and the analyst. The idea of defining and explaining "problems" survives, but with a twist: Rather than controlling the problem, the researcher becomes part of it. In the remainder of this Essay, we look at several projects in current legal anthropology that illustrate the potential of this informed positivism, and, we believe, the future of the discipline.

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61. The concept of the construction of the "other" first gained widespread currency in EDWARD W. SAID, *ORIENTALISM* 1-28 (1978).

62. For a more elaborate and theoretical treatment of this question, see Peter Just, *History, Power, Ideology, and Culture: Current Directions in the Anthropology of Law*, 26 *LAW & SOC'Y REV.* 373 (1992).

63. See *id.* at 382-83.

64. LLEWELLYN & HOEBEL, *supra* note 39, at 26.

65. See CONLEY & O'BARR, *supra* note 54, at 8-9, 35.



#### D. *Anthropologists Look at the American Legal System*

The cross-cultural comparison of how different societies maintain order and manage conflict has been legal anthropology's defining contribution. Many anthropologists of law continue to work on these issues in a variety of settings around the world.<sup>66</sup> Over the past several years, however, a new trend has emerged, as a number of legal anthropologists have begun to apply the methods of anthropology to the study of the American legal system. This trend is due in part to some new logistical realities.<sup>67</sup> But more significantly, it reflects contemporary anthropology's rejection of the conventional distinction between the complex, historical West and the traditional, static non-Western world.<sup>68</sup> In legal anthropology, as elsewhere, researchers have admitted that their analytic high ground is a mirage. They have started to look at themselves and their surroundings with the ethnographic voyeurism that they formerly reserved for the world's "others."

Among the questions that have arisen as a result of the inclusion of American society in the purview of legal anthropology are the following: (1) To what degree is it appropriate to treat law as a separate and distinct part of the social system?; (2) How well does the case method actually work as an analytic paradigm for studying the American legal system?; and (3) To what degree is it appropriate to speak of a single or unified American legal culture?

Three monographs on different aspects of the American legal system, written by legal anthropologists and published between 1986 and 1990, provide a basis for examining these issues.<sup>69</sup> These books are:

66. See, e.g., LAURA NADER, *HARMONY IDEOLOGY: JUSTICE AND CONTROL IN A ZAPOTEC MOUNTAIN VILLAGE* (1990) (studying village law in Mexico); Robert M. Hayden, *Constitutional Nationalism in the Formerly Yugoslav Republics*, 51 *SLAVIC REV.* 654 (1992) (studying politics and ideology in former Yugoslavia); Susan F. Hirsch, *Gender and Disputing: Insurgent Voices in Coastal Kenya Muslim Courts* (1990) (unpublished Ph.D. dissertation, Duke University) (studying gender differences in use of Muslim courts of Kenya).

67. As we have observed personally during our respective careers, the postcolonial world has become less accessible to Western anthropologists over the last 25 years. Previous generations of anthropologists, from Malinowski to Bohannan, were seen as useful by colonial administrators because they produced information that facilitated the task of imperial governance. *AFRICAN POLITICAL SYSTEMS*, *supra* note 32, is perhaps the best example of this "helpful" anthropology. Therefore, the colonial powers, especially Great Britain, funded and supported ethnographic research. With the demise of colonialism, anthropologists were stigmatized in many countries because of their former associations. In addition, travel is expensive, and funding agencies began to ask in the 1970s and 1980s whether it was really necessary to journey thousands of miles to answer basic questions about human social behavior.

68. This point is made effectively in COMAROFF & COMAROFF, *supra* note 36, at 13-18.

69. We intend these examples to be illustrative rather than exhaustive. For up-to-date reviews of the extensive and often excellent literature of contemporary legal anthropology, see

Carol J. Greenhouse's *Praying for Justice: Faith, Order, and Community in an American Town*;<sup>70</sup> Sally Engle Merry's *Getting Justice and Getting Even: Legal Consciousness Among Working-Class Americans*;<sup>71</sup> and our own *Rules Versus Relationships: The Ethnography of Legal Discourse*.<sup>72</sup> We will briefly examine the methods and objectives of each study and then consider what each has to say about the three questions raised above.

