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Prolegomenon to a Fairness-Centered Anthropology of Law

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PROLEGOMENON TO A FAIRNESS-CENTERED ANTHROPOLOGY OF LAW

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Abstract

Legal anthropology, which began with Malinowski's holistic reflections on law, has today drifted toward an emphasis on the study of dispute resolution. Part I outlines the three historical phases of this development—Holism, Realism, and Processualism—and identifies two shortcomings of viewing the dispute as the central problem for legal anthropology: (1) the collapse of law into dispute analyses has not been, and perhaps cannot be, fully theorized; and (2) the most pressing of current problems, such as human rights and intellectual property issues, cannot be reduced without distortion to the disputing paradigm. Part II offers *fairness* as an alternative organizing concept for legal anthropology. According to the essay's arguments from initial premises, law should be operationalized as one of a system of coordinated norms of social regulation, with the unique goal to foster perceptions of fairness about structural inequalities. Turning attention away from disputes and onto fairness allows legal anthropology to benefit from the insights into law-related phenomena (e.g., fair sanctioning) gained by other subfields of anthropology such as economic anthropology, but most importantly returns the field's orientation toward its original interest in law.

Overview

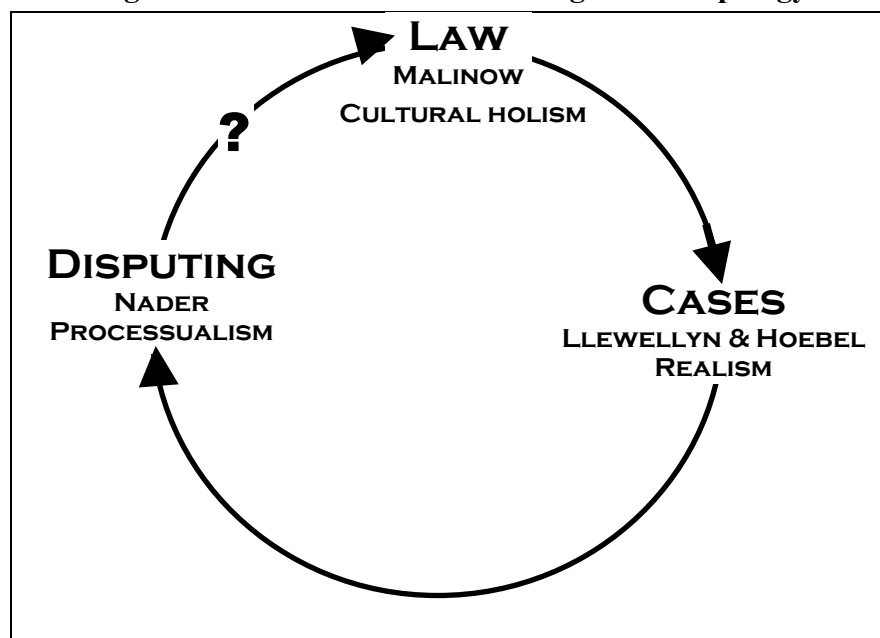
The presumed subject of legal anthropology is *law*. “Law” in its most general sense refers to those presumably obligatory rules promulgated and enforced with the goal of fostering group life through a mix of negative injunctions, positive requirements, and aspirational ideals. This view excludes the “private law” that a person might impose upon herself as well as rules devised to achieve some end other than group living, such as moral perfection or obedience to deities. Without suggesting that such elements are essential to the concept, law is often correlated with political policy-setting authority, enforcement mechanisms and organizations, and dispute-resolution techniques. While this broad reading of “law” shall serve as a starting point, by discussion’s end a more nuanced and theoretically productive description of the category will be defended.

Traditional anthropological research has employed techniques to discern patterns and conclusions about law just as they do about other social phenomena, such as religion, economics, and kinship. The resulting literature contains, however, a pronounced bias toward the *dispute-resolution* facet of the legal institution. This most recent phase of the discipline’s history has not been understood to problematize the anthropologist’s ultimate goal of reaching conclusions about law in its broader sense. On the contrary, as depicted in Figure 1, throughout the discipline’s changing perspective the subject presumably has remained constant. At the least, no principled argument has been formulated to effect a disciplinary sea-change away from law. One may have crept upon us unawares, however. The problematic link in the cycle is the third, the return to conclusions about law from studies of disputes. We have an intuition that a relationship exists between the two, but despite their nonequivalence we are rarely told how the

transition from one to the other should be made.

The argument offered here is that the presumption of an untroubled translation of dispute data into insights about law is misplaced. However justified the historical reduction of law to disputing may have been—a three-stage process reviewed in Part I—an ability to reconstitute disputing in order to draw conclusions about law has not been demonstrated. Legal anthropology currently lacks any such translation theory. This lacuna is not remediable; that is, the problem is not that anthropology has to date failed to articulate such a connecting theory, but that no such theory is conceivable. If that is indeed the situation, then to the extent that the goal of legal anthropology is to study law it has become peculiarly ill-positioned for that task.

Figure 1: Theoretical Trends in Legal Anthropology



Beyond such philosophical concerns, the single-minded attention to disputation has incurred practical costs as well. The initial focus of the discipline's energies onto disputing meshed well with the pressing problems up to that day—the 1960s—and which legal anthropology hoped to address, from administration of local populations under colonial powers

to customer complaints regarding large industries. The central issues of these problems could effectively be framed as questions about dispute processes without risk of major distortion. Even if legal anthropology was unable or uninterested thereby in discussing “law” in some broader sense, dispute studies effectively isolated major currents within the cultural milieu.

Many contemporary problems of law and society, however, can no longer be reduced to hypotheses about disputing without obscuring the central issues. Examples include dilemmas of human rights and intellectual property, of which neither were on the intellectual horizon when dispute-centered legal anthropology rose to the fore. Whereas earlier work studied remedy and resolution—the healing of irruptions after the tearing of social bonds—current concerns require finding ways to prevent the injury in the first place. The antisocial ruptures now being contemplated—genocide, for example, or the expropriation by multinational corporations of local cultural products—cannot be “resolved” in any ordinary sense. Because the threatened harms are irreparable, the only worthwhile objective is to prevent the injury rather than to look for ways to make meager amends afterwards. Dispute resolution studies, therefore, are no longer well-equipped to consider some of the emerging law-centered problems confronting today’s societies. Assuming anthropology aspires to be a going concern rather than an antiquarian exercise, those are the topics that should head our research agendas.

If disputing is not suited to serve as the paradigm of legal anthropological studies, the question becomes what should take its place. The proposal offered in Part II is that legal anthropology’s organizing concept from which to consider contemporary problems should be *fairness*, not disputes. Within this model, “law” can productively be operationalized as one component of a coordinated system of norms of social regulation, one charged with the special task of fostering perceptions of fairness, especially about society’s structural inequalities.

Fairness studies would not eliminate dispute resolution from the topics of legal anthropology. On the contrary, it incorporates one of the central puzzles of disputing—why does the losing party tend to accept the unfavorable outcome? Unlike dispute studies, however, studies about fairness provide a conceptual tool that can be applied to non-dispute issues, reveal natural contact points with broader developments within related specialties, and, not least, offer a basis for conclusions about law as an overarching category of norm of social regulation.

I. Limitations of the Dispute Orientation in Legal Anthropology

A. Historical Review

1. Original Anthropological Study of Law

Although its roots extend far into antiquity and up through more contemporary works such as Maine's *ANCIENT LAW* (1861), legal anthropology traces its modern origins to Bronislaw Malinowski's *CRIME AND CUSTOM IN SAVAGE SOCIETY* (1926). The theoretical focus of his short essay unmistakably centered on "law" as broadly understood. For Malinowski the key problem to be answered about law was the source of the feeling of its being obligatory, even in cultural contexts lacking formal enforcement machinery and institutions. By "inquiring into the nature of the forces which make [law] obligatory, we shall be able to arrive at much more satisfactory results than if we were to discuss questions of authority, government and punishment" (Malinowski 1926, p. 13). He concluded that law forged ties of "binding obligation" via the reciprocity that links members and units of the group into a larger whole.

Malinowski explicitly eschewed the narrower definition of law that so many legal anthropologists applied both then and now. "We can see now that a narrow and rigid conception of the problem—a definition of 'law' as the machinery of carrying out justice in cases of trespass—would leave on one side all the phenomena to which we have referred" (*Id.* at p. 30).

Without denying this negative function, Malinowski gave equal emphasis to law's positive and preventive function to inculcate norms of social order. Later legal anthropologists would echo this recognition of the positive as well as negative multifunctionality of law, but rarely would their theories incorporate it.

Beyond the broad scope of the law he studied, we should also note how Malinowski arrived at his results. "He was the first to apply the ethnographic method to the study of social order" (Conley & O'Barr 2002, p. 847).

We shall see that by an inductive examination of the facts, carried out without any preconceived idea or ready-made definition, we shall be enabled to arrive at a satisfactory classification of the norms and rules of a primitive community, at a clear distinction of primitive law from other forms of custom, and at a new, dynamic conception of the social organization of savages. (Malinowski 1926, pp. 15-16)

The inductive analysis performed by Malinowski does not build upon a corpus of "cases" but instead flows from the accumulated insights of extended fieldwork surveying the whole of culture. *CRIME AND CUSTOM*, in fact, contains few of the case reports that would become typical of the genre. More importantly, the use of cases that he envisioned was merely as insightful illustration to bolster conclusions arrived at by other means: "In order to make this negative criticism conclusive, we have given a positive statement of a concrete case to present the facts of primitive law as it really is, and have shown in what the compulsory nature of primitive legal rules consists" (*Id.* at p. 64).

The two principal observations from this inaugural period of legal anthropology, therefore, are (1) that law is a broad category of social control, which can include but is not

equivalent to studies of “authority,” “punishment,” or “trespass”—concepts frequently more central to conflict and dispute studies—and (2) that while based upon inductive reasoning, the data for that method are not limited to isolated legal cases but instead draw upon the whole of sociocultural interactions.

2. From Law to Cases

While Malinowski was demonstrating that interesting conclusions about law need not derive from the inductive analysis of cases, legal education promoted the opposite technique.

The casebook method, introduced in 1870 by Christopher Columbus Langdell, dean of the Harvard Law School, also fostered an inductive learning technique. Contrary to Malinowski’s cultural holism to understand the *nature* of law, in this context the goal was to draw conclusions about the *rules* of law. The different objectives informed the respective methodologies. The assumptions underlying Langdell’s pedagogical innovation are that:

(1) law is a “science” distinct from other disciplines and therefore is best understood without reference to them; (2) this science is best studied through exclusive focus on appellate cases; and consequently (3) the “art” of lawyering (for example, interviewing, counseling, and negotiating) is not a fit subject for a “scientific” law school education. (Taslitz 1991, p. 144)

Students read a smattering of appellate decisions on a specific topic, and are challenged to arrive at the underlying rule of law that could produce all the apparently disparate outcomes. The new vehicle for this method was the casebook, which published selected and edited case decisions.

