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## Little Black Boxes: Legal Anthropology and the Politics of Autonomy in Tort Law

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# Little Black Boxes: Legal Anthropology and the Politics of Autonomy in Tort Law

RIAZ TEJANI\*

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[T]he student of the “legal” must wrestle with how the “legal”  
comes into recognizable being as a something discernibly  
different from just what is going on, in general.

-Karl Llewellyn<sup>1</sup>

## I. INTRODUCTION

Law’s interdisciplinary turn toward social sciences suggests a growing realization that jurists may not be independently equipped to explain the world in and upon which they act. But if law embraces empirical social

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1. Karl Llewellyn, *The Normative, the Legal and the Law Jobs: The Problem of Juristic Method*, 49 YALE L. J. 1355, 1366 (1940).

science for its usable output, it struggles to make sense of the more interpretive disciplines such as anthropology. This has proven to be a major setback for both law and anthropology and confounds the historically productive rapport between the two fields stretching back more than a century.<sup>2</sup> While it may be tempting to conclude that today's legal academic misunderstands the interpretive turn in anthropology, that conclusion offers little to facilitate a rapport of the kind badly needed today.

Instead, in this piece I wish to argue that legal scholars' difficulty with anthropology arises not from its interpretivism generally, but from its particular approach that equates law with culture for what appears to be methodological expediency. As I explain below, the equation that treats law as culture permits the anthropologist to study law at a wide variety of "locations" or "field sites"<sup>3</sup> while sacrificing a distinction that is—even if socially fabricated—of great significance to the people for and against whom it operates. What this comes down to, then, is a confrontation between two views: one that sees law as merely a variant of larger systems of symbol and practice and a second that sees it as somehow exceptional—autonomous in its operation and consequence in daily life. While this may share with other accounts the conclusion of *autonomy*, it uses it differently.<sup>4</sup> As some defend or eulogize a putatively *natural* autonomy of law, I join positivists in viewing legal autonomy as social fact—fabricated and maintained through relationships between institutions and actors.<sup>5</sup> My suggestion here, is that we view law from the inside as autonomous because that is how most experience

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2. See Sally Falk Moore, *Certainties Undone: Fifty Turbulent Years of Legal Anthropology, 1949–1999*, in *LAW & ANTHROPOLOGY: A READER* 346–67 (Sally Falk Moore ed., 2005).

3. See, e.g., Akhil Gupta & James Ferguson, *Discipline and Practice: "The Field" as Site, Method, and Location in Anthropology*, in *ANTHROPOLOGICAL LOCATIONS: BOUNDARIES AND GROUNDS OF A FIELD SCIENCE 2* (Akhil Gupta & James Ferguson eds., 1997).

4. Brian H. Bix, *Law as an Autonomous Discipline*, in *THE OXFORD HANDBOOK OF LEGAL STUDIES* 976 (Peter Cane & Mark Tushnet ed., 2003):

It remains valuable to focus on what is distinctive to law—that it is, in most legal systems, guidance through general rules; that it may involve an interaction of law-making and law-applying institutions (e.g., courts applying the rules passed by legislatures); and that (in common law systems) the application of rules will be done through a judicial system that both authorizes judicial law-making and has important rules of *stare decisis* (rules of hierarchy and rules about the way that later decisions are constrained by earlier decisions). All of these features may contribute to a form of reasoning that is distinctive, if not entirely autonomous.

*Id.*; see also Sally Falk Moore, *Law and Social Change: the Semi-autonomous Social Field as an Appropriate Subject of Study*, 7 *LAW & SOC'Y REV.* 719 (1973); Richard Posner, *The Decline of Law as an Autonomous Discipline*, 100 *HARV. L. REV.* 761 (1987).

5. Bix, *supra* note 4, at 977 ("As regards legal reasoning, 'autonomy' should be understood in a relative way. No one has ever seriously claimed that law is a way of thinking entirely of its own category, and legal reasoning, even when most autonomous, does not shun (for example) basic rules of logic and inference. While there are times when the legal profession seems to depend on a language and a way of thinking entirely foreign to common sense and common language, this is the only appearance of the extremes of the practice.").

and navigate it under regimes of increasing global complexity and expansiveness.<sup>6</sup>

This suggestion departs from current legal anthropology in an important manner. To date, most work within the subfield has explored the meaning of law to its ambient culture and society; it has focused upon the ways in which law mediates social relations and becomes meaningful in everyday life. Here, I wish to take the opposite approach of understanding culture and society as understood from the perspective of legal rules and processes. The goal in this effort is to understand the way rulemakers *maintain* the provisional autonomy of the legal sphere, and this embraces a key anthropological objective to depict institutions and practices from the “native’s point of view”.<sup>7</sup> Since Malinowski’s initial fieldwork on tribal crime in the Trobriand Islands, this goal has become the common denominator of most ethnographic field research. And yet, it has not prevented legal anthropologists from treating law perennially from the outside.<sup>8</sup> That is because, among other things, its writers have become preoccupied with the “spaces in between” social groups, cultures, and *epistemes*. One result of this reflexivity has also been a preoccupation with interfaces between disciplines: “where we stand and who are our ‘Others’?”<sup>9</sup> But, the dominance of this question has forestalled development of theories and methods useful to academic law the way, notably, economics has been in the development of tort theory.<sup>10</sup> However, this is not to say that anthropology should be *un-reflexive*; its introspection has been necessary in coming to grips with its dubious role in colonial projects past and present.

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6. See RONALD DWORKIN, *LAW’S EMPIRE* 13 (1986) (“Theories that ignore the structure of legal argument for supposedly larger questions of history and society are therefore perverse. They ignore questions about the internal character of legal argument, so their explanations are impoverished and defective . . . . It was Oliver Wendell Holmes who argued most influentially, I think, for this kind of ‘external’ legal theory, the depressing history of social-theoretic jurisprudence in our century warns us how wrong he was.”).

7. See Clifford Geertz, *From the Native’s Point of View: On the Nature of Anthropological Understanding*, in *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* (3rd ed. 2000) [hereinafter Geertz I].

8. See BRONISLAW MALINOWSKI, *CRIME AND CUSTOM IN SAVAGE SOCIETY* (1926); see also MARCUS GEORGE E. & MICHAEL M. J. FISCHER, *ANTHROPOLOGY AS CULTURAL CRITIQUE* 18 (1986) (“Ethnography is a research process in which the anthropologist closely observes, records, and engages in the daily life of another culture—an experience labeled as the fieldwork method—and then writes accounts of this culture, emphasizing descriptive detail.”).

9. John Comaroff, *Dialectical Systems, History and Anthropology: Units of Study and Questions of Theory*, 8 *J. OF SOUTHERN AFRICAN STUDIES* 143, 144 (1982) (“In my own view, there ought to be no ‘relationship’ between history and anthropology, since there should be no division to begin with. A theory of society which is not also a theory of history, or vice versa, is hardly a theory at all.”); see also Rena Lederman, *Comparative “Research”: A Modest Proposal Concerning the Object of Ethics Regulation*, 30 *POLITICAL AND LEGAL ANTHROPOLOGY REVIEW* 319, 319 (2007).

10. See, e.g., John C. Moorehouse, *Law and Economics and Tort Law: A Survey of Scholarly Opinion*, 62 *ALB. L. REV.* 667, 667–68 (1998).

But productive *self-evaluation* and *productivity* are two different things. Why then, should legal anthropology be productive and how can this be gauged?

While the subfield takes as its key occupation the ethnographic or ethnological study of law *and* law-like activity, I wish to understand its productivity here in terms of positive influence upon formal law in both scholastic and professional modalities.<sup>11</sup> Thus, this article proceeds in four stages to suggest that legal anthropology take greater stock of the provisional autonomy of law. First, in Part II below, it briefly introduces the context and gravity of the problem including missed opportunities to predict and forestall recent incidents of large-scale injustice. This assertion relies upon an understanding of law under global governance as *occulted*—a term I have developed elsewhere to mean hidden behind increasingly global legal knowledge and expertise—and upon the notion that ethnography of law, nearly by definition, may have its ear to the ground ahead of looming crises.<sup>12</sup> Second, the article draws attention in Part III to early critical rapport between the disciplines in three historic moments. Here, “historic” need not be read as “in the past.” These moments present problems that are still very current today in the debates about legal anthropological relevance. Showing this, Part IV explores the problems of relevance in recent approaches to legal anthropology and their solubility within modern legal practice and teaching. Finally, borrowing from Latour’s seminal contribution to science and technology studies, Part V presents the notion of *legal black boxes* with recourse to their manifestation in the doctrinal law of torts.

## II. LAW IN GLOBAL GOVERNANCE: COMPLEXITY, INFLUENCE, OCCULTATION

The view of anthropology from the legal academy has never been more significant. Over the past fifteen years, rules about global warfare,<sup>13</sup> financial markets,<sup>14</sup> corporate citizenship,<sup>15</sup> and regional governance<sup>16</sup> have

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11. Other empirical fields that have come to be influential upon law are less self-conscious of distinctions between “pure” and “applied” research. *Applied* in this context is probably best replaced by the term *relevant*.

12. Riaz Tejani, *Crisis and Constitution: French Antiracism and Belonging in the New Legal Order of Europe* (May 10, 2011) (unpublished Ph.D. dissertation, Princeton University) (on file with Mudd Library, Princeton University).

13. See, e.g., Ganesh Moorehouse, *Counterinsurgency, The War On Terror, And The Laws Of War*, 95 VA. L. REV. 1745 (2009); see also David Weissbrodt & Amy Bergquist, *Extraordinary Rendition: A Human Rights Analysis*, 19 HARV. HUM. RTS. J. 123 (2006).

14. See, e.g., Fiona Haines, *Regulatory Failures and Regulatory Solutions: A Characteristic Analysis of the Aftermath of Disaster*, 34 LAW & SOC. INQUIRY 31 (2009).

15. E.g., *Citizens United v. Federal Election Commission*, 558 U.S. 50 (2010).

drastically evolved to have wider influence on private lives and bodies while simultaneously appearing to fade from sight.<sup>17</sup> More importantly, these rules have changed largely with decreasing comment or resistance from lay people.<sup>18</sup> That faceless group, or “public,” has not only been rendered more passive to the large scale development and enforcement of rules in global context, it is often unaware or uninformed of them.<sup>19</sup> As governance and rulemaking become increasingly global and technologized in scope and form, the public whose behavior is regulated enjoys less participation in and understanding of the process. Legitimacy is maintained, however, by the entrustment of rulemaking in the hands of increasingly specialized “experts” whose knowledge is considered beyond the reach of most.<sup>20</sup> Elsewhere, I have written of the role such “occult” knowledge played in the demise of the 2005 European Constitution in France.<sup>21</sup> There, increased regionalization of norms and rulemaking left a significant gap between decision-making power and its bases—a “democratic deficit” in the words of some.<sup>22</sup>

This being the case, fieldwork-based legal anthropology would appear well poised to furnish advance insight on the local “realities” affected by such global governance shifts. And in some cases, it has already furnished such insight. However, the influence of these studies on mainstream law

16. See Nicholas Kulish & Paul Geitner, *Euro Zone Crisis Boils as Leaders Fail to Signal New Steps*, N.Y. Times, May 23, 2012, <http://www.nytimes.com/2012/05/24/world/europe/euro-crisis-intensifies-as-leaders-bicker.html?pagewanted=all>; see also Floyd Norris, *As Europe's Currency Union Frays, Conspiracy Theories Fly*, N.Y. Times, June 14, 2012, <http://www.nytimes.com/2012/06/15/business/as-europes-currency-union-frays-conspiracy-theories-fly.html?pagewanted=all>.