In *Praying for Justice*, Greenhouse explains that her original goal was to examine the use of courts by the residents of "Hopewell," a Georgia town that has recently been transformed into a suburb of Atlanta.<sup>73</sup> Her specific focus was on the Baptists, the largest religious group in Hopewell. Greenhouse did what anthropologists have conventionally done: She set herself up in Hopewell and lived there between 1973 and 1975. Thus, Greenhouse attended church, studied records of the local historical society, and made many friends who spent time explaining how things work locally. She quickly discovered that the citizens of Hopewell eschew the legal system as a mechanism for maintaining social order and solving the inevitable problems that arise in the life of a community.<sup>74</sup> She came to realize that in the world of Hopewell's Baptists, the church is much more important than the law as a means of maintaining social order. Greenwood was thus compelled to shift her focus from the formal legal system to Baptist "religious doctrine and praxis," noting in particular the Baptists' ethic of avoidance of actual and potential conflict.<sup>75</sup>

In *Getting Justice and Getting Even*, Sally Merry investigated a very different cultural setting: working-class neighborhoods in the Boston metropolitan area. The residents of these neighborhoods share a consciousness of the law as a mechanism for resolving the problems of daily life.<sup>76</sup> Unlike Hopewell residents, the people Merry studied turn to the formal legal system to solve neighborhood problems that arise from simple conflicts about shared space: disputes over noise, dogs, children, and

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Just, *supra* note 62, and Elizabeth Mertz, *Language, Law, and Social Meanings: Linguistic/Anthropological Contributions to the Study of Law*, 26 LAW & SOC'Y REV. 413 (1992).

70. CAROL J. GREENHOUSE, *PRAYING FOR JUSTICE: FAITH, ORDER, AND COMMUNITY IN AN AMERICAN TOWN* (1986).

71. SALLY E. MERRY, *GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS* (1990).

72. CONLEY & O'BARR, *supra* note 54.

73. GREENHOUSE, *supra* note 70, at 9. "Hopewell" is a fictitious name for a real place. Greenhouse describes it as a "white, moderately affluent, newly suburban town, where family, work, and religion form the core of people's concerns." *Id.*

74. *Id.* at 9-14.

75. *Id.* at 23-27.

76. MERRY, *supra* note 71, at 1-4.

parking places.<sup>77</sup> Many also call the police and expect the law to help in solving problems between husbands and wives, boyfriends and girlfriends, and parents and children.<sup>78</sup>

This is not, according to Merry, a reflection of increasing litigiousness in America nor of the loss of shared community values. Rather, for the residents of these urban neighborhoods, the law is—as is the church for Hopewell's Baptists—simply the preferred mechanism for maintaining social order and repairing damage when it occurs.<sup>79</sup> Merry's investigation included both formal courts and court-sponsored mediation centers. But whether they resort to formal or alternative dispute resolution procedures, these Americans believe they are entitled to the assistance of legal institutions.<sup>80</sup> Moreover, they call on them regularly when the need arises. This results in what Merry terms the paradox of legal entitlement: When they turn to such institutions, these citizens also submit to the power of law over aspects of life that have traditionally been defined as private. They assert their rights at the cost of their autonomy.<sup>81</sup>

In *Rules Versus Relationships*, we examined small claims courts in North Carolina, Pennsylvania, and Colorado. Our research question was, in simplest terms: How do litigants think about and present their cases?<sup>82</sup> After analyzing more than 150 cases in the three states, we found among the litigants we studied two radically different orientations toward the law and the solutions that it can provide for the problems of social life.<sup>83</sup>

In conceptualizing a dispute, interpreting rights, and allocating responsibility for events, *relational* litigants focus heavily on status and social relationships.<sup>84</sup> They believe that the law is empowered to assign