Langdell’s casebook method expressed the nineteenth century’s commitment to *legal formalism*. Formalism holds “that judges decide cases on the basis of distinctively *legal* rules and reasons, which justify a unique result in most cases (perhaps *every* case)” (Leiter 2005, p.

50). Law was a self-contained, complete system of rules within which individual disputes were to be resolved without attention to the contingent, non-legal facts of the situation.

By the turn of the century, however, veins of jurisprudential thought had begun to react against formalism. Roscoe Pound championed a *sociological jurisprudence* which argued that law is made, not found hidden in existing codes or precedents, and that given this “conception of law as a means toward social ends, the doctrine of law exists to secure interests, social, public, and private, [and] requires the jurist to keep in touch with life” (Pound 1912, p. 146-147). This call for attention to the social sciences constituted a direct refutation of the first principle of Langdell’s teaching method.

Pound’s writings inspired Karl Llewellyn, who named and defended the related but distinct *legal realism*. The “core claim” of legal realism is that “in deciding cases, judges respond primarily to the stimulus of the facts of the case, rather than to legal rules and reasons...*whether or not those facts are legally significant*” (Leiter 2005, p. 52, 53). Although law was therefore indeterminate (i.e., not the closed logical system depicted by formalism), it was nonetheless predictable if the psychosocial influences upon the judge could be known. Realism envisioned a more intimate role for the social sciences than that anticipated within Pound’s sociological jurisprudence. In the latter, law remained an independent discipline which could direct the development of society in chosen directions. The role of social science was limited to helping to choose those directions. In Llewellyn’s realism, however, the social sciences are required to render law itself comprehensible. This dialectical relationship between law and society influenced the kinds of materials law students were expected to consider when determining the “law” on a given topic:

Legal realism adopted the earlier formalism-based casebook with few modifications:

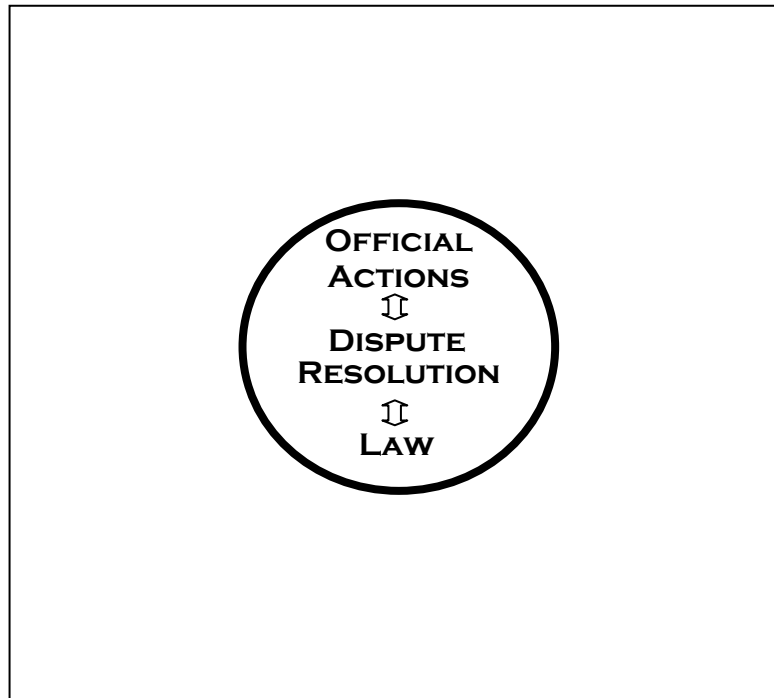
To really teach law, the Realists thought, it was necessary to understand the economic, political, and social dimensions of the problems courts confront...

Thus, the modern legal teaching materials are typically titled, “Cases *and Materials* on the Law of...,” where the materials are drawn from nonlegal sources that illuminate the various nonlegal factors relevant to understanding what the courts have done. (Leiter 2005, p. 60)

The convergence of the de-emphasis of rules and judicial precedents as the privileged locus of law and the heightened scrutiny on the extralegal influences upon judicial decision-making led realists to the conviction that law could be reduced to that process. In his classic *THE BRAMBLE BUSH* (1930, p. 3), Llewellyn writes that “this doing of something about disputes, this doing of it reasonably, is the business of the law. And the people who have the doing in charge, whether they be judges or sheriffs or clerks or jailers or lawyers, are officials of the law. *What these officials do about disputes is, to my mind, the law itself.*” Although he later expressed regret over these “unhappy words” (Llewellyn 1951, p. 9), “how this recantation fits into his general view of the law remained unclear” (Letwin 2005, p. 197).

Even if regretted, the phrase was a benchmark influencing the course of not only legal realism, but also the wider disciplines that absorbed it. Here we find annunciated in stark terms the primary equations of legal realism as a methodology: official acts about disputes are the law (see Figure 2). That this statement should issue from Llewellyn is particularly telling due to the central role he would play in the emergence of legal anthropology.

Figure 2: Realist Equation of Officials, Disputes, and Law



Through Karl Llewellyn and E. Adamson Hoebel's *THE CHEYENNE WAY* (1941), legal realism became the dominant influence in legal anthropology in both method and theory. Llewellyn and Hoebel argue that in addition to the "intended and largely effective regulation and prevention [of conflict]," law also has "the peculiar job of cleaning up social messes" (*Id.* at p. 20). Contrary to the study of formal rules or of typical behaviors to extract the rules of law that regulate society, they point to the "trouble-case" as the best window on society's norms of social regulation:

The techniques of *use* of any legal form or rule are, if anything, more important than the form and rule themselves. The techniques of operation of the legal personnel, and the latter's manner of handling the techniques—these commonly cut further into the nature of a society's legal system than does the "law" itself. But they must be dug out of the cases in which actual troubles have been dealt with" (*Id.* at p. 27).

Llewellyn and Hoebel's identification of the trouble-case as the best data for legal anthropology perhaps inevitably led them to arrange their text in the manner of the Langdellian casebook. The casebook offered a field method particularly helpful in cultural contexts lacking written law and codes. Cases could be analyzed for their underlying norms just as was done in the law school classroom. Every subsequent legal ethnography of significance would emulate this method, wherein the primary data for analysis comprise a numbered series of episodes (cases, disputes) and their resolutions.

The new realistic approach to the anthropological study of law thus shared with its Malinowskian roots a reliance upon the inductive method. It differed, however, in that the data for this analysis were now the cases which had for Malinowski served only as illustrations of findings derived through observations gathered during long-term fieldwork. Like Malinowski, the overt goal of Llewellyn's enterprise—and reinforced by the casebook method he employed—was to learn about “law.” Trouble-cases were not an end in themselves, but a privileged window onto the overarching category that functioned also to prevent trouble-cases from occurring in the first place. Both *THE CHEYENNE WAY*, and Hoebel's later survey, *THE LAW OF PRIMITIVE MAN* (1954), showcased this interest in using the analysis of cases to identify broader legal norms pervading the respective cultures.

The contrasting role that the case played within these two phases can be illustrated through examination of a fieldworker who published major works in each. Robert Barton published *IFUGAO LAW* in 1919, while *THE KALINGAS* followed in 1949.

Of works within the legal anthropology canon, *IFUGAO LAW* most closely resembles the classic *HANDBOOK OF TSWANA LAW AND CUSTOM* (1938) by Isaac Schapera. Both works are organized around categories of Anglo-American law (e.g., Barton's chapter titles are: *The*

Family Law, The Property Law, Penal Law, and Procedure), which state directly the indigenous rule of law under the heading as arrived at by the ethnographer. For example, Barton begins his description of the “nature of marriage” with the observation that “Marriage among the Ifugaos is a civil contract of *undefined* duration. It may last a month, a year, a decade, or until the death of one of the parties to it. *It has no essential connection with the tribal religion*” (Barton 1919, at p. 10). Cases are recounted sparingly, and are almost always introduced with descriptors as “typical,” “ordinarily,” or “illustration.” These adjectives clarify the role played by the cases within the author’s explication of the indigenous legal system, a role equivalent to that within Malinowski’s work. The illustrative cases offer vivid ethnographic ratification of the asserted summary of the legal rule, but—at least within the text—are not part of the data used to arrive at that rule. Like Malinowski, Barton’s concern is remains “law” in the broad sense.

Barton died in 1947, two years before the publication of *THE KALINGAS: THEIR INSTITUTIONS AND CUSTOM LAW*. Although half of the fieldwork had been completed in 1916, visits of equal duration occurred in 1941. This work is perhaps especially sensitive to the methodological and theoretical advances between the project’s inception and its eventual completion several decades later.

In his introduction to Barton’s book, Hoebel repeats his version of the legal realists’ view on the nature of law—“Law is what people actually do in cases of violation of their social norms when such violation, or deviation, is punishable by the privileged use of force on the part of the injured party or by a public official” (p. 2)—and declares Barton both “an anthropological behaviorist and a realist.” Given that endorsement, we anticipate that *THE KALINGAS* will be a discernibly different work from the earlier, pre-realist *IFUGAO LAW*.

Cases are not only more prevalent (numbering 104), but conform to the numbered format

of Llewellyn and Hoebel's own work. Instead of launching immediately into an account of Kalinga law as he had with the Ifugao, Barton now begins his ethnography with a broad description of the society he studied. His use of the case reports is noticeably more studied. Although many remain little more than anecdotes or stories, and thus not truly "cases" at all—indicating perhaps a conscious attempt to squeeze his earlier data into the new format—he often recounts the questions he asked of the informant to shed further light on the example. The case, in other words, is far more likely to be a source of data in *THE KALINGAS* than ever it was in *IFUGAO LAW*. Gone as well is the obvious deconstruction of indigenous law into Anglo-American legal categories. Instead of a chapter on "family law," we are instead offered a more sensitive description of the "household and kinship group and their custom law."

Barton's wish to reflect the new realist position can perhaps be seen in the manner in which he argues for the emerging role of Kalinga state law, words that cannot avoid reminding us of Hoebel's own position:

But it would be a mistake not to recognize the pangats' moderative and meditative activities as exercise of a police power, *and one that is backed by force*, even though only a psychological compulsion, "influence over the people," is employed. For that influence is grounded partly in trust of the pangats as men whose vision exceeds the narrow one of their kinship groups but mainly in fear of them as dangerous men who have killed a number of people. Thus, there *is* a sanction of force [as Hoebel requires], clumsily and indirectly applied, it is true, but nonetheless force. (p. 254)

The transition in Barton's work parallels that in legal anthropology as a whole. A broad, discursive contemplation on law in indigenous settings, in which cases serve primarily as

illustrations of points arrived at through other means based on study of society as a whole, has become, under the influence of Llewellyn's legal realism, the study of cases in order to extract both the rules of substantive law as well as the relationship of law to other social institutions. Despite such changes, however, the focus throughout remained a broad, overarching concept of "law."