17. One paradox of neo-liberal economic and social policies more generally. See, e.g., CAROL GREENHOUSE, *THE PARADOX OF RELEVANCE: ETHNOGRAPHY AND CITIZENSHIP IN THE UNITED STATES* (2011) [hereinafter GREENHOUSE I].

18. Meant here in its descriptive sense, the phrase captures the vast population of citizens and residents who go about their daily lives without the power to spontaneously act upon the structures and rules of government. To deny that such a group exists, or to label them in less clear terms, is to contribute to their invisibility. See also RONALD NIEZEN, *PUBLIC JUSTICE AND THE ANTHROPOLOGY OF LAW 1* (2010). A similar awkwardness is necessary in the faceless notion of “publics,” “[P]ublics, however intangible, have also become part of the social worlds of those whom it is possible to know intimately.”

19. See, e.g., Anthony Fowler & Michele Margolis, *The Political Consequences of Uninformed Voters* (MIT Political Sci. Dep't Research Paper No. 2011-12, 2011).

20. See, e.g., ARTHUR GOLDWAG, *CULTS, CONSPIRACIES, AND SECRET SOCIETIES* (2009). One index of this development has been a rise in conspiracy theories. The World Wide Web abounds with sites analyzing conspiracies behind the Kennedy assassinations, moon landing, and September 11th among many others.

21. Tejani, *supra* note 12. Occult in this sense means hidden from view but for a select few, experts, or elites. Unlike other forms of normativity premised upon self-dominance such as disciplinary power or hegemony, occultation of law in these contexts is premised upon the “unknowability” of complex rules and processes inscribed into legal doctrine. It remains whether unknowability is a proper object of ethnographic study. See NIEZEN, *supra* note 18, at 1. I join Niezen's view to “brake with the source of anthropologists' disciplinary identity by discussing social actors who are intangible, abstract, notoriously unpredictable and largely unknowable.” *Id.*

22. DAVID MARQUAND, *PARLIAMENT FOR EUROPE 64* (1979); see also DAMIAN CHALMERS ET AL., *EUROPEAN UNION LAW: TEXT AND MATERIALS 64* (2006).

research and teaching has remained minor.<sup>23</sup> This is unfortunate because while anthropologists serve an important documentary and interpretive role in late-modern, Western societies, their greatest potential contribution may be to influence law and policy through accounts of everyday lives influenced by and legitimating abstract decisions of which many run counter to communities' own economic and social interests.<sup>24</sup>

### III. CRITICAL PREHISTORY: EVOLUTIONISM, LAW IN ACTION, AND LEGAL REALISM

Today's palpable gulf between anthropology and law, however, may be exceptional. While the two were discrete in their conceptions of evidence and methodology, these differences were once well-articulated and productive. Sociocultural anthropology emerged and grew largely on the basis of ethnological and ethnographic studies of norms and dispute resolution so that law, in short, fueled the furnace of the burgeoning new "science of culture."<sup>25</sup> Meanwhile, those early studies were conducted by trained jurists and came to influence the development of hard law in the new metropolitan nation-states.<sup>26</sup> *Nations* and *nationalism* emerged as new "imagined" or "represented communities" and early legal anthropology helped define the boundary between metropolitan subjects of history and their "Others" held over from a bygone era.<sup>27</sup> At the same time, ethnography was rendered more important by calls to understand law in movement rather than as static doctrine. Three watershed moments in this early rapport are often noted: (1) the popularization of *evolutionism* in law by Sir Henry Maine; (2) the rupture between law in books and *law in action* signaled by Roscoe Pound; and (3) the elucidation of *legal realism* via the "law jobs" of Karl Llewellyn. Each of these figures was a legal scholar who brought sociocultural insight about law back into the legal academy in ways still visible today.

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23. See Annalise Riles, *Representing In-Between: Law, Anthropology, and the Rhetoric of Interdisciplinarity* U. ILL. L. REV. 597 (1994). For some, this feeling is mutual. See LAWRENCE ROSEN, *LAW AS CULTURE: AN INVITATION*, 63 (2006) ("[M]any American scholars have undeniable prejudice against law. Like their countrymen, they tend to think of law as a domain of specialists, rife with strange terminology and far from disinterested maneuvering.")

24. See David Runciman, *Why Do People Vote Against Their Own Self Interest?*, BBC NEWS (Jan. 30, 2010), <http://news.bbc.co.uk/2/hi/8474611.stm>; see also Charles Simic, *Age of Ignorance*, N.Y. REV. OF BOOKS BLOG, (March 20, 2012, 10:25 AM), <http://www.nybooks.com/blogs/nyrblog/2012/mar/20/age-of-ignorance/>.

25. George Peter Murdock, *The Science of Culture*, 34 AM. ANTHROPOLOGIST 200 (1932).

26. This was possible as the new Westphalian international order assumed each nation would be governed by one state with one law, and that each state would be legitimated by one nation.

27. BENEDICT ANDERSON, *IMAGINED COMMUNITIES* (2d ed. 1983); JOHN KELLY & MARTHA KAPLAN, *REPRESENTED COMMUNITIES: FIJI AND WORLD DECOLONIZATION* (2001).

### A. *Maine*

Henry Maine is sometimes considered the foundational legal anthropologist—a primacy indicative of his historicity and wide scholarly exposure.<sup>28</sup> He was the first Anglo-Saxon jurist to formally analyze South Asian legal norms, and his “status to contract” theory came to typify the evolutionist thinking that European metropolitan law was more advanced in form and systematicity than its counterparts among non-Western peoples.<sup>29</sup> But this assertion was widely discredited even as it came to be reinvoked time and again in contract law casebooks.<sup>30</sup> Today, few wish to support the overt racialism underpinning evolution; nevertheless, Maine continues to be reinvoked with some frequency.

One of the greater lessons found in revisitations of Maine may be the apparent dislike he harbored for legal practice.<sup>31</sup> Annalise Riles has written that such disdain is suggestive of Maine’s great consciousness of “disciplinarity”—the role that anthropology could play in conversations with law on the topic of context and culture.<sup>32</sup> We might, however, also view it as indicative of something deeper: legal anthropology’s early difficulty with *expertise*. Viewed in certain perspective, Maine illustrates the beginning of a rift between legal culture and profession—a foundational preference to view and understand law at sites removed from the locus of metropolitan legal practice in his time. Indeed, his acceptance of an administrative post in India subsequent to bar admission suggests that he preferred the ethnological theorization afforded by colonial positioning over head-to-head interlocution at the English bar.<sup>33</sup>

This preference was more than conceptual; it was practical. As with the pursuit of dual studies in law and anthropology today, the demands of legal profession and the demands of ethnographic fieldwork can become mutually exclusive. For Maine to compose *Ancient Law*, his position in India would be far more consequential than one among the English courts. And yet, what did this mean for professional relevance of his work and later legal anthropologies following it? Would there be a way to create relevant theory on legal culture while developing a keen understanding of the way law is

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28. See Carol Greenhouse, *Just in Time: Temporality and the Cultural Legitimation of Law*, 98 *YALE L. J.* 1631, 1632 (1998); JOHN CONLEY & WILLIAM O’BARR, *RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE* 3 (1990).

29. See, e.g., NORBERT ROULAND, *LEGAL ANTHROPOLOGY* 228–29 (Phillippe Planel trans., 1994).

30. See, e.g., FRIEDRICH KESSLER ET AL., *CONTRACTS: CASES AND MATERIALS* 19 (1986).

31. Riles, *supra* note 23, at 608.

32. *Id.*

33. *Id.* at 608–09. Maine’s role in British colonial administration saw him engaged in governance rather than advocacy.



*practiced* in any given context or are these epistemologies inherently insoluble? And once such appreciation was cultivated, to what extent would it be generalizable in the way jurists hope cultural meta-theory to be?

Even more fundamentally, what would be the role of *generalizability* across these disciplines? Legal anthropology has since eschewed sweeping meta-theory— notions that try to explain globally the distribution of other notions—of the kind Maine promulgated. Meanwhile, academic law has further embraced such sweeping theories when plausible with open arms in a way that partakes of the interdisciplinarity I began with above.<sup>34</sup> But, if confirmation of such theories in science occurs through experimentation and observation, in law it occurs through through stable rule creation and enforcement. Meta-theory in law beyond a certain threshold of plausibility, therefore, is always “confirmed” when it creates the worlds into which it is born.

While Maine’s documented legacy has been the influence of “status to contract” in casebook introductions and law and society article footnotes, we might view him here as his own symbol for the early practical incommensurability between legal culture and profession among anthropological writings on law.

#### B. Pound

Roscoe Pound’s 1910 article “Law in Books and Law in Action” introduced a second seminal moment.<sup>35</sup> There, Pound argued that law was drastically more than the sum of its doctrines and rather entailed (and thus required study of) law as practiced and lived by its constituents.<sup>36</sup> The concept expanded the venues of law to include nondoctrinal—though still formal—settings like courtrooms, firms, legislatures, clinics, police precincts, and so on.<sup>37</sup>

For Pound, this move was animated by a belief that access to American justice was bifurcating along class lines.<sup>38</sup> “The malefactor of means,” he wrote, “the rogue who has an organization of rogues behind him to provide a lawyer and amount of habeas corpus has the benefit of law in the books.”<sup>39</sup>

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34. See, e.g., Luca Anderlini & Leonardo Felli, *Transaction Costs and the Robustness of the Coase Theorem*, 116 *ECON. J.* 223, 223–45 (2006). Ronald Coase’s “irrelevance theorem” has been widely accepted and promoted as a rationale behind economic jurisprudence in Tort Law. See R.H. Coase, *The Problem of Social Cost*, 3 *J. L. & ECON.* 1, 1–44 (1960).

35. Roscoe Pound, *Law in Books and Law in Action*, 44 *AM. L. REV.* 12 (1910).

36. *Id.*

37. John Hanson & Michael McCann, *Situational Torts*, 41 *LOY. L.A. L. REV.* 1345, 1389 (2008).

38. Pound, *supra* note 35, at 17.

39. *Id.* (“The fact remains, however, that the attempt of the books to compel prosecutors to use only a case-knife is failing. They will use the pickaxe in practice, and until the law has evolved some device by which they may use it in all cases the weak and friendless and lowly will be at a practical disadvantage, despite legal theory.”).