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77. *Id.* at 38. Merry suggests that plaintiffs in neighborhood conflicts often want the courts to intervene for the purpose of severing community relationships, not mending them. *Id.* at 40. Compare the Hopewell residents, whom Greenhouse extols as a "testimony to the vitality of the concept of community." GREENHOUSE, *supra* note 70, at 208. However, Greenhouse also notes that the Baptists' rejection of litigation "should not be understood first or only as an affirmative function of their close social ties, that is, in terms of relational distance, but should be understood in terms of the consequences of their theoretical rejection of all forms of human authority." *Id.* at 122.

78. MERRY, *supra* note 71, at 47-59.

79. *Id.* at 16-17.

80. *Id.* at 172-79. Merry argues that this attitude is shaped by "such deep-seated cultural traditions of American society as individualism, equality, faith in the law, and the search for freedom from the control of neighbors and local leaders." *Id.* at 17.

81. *Id.* at 179-82.

82. CONLEY & O'BARR, *supra* note 54, at ix-xiv.

83. *Id.* at 58-81.

84. *Id.* at 58.

rewards and punishments according to broad notions of social need and entitlement.<sup>85</sup> This belief appears to be associated with a general social experience in which the individual lacks autonomy and is instead a passive victim or beneficiary of decisions that he or she is powerless to influence.<sup>86</sup>

In court such litigants strive to introduce into the trial the details of their social lives.<sup>87</sup> Their accounts of their troubles emphasize the social networks in which they are situated, often to the exclusion of the contractual, financial, and property issues that are typically of greater interest to the court. Even an event such as an automobile accident involving strangers may be described in terms of the social history of the parties. Whereas the law demands specific proof of responsibility, litigants giving relational accounts are more likely to assert that certain things "just happen" to certain kinds of people. Predictably, courts tend to treat such accounts as filled with irrelevancies and inappropriate information, and relational litigants are frequently evaluated as imprecise, rambling, and straying from the central issues.<sup>88</sup>

By contrast, *rule-oriented* litigants interpret disputes in terms of rules and principles that apply irrespective of social status.<sup>89</sup> They see the law as a system of precise rules for assessing responsibility, and reject as irrelevant everything not circumscribed within these rules. This view of the law seems to be rooted in the belief, undoubtedly shaped by social experience, that society is a network not of relationships, but of contractual opportunities that each individual has the power to accept or reject on a case-by-case basis.

In presenting their cases in court, rule-oriented litigants structure their accounts as a deductive search for blame.<sup>90</sup> Every injury is presumed to have a human agent as its cause. Alternative theories of responsibility are mooted and disposed of until the litigant is finally able to point to the opposing party as the only person on whom responsibility for the events complained of can be plausibly fixed. Rule-oriented accounts thus mesh better than relational ones with the logic of the law and the agenda of the courts.<sup>91</sup>

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85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 59.

91. *Id.*

### 1. Is law a distinct cultural category?

These three studies of facets of the American legal system cast doubt on whether the law should be treated as a distinctive part of society. Merry, as well as ourselves, have self-consciously focused on law as a means of settling disputes, largely ignoring other ways of solving problems. This was partly because of the way each study defined the universe of its concerns. For Merry, mediation centers and courts were the catchment mechanism.<sup>92</sup> For us, the individuals we chose to study were those who undertook to solve social problems via the small claims system.<sup>93</sup> There is, of course, nothing wrong and much right with such selection procedures; in many cases they are a practical necessity. But by limiting themselves to problems that were managed by court or mediation centers, both studies created an artificial sense of the primacy of law as a problem-solving device. Neither project could deal with how people manage other problems that never make it to a dispute-resolution forum. A broader framing of the research question—such as “What conflicts arise in the daily lives of Americans and how do they manage these problems?”—might have led to an understanding of why the law is the preferred remedy in some circumstances but not others.