3. From Cases to Disputes

The lawyer's view of law embedded in legal realism proved too restrictive and ethnocentric to anthropologists. That perspective, for example, privileged formal dispute resolution mechanisms (i.e., the "case") over more informal social processes working toward the same end. A uniquely anthropological model would emerge under the label of *legal processualism* which would incorporate some elements of its disciplinary predecessor while discarding others. Thus, while representing an advance in the understanding of how law related to other social components, it achieved this result by more narrowly construing "law" as solely about dispute resolution.

The emergence of processualism developed organically from the intellectual milieu of that time. Methodological focus upon the case had served well so long as the anthropological orientation remained functionalist in nature. Malinowski, Llewellyn, and Hoebel all assumed that judicial proceedings were primarily status quo-enforcing social acts, and thus that the central phenomena of interest were the processes by which judges or other decision-makers arrived at their pronouncements.

As the weaknesses of functionalist theory became more evident, realism's assumptions became correlatively more unsatisfactory. Legal processualism introduced two alterations to the inherited methodology, which, while small and commonsensical at the time, would effect a sea-

change in the specialty.

The chartering document for this phase is Laura Nader's 1965 essay, *The Anthropological Study of Law*. She begins with a review of the field's literature up to that point. While finding a shift away from the "philosophical and theoretical question" of attempting to define "law," she recognizes that, "for cross-cultural purposes...we would have to agree upon an operational definition of law in order to agree upon what is to be compared" (pp. 5-6).

A central theme of her essay is both to force a recognition that works based upon the case method have been primarily descriptive, and to advocate renewed attention to comparative methods and the search for cross-cultural universals. Her influential contribution to this program was the argument that the "dispute case, unlike any particular form of adjudication or class of disputes or functions, is present in every society," and thus "could provide key material around which comparison would be made" (p. 24).

Shifting field attention from the case (understood as bounded by some sort of formal proceedings) to the dispute generates new questions:

Especially relevant are the descriptions of trouble cases before they are found in a recognized court or tribunal. Such descriptions are important if we are to enhance our understanding of the origin of breaches of norms and the reaction of society to breaches of its rules; such "social dramas" are important as well for an understanding of the function of conflict as a product of culture change, a source of culture change, or as an aspect of a stable social system. (p. 16)

Ethnographic focus within a processualist orientation would turn not toward the official decision-maker, but onto the actor who initiates and pursues the complaint. Following that course of events introduced an anti-functionalist temporal dimension that had been missing from the

classic trouble case studies. The judicial *case* came to be viewed as one potential (but not necessary) phase of a longer *dispute*. The interesting questions became not the means by which official judges approached their tasks, but how the plaintiff chose from among the culturally available alternatives to resolve the conflict. Although processualists would remain interested in the case when it arose, they were equally interested in the history of the complaint before it entered the judicial system (or its local analogue) and the sequel of the argument after the formal proceedings were concluded. Nader summarized her ethnographic ideal as characterized by:

- (1) a stress on law as a process rather than a framework—on the settlement of a conflict and the mechanisms through which this is achieved, rather than on the definition of legal rules and the identification of particular agencies or parties formally backed by force and endowed with authority;
- (2) an interest in the social context of dispute resolution and in the influence of this context on the process;
- (3) (as implied in part by 2) an interest in the litigants and in their relationships to each other as well as to all other persons involved in settlement procedures;
- (4) an interest in multiple systems within one society and in the bases for and strategies involved in choosing one resolution mode over another;
- (5) the use of an extended case, or a sequence of related cases, to illustrate in detail the processes and strategies involved. (Nader & Yngvesson 1974, p. 889)

In place of the formal, institutionalized “case,” Nader employed the *extended case*. As Max Gluckman (1973) explains, the extended-case method examined not only the case itself, but also how the case found its way into the court, mapping out the experiences of the parties both before and after the court decision. The extended-case method aspired toward “a synchronic analysis of general structural principles that is closely interwoven with a diachronic analysis of the operation

of these principles by specific actors in specified situations” (van Velsen 1967).

Transition to Nader’s processualism was not without consequences. While offering a superior solution to the problem of the cross-culturally valid unit of analysis—disputes between parties is a cultural universal in a way that the case is not—it limited legal anthropology’s theoretical options in other ways. The part had become the whole of law, with little or no elaboration of what that meant for a self-avowed anthropology of “law.”

The combination of influences of the philosophy of legal realism and the methodology of the casebook demanded a practical dependence upon case decisions that would lead scholars to conclude that law is *only* about dispute resolutions—recall Nader’s first point above, that ethnography should focus on “the settlement of conflict and the mechanisms through which this is achieved.” Processualism differed from its predecessors only by making an explicit virtue out of accidental necessity when it redefined the disputing data already being collected by legal ethnographers as the whole of the universe of theoretical interest. The constriction of the anthropology of law into an anthropology of disputing was now complete. The unexamined assumption remained—one challenged here—that this was merely a change in degree of emphasis, and not of kind.

While many have noted and commented upon the (over)emphasis of American legal anthropology upon dispute resolution (*see* Snyder 1993), it should be noted that this outcome was not unambiguously required by the terms in which Nader had originally conceived the new paradigm. Like Malinowski, she recognized both the positive and negative functions of law:

[It] is not always clear whether the social control functions of law are to “clean up social messes” [as argued by Llewellyn and Hoebel], or to maintain order [which was Malinowski’s position], although how the law handles the breach is

usually clearer than how in fact it serves to maintain order. (p. 18; *see also* Nader & Todd 1978, p. 1)

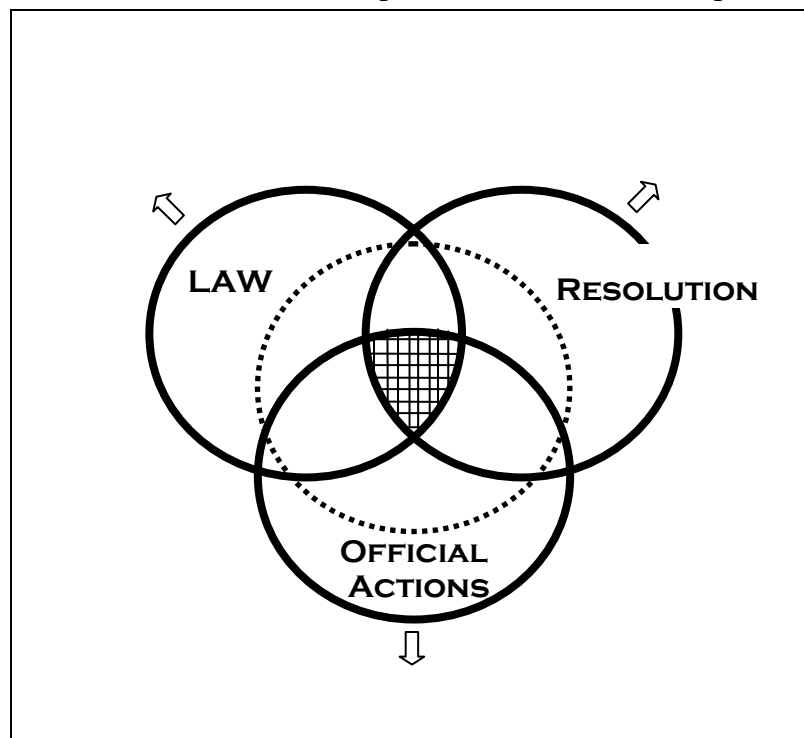
If it is indeed true that legal anthropology has acquired a singular mania for dispute settlement at the expense of understanding other aspects of the law, this is the outcome of contingent historical factors and not of a reasoned theory of law. Nader allows that law includes more than the dispute resolution studied by processualism, however much her own method leaves no room for these alternative functions.

A major consequence of the new processual research was that it did not support realism's equation between official acts, disputing, and law. Whereas originally these had been defined as coterminous concepts, processual theory supported an expectation that these variables interacted but remained severable in the analysis, not least because disputing encompassed the choices among alternatives by individual plaintiffs and was therefore not reducible to official actions. Dispute resolution can be achieved through law, but it can also be the result of nonlegal practices such as mediation and arbitration (both formal and informal). Likewise, while on the surface a good bit of law could appear to be concerned with the resolution of disputes, its field of operation is, as Nader recognized, much wider.

Figure 3 summarizes the points of contention. The three variables that were equated in legal realism (*see* Figure 2) have diverged after the improved cross-cultural observation under the influence of legal processualism. The field's explicit methodology, however, limits its attention to the increasingly diminishing area where the three continue to be equivalent (i.e., the hatched area). Expansion of the discussion beyond this small area depends upon rhetorical strategies—such as uncritical changes from one term to another—to expand conclusions about this core to the outer boundaries of the categories. For legal realism such transitions were not a

problem, since it had defined the law, disputing, and official actions as equivalent; legal processualism had demonstrated the error of this view, without taking the additional step of explaining how one moved from one field of action to the other.

Figure 3: Processualist Relationships between Officials, Disputes, and Law



Indicative of processualism's slippage between theory and method is that the casebook organization of disputing cases (extended and otherwise) remained the distinctive approach of legal anthropology even as it was receiving heavy criticism in its original context of legal education (see, e.g., Watson 2004; Kissam 2003). What is not self-evident, however, is that an analytical technique created to foster legal formalism, and adapted to advance the thesis of legal realism, serves well when applied to analysis of anti-realist processual theses. That which should have been argued, was instead only presumed.

In short, legal processualism both exacerbated some strands of legal realism, such as the emphasis on the negative, disputing aspect of legal processes, while contradicting others, like the

equivalency between law and official acts. Deviation from the inherited tradition, however, did not noticeably influence either the analytical or discursive method of the discipline.

Such broad generalizations should be supported at least by a specific example of the complications. HARMONY IDEOLOGY (1990) analyzes the data Nader gathered from two villages in Oaxaca, Mexico, from 1957 to 1968. As she explains,

When I began my studies among the Talean Zapotec of Mexico, my attention was claimed by the role of courts in systems of cultural and social control, a problem until then unstudied by anthropologists. To explain what I was observing and its uniqueness, I turned to comparison with other communities and posed the question “Why do the Talean Zapotec litigate so frequently in comparison with other American Indian groups....” (p. 1)

Her decades-long fieldwork led her to propose the key concept of *harmony ideology*:

[The] basic components of harmony ideology are the same everywhere: an emphasis on conciliation, recognition that resolution of conflict is inherently good and that its reverse—continued conflict or controversy—is bad or dysfunctional, a view of harmonious behavior as more civilized than disputing behavior, the belief that consensus is of greater survival value than controversy. (p. 2)

Although originally imposed upon the indigenous peoples by the Christian Spanish conquerors so as to discourage dissent and render the peoples more governable, the Taleans, Nader argues, turned the process on its head. Taleans litigate in order to resolve problems and disputes at the local level, which in turn prevents exacerbation followed by intervention from the state government. “The illusion of peace is crucial to the maintenance of autonomy, or the ability to decide one’s own destiny” (p. 6). Although this intriguing thesis has been criticized (see e.g.,

Just 1992), our interest lies more with her methodology than with any particular conclusions.