Inverting American revolutionary suspicions of monarchic justice—in which a sovereign adjudicator could be arbitrary and irreproachable—Pound decries the arbitrariness of textualized legal rules for their susceptibility to creative, expert wielders. The law of “books” is a luxury out of reach to the pauper, and a tool for manipulation and cunning for the wealthy. Such inequality demanded that this new distinction between formal and applied law be better understood within the academy and the profession. Pound’s classed vision of justice is instructive today. Formalized law, it holds, is not accessible to laypersons, and is, rather, mediated by a tier of experts trained in the language and posture of legal argumentation. In today’s world, many hold a reinverted view of justice wherein formal rules generally ensnare the common person, while the exceptional person of means is thought to receive “special treatment” or “celebrity justice.”<sup>40</sup>

The rift between books and action opened up studies of law to “law in society.” Though the modern trend in legal anthropology has been to place heavier emphasis on the “society” side of this formulation, law in action carried a sense—evident in Pound’s account—that formal institutions still remained the key framework through which to view “action.” While one major strand in legal anthropology influenced by the work of Michel Foucault would come to view action elsewhere, this original formulation of law in action seems to have influenced a narrow group of modern legal anthropologists who successfully steer close to the shores of legal institutions.

One example may be *Law and Community in Three American Towns*, an illuminating collaboration by Greenhouse, Yngvesson, and Engel.<sup>41</sup> Separately, the authors conducted and drew up ethnographic field studies in American small towns in the 1980s.<sup>42</sup> The choice of field sites allowed them to observe legal behavior among residents both at the early stage of dispute formation and choice to litigate, as well as at the later stages of court filing and appearances. But these sites also allow larger observations about the changing nature of small town life in America in an era of deindustrialization, increased immigration, and rapid population flight from rural to urban life. Latour has offered another impressive update on “law in action” in his 2010 study of the French *Conseil d’Etat*.<sup>43</sup> There, he observed sessions of the *Conseil* and drew observations about its reasoning and

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40. See, e.g., Theodore J. Boutrous & Michael H. Dore, *Celebrity Justice: A New Double Standard*, 22 COMM. LAW. 3 (2004); see also Jared Chamberlain et al., *Celebrities in the Courtroom: Legal Responses, Psychological Theory and Empirical Research*, 3 VAND. J. ENT. & TECH. L. 551 (2006).

41. CAROL J. GREENHOUSE ET AL., *LAW AND COMMUNITY IN THREE AMERICAN TOWNS* (1994) [hereinafter GREENHOUSE II].

42. *Id.*

43. BRUNO LATOUR, *THE MAKING OF LAW: AN ETHNOGRAPHY OF THE CONSEIL D’ETAT* (2009).

assumptions, all in a period in which French national legal culture was undergoing dramatic changes.<sup>44</sup> These examples are exceptional in that they remain more “institutional” in choice of field site than much legal anthropological empirical work today. They can be considered illustrative of the law in action influence on anthropology, but that influence remains marginal with a greater number of field studies today aimed at “law-like” behavior.

### C. *Llewellyn*

If Maine and Pound highlighted the problem of expertise, Karl Llewellyn stood for a plausible solution: the placement of law and law-like activity along a single spectrum of social practice. This conceptual merger was articulated in his ethnographic collaboration with anthropologist E. Adamson Hoebel.<sup>45</sup> There, Llewellyn and Hoebel describe what they term the “law jobs,” the diffuse legal practices spread among various actors in the Cheyenne tribes.<sup>46</sup> Written in 1941, the work explores law in its diffuse *loci* as something belonging to an entire tribe rather than just its experts.<sup>47</sup>

The “law-jobs” were comprised of five elements that, he felt, transcended all legal contexts from ancient to modern.<sup>48</sup> These included what Llewellyn termed: (1) disposition of trouble-cases; (2) preventive channeling and reorientation of conduct and expectations; (3) allocation of authority and arrangement of procedures which legitimize action as being authoritative; and (4) the net organization of the group as a whole to provide direction and incentive.<sup>49</sup> But interestingly, despite typology of these diffuse behaviors, Llewellyn did not challenge a key distinction about law as, at once, more grave and more violent than mere customary norms. “Normative generalization,” he wrote, “is part of what goes to generate and to make up the ‘legal’; it is not the whole . . . . It must be more; it reaches beyond the *normation* of oughtness into the *imperative* of mustness.”<sup>50</sup> The whole purpose of this conversion from norm to rule, we learn, is to secure the reproduction of the society against anomic forces of individualism, deviance, and so forth.

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44. *Id.*

45. See E. ADAMSON HOEBEL & KARL LLEWELLYN, *THE CHEYENNE WAY: CONFLICT AND CASE LAW* (1941).

46. *Id.*; see generally Llewellyn, *supra* note 1.

47. HOEBEL & LLEWELLYN, *supra* note 45.

48. Llewellyn, *supra* note 1, at 1374 (“[T]he law-jobs hold, as basic functions, for every human group . . . . They are implicit in the concept of ‘groupness.’”).

49. *Id.* at 1373.

50. *Id.* at 1364.

The law-jobs seem to augur the kind of thinking later addressed by Foucault via “disciplinary power.”<sup>51</sup> But Llewellyn and Hoebel offer an account where law meets legal culture in a way that is optimistic about both human nature and the sophistication of Cherokee problem solving.<sup>52</sup> Later, Foucault provides an explanation for the coexistence of State and interpersonal power relations in a way meant to capture a human drive for coercion. The two overlap in the implicit recognition of the role of legal culture in law’s efficiency. Given this overlap, it might appear lawyers and anthropologists would have much to talk about.

Yet, while readings of both Llewellyn and Foucault may begin at a common locus of “legal culture,” they quickly veer off in different and influential directions. Disciplinary power gave rise to the practice in social sciences of studying law far from its sources of emanation. Beginning in the 1970s and continuing up to the present, ethnographers took the study of law to contexts as disparate as urban gangs, punk music scenes, and biomedical engineering. At all of these sites, ethnographers argued, one could witness the influence of and negotiation with “the law.” Indeed, it began to appear that the true substance of *the law*—its raw material—lay simply in day-to-day human relations. The popularity of sociocultural studies of law premised upon disciplinary power might be read as one example of the wider success and influence of first wave legal realism.<sup>53</sup>

Ongoing interest in Maine, Pound, and Llewellyn paints a promising picture of the sociocultural study of law within the legal academy.<sup>54</sup> Though none were trained anthropologists, each championed ethnological and ethnographic approaches to support propositions about the law and the reinsertion of those approaches into studies of Anglo-American legal doctrine. Few if any subsequent thinkers have approached the integrated influence of these figures. Instead, sociocultural legal studies have come to generate rich narratives of law in the “local” context but rarely directed lessons from those back toward law as a practice or profession.

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51. *See, e.g., id.* at 1392 (“In the main, machinery ‘legal’ in character, and personnel ‘official’ in character, have best potentiality for accomplishing the ‘law-jobs.’ But rarely, in any culture, and never in a culture both developed and mobile, can official ‘legal’ machinery and personnel accomplish the whole of those jobs. What is wanted is an on-going optimum balance, keeping in the hands of the official ‘legal’ machinery and personnel, and well-handled by them, so much as they can best handle.”).

52. *Id.* at 1373.

53. Bix, *supra* note 4, at 980.

54. All three of these men are extraordinarily accomplished scholars. Maine held a professorship in jurisprudence and law at Oxford and Cambridge, Pound taught law at Northwestern and Chicago and became Dean at Harvard Law School, and Llewellyn taught law at Yale, Columbia, and Chicago.

## IV. THE PROBLEM OF RELEVANCE

In her trenchant work, *The Paradox of Relevance*,<sup>55</sup> Carol Greenhouse explores the problem of relevance in anthropology amid its contemporary sociopolitical context. There, she posits that the dilemma results not from inherent disciplinary turns but rather from the object of ethnography shifting away from collective notions of meaning and “Self” toward increasingly individualized forms of belonging.<sup>56</sup> A similar observation might now be drawn about law under new regimes of global governance.<sup>57</sup> Changes in legal cultural conditions have eschewed the community bases of norms and emphasized abstract institutions, processes, and administration. Far reaching global warfare and financial collapse have been key products of this, and each was enabled by the cultural shift Greenhouse describes. By their very nature, they have escaped anticipation and description by contemporary legal ethnographic fieldwork and necessitate a reorientation of the kind for which this article advocates. To be more specific, the subfield might now include in its prospective audience judges, lawyers, and lawmakers—experts whom it might take in new orientations as its native interlocutors.

In order to do this, the it must contend with one particular dilemma. On one hand, legal anthropology tends to hold that *law* is not just the domain and material of governmental institutions and their experts, and rather the entire complex of norms and control that interleave the contextual society. On the other hand, laypersons, particularly those within the complex urban societies to which legal anthropologists often look when they speak about law, generally do not see law in this way. Instead, they look to it as very much the province of trained and skilled experts. Whether they should or not is a separate matter; so long as anthropology—ethnography, to be precise—is a descriptive endeavor, it must take stock of the experience of everyday actors. Significantly, those individuals do not typically experience law as “diffuse” in the way that legal anthropology would expect them to.

This is, at bottom, a problem of “seeing.”<sup>58</sup> While we would not often admit it, legal anthropologists by and large are viewing law from the

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55. GREENHOUSE I, *supra* note 17.

56. *See id.* at 34 (“[T]he calls for relevance could only make more pressing the question of what relevance could actually mean in practice . . . . The fact that *relevance* was presented as a *mediating path* in relation to anthropology’s internal debates implied that anthropologists had only themselves to blame if the public overwhelmingly communicated through other channels. In retrospect, this accusation misses the mark. It was politics that abandoned *society* as social—the basis of social security—and failed the people with whom anthropologists most readily identified, that is, minority communities at the social margins.”) (internal footnotes omitted).

57. *See* NIEZEN, *supra* note 18, at 4 (“[T]he institutions of global governance are built upon ideas of effecting change among non-compliant peoples in the interest of furthering cosmopolitan values of peace and development.”).

58. *See, e.g.,* Riaz Tejani, *The Vanishing Point: Humanity, Vision, and Value Theory in the Age of Economic Globalization*, 20 ALTERNATE ROUTES 132 (2004) (suggesting that the conceptual distinction between humans and their *others* is based upon the visualization of nature as exchange value).

outside—what they sometimes call the *etic* perspective.<sup>59</sup> That is, the role of the ethnographer in legal contexts, even those far from the institutions of sovereign power, is less one of *participant* and more one of *observer*. Almost by definition, such contexts do not lend themselves to real “participation” as would other kinds of fieldwork. The researcher is usually not a stakeholder in the proceedings or resolution, nor is she typically an advocate or adjudicator.<sup>60</sup> So, while legal anthropology can often only observe law in core contexts such as these “from the margins,” it has been adept at observing fast evolving or remote “law-like” situations. Our accounts of the margins, interstices, and remote occurrences of law and law-like activity require that we be honest about the way law really works, for better and for worse, in ways that regulate everyday behavior.

A first step in this direction might be to provisionally redefine the legal “native” as *expert*, and to therefore take the “expert’s point of view.” There, from the perspective of legally trained and licensed law practitioner or adjudicator, law is not “everywhere you find it.” More to the point, for these actors, a world of difference exists between “law” on one hand and “law-like” on the other. Practice is geared toward specific problems. Problems must be solved. Solutions come with outcomes. Outcomes impact lives. And the path between each of these is paved with rules, codes, procedures, forms, argument structures, and patterns of reasoning. Each of these in most cases, have been learned or experienced through years of law school training, months of bar preparation, threshold evaluation in one bar examination or more, and finally the practical experience of a kind only licensed individuals are permitted to attain. Reckoning with these practicalities has remained thin in legal anthropological writing. Perhaps one reason is that few scholars know firsthand the exigencies of *both* fieldwork and legal practice, or their divergences on such integral concepts as *evidence*.