It is in this context that Greenhouse's study is so important. Because she did not limit herself to courts or mediation centers—because Hopewell Baptists rarely use them—or abandon the search for conflict—when she found that there was almost none in the expected sense—Greenhouse found here in America what anthropologists have noted elsewhere, namely that law and religion can serve similar purposes of social control and problem solving.

The findings of the three studies show that the law works under some circumstances to solve social problems and to help order society. But the law has important limits in America, as it does in tribal societies such as those studied by Malinowski, Hoebel, and Bohannan.<sup>94</sup> If we are to understand the place of law in regulating social life, we must not focus simply on legal institutions. We must not be misled by the seeming independence of institutionalized law into thinking that law is a genuinely autonomous part of social life. Some of the litigants whose efforts are reported in *Rules Versus Relationships* poignantly asked legal officials who could not or would not deal with their problems: “Where shall we

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92. MERRY, *supra* note 71, at 17-20.

93. CONLEY & O'BARR, *supra* note 54, at 26-29.

94. See, e.g., BOHANNAN, *supra* note 43; HOEBEL, *supra* note 17; MALINOWSKI, *supra* note 27.

go if not here?"<sup>95</sup> To reach a fuller understanding of law in America, we must appreciate the salience of this plea. We must go beyond the question of how law works and ask how our society is regulated. Because of its holism and its experience in societies where law is not institutionally separate, anthropology is ideally suited to make that inquiry.

## 2. How useful is the case method?

For Merry, the case method provided an appropriate mechanism for illustrating the legal consciousness of working-class Americans. But when different questions are asked, does the case method work equally well? In the research that produced *Rules Versus Relationships*, we found the case method to be useful for some purposes but inadequate for others.

Small claims litigants are, of course, required to frame and present their grievances as conventional civil cases. We adopted the case method in the sense that we tracked litigants as they moved through the system from the point of filing their cases. We interviewed plaintiffs at the courthouse as they filed their complaints, observed trials, and then interviewed both plaintiffs and defendants several weeks after trial.<sup>96</sup>

We departed, however, from the case method as it has been used in legal education and much of legal anthropology. We focused not on outcomes or legal doctrine but on the structure, style, and content of the accounts of their problems that litigants gave at different points in the process.<sup>97</sup> We studied the legal thinking of litigants at the time they decided to take legal action, as they prosecuted and defended their cases, and as they reflected on their experiences with the law.

We found litigant accounts to be remarkably fluid. At filing time, most claimants did not yet appreciate that there was any version of the issues other than their own.<sup>98</sup> In court, this understanding shifted radically when defendants challenged their claims and accounts. Afterwards, people talked about winning and losing, but placed a higher priority on how they felt about their court experiences. Whether they had an opportunity to tell their story was often as important as whether they won.<sup>99</sup> And when people lost, they tended to blame themselves or the judges who presided over their cases. This personalizing of responsi-

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95. See, e.g., CONLEY & O'BARR, *supra* note 54, at 98-100.

96. *Id.* at 30-33.

97. *Id.* at 29-30.

98. See William M. O'Barr & John M. Conley, *Lay Expectations of the Civil Justice System*, 22 LAW & SOC'Y REV. 137, 145-46 (1988).

99. See, e.g., CONLEY & O'BARR, *supra* note 54, at 127-31.

bility for loss allows litigants to complain about their own negative experiences while maintaining their overall faith in the American legal system.<sup>100</sup> In discovering these attitudes, the case method was a useful initial step. But our experience demonstrates that limiting one's focus to issues of winning and losing can deflect attention away from other equally important questions about America's legal culture.