As Nader frames it, the problem concerns issues of dispute resolution: how the local courts are constructed to settle arguments, who resorts to these mechanisms, the processes by which complaints are heard, and the benefits that accrue from these mechanisms. The primary data for Nader's analysis are cases heard in the local court system, including at least 108 stories that she recounts, to a larger number used to generate descriptive statistics.

Nader explains that while she "make[s] central use of the *dispute case*," she uses these data "to reveal how social organization in general and how the social organization of *law* in particular relate to control, to relative power, and to autonomy over an extended period of colonization" (pp. xvi-xvii, emphases added). The transition from data about disputing to conclusions about law is undiscussed, implying that the relationship between the two is unproblematic. Nothing in the text dispels that impression. Yet even if dispute resolution were always and necessarily a legal topic (and her own data disprove that simple equation), that reality would not eliminate the possibility of meaningful remainders, i.e., the positive, non-dispute resolution dimensions of law that she herself recognizes. If law possesses such reminders, the transition she employs is a point to be argued, and not assumed. Law, Rouland (1994, p. 41) concludes, "cannot be reduced to disputes." Similar (if not greater) difficulties appear when attempting to move in the opposite direction, from disputes to law.

Nader's theory, then, appears to be out of step with her methodology. Her technique of gathering data does not allow for the non-dispute resolution functions of law. This is not a momentary 'setting to one side' the non-conflict resolution aspect of law. Processualism as Nader has defined it lacks both methodological and analytical tools to speak on that point. Intended as a reaction against the limitations of legal realism, Nader's processualism bares the

indelible marks of that jurisprudential legacy.

The two ends of her intellectual exercise do not, in the end, align. The dissonance between rhetoric, theory, and method requires us to scrutinize more closely the limitations of disputing as the preferred analytical concept in legal anthropology.

B. Theoretical Consequences of Disputes as the Organizing Concept in Legal Anthropology

Table 1 parses the trends within legal anthropology reviewed in the previous section. While all phases employ an inductive technique, each uses a distinctive combination of preferred data and research goal that changes only one element from its immediate predecessor. Functionalists employed field observations to reach conclusions about the institution of law; realists studied “trouble-cases” or disputes still with an eye toward understanding law in its broad sense; while processualists collected data on those same disputes in order to elucidate only one part of recognized functions of law, dispute resolution. The primary point is that by the end of this history the interests and techniques have nothing in common with the original basis on which the field was founded.

Table 1: Features of the Three Phases of Development

	Method	Problem
Functionalists	Field observations	Law
Realists	Dispute Cases	Law
Processualists	Dispute Cases (extended)	Disputing Processes

To the extent that academic specialties are uniquely defined by the conjunction of “intellectually broad questions or problems and the methodologies deemed appropriate to explore them” (Donovan 1991, p. 30), while each stage in the history of legal anthropology bears

a family resemblance with its contiguous neighbor, the extreme ends of the progression, sharing neither problem nor method, cannot be said to be part of the same intellectual project—to be “about” the same thing.

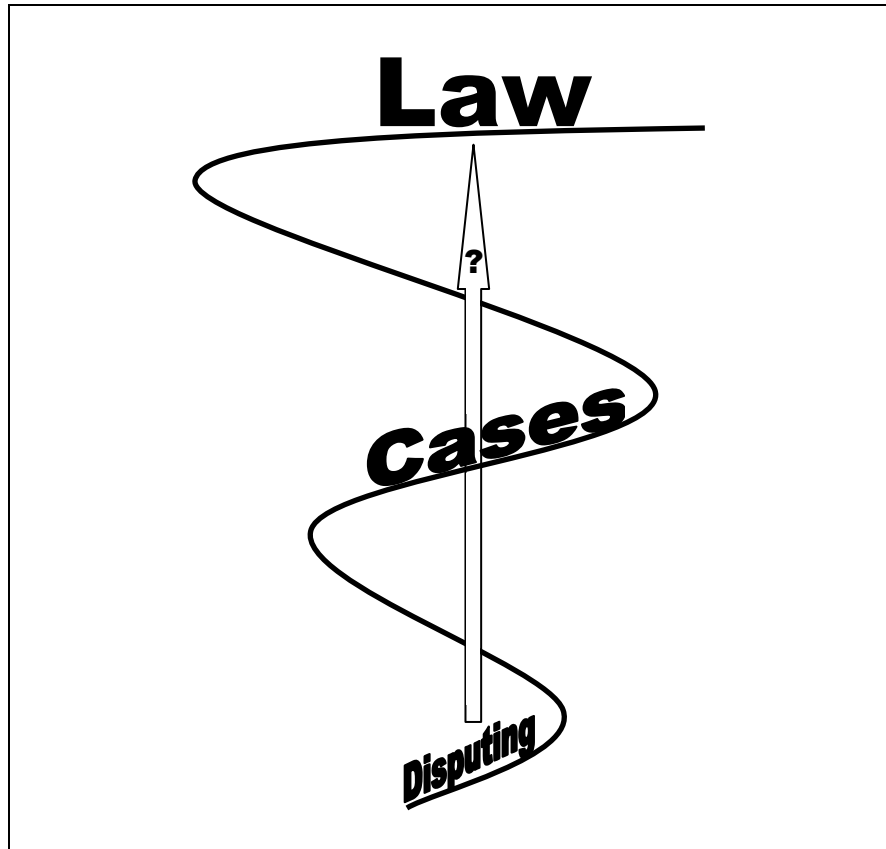
Each step of the historical progression from an original study of law to a concentration on disputing processes was reasonable. When the theoretical implications of the changes were considered, they were most often judged a refinement of the existing method rather than a radical departure from the early roots.

However, as the historical review has demonstrated, the methodological shift from general field studies to cases to disputes did not result in the refinement of theoretical equivalents but rather in a gradual narrowing of the field of inquiry—from law to dispute resolution—an evolution that put more and more conceptual distance between the first link in the chain and the last, diminishing the ability to immediately relate the two ends. Figure 4 rotates the relationship first depicted in Figure 1, making visible what was heretofore hidden, namely the increased conceptual distance with every methodological reformulation from the original object of “law.” Each refinement described an ever smaller slice of the original phenomena, with the result that dispute processes represent only a fraction of the original. To immediately relate the two, as Nader attempts to do, would require a sophisticated theory (assuming it can be done at all). A major theoretical lacuna within legal anthropology is the absence of such philosophical justification, which should confound attempts to reconstitute arguments about disputing into conclusions about law.

To be clear, the error has not been that legal anthropology has chosen to concentrate its efforts on questions of the disputing process. It lies rather in the attempt to build this enterprise upon philosophical apparatus that carve out this topic as impliedly the only legitimate, or at least

worthwhile project for the discipline, leaving unexplored a vast intellectual terrain that ordinarily also falls within the boundaries of the study of “law.” In a field awash with the study of conflict, O’Barr and Conley (1990, p. 167) are right to ask whether there is room for an anthropology of peace and accord, a question that Malinowski would have thought needed no asking.

Figure 4: Conceptual Distancing of Disputing from Law



Even the questions asked about dispute resolution would benefit from a fundamental rethinking. Why, for instance, has the American legal system been notoriously ineffective when dealing with questions about life, such as abortion, death penalty, euthanasia, or stem cell research? What should be the metric by which failure of law to resolve a dilemma should be counted as a failure of law to do the work expected of legal institutions, or of the actor who has attempted to enlist legal force to resolve problems for which it is an inappropriate choice? For

example: Does law create rights, or only recognize rights already popularly observed? Do citizens expect law to be conservative in its view of social norms, or progressive? What are the proper bounds of substantive legal subject matter, a worry that prompted Pound to write that “when men demand much of law, when they seek to devolve upon it the whole burden of social control, when they seek to make it do the work of the home and of the church, enforcement of law comes to involve many difficulties” (Pound 1917, p. 56). If law is not the whole of social control, how then does law interact with other institutions of social regulation such as religion and custom? None of these are necessarily questions involving disputes, yet all touch intimately on the domain of law and its functioning within society, and form the cultural background against which disputing occurs. While many writers expound on these matters, the point here is that such exegeses are appended to the dispute orientation of legal anthropology, rather than flowing naturally from it.

C. Irreducibility of Contemporary Problems to Disputing

The previous section argued that when legal anthropology turned its attention away from law and toward disputing, it lost the rationale upon which to draw conclusions about its self-denominated focal phenomenon, law. Problems with the field’s dependence upon dispute studies are not limited, however, to what are perhaps esoteric conclusions about its philosophy of method. A more practical difficulty is that many of the pressing issues of the day, in which legal anthropologists should be expected to assume a commanding role, are no longer reducible to the disputing model.

Since the 1960s, when Nader first gave voice to the interests of legal processualism, the significant problems toward which legal anthropology might be expected to make a useful contribution have changed. Of particular importance among the emerging challenges are the

issues of human rights—to which anthropologists did not begin making significant contributions until the 1980s (Goodale 2006, p. 2)—and intellectual property, which Stephenson (1994, p. 181) suggests did not rise to the fore in the anthropological consciousness until the early 1990s.

Without doubt much of what goes on within intellectual property rights [IPR] conforms to the model of disputing. But the majority (like violations of human rights) does not always fit that model because there is no “resolution” possible. Victimized groups cannot be compensated for genocide; likewise, indigenous peoples from whom valuable resources have been taken out of their control have been denied their right to self-determination as defined in Article 1(2) of both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. Losses incurred through such “commercial exploitation of cultural property can become irreversible and can contribute to the loss of people’s autonomy” (Posey & Dutfield 1996, p. 7), while Brown (2003, p. xi) calls attention to “the difficulty—the near-impossibility, in some cases—of recapturing information that has entered the public domain and determining its proper owner.” The lesson appears to be that if the situation has devolved to the point of a “dispute,” not only are the indigenous peoples likely to lose because the IPR system is by design tilted against them, but whatever the outcome they have already suffered an irremediable harm.

In practical terms the questions involve the protection of cultural products from misappropriation and exploitation by outsiders. This difficulty can involve materials as disparate as plant varieties that have been selected over generations by the local population, to their religious iconography and folklore. For a variety of reasons IPR law “of the capitalist West presents a hostile setting for indigenous intellectual property rights” (Greaves 1994, p. 179). According to one statement by indigenous groups,

Prevailing intellectual property systems reflect a conception and practice that is:

- Colonialist, in that the instruments of the developed countries are imposed in order to appropriate the resources of indigenous peoples;
- Racist, in that it belittles and minimizes the value of our knowledge systems;
- and
- Usurpatory, in that it is essentially a practice of theft.

(COICA/UNDP Regional Meeting on Intellectual Property Rights and Biodiversity, 1994)

Attempting to participate in that system can not only fail to meet the needs of the indigenous groups—copyright and patent protections, for example, even when they can be obtained are for limited periods only, and thus do not achieve the local desire to retain perpetual control over cultural resources—but even the attempt can be counterproductive. The processes by which state level protections can be obtained often require divulging the very secrets the groups wish to keep hidden in a belief that this knowledge in the hands of outsiders can drain it of sacredness. In the view expressed in the Indigenous People’s Earth Charter (1992, §77), “The Eurocentric notion of ownership is destroying our peoples.”