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59. See Geertz I, *supra* note 7, at 56.

60. See, e.g., James Clifford, *Identity in Mashpee*, in *LAW AND ANTHROPOLOGY: A READER* 178 (Sally Falk Moore ed., 2005). There, the author observing a legal proceeding on the very sensitive topic of American Indian tribal status could only watch from the audience as the tribe’s advocates pled their case before a judge. Since Clifford was not an anthropologist but rather a historian, his work attempted fieldwork but stopped short of talking to people involved in the trial. Fieldwork is not generally a method of historiography, and one wonders if the partiality of Clifford’s method resulted more from practical limitations about observing law in context than from a real, preformulated, disciplinary outlook on what should be done in such contexts. There are rare exceptions to this. See, e.g., LAWRENCE ROSEN, *THE ANTHROPOLOGY OF JUSTICE: LAW AS CULTURE IN ISLAMIC LAW* 1 (1989) (author describing his first court appearance on behalf of an Indian tribe following his own legal training).

A. *Reading Evidence: Interpretivism, Reflexivity, Comparativism*

Within sociocultural anthropology, evidence often consists of field notes and interview transcripts. By those two means, researchers learn of informant worldviews based upon what they are told and shown. With respect to *legal* anthropology, the most apparent problem with this approach under new complex legal regimes is that laypersons increasingly do not know where legal rules originate or how they are applied. In tribal societies—the inaugural object of legal anthropology—law emerged from customary norms to *become* formalized as legal rules in what Paul Bohannon famously called “double institutionalization.”<sup>61</sup> Today, in many instances, legal rules migrate. They are developed from institutions outward, or are borrowed from one community and applied to another. The interaction and impact of such rules with and upon anthropological informants may not be accurately captured by the dominant approach of *interpretivism*—the capturing of native interpretations of local worlds. Limited reception of legal anthropology within the legal academy today may well be rooted in this insufficiency.

More broadly, the history of ethnographic empiricism—the record to which interpretivism responds—has been problematic and destabilizing. At its origin, ethnographic fieldwork was conducted in the mid-to-late nineteenth century by colonial missionaries.<sup>62</sup> Many of these missionaries sought to document and learn native languages and belief systems, often with the aim of fostering rapport and religious conversion.<sup>63</sup> Through written correspondence, these early ethnographers would transmit notes back to scholars in English or French universities who then drew up sweeping theories about “primitive man” based on cross-cultural comparison or *ethnology*.<sup>64</sup>

Because of this dubious history, ethnographic empiricism has long carried the stain of colonialism. Not only were its early insights used to better “know” the native peoples whom it dominated, they were often

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61. See Paul Bohannon, *The Differing Realms of Law*, in *LAW AND WARFARE: STUDIES IN THE ANTHROPOLOGY OF CONFLICT* 43–56 (Paul Bohannon ed., 1967).

62. See George W. Stocking, Jr., *Colonial Situations*, in *COLONIAL SITUATIONS: ESSAYS ON THE CONTEXTUALIZATIONS OF ETHNOGRAPHIC KNOWLEDGE* 3, 4 (1991) [hereinafter *Colonial Situations*]; see also John Cinnamon, *Missionary Expertise, Social Science, and the Uses of Ethnographic Knowledge in Colonial Gabon*, 6 *HIST. IN AFR.* 413 (2006).

63. See *Colonial Situations*, *supra* note 62, at 4.

64. See GEORGE W. STOCKING, JR., *AFTER TYLOR: BRITISH SOCIAL ANTHROPOLOGY 1888–1951*, at 15 (1995).

utilized in their domination as well.<sup>65</sup> But in the interwar and postwar periods, the goal of ethnography shifted from surveillance and documentation toward advocacy. It sought to defend native beliefs and practices on the eve of their apparent disappearance under colonial contact and pressure.<sup>66</sup>

With this new prioritization of native life came a belief in the internal logic and wisdom of native worldviews. Such worldviews, and their understanding through ever-closer approximation of local interpretation, came to be called *interpretivism*. Interpretive anthropology viewed culture as native text, constantly undergoing interpretation and reinscription with meaning. This line of thought later spawned cultural studies—a less empiricist and more far-reaching field interested in the semiology of Western popular and ethnic culture. The powerful influence of interpretive anthropology on knowledge production may have limited the uptake of new accounts in related applied disciplines.<sup>67</sup>

In one of the great fleeting moments of rapport between law and anthropology, Clifford Geertz delivered a series of lectures at Yale that eventually became the content for his key essay *Local Knowledge*.<sup>68</sup> There, Geertz grappled with the cold relations between law and anthropology, attempting to reconcile them with recourse to law's anthropological tendencies.<sup>69</sup> Comparing the concepts of *haqq*, *dharma*, and *adat* found in the Arab, Hindu, and Malay cultures, respectively, Geertz tells the Yale audience that in each of these concepts lies the conceptual merger of fact and law that always already entails the intimacy of law and culture.<sup>70</sup> Law from

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65. See generally TALAL ASAD, *ANTHROPOLOGY & THE COLONIAL ENCOUNTER* (1973) (Talal Asad ed., 1979) (discussing the ways in which anthropological thinking and practice have been affected by British colonialism); see also Diane Lewis, *Anthropology and Colonialism*, 14 *CURRENT ANTHROPOLOGY*, no. 5, Dec. 1973, at 582 (“Since anthropology emerged along with the expansion of Europe and the colonization of the non-Western world, anthropologists found themselves participants in the colonial system which organized relationships between Westerners and non-Westerners. It is, perhaps, more than a coincidence that a methodological stance, that of the outsider, and a methodological approach, ‘objectivity’ developed which in retrospect seem to have been influenced by, and in turn to have supported, the colonial system.”).

66. See, e.g., Claude Levi-Strauss, *Race and History*, in 2 *STRUCTURAL ANTHROPOLOGY* (1976). This work was originally delivered as a lecture to UNESCO.

67. See MARCUS & FISCHER, *supra* note 10, at xi (noting a “marked decline of government interest in, and support for, research in a number of fields, including anthropology”).

68. Clifford Geertz, *Local Knowledge: Fact and Law in Comparative Perspective*, in *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 167 (1983) [hereinafter Geertz II].

69. *Id.*

70. See *id.* at 214–15.



the native's point of view is a cosmology in which norms and the factual "world" upon which they act are linked. To be part of any local world, in this way, is to be a subject of its rules. Geertz gives as example a case in which one Indonesian tribesman name Regreg loses his wife to a man from another village.<sup>71</sup> Because of the strain this puts on him, Regreg refuses to serve on the chiefly council governing the tribe at a time when he would be otherwise compelled to do so.<sup>72</sup> It is his turn, and there is no contemplated alternative to service.<sup>73</sup> Yet, he has neither the mind nor motivation to serve, leading in turn to further agony.<sup>74</sup> "Refusal," we are told, "is tantamount to resigning not just from the village but from the human race."<sup>75</sup> Construal of the world in terms sanctioned by the prevailing norms of any one locality becomes, in short, requisite to worldly existence. Presenting this insight to a law school audience, Geertz fulfilled the role that he would become most respected for: ambassador between the disciplines. He was only the second anthropologist invited to speak in the Storrs Lecture Series,<sup>76</sup> and had, just by "being there", helped signal the importance of culture to law recognized at

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[M]y intent has not been, as I mentioned earlier, to compress Islamic, Indic, and Malaysian notions about the interconnections of norms and happenings into some handbook for *ex patria* litigants but to demonstrate that they *are* notions. The main approaches to comparative law—that which sees its task as one of contrasting rule structures one to the next and that which sees it as one of contrasting different processes of dispute resolution in different societies—both seem to me rather to miss this point: the first through an overautonomous view of law as a separate and self-contained "legal system" struggling to defend its analytic integrity in the face of the conceptual and moral sloppiness of ordinary life; the second through an overpolitical view of it as an undifferentiated, pragmatically ordered collection of social devices for advancing interests and managing power conflicts. Whether the adjudicative styles that gather around the *Anschaungen* projected by *haqq*, *dharma*, and *adat* are properly to be called "law" or not (the rule buffs will find them too informal, the dispute buffs too abstract) is of minor importance; though I, myself, would want to do so. What matters is that their imaginative power not be obscured. They do not just regulate behavior, they construe it.

*Id.* (internal footnote omitted).

71. *See id.* at 176.

72. *See id.* at 176–77.

73. *See id.* at 177.

74. *See id.*

75. *See Geertz II, supra* note 68, at 177:

You lose your house-land, for that is village-owned here, and become a vagrant. You lose your right to enter the village temples, and thus are cut off from contact with the gods. You lose, of course, your political rights—seat on the council, participation in public events, claims to public assistance, use of public property, all matters of great substance here; you lose your rank, your inherited place in the castelike order of regard, a matter of even greater substance. And beyond that, you lose the whole social world, for no one in the village may speak to you on pain of fine. It is not precisely capital punishment. But for the Balinese, who have a proverb, 'to leave the community of agreement [*adat*, a sovereign word whose ambiguities I shall be returning to at some length later on] is to lie down and die,' it is the next best thing to it.

*Id.*

76. The Storrs Lecture Series, one of Yale Law School's oldest and most prestigious lecture programs, was established in 1889. These annual lectures are given by an American or foreign jurist or scholar who is not ordinarily a member of the regular faculty of the Law School.

one of the highest disciplinary levels.<sup>77</sup> And yet, likely for the reasons addressed below, the luster of the moment quickly faded and with it, the influence of interpretive anthropology on legal scholarship.<sup>78</sup>

Three key tenets of interpretive anthropology's empirical approach may have posed a problem for legal scholars. First is the notion that ethnographers are describing their object legal cultures from within. This softens the empirical approach to describe not simply what the researcher sees, but local interpretations of what is being seen. From inside the fieldwork project, this mandate is incredibly challenging and fruitful. It requires the researcher to attempt to delve into the native mindset, its *Anschauungen* to echo Geertz's teutonism.<sup>79</sup> Even if this goal is never fully achieved, its pursuit is what leads to some of the greatest insights in the fieldwork endeavor.<sup>80</sup>

But lawyers talk to people in their own way. The interview is as important to their enterprise as it is to ethnography, albeit within a different modality and set of goals. To an Anglo-American lawyer, client communication is not only fundamental; it is highly stylized to illicit the "right" information that serves the case. Meanwhile the ethnographer's interview may actually be designed to illicit the "wrong" information—the kind of material that will open up unexpected avenues of inquiry in a potentially endless string of questioning whose real object is an entire cultural or sub-cultural panoramic. And, in some sense, lawyers are "better" at talking to people. Their speech is goal-oriented and measured and often comes at times when their interlocutors are suffering from a dilemma which they are positioned to solve. Ethnographers ask tough questions, but these are typically experienced by interviewees—often by design—as open-ended and ignorant. Put otherwise, if the interview in professional law and field ethnography can be properly compared, the former sees the lawyer in the role of expert while the latter sees the informant as expert. The ethnographer, meanwhile, and in particular when approaching legal customs and institutions, must operate as a layperson.