Carol Greenhouse's study further illustrates a basic problem with the case method and its inherent focus on confrontation: It is ill-adapted for investigating how people avoid conflicts. As they do everywhere, problems often arise among the residents of Hopewell. But rather than turning to the courts, they use prayer as a means of self-examination and self-control, and gossip as a mechanism to control and limit those who get out of line.<sup>101</sup> Such a subtle system for maintaining order is invisible to the traditional case method, but is readily apparent to the ethnographer who starts with no bias for conflict over concord.<sup>102</sup>

### 3. Is there an American legal culture?

In studying the Cheyenne, Tiv, or Trobriand people, ethnographers of law such as Hoebel, Bohannan, and Malinowski looked for locally distinctive rules and procedures.<sup>103</sup> Each attempted to explain, as he understood it, what the people he studied believed about right and wrong and how they dealt with transgressions. Thus, there emerged a description of Tiv ways of doing things, of Cheyenne procedures for settling interpersonal disputes, and of Trobriand ideas about criminality. In retrospect, such generalizations appear grandiose and far too expansive. Living in a couple of villages for a year or two or spending time among old people recalling bygone days does not provide an adequate basis for generalizing about hundreds or thousands of people. Contemporary anthropologists reject this expansiveness as naive, arrogant, or both, and are careful to limit their generalizations to the specific people, places, and times they study.

But what of America? What do we know about law in America on the basis of studies such as the three we discuss here? Can we generalize or must we limit our interpretations to particular courts and communi-

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100. See, e.g., *id.* at 150-65.

101. GREENHOUSE, *supra* note 70, at 183-98. Greenhouse notes that "[t]he people of Hopewell do not consider order to be a matter of complying with rules, nor do they consider that human intervention can accomplish any constructive purpose. They are not remedy oriented; they seek no satisfaction except that of prayer." *Id.* at 25.

102. See *id.* at 24, 30-31.

103. See, e.g., BOHANNAN, *supra* note 43; HOEBEL, *supra* note 17; MALINOWSKI, *supra* note 27.

ties? The best answer to this question is to appreciate the difference between the qualitative approach of anthropology and the more quantitative approaches that prevail in other disciplines. Statistical analysis depends on knowing the range of possibilities, their relative frequencies, and their respective distributions. Anthropology is especially helpful in discovering and describing the possibilities. It can show how things are done in a variety of specific instances. Legal anthropology can tell us, for example, that Hopewellians do not go to court and that working-class Bostonians do, or that many small claims litigants are at least as concerned with how they are treated in court as whether they win or lose. In short, anthropology can tell us what to consider.

The difficulty of this task should not be underestimated, particularly when novel issues are involved. We have often observed lawyers listening to anthropologists and then commenting, "Of course—that's obvious!" Our response, usually given *sotto voce*, is always the same: "Then why didn't *you* think of it?"

### III. CONCLUSION

As has been true with all successful ethnography, every answer that has emerged from these studies has generated a new set of questions. In our own work, for example, we need to know how the rule and relational orientations are distributed, and how this distribution affects access to justice. In the case of Merry's work, are the working-class citizens of greater Boston representative of working-class people across America? And is the litigiousness Merry observes driven by class alone, or is it also related to such factors as ethnicity and history? Greenhouse's research gives rise to a similar question: Is it typical for all middle-class America to eschew the courts as a forum for managing conflict? Alternatively, are Greenhouse's findings limited to the white, suburban, Baptist community in which she worked?

These specific issues are illustrative of the larger questions that a meaningful legal anthropology of America must aspire to answer. The ultimate challenge, as it has always been for anthropology as a whole, is to prescind from studies of individual communities in pursuit of a theory of social control in America. Anthropologists must see law as one of many mechanisms that facilitate social control, and must investigate their respective distributions. The legal anthropology of America must examine law as a culture unto itself, and also as a constituent of a much broader cultural milieu. What, for example, does it mean to be litigious, and do some or all of us fit the description? What about conflict avoidance? Most of us spend most of our lives minding our own business:



What are the factors that disrupt this background condition? And what role does our uniquely large and influential legal elite play in all of this? By keeping such questions in mind, anthropologists can continue doing what they do best: looking long and hard at real people in real places. And legal anthropology can fulfill its century-old promise of illuminating the day-to-day ordering of human society.