An immediate challenge for legal anthropologists is to generate the kinds of ethnographic knowledge that would help to restructure these intergroup relationships. For instance, surprisingly little has been done in the way of a comparative outline of the concept of “property.” While we easily find generalized summary statements—e.g., “most indigenous peoples do not regard their heritage in terms of property but rather in terms of individual and community responsibility, and that heritage is more appropriately seen as a bundle of relationships than a bundle of economic rights” (Suagee 1994, p. 203)—we do not often find nuanced ethnographic comparisons that would support a principled counterproposal to satisfy the interests on all sides

(for one model of how local precursors of legal universals can be identified, see Renteln 1990). Such studies would provide a useful foundation upon which to construct an alternative to Western-based intellectual property rights that could nonetheless serve the interests of all parties. For some workers, the solution lies in the articulation of alternative legal mechanisms, such as “traditional resource rights,” which recognize a more expansive category needing protection than the purely economic rights associated with Western IPR regimes (Posey & Dutfield 1996); for others, such as Michael Brown (2003, p. 222), “cordoning off heritage as a discrete domain that can be defined and defended by law” is “folly.”

If one goal of dispute resolution is to restore the status quo (by either compensating the victim for damages or returning the victim to her previous condition), the dispute paradigm cannot serve where the status quo cannot be restored. The peoples have been exterminated, or the knowledge given forever to the public domain. Monetary remuneration for such misappropriation does nothing to address the resulting loss of autonomy or cultural disintegration. For these kinds of problems the only worthwhile goal is to prevent the violation, rather than to rely upon post facto responses to them. This need compels the reconsideration of the positive functions of law identified by Malinowski that that lie beyond the conceptual techniques of a dispute-centered legal anthropology.

That these issues are not reducible to the dispute model has not hindered legal anthropologists from writing on them, but those writings are not linked to the core metaphor of the field, the dispute, and thus form a body of “orphan” works. Symptomatic is that writings on these new topics tend rarely to cite to or incorporate primary literature or viewpoints of legal anthropology, more often relying predominantly on scholarship in law, jurisprudence, and political science. The danger is that legal anthropology will become marginalized in the very

debates to which it should be most deeply involved.

If the rising controversies over intellectual property and human rights are to be the challenges for which legal anthropology should be exceptionally well placed to make a contribution, its disputing paradigm may frustrate that expectation. In order to meet such challenges, we first require an appropriate method that will provide a firmer foundation for legal anthropologists to build upon. That, in turn, requires a theory of law adequate to the needs of anthropology. That search may begin as did Laura Nader's, with the identification of a cross-culturally meaningful concept around which to organize our thinking. Any such attempt will necessarily be incomplete, but it should reliably identify the focal phenomena for study, allow for the mapping of its relationships with related but nonequivalent social phenomena, and exclude no relevant part of the social category of law.

II. A Fairness Alternative

Part I reviewed the historical contingencies that have resulted in legal anthropology's current emphasis upon the dispute as the organizing concept, with a shift in the problem from that of law to the elucidation of dispute-resolution processes. This development was reasonable, even needful when viewed in the context in which it unfolded. Still, this outcome has not been without costs. Principle among those identified are an overemphasis upon the negative functions of law, an undefended assumption that disputing data unproblematically informs on questions about legal norms and institutions, and an inability to reflect deeply upon those of today's problems that cannot be productively reduced to models of disputing.

These limitations flow intrinsically from the concept of the dispute, and thus are likely to endure so long as the specialty favors that focus. The present section outlines an alternative method, one that avoids these shortcomings while orienting legal anthropology again toward law.

The first point argues that law should be viewed not in isolation, but rather as one of a number of norms of social regulation. The challenge will be to identify those other forms, and to isolate the unique contribution of law when situated within this global suite of normative systems. The assumption here is that any unique quality identified for law should serve as the foundation for an anthropology of law. Discussion concludes with the proposition that the unique work of law is to foster perceptions of fairness, especially about structural social inequalities and the unfavorable outcomes of disputes. Reorienting the anthropological study of law away from disputing and onto fairness issues would not eliminate interest in disputes, but only make dispute analysis the means to a law-centered end rather than an end in itself.

A. *Law a Norm of Social Regulation*

1. Norms of Social Regulation Generally

The sense of inevitability of the reduction of legal anthropology to dispute analysis arises because each step in the progression followed naturally from the phase that immediately preceded it. If the goal is to find an alternative that avoids that outcome, it seems advisable to begin anew. What is this thing called “law” that attracts the attention of social scientists, including legal anthropologists? The generic outline of law offered in the introduction can now be expanded:

- ◆ Although the details vary between societies, law as it interests social scientists is closely associated with the *ongoing social* life of a community.
- ◆ Social facts identifiable as “law”, whatever the form in its local environment, are presumed to be a binding obligation upon the society’s members rather than an optional standard or a discretionary preference. Law sets standards everyone is expected to comply with, or at least not deliberately and openly

flaunt.

- ◆ Law regulates the interactions between members of the group through both negative and positive influences. Law variously teaches the proper mode of behavior—its *aspirational* dimension, directing how one ought to behave, and its *prescriptive* aspect, declaring how one must behave by punishing those who veer too far outside the established standards of acceptability. Sanctions to achieve this goal can also be either positive or negative, and are applied both to omission of required acts and to commission of prohibited ones.
- ◆ Finally, laws are ordinarily expected to be enforced by some external authority rather than be an exercise solely of personal discipline.

This generic summary begins with the recognition of law as a feature of social, and not personal life. As such a general intent of law is to canalize behaviors in preferred directions, those that advance the goal of group stability over time. By whatever means, for whatever ends, the *sine qua non* of law is to generate behavioral regularities in social actions.

This property—to generate a predetermined field of behavioral expectancies—places law within the category of *social norms*. “Norm” is another contested term, but for present purposes we may accept the following definition offered by Jack Gibbs (1965):

A norm in the generic sense (i.e., encompassing all the various types of norms) involves: (1) a collective evaluation of behavior in terms of what it *ought* to be; (2) a collective expectation as to what behavior *will be*; and/or (3) particular *reactions* to behavior, including attempts to apply sanctions or otherwise induce a particular kind of conduct.

The need for norms that limit the range of possible actions by group members should be

apparent. Despite that fact that group life satisfies requirements that could not otherwise be met, each individual continues to have his or her own objectives, desires, aspirations, and other personal motivations. The central tendency of those private goals is to drive the group—be it the family, tribe, or even city or state—apart. These can be termed the *centrifugal social forces*.

In order to overcome forces that would disperse the group, there must be countervailing forces to hold it together. These are the *centripetal forces of social regulation*. Social regulation involves inculcating within group members the norms of acceptable behavior, goals, aspirations, and even emotions, while allowing venting of inevitable frustrations, angers and conflicts in ways that do not threaten the long-term stability of the group. In Gibb's terms, norms guide the behaviors of the member, shape the expectations of the co-members, and motivate actions and reactions to minimize the impact of significant deviation from expectations through the use of coercive sanctions. Successful regulation requires the balancing of the needs of the group against those of its individual members. The balance to be found is for enough of the needs of the members to be satisfied while still allowing for a stable corporate organization so that those needs, too, can be fulfilled.

This general description recapitulates points long recognized in anthropology. As Malinowski (1939, p. 949) observed:

Every cultural activity again is carried out through co-operation. This means that man has to obey rules of conduct: life in common, which is essential to co-operation, means sacrifices and joint effort, the harnessing of individual contributions and work to a common end, and the distribution of the results according to traditional claims. Life in close co-operation—that is, propinquity—offers temptations as regards sex and property. Co-operation implies leadership,

authority, and hierarchy, and these, primitive or civilized, introduce the strain of competitive vanity and rivalries in ambition.

Stated in these broad terms, we expect that society will contain several types of norms that collectively serve to generate social stability. Some of these, as Paul Bohannan (1965) argued, have been elaborated and elevated to the status of institutions. Legal anthropology specializes in only one, law, but it should remain an open question to what extent it can understand that one in isolation from the others. The immediate need, therefore, is for a typology of the norms of social regulation.

2. Typology of Norms of Social Regulation

Workers have previously attempted to itemize the norms of social regulation. William Sumner (1906) identified two, “folkways” and “mores,” while Pitirim Sorokin (1947) counted four: law-norms, technical norms, norms of etiquette and fashion, and a residual category containing everything else. Sir Paul Vinogradoff (1914, pp. 19-21) noted that, in addition to laws, “People conform also to fashions, to manners and customs, to conventional standards, to precepts of morality,” all of which are obligatory, but laws being even “more obligatory” than moral duties. Richard Morris (1956) critiqued such earlier efforts and identified seventeen criteria to categorize norms, while Jack Gibbs (1965) used his three definitional attributes given above to generate a grid containing twenty types of norms. Few of these attempts are today more than intellectual curiosities, not least because they did not translate well into the recognized institutions of social norms encountered by anthropologists in the field.

While no accepted, principled typology of social norms is currently available, we do have notions what some of those norms will need to be if they are to accomplish the task of effective social regulation. Rules will be required to govern both *intragroup* and *intergroup* behaviors.

Included will be rules about rules (metarules) to determine, for example, when a situation should be treated as within or between groups, an assessment that cannot always be determined by the identities of the actors. As often as not, it is the role or status a person inhabits for purposes of that interaction, and how these compare with the opponent, that will determine which norms predominate.

The intra/intergroup sets will not be mirror-imaged. Intragroup norms will be numerous and detailed, as compared to intergroup norms which will be smaller in absolute number, apply to fewer situations but more apt to be strictly and literally enforced against outsiders. Further, among insiders the rules foster peace; with outsiders, justice. While peace may be the greater imperative within the group due to a need to preserve ongoing reciprocal relationships (Crocker & Crocker 2004), justice (including revenge) often becomes the goal in conflicts with outsiders who lack a recognized, ongoing role in the social structure (*see also* Gluckman 1967, Nader & Todd 1978, p. 13).

Allowing that greater social importance is assigned to the maintenance of intra- than of intergroup bonds, and that intragroup relations will present a wider variety of problems requiring a diverse array of solutions, we expect more normative types to operate in this context. Assessments of intragroup behaviors can perhaps be aligned according to a simple trichotomy of whether they are ideal, typical or average, or minimal. These normative standards in turn map onto institutions roughly as morals and religion, custom, and law.

As a category, norms of morality foster standards of *ideal* social behavior, what people *ought* to do. Custom, as that term is usually understood, distils the summed observations of cumulative group experience, indicating what people are expected *typically* to do. *Minimal* norms are those behaviors members must observe if the group is to endure with a baseline level

of functionality as a distinct and stable collectivity. Given the corporate costs of noncompliance, these are the rules that society is prepared to enforce with physical sanction if necessary, leading many social scientists to identify this category as “law.” The members of this typology obviously overlap in practice. They are offered as Weberian ideal types, not as descriptions of social realities.