Comparison of these professional archetype roles leads to one possible conclusion; that lawyers are, by training, skeptical of what they are told when it comes unstructured and unmediated by their own questioning. This possibility becomes most credible in light of Geertz's fact-law continuum;

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77. Max Gluckman was the first. See Riles, *supra* note 23, at 637.

78. See *id.*; see also GREENHOUSE I, *supra* note 17, at 18 ("Ethnography's literariness became an object of struggle and an icon of political struggles beyond the discipline . . .").

79. See Geertz II, *supra* note 68, at 232.

80. Most admit that this goal is rarely if ever "achieved."

that is, law does not simply *act* on reality, it *structures* it.<sup>81</sup> But, while this possibility is critical, it is not necessarily *relevant*.

Here are, then, two key distinctions between the lawyer and the ethnographer of law. First is the role of expert that the lawyer assumes in interacting with its informant and the opposite role of layperson that the fieldworker properly assumes in interacting with its informant. Second is the goal-orientation motivating a lawyer's often formal or stylized speech versus the ethnographer's open-ended questioning. Given these, why would lawyers read interpretive anthropologies that point out a social constructivism in which they have already been self-consciously engaged?

Another potential difficulty of late-modern anthropology may be the priority granted to *reflexivity*. This introspection has brought great advancements by situating the researcher in relation to her object of study and her audience and by attending to doubts raised by that situation. It has produced insight on the fieldworker's own motives and experience, and has made almost every ethnographic project a comparative one. Nevertheless, reflexivity's prevalence in empirical anthropology has a limiting effect on the uptake of ethnographic research by lawyers and law scholars because this presents a problem of generalizability for legal academics. It marks qualitative research with a particularism unique to this or that author or his or her field site. Meanwhile, law must itself continually struggle with the generality and particularity of its own principles—especially visible below in the normative modality of tort law.

Finally a third potential dilemma to that uptake may be *comparativism*. This will sound heretical to some; one very succinct definition of legal anthropology pegs the discipline as the ethnographic and cross-cultural study of norms and dispute resolution.<sup>82</sup> To consider as a limitation the "cross-cultural" element of this study is to potentially devalue one of its most distinguishing traits. It is also to discourage unparalleled opportunities for international and trans-regional studies of legal culture. For purposes of understanding recent developments such as global governance and regional integration, such discouragement may seem obscurantist. But hypotheses on this question do not presumptively translate to other fields such as social movements or global politics. In those arenas, the comparative lessons from legal anthropology have made greater impact and enjoyed warmer reception. In the discrete community of legal academics, meanwhile, comparative legal culture enjoys no greater magnanimity than comparative law itself.

Comparative law and legal anthropology have shared the common methodological approach of looking beyond the researcher's own cultural and linguistic context. While the latter has been based in ethnographic

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81. See Geertz II, *supra* note 68, at 170; see also ROSEN, *supra* note 23, at 9.

82. See CAROL J. GREENHOUSE, PRAYING FOR JUSTICE: FAITH, ORDER, AND COMMUNITY IN AN AMERICAN TOWN 28 (1986).

fieldwork over time in the ways described above, the former takes, as its object of study, not legal communities so much as legal doctrines and concepts compared across cultural frontiers.<sup>83</sup> At a high level of generality, this has entailed comparison of principles in the various world legal systems: Common, Civil, Islamic, Soviet, Hindu, and Chinese Law. But, from the perspective of the legal ethnographer, pure comparative law has the readily identifiable weakness of decontextualization. The comparative jurist looks to rules and principles on a given subject within two or more legal communities and stands those in relation to one another.<sup>84</sup> The ethnographic field researcher enters and interacts with the communities constituted by those rules and principles to glean their dynamic meanings in people's daily life.<sup>85</sup> Each draws conclusions based on their research, and presumably wishes for those conclusions to enlighten the audiences they intended.

Further, comparative law has experienced only limited acceptance in mainstream legal scholarship and teaching. One reason for this, which confronts legal anthropology as well, is the perennial suspicion that lessons offered by contexts afield are of little use to law students and represent only pet research interests of their instructors. How, some would ask, does understanding how the *qadi* (judge) of Islamic law reaches a decision help to determine, influence, or construe the jurisprudence of Anglo-American judges?<sup>86</sup> Similarly, the reflexive, social science response might ask why insight on Anglo-American jurisprudence must be the benchmark for the relevance of accounts of Islamic justice. These counter-questions reflect a dispute between scholarship's professional use value, and its exceptional role as knowledge "for its own sake." The former demands our research be well-grounded and engaged but renders it susceptible to "market" demands for something less like knowledge and more like "information." The latter shields our research from market-driven need, but obviates the ethical imperative of relevance.

#### B. *Law Versus "Law-Like" Activity*

Anthropology has struggled to properly characterize *law* for much of its history. Its difficulties began with the dubious partnership between research and political subjugation. Early ethnological work drawing on missionary ethnography carried an important *gravitas* not just among the developing

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83. See Annelise Riles, *Introduction: The Projects of Comparison*, in *RETHINKING THE MASTERS OF COMPARATIVE LAW* 1, 5 n.12 (2001).

84. PETER DE CRUZ, *COMPARATIVE LAW IN A CHANGING WORLD* 3 (2006).

85. Moore, *supra* note 4, at 745.

86. See *supra* note 48 and accompanying text.

social sciences, but among the *life sciences* as well. Conclusions about “Man’s” evolutionary past were drawn from cultural observations among “primitive” peoples of the global East and South, as well as native America. The relevance of the discipline lay in its offering of lessons on human essences—the natural tendencies of mankind underpinning all other scientific, industrial, and artistic pursuits. The evolutionist agenda gave way slowly—markedly between the two World Wars thanks to increased cross-cultural contact—to a preservationist one. Whatever insights primitive people and their cultures could supply, they would soon vanish and thus needed to be documented if not “salvaged.”<sup>87</sup>

Finally, beginning in the 1960s and coinciding with human migration to metropolitan countries, wars of decolonization, and civil rights movements notably in the United States and England, sociocultural anthropology turned increasingly to its own metropolitan, urban contexts.<sup>88</sup> In this move, it could offer in-depth, longitudinal, qualitative accounts of changes in metropolitan societies brought on by the increased *heteroglossia* of multicultural urban life.<sup>89</sup> But, as this development unfolded, a new problem arose: to the extent that anthropology was now turned toward Western, urban society, and to the extent that its method had evolved to become “participant-observation,” what, if anything, could it offer empirically that was not already available through neighboring fields like urban sociology, or gonzo journalism? And more specifically, was the provision of empirical data any longer its concern? For some associated with the interpretivism already described, the answer was ‘no’. For them, anthropology was to henceforth work as a humanities discipline. Unlike literature, it would read cultural practices as text. Unlike history, it would treat people’s narratives as their archives.

For the subfield of legal anthropology, the turn to metropolitan or global society and concurrent humanization of the discipline and its methods has been challenging. Ethnographic fieldwork no longer offers the potential of putative “eureka!” insights it once might have. Few expect to deduce a unified theory of justice or fairness from tribal dispute resolution in the remote Amazon—first, because ethnography has left few stones unturned and few tribes unchanged; and second, because unified social theory has left the agenda almost everywhere.<sup>90</sup> Further, studies of “complex” societies call for a different approach than did the study of “primitive” ones. For Levi-

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87. See *supra* note 60 and accompanying text.

88. See Moore, *supra* note 4.

89. See generally MIKHAIL BAKHTIN, *THE DIALOGIC IMAGINATION: FOUR ESSAYS* 67 (1982). *Heteroglossia* is Bakhtin’s term for the multiplicity of national languages presented in the literary novel form.

90. Chagnon’s famous study of the Yanomamo in Venezuela has become a symbol for these excesses. Chagnon portrayed the tribe as one of the last “untouched” peoples, but his critics accused him of infecting the Yanomamo with measles, misrepresenting their practices, and collaborating with government officials in their subjugation. See PATRICK TIERNEY, *DARKNESS IN EL DORADO* 10 (2000).

Strauss among the tribes of the Brazilian Amazon, the pen and notepad were markers of an ingenious literary magic of which no local chief was in possession.<sup>91</sup> The anthropologist, for better and for worse in such contexts, was his or her own kind of shaman. Even if he was ignorant of local practices, he approached them from a correlative position of expertise. For today's urban legal ethnographer there is little such parity of position within the larger framework of legal systems and institutions. Unless trained in the same venues as metropolitan jurists, the ethnographer must approach these actors from a position of relative ignorance about doctrine, procedure, and practice. Moreover, he now usually cannot count on the prestige of a new communication technology previously unheard of by jurist-informants.

Perhaps for this reason field studies of legal culture have turned increasingly to venues far afield of formal legal institutions. "Law-like" behavior became a stand-in for law, enabling fieldwork among a wider variety of communities and contexts. As I am suggesting, this development has been a mixed blessing. On one hand it has opened up the conceptual field to consider the mutual influence of law and diffuse social behavior. On the other hand, it may have diluted the influence of legal anthropology in the mainstream legal academy. From the perspective of legally trained experts, much law-like activity is a byproduct of formal legal activity.<sup>92</sup> The formalities studied and practiced in the legal profession are, from that position, non-negotiable. Or, as Halperin aptly writes, "[l]aw can bite and often bites with a violence that is not purely symbolic"<sup>93</sup>

Clients often see lawyers as therapists, experts who at certain cost can hear their problem and make it go away. But, to do this requires more than hearing: it requires translation. And second, formalities are non-negotiable because they are the ways in which client problems must be articulated in a legally cognizable form for the adjudicator to resolve, or for opposing parties

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91. See CLAUDE LEVI-STRAUSS, *TRISTES TROPICS* 296 (John Weightman & Doreen Weightman trans., 1992).

92. Civil recourse theorists, for instance, argue that one of tort law's main functions is to provide a formal right to redress with such right forming ones of the individual's due process rights. John Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 *YALE L.J.* 524, 626 (2005).

93. Jean-Louis Halperin, *Law in Books and Law in Action: The Problem of Legal Change*, 64 *ME. L. REV.* 45, 58 (2011); see also Llewellyn, *supra* note 1, at 1364. Llewellyn also used the metaphor of odontological violence:

The 'legal' has to do with ways and standards which will prevail in the pinch of challenge, with rights and the acquisition of rights which have teeth, with liberties and powers whose exercise can be made to stand up under attack. Let there be no doubt about this: you can have law-stuff, undeniable law-stuff, which is neither right nor just; when you are put to the choice, you will know the 'legal' from the right or just because the 'legal,' when insisted on, is what prevails, and the right or just will have to suffer accordingly.

Llewellyn, *supra* note 1, at 1364.

to respond. The lawyer must take messy real world situations (“fact patterns” in more didactic terms), break them into smaller, articulable units, and then address them under rules and procedures already available. Occasionally, as novel patterns arise, she has the opportunity to suggest new ones.