In contrast to the three types of norms of intragroup social regulation, the model anticipates only one that specifically targets intergroup behaviors. Yet another debt this discussion owes to Malinowski is his concept of *phatic communication*, defined as “a type of speech in which ties of union are created by a mere exchange of words.” This linguistic category is a species of “phatic communion,” which “serves to establish bonds of personal union between people brought together by mere need of companionship and does not serve any purpose of communicating ideas” (Malinowski 1923[1949], pp. 315-316).

Behavioral acts other than the linguistic can serve equally well to establish phatic communion. Phatic norms are behaviors that seek to establish that both parties inhabit the same social reality for purposes of the immediate interaction. The norms embodied in these acts are primarily display rules used to show that one party—usually the subordinate member of the dyad—can interact meaningfully with the local community, the upper class, or whatever in-group the outsider desires to approach, with the goal, in Malinowski’s words, to bring the parties “into the pleasant atmosphere of polite, social intercourse,” within which more substantive exchanges can then occur. Such norms comprise the bulk of the rules of etiquette and politeness, as suggested in this formal characterization by Brown and Levinson (1987, p. 103):

The strategies of positive politeness involve three broad mechanisms.... Those of the first type involve S[peaker] claiming ‘common ground’ with H[earer], by

indicating that S and H both belong to some set of persons who share specific wants, including goals and values. Three ways of making this claim are these: S may convey that some want (goal, or desired object) of H's is admirable or interesting to S too; or he may stress common membership in a group or category, thus emphasizing that both S and H belong to some set of persons who share some wants; finally, S can claim common perspective with H without necessarily referring to in-group membership.

These four types of norms—ideal, typical, minimal, and phatic—guide behaviors by different mechanisms toward the same end of regularizing interactions so as to foster group stability and efficiency. While no claim can be made that they exhaust the varieties of social norms, we shall take it as given that any final set shall include at least these.

3. Coordinating the Types of Norms

The previous section identified four types of norms of social regulation: three intragroup norms (ideal, typical, and minimal) and the intergroup phatic norm. Each type of norm was loosely identified with social institutions assigned special (but not necessarily exclusive) responsibility for managing the norm types: religion, custom, law, and etiquette respectively. Were we to leave discussion here, a social group would have an assortment of unrelated strategies from which to choose to achieve the primary objective of generating sufficiently enduring bonds to assure the temporal continuity of the group.

Scholars have long anticipated, however, not only that society is regulated by a variety of norms, but also that these norms coexist in mutually reinforcing relationships. Montesquieu (*Pensée* 645 (542. I, f.432v.): 1730-31), for example, proposed that “States are governed by five

different things. By religion, by general maxims of government, by specialized laws, by customs, and by manners. These things all have a mutual relation one to another.” More contemporary opinion is heard from Max Gluckman. He believed that “‘Law’ is to be grasped not by a single definition, but by being placed in relation to other forms of control by contrast, by refinement of vocabulary...and by examining its actual role at the head of a hierarchy of constituent concepts” (Gluckman 1967, p. 346). In other words, to be useful to the social scientist, “law” does not require a definition of essential properties so much as an identified structural relationship to related concepts. This section attempts to meet Gluckman’s challenge.

To investigate whether the identified types hide a deeper relationship we must further parse the idea of social regulation. If we can identify the organizing dimensions of the category, we might be able to use these axes to arrange the four named species of norms into a meaningful associational network.

Recall that, from the generic summary of law, the ordinary extension of the category includes both rules that model and inculcate aspirational ideals, and those that sanction behavioral infractions (i.e., Malinowski’s positive and negative legal functions). Ideals are internalized, while behaviors are acts that may or may not reflect a concordant inner state. People often participate in communal religious rituals, for example, without really “believing.”

This distinction can be rephrased as a contrast between *social cohesion*, which achieves social regulation based upon internalized values, and *social control*, which achieves social regulation through external enforcement.

The major contrast is that of control in the sense of containing people against their will, or at least against the personal desires of the individual, frequently by means of exercise of political powers, with cohesion, the binding of people into a collectivity through their own

desires and actions. “‘Cohesiveness’ is the descriptive and technical term used by social psychologists to refer to the essential property of social groups that is captured in common parlance by a wide range of other expressions, such as solidarity, cohesion, comradeship, team spirit, group atmosphere, unity, ‘oneness’, ‘we-ness’, ‘groupness’, and belongingness” (Hogg 1992, p. 1). Unlike control, cohesion emphasizes “the attractiveness of the group—the extent to which the group is a goal in and of itself and has valence” (Id., p. 21). Again, the distinction is ideal, and not descriptive. One person may experience the norm against murder as a form of social control—but for her fear of punishment, she would commit the act—while her neighbor finds the rule expressive of her own inclination against killing and characteristic of the group’s attitude about the value of life. But it seems possible to speak about systems of regulation that are experienced predominantly in one way rather than another.

A second dimension of social norms considers their content. Some norms describe *how* things are to be done; others mandate *what* is to be done. This contrast—suggested in the generic summary by the contrast between rules and metarules—can be described several different ways: process versus outcome, means versus ends, but that applied here shall be *procedure versus substance*. Procedural norms (the “how”) determines matters such as who has authority to make rules and settle a conflict, and the manner by which these responsibilities are assigned and penalties assessed. The primary purpose of substantive norms is to define which actions are transgressive within the group, either by their commission or their omission.

In terms of these dimensions, law can be operationalized as a cohesive-procedural, minimal norm of social regulation. This is not a description of law’s essential attributes, but situates law within the context of its sister categories. Law as a distinctive normative category is concerned more with the “how” of social intercourse than with the “what.” Moreover, it is

distinguished primarily by its reliance on internalized acceptance of norms than by power-based control from external authorities.

This characterization of law in some ways contradicts those, such as Hoebel (1967, p. 28), for whom control and sanction are the hallmarks of law, although we needn't go so far as Rouland (1994, p. 119) in saying that "To attempt to define law through the use of sanctions is ... an abuse of language." Once one has surrendered Hoebel's (1967, p. 28) insistence that sanction be physical, and accepted Pospisil's (1971, pp. 87-95) conclusion that even social and psychological sanctions qualify, sanctioning becomes a property of every normative system, and not of legal norms alone. Nor does sanctioning by "a staff of people holding themselves specially ready for that purpose" (Weber 1954, p. 5) resolve the difficulty, given, as one example, that religious sanctions are also doled out by persons acknowledged to possess the requisite formal authority be they priests or gods. To require a distinct policing agency goes too far; by that standard, England had no law until its first police force was organized in the 1830s (Friedman 2000, p. 267)!

Any interpretive scheme that produces such counterintuitive results should not be adopted. One advantage of the present exercise in structural coordination is that it suggests an alternative that can perform the theoretical work sanctioning was expected to accomplish, namely the identification of an attribute unique to law. The traditional emphasis on sanctioning may have been a consequence of analyzing law apart from other norms. That which appears unique or of special value when contemplated in isolation fades in significance when considered comparatively, not only across cultures but also between institutions within the same society.

The weakness of sanction as an essential element of law ultimately lies in its failure to offer a valid image of the ordinary relationships between law and the individual. An initial

premise of the concept of “law” was that it fostered group living. From this follows the expectation that most people, most of the time, will comply with most laws without the intervention of external authorities, as a consequence of their identification as part of the group. Often observance of these norms helps to establish the boundaries of the group, and thus serves to reinforce identification with the group. Such compliance cannot then be reduced to a “fear” of possible punishment in the event of a breach. While that description may accurately apply to some specific instances, a technical analysis would parse the social condition as a political order cloaked in legal machinery, rather than as a legal institution per se because group solidarity is not the goal of the enforced normative order. The distinction between power and norms is the sine qua non of the line between politics and law.

Accordingly, contrary to the literature’s frequent control emphasis of law, cohesion appears to be most usual phenomenological relationship of people to their legal systems. Most people, if asked why they comply with laws, would simply say that it is the right thing to do. Specialized policing agents may exist to enforce the occasional breach, but no society can rely upon compliance with law only in the presence of such forces, at least over the long term. Tom Tyler (1990, p. 178) tested this hypothesis in the American culture, and found that

People obey the law because they believe that it is proper to do so, they react to their experiences by evaluating their justice or injustice, and in evaluating the justice of their experiences they consider factors unrelated to outcome, such as whether they have had a chance to state their case and have been treated with dignity and respect.... This image differs strikingly from that of the self-interest models which dominate current thinking in law, psychology, political science, sociology, and organizational theory, and which need to be expanded.

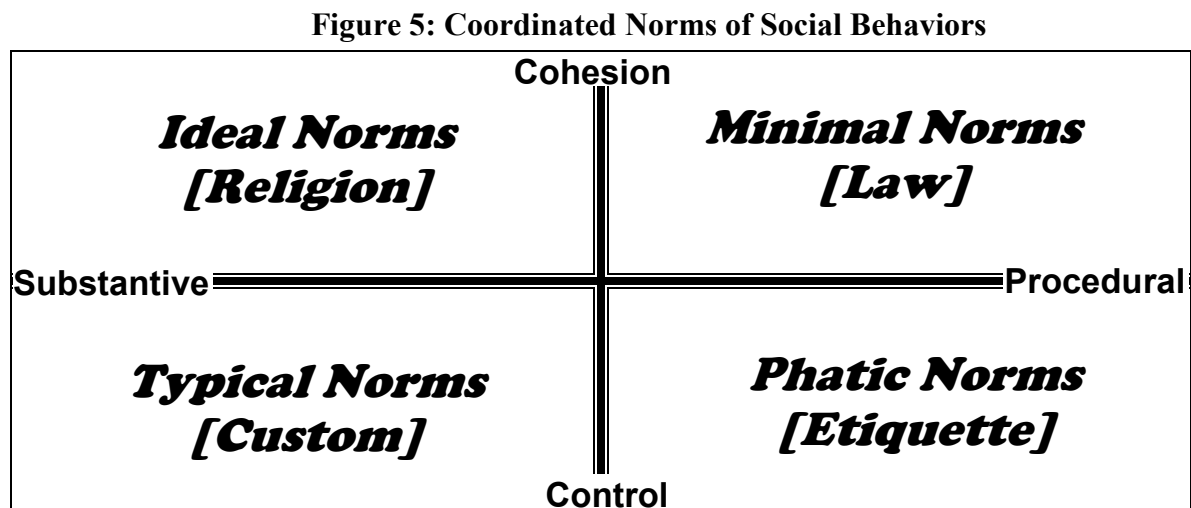
The position adopted here is that, instead of focusing on the unusual examples of law enforcement when sanction is required, as have some of the earlier theories in legal anthropology, the modal view of law emerges from the more ordinary examples of the role of law in daily life, wherein people want to abide by these norms. It is in this sense that law has here been characterized as a norm of social cohesion rather than of social control.