Acculturation to this new modality of thought and communication has vexed many a first-year law student. Elizabeth Mertz has incisively written on language patterns in first-year courses at a wide variety of American law schools.<sup>94</sup> There, she observed the ways in which new students are encouraged to dissect cases in a distant and hyper-rational modality.<sup>95</sup> Students are rewarded for distant application of legal principles motivated by well-settled policy, and discouraged from importation of affective and subcultural instincts on the outcome of a case.<sup>96</sup> For others, this abstraction through pedagogy results in an overall professional distance that separates law students from their lay context by the time of graduation.<sup>97</sup> A better understanding of law-like activity may shed light on this process in a few ways.

First, law-like might be distinguished from law-in-action. The latter begins with legal doctrine formalized at one or another level and requires some fixed formal rule.<sup>98</sup> Its goal is to observe that doctrine in practice. And while it is true that the practice such doctrine may give rise to will differ from that imagined by its architects, or vary from one context to another, these are still occasioned and influenced by the norm itself.<sup>99</sup> Ethnographers

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94. Elizabeth Mertz, *Teaching Lawyers the Language of Law: Legal and Anthropological Translations*, 34 JOHN MARSHALL L. REV. 91, 93–94:

The distinctive epistemology that underlies legal language, as it is taught in the doctrinal classrooms, fits very well with overall goals and features of the legal system in the United States. Thus, there is a symbolic “fit” that connects teaching method, legal language, the legal system, and that system’s underlying worldview. This symbolic connection makes sense of the persistence of certain Socratic aspects of legal teaching, despite ongoing complaints about efficacy, fairness to students of differing backgrounds, and negative impacts on students. The cultural logic entailed by the fundamental worldview taught to law students alters incipient lawyers’ orientations concerning human conflict, authority, and morality. A crucial aspect of this changed orientation involves training students to read texts with a new focus, so that they learn to interpret stories of conflict in legal terms. When view through this lens, traditional legal pedagogy symbolically mirrors and reinforces an epistemology that is vital to the legal system’s legitimacy.

*Id.*

95. *Id.* at 99.

96. *Id.* at 100.

97. Bix, *supra* note 5, at 983 (“Legal education is relevant to questions about the autonomy of law, not only in the sense that this is the context in which forms of legal reasoning are passed on within the profession, but also because the training itself may express the forms of knowledge and decision-making that are considered distinctive for law, or at least for one particular legal system.”).

98. See, e.g., STEWART MACAULAY ET AL., INTRODUCTION, LAW IN ACTION: A SOCIO-LEGAL READER, 1 (2007).

99. See, e.g., GREENHOUSE II, *supra* note 41.

have been remiss to conflate this with activity forming or negotiating informal norms and their enforcement.<sup>100</sup>

To illustrate this, we might imagine a children's playground game. That game may incorporate rules formalized elsewhere—for instance in the disciplinary handbook—such as “no hitting.” But a nexus between that form and the playground rule would need to occur in order to properly call this “law in action.” Such a nexus might be the moment of introduction when a child introduces or invokes the formal school rules. Without this, the uptake of social norm into informal practice is more properly “law-like”—it illustrates the children's mimesis of rulemaking and enforcement and not necessarily law as such. Whether such behavior fulfills a need that is learned or innate is a question beyond the scope of this article.

The playground illustrates a key distinction between law-like behavior and law in action; formalized rules with enforceability. The informal negotiation or negation of rules is ripe for ethnographic investigation and tells us about identity, individualism, free will, belonging, community, collectivism, opportunism, and so forth. But these topics are *distinct* from the study of how discrete formal doctrines play out in real-world contexts.<sup>101</sup> A presumption that this distinction is negligible, I contend, has limited the reach of legal anthropology by ignoring the specific, integrated roles of profession and expertise.

The will to look past such experts is, for reasons above, understandable. But might the popular entrustment of advocacy to a legal profession—a division of labor in some senses—be read ethnographically as expressing its *own* wisdom? This question requires us to reflect on the nature of “profession.” While sometimes compared to medicine, law's status as a profession is based on something other than erudition and clinical service. The process of legal education serves, no doubt, as a rite of passage to determine membership in the community of practice and expertise. But what truly defines the “legal profession” is its ongoing self-governance or *autopoiesis*.<sup>102</sup> Bar admission, adherence to the rules of professional responsibility, and submission to judges formed by the same processes all ensure that the law maintains practical and moral boundaries between itself

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100. See NIEZEN, *supra* note 18, at 2 (“A basic difference can therefore be drawn between those laws that have built into them a formal mechanism of enforcement[] that are supported by the possibility of (ideally) behavior-modifying, judicially applied sanctions, and those that rely more exclusively on popular opinion, compassion, the ‘politics of shame’, or . . . the cultivation of popular ‘indignation.’”).

101. A challenge to this may be found in juries. Some have pointed out the ambivalent view of juries in modern tort law. The adherence to a common practice of general verdicts shields the jury from scrutiny and prioritizes the common sense judgment of twelve jurors for the formal logic of common law rules. KENNETH ABRAHAM, *THE FORMS AND FUNCTIONS OF TORT LAW* 12 (3d ed. 2007); *see also supra* note 11 and accompanying text.

102. GUNTHER TEUBNER, *AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY* 3 (1987).



and other fields through self-governance. This maintenance of an insular community with discrete rules of practice and morality comes with a language whose mastery is requisite to success.<sup>103</sup> Finding themselves suddenly facing a dispute, lay individuals may either attempt to quickly learn and deploy that language, or approach those trained or experienced in its deployment.<sup>104</sup> For these reasons, the law world looks very different to anthropologists and lawyers.

Thus, the tendency to see “law-like” conduct as “law” has missed a significant opportunity. In an era when abrogation of rules and morality at very high levels has been lightly scrutinized and poorly understood, what should be anthropology’s role in bridging the disconnect between expert and lay knowledge when that gap has permitted gross injustice on a global scale? How can it study law in a way that takes seriously its “ethnographically” experienced other-worldliness?<sup>105</sup> And above all here, how can it communicate with *experts* in a way that takes seriously the way they do business, the way laypeople see them, and the possibilities afforded by a more relevant study of legal culture at its cores rather than just peripheries?<sup>106</sup>

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103. See GREENHOUSE II, *supra* note 43.

104. American popular culture is rife with examples of people doing this, much to the comedic pleasure of wide audiences. LEGALLY BLONDE (MGM 2001) and MY COUSIN VINNY are but two cinematic examples. These images also have a way of entering our lexicon as *clichés*, shorthand for the whole uncanny experience of bridging an expertise gap from a precarious position despite all odds only to win. See LEGALLY BLONDE (MGM 2001); MY COUSIN VINNY (20th Century Fox 1992).

105. See NIEZEN, *supra* note 18, at 1. Niezen aptly terms this an “ethnography of the unknowable.” *But see, e.g.,* Tejani, *supra* note 58. This stands opposed to more accepted notions of “law as local knowledge.”

106. See IMMANUEL WALLERSTEIN, THE MODERN WORLD SYSTEM: CAPITALIST AGRICULTURE AND THE ORIGINS OF THE EUROPEAN WORLD-ECONOMY IN THE SIXTEENTH CENTURY (2011). A breakdown of the conceptual boundary between formal legal doctrine (even in action) and “law like” behavior has coincided with the permeation of disciplinary boundaries. This has largely occurred in the form of methodological and theoretical borrowing; the use of archives in ethnographic fieldworks is one key example. See JOHN COMAROFF & JEAN COMAROFF, ETHNOGRAPHY AND THE HISTORICAL IMAGINATION 18 (1992). But this change has not razed disciplinary borders. If anything, it has brought discussions of disciplinarity to the front of legal anthropological work. Such discussion can be important, as it serves a goal of transparency and author positioning for scholarly audiences. Nevertheless, the trend toward this interdisciplinary positioning comes with potential costs. Bringing law and anthropology together by conceptual bridge-building surrenders the productive value of colliding the two at their conceptual cores. The former enterprise has already been described above. It is represented in the argument that law can be understood through “law like” behavior and entails an ethnographic focus on law’s margins. This allows the researcher to approach a field site not otherwise of obvious ‘value’ to mainstream lawyers and describe ways in which it is analogous to the situations in which they more often operate. This then allows them to draw lessons for their own work. Whether lawyers complete this process is questionable. More likely, they stop short because other disciplines and their studies are more direct about their message.

### 1. Disciplinary Power

A preliminary step might be to reevaluate the conceptual weight given to *disciplinary power* in legal ethnography. That term, distinguished from State or sovereign power as the exercise of domination in micro-social relationships, originated by French social philosopher Michel Foucault and has pervaded social science and humanities in Europe and North America over the past twenty years.<sup>107</sup> Disciplinary power is pessimistic about human nature: heavily influenced by Nietzsche, Foucault saw discipline rooted in the human being's individual will to dominate its local contexts while serving the legitimation of sovereign power.<sup>108</sup> Historical examples of this abounded in his time. French collaboration under Vichy, Colonial repression in North Africa, and quotidian military atrocities in South East Asia, were all recent or contemporaneous political concerns for the French Nietzscheans.

In a sense disciplinary power evokes the *law jobs*. The law jobs are diffuse law and law-like activities in which wide numbers of tribal members participate, and upon which the successful governance of Cherokee behavior and social reproduction is premised.<sup>109</sup> They represent a kind of legitimacy or "buy-in" where tribal members collaborated in their own normative regulation. Similarly, *disciplinary power* and its myriad practical sites serve the legitimacy of *sovereign power*—the basis for State authority. Beyond

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107. *Most Cited Authors of Books in the Humanities, 2007*, Times Higher Education (FEB. 10, 2013), <http://www.timeshighereducation.co.uk/story.asp?storyCode=405956>.

108. MICHEL FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972–1977* 98 (1980) ("Power must be analysed as something which circulates, or rather as something which only functions in the form of a chain. It is never localised here or there, never in anybody's hands, never appropriated as a commodity or piece of wealth. Power is employed and exercised through a net-like organisation. And not only do individuals circulate between its threads; they are always in the position of simultaneously undergoing and exercising this power. They are not only its inert or consenting target; they are always also the elements of its articulation."); *see also id.* at 105 ("This new type of power, which can no longer be formulated in terms of sovereignty, is, I believe, one of the great inventions of bourgeois society. It has been a fundamental instrument in the constitution of industrial capitalism and of the type of society that is its accompaniment. This non-sovereign power, which lies outside the form of sovereignty, is *disciplinary power*. Impossible to describe in the terminology of the theory of sovereignty from which it differs so radically, this disciplinary power ought by rights to have led to the disappearance of the grand juridical edifice created by that theory. But in reality, the theory of sovereignty has continued not only to exist as an ideology of right, but also to provide the organising principle of the legal codes of Europe acquired in the nineteenth century, beginning with the Napoleonic Code . . . [T]he theory of sovereignty, and the organisation of a legal code centred upon it, have allowed a system of right to be superimposed upon the mechanisms of discipline in such a way as to conceal its actual procedures, the element of domination inherent in its techniques, and to guarantee to everyone, by virtue of the sovereignty of the State, the exercise of his proper sovereign rights. The juridical systems—and this applies both to their codification and to their theorisation—have enabled sovereignty to be democratised through the constitution of a public right articulated upon collective sovereignty, while at the same time this democratisation of sovereignty was fundamentally determined by and grounded in mechanisms of disciplinary coercion." ) (emphasis added).