We have similar initial warrant to depict law as more involved with problems of procedure than of substance, again an apparently counterintuitive assertion. The model does not claim that the content of some laws is not concerned to prescribe the *what* of social action. But such substantive content cannot be what sets law apart from the other norms of social regulation. All of the norms contain at least some rules of similar substance. It is not always possible, upon learning the rule, to know what kind of norm is being presented. Rules against murder can be legal, customary, or religious, and perhaps even a matter of etiquette if, for example, a host-guest relationship is in force. In other words, substantive rules demanding refraining from homicides can be equally ideal, typical, minimal and polite.

For this reason substantive rules cannot comprise the distinctive element of law. Once that expectation has been challenged, we are freed to reconsider the problem *de novo*. A claim is made here that the special contribution of law to social regulation flows from its procedural, rather than its substantive dimension. This assertion is, at least, in line with modern philosophy of law. For example, Shirley Letwin, drawing upon the work of Michael Oakeshott, depicts legal rules as “adverbial”: “Instead of commanding the subject to perform anything, a rule designates the manner in which certain activities are to be carried out by those who wish to engage in them or a manner of punishing certain actions that are forbidden. A law against murder does not command anyone to refrain from killing, nor does it prohibit all killing. It

stipulates that whoever causes the death of another person in a certain manner under certain conditions will be guilty of the crime of murder. It prohibits causing death ‘murderously’” (Letwin 2005, pp. 334-335). For different reasons Randy Barnett also highlights the procedural nature of law when he argues that the binding quality of legitimate laws flows from “their procedural assurances that the rights of the nonconsenting persons on whom they are imposed have been protected” (Barnett 2004, p. 46). Without those procedures, the laws are not legitimate whatever their substantive content, and thus impose no duty to obey.

With law characterized as a cohesive-procedural, minimal norm of social regulation, the remaining norms of social regulation can be similarly distributed among the graphical quadrants depicted in Figure 5:



Taken as a whole, each of the types has its characteristic solutions to the problems to:

- 1) Inculcate behaviors that foster social bonds (i.e., “good” behavior);
- 2) Demarcate the boundaries of behaviors beyond which one becomes antisocial (i.e., not only fails to foster the good, but actively poisons the existing bonds); and
- 3) Sanction those who cross the boundary. Nothing, in other words, should lead the social scientist to an initial expectation that “sanction” is a unique property of law.

Each kind of norm further has its particular arena of social effectiveness, and generates its characteristic fruits of social organization. Which predominates in any given situation depends on several factors, including:

- 1) The psychology of the actors (what will they respond to?);
- 2) The nature of the disruption (is it due to ignorance, carelessness, or willful transgression?);
- 3) The power of the institutions relative to the needs of the problem (which has the ability to solve the transgression, to impose the required solution, in a timely and effective manner?); and
- 4) Whether the goal is to *prevent* or to *heal* a breach.

The graphical model eliminates the need to answer these questions in terms of autonomous categories. Rather than an either/or formulation, it intrinsically encourages a both/and response, and allows the mapping of individual cases into a defined normative. Further, it permits any specific social behavior to be diachronically represented as it moves between the different forms of social regulation based upon changes in its fundamental elements (thereby incorporating Pospisil's (1964) legal dynamics).

Because each of the norms preferentially governs a specific slice of social interaction, all are required for adequate functioning. Social centripetality is achieved, says Max Gluckman (1959, p. 2, 47-48), albeit using other terminology, by the crosscutting obligations incurred by the coordinated types. Each type of norm generates its own bonds of social relationships, and it is the latticed network of all of them that allows the group to cohere over time. Conflicts arising along one line are contained, or at least temporarily restrained, due to normative ties between the same parties incurred along another. The default expectation then becomes that no viable society

exists without some form of religion, custom, etiquette, and law. The principled structural relationships described by the model move analysis of these connecting lines and institutional dependencies out of the metaphysical and metaphorical and into real social space.

B. *Fairness as the Unique Task of Law*

Granting the characterization of law as a cohesive-procedural minimal norm of social regulation, we are now equipped to isolate the special contribution of law toward creation of a stable social structure. Recall that one goal of social regulation, broadly phrased, is to strike a balance between the individualized goals of the each member and the needs of group life. An inescapable tension arises both between the designs of the individual members of the group, and between each individual and the corporate entity that is the group. Law addresses this need through procedural rules that generate a socially-constructed phenomenological experience of *fairness* of the established social order.

Society imbues the individual with desires for valued attainments, both material and immaterial, but also frustrates many from realizing those ambitions—either at all or as often as he or she would like—by forbidding certain methods to attain them such as theft and murder, or by assigning those desirables to others. If any group is to endure over time, those privations must be experienced as acceptable (or at least tolerable) to its members. Otherwise, little would prevent the losers in these conflicts from leaving or revolting. Either outcome would be cumulatively devastating to the longevity of the group. This, according to Llewellyn and Hoebel (1941, p. 45), is the “major difficulty of all law—the problem of really getting a fresh start in relations between litigants after disposition of a trouble-case. This is the problem not only of keeping settled what has been legally settled, but of killing off the grievance tension.” Better still if expectations can be shaped ab initio to minimize later frustrations.

Aristotle, in Book V of *Politics*, identified as a cause of revolution not inequality per se, but inequality perceived as a wrong. Anthony Kronman (1983, p. 41-42) similarly says of Weber that “At the root...of all legitimating explanations is the demand, a demand felt by the fortunate and the unfortunate alike, that there be a *reason* for these inequalities.... [It] is not the fact of suffering, by itself, that human beings find intolerable.... Rather, it is the threatened meaninglessness of suffering and good fortune alike that is unacceptable.”

Persons have demonstrated a willingness to accept inequalities and unfavorable outcomes *when they view the process resulting in those ends as having been fair*. The claim made in this section is that it is the distinctive (not sole) function of law, as a norm of social regulation, to foster and inculcate perceptions of fairness, especially as regards the structural inequalities in the social system and the outcomes of disputes. Fairness does not guarantee a “win,” but only that the complaint was, in some way, at some level, heard, considered, and resolved according to known standards—i.e., the outcome is “just” as determined by the rules operable within that group. O’Barr and Conley (1990, pp. 127-131) have documented the power of this motivation when observing that formal winners still felt cheated if they have not been allowed an opportunity to adequately voice their felt injuries. It is easier, in other words, to accept losing if one is at least able to play the competitive game against one’s adversary for the desired resources, including recognition of personal dignity. Law is that game, and scholars such as H.L.A. Hart identify “the idea of fairness [as] essential to law” (Letwin 2005, p. 213).

Fairness has been frequently discussed as an important issue in group dynamics. Perhaps the preeminent of these discussions is that by the political philosopher, John Rawls. One of Rawls’s goals was to describe the conditions under which a society can be stable from one generation to the next. Such a “well-ordered society” is one that is “effectively regulated by

some public (political) conception of justice, whatever that conception may be” (Rawls 2001, p. 9). Basic to this stabilizing conception of justice, Rawls believes, is the idea that the organizing structure of society should be “fair.” A fair structure in his model does not guarantee all persons will be equally situated, but only that any inequalities that do exist in the system shall, among other criteria, operate for the benefit of those least advantaged. Rawls’s works articulate how such a system could be devised (in an “original position” behind a “veil of ignorance”) and what rules of social organization would necessarily follow from that approach.

The present thesis assumes, as does Rawls, that a fundamental problem of social living is ensuring the stability of the group over time, and that one key to that longevity lies in perceptions of inequalities as fair by those disadvantaged by the social structure. Social scientists, like Rawls, are not concerned with fairness in any moral or philosophically absolute sense (if any such could be established), but only in the *perceptions* of fairness held by members of a particular group. The elements of that evaluation in any specific setting are thus an ethnographic problem and not a philosophical puzzle in the abstract. It does not require that law treat all persons equally, but only that the inequalities should not be fundamentally unsupported by the basic propositions held by the group as a whole (and not only by certain classes). Legal anthropologists do *not* ask, Is this system fair? They ask, What are the criteria used by members to determine whether any given outcome is fair by the standards of the group, “whatever that conception may be.” Querying fairness differs from other questions that can be asked about views of the social structure, such as whether it is “right” or “good.”

By focusing on fairness we are able to identify a type of social regulation that is presumptively unique to the legal norm. Other modes of social regulation, while equally effective in contributing to that larger goal, do so through means other than the promotion of

perceived fairness. Religion regulates society, in this model, by force of norms emanating from an unimpeachable source, God (or some similar ultimate concept). Having a source superior to the normal human condition explains why religion is able to contain pronouncements about idealized human behavior. The point is that one should merely obey, as did Abraham when ordered to kill his only son. The apparent unfairness of a specific dictum, or set of circumstances, is not regarded as relevant. One negotiates with God at one's peril, even to the extent that demands for coherence or orderliness—or fairness—are unacceptable, as Job learned.

Custom regulates society through norms handed down from a similarly un rebuttable source, the time-immemorial wisdom of the forefathers. It is the presumed history of their actions that generates the concept of the typical behavior. The pressure here is that one should do what has always been done, if for no other reason than because it was done that way and the group survived. To be perceived as altering the sequence—however much it actually changes—might raise fears of frustrating that outcome, and severing the identity-forming line of ethnic continuity. As with religion, the rightness or fairness of custom is rarely the primary concern. Behavioral compliance is the goal, not psychological acceptance. For that reason both religion and custom fall on the substantive side of Figure 5's graphical model.

Finally, etiquette catalogs how one should behave in public situations, especially when dealing with outsiders (explaining its placement as a procedure-centered norm). While it is possible to set such rules aside among intimates, an outsider expects their observance because the rules provide the most efficient mode of communicating social mutual intelligibility. Like language, it rarely makes sense to ask if a rule of etiquette is good, right, or fair; its social value flows from its being a lingua franca between parties who typically do not directly interact.

All the norms of social regulation have their special provenance, and if, as Rawls and

others have strenuously argued, one such need is to generate perceptions of fairness, that task must fall to law. This is not all law does, but it is what is special about law. Perceived fairness, then, is the unique object of the law, and as such should serve as the disciplinary focus of legal anthropology: What are the boundaries of circumstances that individuals are willing to accept as fair? How are perceptions of fairness inculcated and fostered? What are appropriate responses to instances of unfairness? What is the relationship between fairness judgments and formal rules? And most broadly, how do legal institutions evolve to promote perceptions of fairness, so that parties in dispute or otherwise disadvantaged will accept the unfavorable outcome?

C. *Economics and Fairness*

Louis Kaplow and Steven Shavell (2000, p. 249) have framed fundamental questions concerning the role of fairness perceptions within the social order:

First, individuals may have tastes for notions of fairness, which is to say that their well-being may depend on whether what they view to be fair treatment is in fact provided.... Second, notions of fairness may serve as proxy principles that may be useful in identifying policies that advance welfare.... Third, notions of fairness can be important as rules of common morality, which are valuable to teach and reinforce because they lead individuals to be less opportunistic in their interactions in their everyday lives.