109. Llewellyn, *supra* note 1, at 1373.

legitimacy, the two concepts both capture a demand for *efficiency* supplied by legal culture. If we take as axiomatic law's goal of regulating human behavior (*optimal deterrence* in some iterations of tort law) then we must account for its ability to accomplish this in the lives of the many while only directly acting upon relatively few individuals.<sup>110</sup> This efficiency requisite for law's success is accomplished precisely through the functioning of "legal culture." Both law jobs and *disciplinary power* seem to account for this demand and supply of legal culture.

But morally the two concepts are sharply different. Llewellyn and Hoebel described the Cherokee approach to law and legal institutions in order to shed light on the American context around them. Llewellyn used the Cherokee example to support *legal realism*—the philosophy that law is geared to the solution of real problems through pragmatic jurisprudence rather than through rote application of rules to facts.<sup>111</sup> In this sense, the *law jobs* provided an opportunity to assert that, in its purest contexts (e.g., tribal society), law was a pragmatic and aspirational endeavor and as such incorporated the practices of a larger swath of the society.<sup>112</sup>

In medical anthropology, disciplinary power has inspired ethnographic and theoretical writings that bridge the physiological and psychological lives of people with the quotidian exercise of State power.<sup>113</sup> There, *discipline* is used to question citizen complicity with the State's exercise of sovereign power. The sovereignty of States cannot function, Foucault wrote, but for the everyday, quotidian acts of discipline wherein human beings effectively police one another's behavior and enforce norms.<sup>114</sup> These sites of disciplinary power have been highly attractive to legal anthropology: NGOs conducting human rights work in the developing world, immigration clinics in metropolitan borderlands, or property conceptions among artists or computer programmers. Studies at these and other sites show us how norms become assimilated and enforced by people in the day to day, and thus how law achieves its greatest efficiency through the ability to control behavior without having to act upon all those within its purview. This is particularly true in new cultural contexts where State authority has not yet been formalized.<sup>115</sup>

And yet are valuable ethnographic studies of these intriguing sites the study of law and its material or are they, rather, studies of the *influence* of

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110. See, e.g., NIEZEN, *supra* note 18.

111. Ajay Mehrotra, *Law and the "Other": Karl N. Llewellyn, Cultural Anthropology, and the Legacy of the Cheyenne Way*, 26 LAW & SOC. INQUIRY 741, 743 (2001).

112. Llewellyn, *supra* note 1, at 1373.

113. See, e.g., JOAO BIEHL, *VITA: LIFE IN A ZONE OF SOCIAL ABANDONMENT* (2005); see also NANCY SCHEPER-HUGHES, *DEATH WITHOUT WEeping: THE VIOLENCE OF EVERYDAY LIFE IN BRAZIL* (1992).

114. NIEZEN, *supra* note 18, at 16.

115. The early Internet is a prime example of this pre-formalized normative environment. See, e.g., Gabriella Coleman, *The Political Agnosticism of Free and Open Source Software and the Inadvertent Politics of Contrast*, 77 ANTHROPOLOGY Q. 03 (2004).

law at informal or pre-formalized sites and their material? For instance, while Geertz writes, “[l]aw doesn’t just mop up, it defines[,]”<sup>116</sup> the dualistic role of law in mopping up *and* world making is no longer denied in legal scholarship and profession. But, the “world making” role of law in all societies, has at times been cleverly held at bay because its lessons do not facilitate *solution* of specific problems in specifically enforceable ways. Law, then, does not *just* mop up—but it does do that among other things when applied to messy social or interpersonal situations. If so, this is simply because we say it can.

This “provisionality” of clean-up and its legitimation of power arrangements seems to be the focus of much legal anthropology. My contention is that neither provisionality nor legitimation should be news to legal philosophers. Of greater insight—both to scholars of law and the ‘publics’ impacted by their students—are the means by which the materiality of law, its rules, procedures, and institutions, escape the gaze of legal subjects through occultation.<sup>117</sup> One such means, I suggest below, is the legal black boxing of culture in the very language of common law rules.

## 2. Law as Culture

With its embrace of disciplinary power, legal anthropology saw diminished influence upon legal education and jurisprudence; this estrangement vexed a discipline once thought to be the most “activist” of the social sciences.<sup>118</sup> Cognizant of this malaise, recent works have called for a reappraisal of the use-value of anthropology to law, and an “invitation” of lawyers to embrace the cultural foundations of their discipline and profession.<sup>119</sup> In furtherance of this, Rosen suggests lawyers should view law, not simply in relation to, but *as* culture.<sup>120</sup>

Echoing Geertz, Rosen writes that law consists of the formal and practical creation and negotiation of categories.<sup>121</sup> When this becomes difficult, arguments are made about why new sets of facts belong in one or another category, or why existing categories must be stretched to

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116. ROSEN, *supra* note 23, at 8.

117. Tejani, *supra* note 58.

118. ROSEN, *supra* note 23, at 200.

119. *Id.*; see GREENHOUSE I, *supra* note 17.

120. ROSEN, *supra* note 23, at 200.

121. *Id.* This insight is almost as old as anthropology. “Anthropologists have long been aware of a basic human capacity to construct categories that bring together patterns of belonging and behavior. In *The Savage Mind*, Claude Lévi-Strauss draws upon a wide range of nineteenth-century ethnological material . . . to illustrate social-conceptual categories connected to emblematic forms of behavior . . . .” NIEZEN, *supra* note 18, at 15.

accommodate new factual variations.<sup>122</sup> Not unlike the lurking structural anthropology of Levi-Strauss, Rosen's account enables analogy of law to the very workings of cognition through language. These, we are told, filter the mind's eye as it gazes out upon the world.<sup>123</sup>

But the characterization of law *as* culture contains a premise I wish to problematize here. This is the notion that law and culture act with the same, or similar, relative torque upon what human beings take for granted as "Real." Reality, the proposition goes, is socially constructed.<sup>124</sup> Its construction consists of fundamental building blocks of perception and understanding: categories by some accounts, words and symbols by others. Use of these categories, words, or symbols, is everything. Created and exchanged among individuals, these become not only the common denominator of community, but, as learned in Geertz' account, requisite to *belonging* in it.<sup>125</sup> Thus, one's status in a community is not only dependent upon internal point-to-point relationships, but also upon one's relationship to the "Reality" in which that community lives and operates.

#### V. LEGAL "BLACK BOXES": TORT LAW AND THE PROVISIONAL AUTONOMY OF CULTURE

The common law is self-reflexive of its role in reproducing social stability through cultural integration. In it, Anglo-American jurists have constructed doctrinal regions where cultural questions are cordoned off to be decided *ad hoc* as questions of "fact" in discrete cases and contexts.<sup>126</sup> Borrowing from Bruno Latour's seminal work in science and technology studies, I wish to consider these doctrinal zones *legal black boxes*.<sup>127</sup> For Latour, "black boxing" entailed the deferral of questions about a given system unit's *function* when the objective was to understand the system as a

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122. *Id.*

123. *Id.*

124. Social constructivism has modern origins in the sociology of Emile Durkheim characterized post-modern social science and reached an apogee with social studies of virtual reality. See EMILE DURKHEIM, *THE RULES OF SOCIOLOGICAL METHOD* (1895); PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE* (1966); SHERRY TURKLE, *LIFE ON THE SCREEN: IDENTITY IN THE AGE OF THE INTERNET* (1995).

125. *Supra* note 77.

126. I specify "Anglo-american" here because it remains to be conjectured whether this development is so ubiquitous in other contexts. It may well be; however, I suspect that its emergence is related to the development of modern nations and nationalisms that sought legitimacy by transcending cultural particularisms of the previous age. In forthcoming work, I will explore the relationship of legal black boxing of culture to the rise of modern nation-states.

127. BRUNO LATOUR, *SCIENCE IN ACTION: HOW TO FOLLOW SCIENTISTS AND ENGINEERS THROUGH SOCIETY* (1987). Myriad spaces in the formal law are carved out and protected to permit judges and juries to defer certain questions to the realms of community, nation, industry—all of which are placeholders for culture. While this does not hermetically seal law from culture, it does practically separate the two in ways highly consequential to both practitioners and clients.

whole.<sup>128</sup> While on one hand such designated zones illustrate the wide imbrication of law and culture (e.g. all law is immanently language), they also indicate a self-conscious effort to separate cultural concerns from legal ones for the purpose of structuring decision-making, advocacy, and public behavior. These areas attest to law's provisional autonomy, and the perennial effort that must go into maintaining this. In this way, legal black boxes are the site at which law fabricates its own autonomy and where knowledge of such fabrication is *occulted*—hidden behind expert knowledge and practice.

The law of torts illustrates this process well.<sup>129</sup> There, common law rules have been developed, enshrined in judicial opinions, and codified into the various *Restatements on Law* by the American Law Institute. Examining discrete causes of action in torts and their constituent “elements,” one sees in them a pattern of deferring cultural questions to non-legal authority (e.g. jury or judge as fact-finder). In the law of torts, cultural questions become variables in the analysis permitted by the rule, but values ascribed to those variables are left *provisional*. This treatment permits law to serve its overtly normative function while separating description from norm.

#### A. *Description and Norm*

The dichotomy between description and norm has preoccupied both law and legal anthropology.<sup>130</sup> With interpretive anthropology came a realization that divisions between description and norm—fact and law for Geertz—were culturally relative.<sup>131</sup> Later, the writing process itself came to be considered a descriptive endeavor as no researcher was an unfiltered lens through which culture was simply magnified.<sup>132</sup> This focus upon description was welcomed after early ethnographic work had been used in the ordering and regulation of native peoples by colonial regimes.<sup>133</sup> Whereas description had once been

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128. *Id.*

129. Bix, *supra* note 5, at 985 (“The argument of the neo-formalists is that *certain areas of doctrine* (e.g. tort law) have an essence, which current practices roughly express, but the law should be reformed to express that essence more fully.”) (emphasis added).

130. *See, e.g.*, Riles, *supra* note 23, at 643–44. Some have cogently sought to establish the contingency of this dichotomy across cultural contexts. One early illustration might be the more functionalist accounts of Malinowski where focus upon proximate *documentation* of norms distinguished itself from the distanced generalizing process of armchair ethnology. In those days, tribal communities were approached as human laboratories and the field researcher viewed himself as scientist. He saw his work of documenting native practices, beliefs, and symbolism not as description but as *inscription*—writing in text what he observed in front of him. Riles, *supra* note 23, at 603–04.

131. Geertz II, *supra* note 68.

132. JAMES CLIFFORD & GEORGE MARCUS, *WRITING CULTURE: THE POETICS AND POLITICS OF ETHNOGRAPHY* (1986).

133. *Id.* at 9–10.

viewed as objective observation of people in their context, it was now one researcher's experience with a circumscribed group that may or may not have been generalizable to the entire society.<sup>134</sup>

This disclaimer makes anthropology conceptually more interesting and presents a safe space for the reflexive description of disappearing cultures, or metropolitan subcultures. It serves an archival function, still ripe since the time of Lévi-Strauss,<sup>135</sup> but it also serves the comparativist priority by providing so-called raw material for comparison across cultural boundaries, and thus, the mapping of those boundaries themselves.