The suggestion that fairness should serve as the organizing concept of legal anthropology involves more than a reorientation of the field from one topic to another. Heretofore fairness issues have not been systematically examined in any capacity by the discipline. This gap is particularly surprising because fairness has become an important concept in at least one other specialty, economic anthropology.

1. Relating Legal to Economic Anthropology

That there should be ties between legal and economic anthropologies follows from the historical influence upon both by Malinowski. Malinowski's "account of the *kula* ring among the Trobriand Islanders of the western Pacific near New Guinea represented one of the first systematic attempts, and certainly the first searching attempt, to examine economic activity as a social phenomenon" (LeClair & Schneider 1968, p. 3). This interest becomes especially relevant when it is recalled that Malinowski construed law in fundamentally economic terms of exchange and reciprocity constituting a system in which accounts of receipts and debts must balance over the long term.

The organizing concept for such a balancing analysis of law is "fairness," at least in the sense that one is getting what is owed from one's exchange partner. The reciprocal exchange need not be mathematically equivalent to be deemed fair, as in an insistence that only 50-50 splits are fair. Rather, perceptions of fairness would be achieved when each party receives what he or she feels is owed, whatever that expectation may be. Even splits may be "fair," for example, only in a context of parity between the two parties. Where that posture does not pertain, a different split (e.g., 80-20) might be deemed fair, as between a king and a subject, or a parent and a child.

Because the factors influencing perceptions of fairness are culturally variable, so too must be the legal systems that give those perceptions institutional expression. From this view, therefore, no legal system can embody a per se abstract principle of balance (contrary to the expectation of the Universal Declaration of Human Rights's conviction that to flourish every society must adopt democratic political systems, regardless of a rooted cultural identity to the contrary). Each working legal system represents a dynamic but relatively stable interplay

between psychological expectations, individual experiences, and institutional performance. Legal systems, therefore, should display a certain intractability to being transplanted into an incompatible cultural milieu—a claim I believe can be reconciled with Alan Watson’s (1993) influential argument to the contrary.

Viewing legal systems as an exchange (most basically, of behavioral restrictions for social order) converges the cross-cultural analysis of legal systems toward the problem of the decision-making behaviors examined by economic anthropologists but also of interest to legal processualists. The items being exchanged may differ, but the calculus of the acceptability would be fundamentally similar under the parsimonious premise that discrete legal and economic evaluative systems would not emerge unnecessarily.

Interest in the economics perspective should not be construed as an unqualified endorsement of that paradigm. At least some variants employ the assumption of the rational actor striving toward the most efficient outcome, an image of human nature that should trouble any observant social scientist. So long as the default merit of the economics viewpoint is understood to be a heuristic *description of behavior* rather than an *explanation* for that behavior based upon the actual mental processes of the informants, it can be appreciated without distorting the interior lives of real people. The suggestion here is not that legal anthropology should be subsumed into economic anthropology, but the less radical claim that legal anthropology should borrow those portions of economic anthropology—particularly research methods, hypotheses, and insights—that productively inform about one concept they share: fairness.

2. Methodologies

From the perspective of the economic anthropologist the task is to identify the appropriate means by which group members compete for and achieve socially valued goals.

Common research problems look at culturally specific decision-making strategies. To better study that problem, economists have designed experimental procedures that isolate relevant values that motivate choices. Of particular significance in experimental economics has been research incorporating game theory models.

Although the Prisoner's Dilemma may be the best known of game theory problems, fairness-related studies often employ a different technique, the Ultimatum Game. The Ultimatum Game is a one-time anonymous interaction between players, thus removing considerations of reciprocity as a confounding influence. One player divides a known pool of a valued good (often but not necessarily money) into two parts, one for himself and another for the second player. If the second player accepts the offer, both players get to keep their portions; if the offer is rejected, however, neither player receives anything. In classical economic terms, the challenge for the first player is to offer as much as necessary to get the second player to accept the offer, but no more. This should be an easy task, given that any offer is more than nothing, leading to theoretical expectations that the second player will accept any offer extended. Actual behavior proves to be more interesting.

Cultural variations in this game have been used to unravel puzzling ethnographic observations in justice administration. First Paciotti et al. (2005, p. 62) characterized the different game strategies of two Tanzanian ethnic groups, the Sukuma and the Pimbwe.

The Sukuma made hyperfair offers—more than half of the money. The Pimbwe respondents proposed significantly less—only 430 [out of 1,000] shillings on average in one within-village test and just 150 shillings in the between-villages test.

This between-group difference was used to explain why only one group, the Sukuma, had

succeeded in the quick creation of “the highly cooperative and aggressive Sungusungu [an organization created to fight back against armed incursions from Uganda and cattle rustling],” which “grew from a grass-roots venture in a few villages in northern Tanzania to a successful justice system replicated and enthusiastically embraced by Sukuma communities across the country.” Efforts by the Pimbwe to form a similar self-defense organization consistently failed, despite being motivated by the obvious benefits. Paciotti et al. theorize that, as the game revealed, the “Sukuma—unlike other ethnic groups in Tanzania—already had rules that promoted large-scale trust, and they could quickly invent a justice system when the need arose.”

Of particular interest are the studies showing how players will forego a personal gain if it punishes someone who has made what is judged to be an unfair offer. As explained by Henrich et al. (2001, p. 73),

In addition to their own material payoffs, many experimental subjects appear to care about fairness and reciprocity, are willing to change the distribution of material outcomes at personal cost, and are willing to reward those who act in a cooperative manner while punishing those who do not even when these actions are costly to the individual.

Indeed, their comparison of fifteen small-scale societies in twelve countries on five continents found the “canonical model [of *Homo economicus*] is not supported by any society studied.” The related economic assumption that social actors are wholly self-interested has also been empirically challenged within this research paradigm (Fehr & Gächter 2000).

The Ultimatum Game participants’ willingness to punish another at an expense to oneself applies even when the player has not been directly harmed by the norm violation (Fehr & Fischbacher 2004). This discovery ties into studies on the evolution and development of

criminal justice systems and the sanctions that have been a mainstay of legal anthropological theorizing. While often accepted as a self-evident phenomenon requiring no explanation, punishment that incurs personal cost (“altruistic punishment”) constitutes a problem for cultural evolution (*see* Boyd et al. 2003). Experimental economics has suggested that only sanctions that are perceived as fair preserve altruistic cooperation, which can be destroyed when sanctioning is seen to be greedy or self-serving (Fehr & Rockenbach 2003). This would mean that sanctioning per se is not a cornerstone of law as a generation of legal anthropologists mistakenly believed, but only fair sanctioning.

The field of neuroeconomics offers a way to relate observed behaviors with specific mental processes. Sanfey et al. (2003) demonstrated that participants in the Ultimatum Game who were scanned during play showed that “unfair offers elicited activity in brain areas related to both emotion (anterior insula) and cognition (dorsolateral prefrontal cortex).” This result provides further contradiction of the “rational choice” model of economics, underscoring the importance of social and emotional dimensions in those decisions.

This method revealed important sex differences in the operation of fair sanctioning. Singer et al. (2006) neuroimaged players while they perceived fair and unfair players who experienced pain.

Both sexes exhibited empathy-related activation in [their own] pain-related brain areas [while observing fair game players receiving pain]. However, these empathy-related responses were significantly reduced in males when observing an unfair person receiving pain. This effect was accompanied by increased activation in reward-related areas, correlated with an expressed desire for revenge. We conclude that in men (at least) empathic responses are shaped by valuation of

other people's social behavior, such that they empathize with fair opponents while favouring the physical punishment of unfair opponents, a finding that echoes recent evidence for altruistic punishment.

While both sexes hate to see fair people punished, males enjoy the punishment of unfair persons. The authors suggest that these results might help to explain the "predominant role for males in the maintenance of justice and punishment of norm violation in human societies."

Because fairness evaluations show the promise of being linked to a biological substrate, it becomes meaningful to then ask when this capability emerged evolutionarily. Such data could generate hypotheses about the emergence of law-related capacities in human evolution. One line of research has already suggested that the equity evaluations at the basis of fairness judgments can be found in other primates (Brosnan & de Waal 2003; but *see also* Silk et al. 2005; Jensen et al. 2006).

This discussion outlines the advantage of the coordinated model over the dispute paradigm currently employed in legal anthropology. Ethnographic descriptions centering on fairness, far from standing alone, fit neatly into a corpus developed in sister disciplines that in return adds theoretical depth to the traditional concepts (like sanction) of legal anthropology.

Conclusions

A theme of this essay has been that the dispute orientation of legal processualism has restricted the anthropological view of law to such an extent that legal anthropology is no longer able to contribute to the most pressing of today's issues. The potential for dispute studies to dissolve the discipline has been noted before. John Comaroff and Simon Roberts (1981) argued that the breadth of the extended case study envisioned by processualist scholars meant that

An adequate account of a dispute therefore requires a description of its total social

context. Once disputes are no longer seen as discrete and bounded pathological events, they may not be neatly excised from the ongoing flow of community life, even for heuristic purpose.... [Taken] to its final conclusion, the subdiscipline of legal anthropology would no longer enjoy analytical hegemony over *any* demarcated field of social action.

Any competent ethnographer should do what a processual legal anthropologist sets out to accomplish, which is to fully describe the innumerable inputs into any social interaction, including the disruptive ones. The expanded case method had in the view of Comaroff and Roberts grown to encompass all of anthropology, rendering “legal anthropology” synonymous with anthropology itself.

This negative evaluation applies not to legal anthropology per se, but only to one overly concerned with the study of disputes. Those who believe that an anthropology of law has a unique contribution to offer to the fuller understanding of sociocultural organization are therefore motivated to identify an alternative core concept around which to design research.

Fairness may be just such a productive substitute. Although it could be studied in an ad hoc manner, its proposed role as the central concept for legal anthropology follows from the characterization of law as a cohesive-procedural, minimal norm of social regulation with the special charge to make psychologically and emotionally acceptable structural inequalities.

How does this approach to the cross-cultural phenomenon of “law” resolve the shortcomings associated with the current dispute orientation? There is no longer a translation problem, since law re-emerges as the object of study, rather than a related concept of disputing with an ill-defined relationship to the overarching category. Second, fairness studies facilitate examination of both the positive and negative functions of law, since, as research has shown, it

not only addresses the maintenance of social cohesion—the positive function—but also throws light on the negative function through the concept of fair sanctioning. Finally, fairness promises to be a more fruitful perspective from which to analyze today's emerging problems such as those involving human rights and intellectual property, not least because it can cultivate interdisciplinary relationships with other specialties via identified points of common interest.

As argued here fairness is not a conclusion about the nature of law, but a tool with which cross-cultural data about law can be productively organized. The goal has been to equip the social scientist with conceptual tools more appropriate to the task of understanding cultural legal practices. Toward this end this essay has offered a mere prolegomenon to the challenges that lay ahead.

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