Despite these virtues of avoiding normative argument, legal anthropology might reevaluate *potential* for its own normative judgments about change in ethnographic communities (particularly as those get closer to home), and the *possibility* that lawmakers in their informants' communities will take up ethnographic accounts in regulating local behavior.<sup>136</sup> Many will cringe at this: first, because ethnographers prefer not to consider their accounts as "empirical output," and second because such accounts have generally and purposely removed themselves from temporality. While law embraces its temporal position through arguments about change, legal anthropology has long distanced itself from time through snapshots of legal culture in the perennial "ethnographic present."<sup>137</sup> This reservation misses two key things. First, as others have said, descriptive accounts are built upon frameworks of normative thinking.<sup>138</sup> Second, normative arguments, even if provisionally autonomous, make descriptive suppositions about the "way the world works."<sup>139</sup>

The mutuality of description and norm in law is nearly inverse to that in anthropology. Whereas in anthropology normative considerations lurk deep in the background of even reflexive projects, in law, descriptive propositions remain obscured.<sup>140</sup> Proponents of a renewed role for legal anthropology have long noted the myriad background cultural assumptions underpinning legal arguments and decisions.<sup>141</sup> Those discussions do not reflect heavily on

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134. *Id.* at 10 ("Cultures do not hold still for their portraits. Attempts to make them do so always involve simplification and exclusion, selection of a temporal focus, the construction of a particular self-other relationship, and the imposition or negotiation of a power relationship.").

135. Lévi-Strauss, *supra* note 66.

136. ASAD, *supra* note 65.

137. E. ADAMSON HOEBEL, ANTHROPOLOGY: THE STUDY OF MAN 32 (1972) ("Cultures are constantly changing and modifying. Yet in anthropology we investigate a society on a field trip of greater or less duration, after which we write up a monograph describing its culture. In so doing, we fix for the moment those main lines of characteristic behavior that have been perceived and noted as though they were all taking place at any given moment.").

138. Riles, *supra* note 23, at 644.

139. *Id.*

140. *See supra* note 5, at 762 ("[Langdell] said that the principles of law could be inferred from judicial opinions, so that the relevant training for students of the law was in reading and comparing opinions and the relevant knowledge was the knowledge of what those opinions contained.").

141. *See* ROSEN, *supra* note 23; *see also* DAVID ENGLE & MICHAEL MCCANN, FAULT LINES: TORT LAW AS CULTURAL PRACTICE 1–20 (2009).

questions of how the world works and rather serve to forestall any such reflection. When legal anthropology presents the problem of cultural assumptions in law then, it usually does so with two implicit messages: first, that realization of this brings added value to lawyers, and second, that capacity to deliver such value grants the subfield its best entry into academic law.

These two notions, I am suggesting, may be overly optimistic. Awareness of the cultural assumptions that enter core legal discussions does not necessarily add value to the work of lawyers because it is insight with which they are already familiar. That is to say, the very work of lawyers—both their reason for being and their formal and informal training—is meant to set aside cultural reflection. This has been observed at several sites: Mertz’ study of the *law school* environment is one example, while Rosen’s discussion of the oracular quality of civil juries is another.<sup>142</sup> Engel and McCann, meanwhile, have noted the great latitude afforded judges on deciding cultural questions as a “matter of law” in several areas of tort law.<sup>143</sup>

#### B. *Tort Law’s Little Black Boxes*

To better understand such deference, it is necessary to consider how formal law treats its contextual cultural environment. This consideration is interested not in the way law ramifies in its social context, but in the way social context is processed in legal concepts. For this purpose I propose a brief but closer reading of Anglo-American tort law. There, legal doctrine is not a panacea for understanding law’s occultation, but it is one example where ethnographic and ethnological study of law benefits from observation of the sovereign power behind it. In this case, black boxes in tort law illustrate how the sovereign authority of institutional rules attempts to prescribe the relationship they shall have with their cultural environment.

##### 1. Strict Liability

The law of torts may be divided into two basic regimes—strict liability and fault liability—imposed through specific causes of action developed

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142. See Mertz, *supra* note 100; ROSEN, *supra* note 23, at 147; see also ABRAHAM, *supra* note 101, at 6–7 (“There are two different kinds of fact-finding that juries perform. One is making ‘pure’ findings of fact. This requires answering *empirical* questions about the world, past, present, or future: did the defendant strike the plaintiff, how long had the banana peel been lying on the supermarket aisle before the plaintiff slipped on it . . . . I do not mean to minimize how difficult it sometimes is to answer merely empirical questions. Predicting how much an injured person will suffer from her injury twenty years from now is a pure empirical question, but that does not make it any easier to answer.”).

143. ENGEL & MCCANN, *supra* note 141.



under common law. Within each of these, deference on matters of culture appears across the entire spectrum of liability theories.

To begin, strict liability was created, and then expanded to cover few *very* specific kinds of harm resulting from activity that in essence is considered “abnormally dangerous.”<sup>144</sup> This concept has changed in its accounting for change over time, and its legitimacy and efficiency are premised not only on corrective justice and deterrence but on changes in these values as societies evolve. Hence, the First Restatement imposes strict liability for “ultrahazardous activity,” defining it in terms of the risk of serious harm “not eliminated by exercise of utmost care” and by the lack of commonality of the conduct.<sup>145</sup> This definition allowed that even highly dangerous activity could become more or less common in time and place.<sup>146</sup> In the Second Restatement, the American Law Institute (“ALI”) switched to labelling this conduct “abnormally dangerous” and added a list of six factors in applying the standard.<sup>147</sup> Most significant was inclusion of factors of *appropriateness to place* and *social utility*.<sup>148</sup> The addition of these factors illustrates the derivative operation of strict liability law vis-à-vis culture; factors adjusting for cultural change in the law would themselves change subject to new priorities. In this case, both utility and place index an added emphasis on the particular industrial use of land and conduct in question and their value to the ambient society.<sup>149</sup> It is important to note that such rules of contextual valuation support cultural mythologies that underpin governance more generally. For example, they have often celebrated environmental purity as a requisite for domestic family life.<sup>150</sup>

Finally, the Third Restatement dropped the six factor test and returned to the earlier, simplified rule reinstating “abnormally dangerous” and defining it in terms of foreseeability, risk despite reasonable care, and commonality of the conduct.<sup>151</sup> Remaining behind this rule today is a flexibility toward cultural shifts in conduct, and the background assumption that greater

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144. See Kenneth S. Abraham, *Rylands v. Fletcher: Tort Law's Conscience*, in TORTS STORIES 207 (Robert L. Rabin & Stephen D. Sugarman eds., 2003).

145. RESTATEMENT (FIRST) OF TORTS § 520 (1938).

146. Context would already be taken for granted as English speaking and subject to Common Law “rule of law.”

147. *Arlington Forest Assocs. v. Exxon Corp.*, 774 F. Supp. 387, 390 (E.D. Va. 1991); RESTATEMENT (SECOND) OF TORTS § 520 (1977).

148. RESTATEMENT (SECOND) OF TORTS § 520 cmt. j-h (1977).

149. See *id.*

150. *Yommer v. McKenzie*, 257 A.2d 138, 140 (Md. 1969) (“The fifth and perhaps most crucial factor under the Institute’s guidelines as applied to this case is the appropriateness of the activity in the particular place where it is being carried on. No one would deny that gasoline stations as a rule do not present any particular danger to the community. However, when the operation of such activity involves the placing of a large tank adjacent to a well from which a family must draw its water for drinking, bathing and laundry, at least that aspect of the activity is inappropriate to the locale, even when equated to the value of the activity.”)

151. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 20 (2010).

incidence of that conduct may serve to limit liability for harm it creates.<sup>152</sup> The goal here, like most of tort law, is not to compensate for *all* wrongs created, but to compensate for wrongs which represent a departure from accepted cultural practices.<sup>153</sup> Those practices are themselves *not* specified; and yet, the rules of strict liability have been rearticulated by the ALI with greater frequency—and seemingly greater urgency—than most other areas of tort law.<sup>154</sup> Likely, the *gravity* of liability without fault in a social context that prides (or defines) itself on due process necessitates greater fealty toward community values out of which law is said to derive. Here, overt deference to culture prevails especially when the potential for substantive injustice through liability without fault is great. In such cases, one might say, the law “punts” to culture.

In difficult cases, these cultural questions are tried to a jury. Civil juries are permitted to address questions of law or mixed questions of law and fact only after a long arduous process of pre-trial and trial advocacy.<sup>155</sup> By the time a question, or questions, reach the jury, one or both sides has failed to prevail on motions to dismiss, summary judgment, or directed verdicts.<sup>156</sup> The judge cannot, “as a matter of law,” say that certain conduct was, for instance, “unreasonable” or departed from “professional standards.” At this, its highest level of difficulty, the law defers to a jury of twelve picked “at random” for putative cross-sectional representativity of local culture.<sup>157</sup> The jury, in its culturally monadic function, operates in Rosen’s words as an “oracle” to which the society turns for almost mystical guidance on a difficult question.<sup>158</sup>

## 2. Fault Liability

Beyond narrow strict liability rules, tort law recognizes *fault liability* for wrongs committed both intentionally and negligently. Considering intentional torts alone, one might expect to find little room internally for cultural questions and, as a result, little need to defer those questions beyond

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152. *See id.* § 20, cmt. j (2010).

153. ABRAHAM, *supra* note 101, at 19 (“At best, the desirability of providing compensation will be a factor that, when linked with others, makes it more likely that there will be tort liability for a particular category of conduct. And even on that view, providing compensation *under certain circumstances* rather than in general is what is really going on when tort liability is imposed.”).

154. *See generally supra* notes 145, 147, and 151. Each of the three Restatement of Torts offers a different definition of activities so dangerous they are subject to strict liability.

155. ABRAHAM, *supra* note 101, at 5.

156. *Id.*

157. *See, e.g.,* Catherine Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348, 2386–87 (1990).

158. ROSEN, *supra* note 23, at 83–84, 147–48.

doctrinal articulation. After all, to consider whether someone was wronged intentionally is, at first blush, a simple inquiry into the nexus between *act*, *intent*, and *result*. The first and third of these components are questions of cause and effect; the second is a question of mental state that often poses no significant factual question because it is read in terms of external manifestation of intent to act rather than intent to harm.<sup>159</sup> And indeed, for harms to the person in “single-intent” jurisdictions the actor need only have intended physical contact making the intent analysis very simple and rendering a claim such as battery nearly a strict liability type concern.<sup>160</sup>

a. Intentional Harms

But, as torts scholars point out, the question of intent has long been an enigma for jurists.<sup>161</sup> An actor’s thoughts can never be known with certainty, and this becomes even more true in diachronic perspective. Some explain that intent is at best a subjective question based on objective evidence: what was *this* person more likely than not thinking given the appearance of the evidence to “average reasonable people.”<sup>162</sup> Then, again, the appearance of evidence to the average reasonable person becomes a question for the jury if the judge believes that reasonable minds could differ on the topic. At this stage, the question is black boxed with the wisdom of lay culture deferred to in the resulting answer.

Other than “objective” indicia of intent in the harms to the person, the law defers to the “oracular” role of culture when protecting other more ephemeral rights. In particular, nuisance, reputational and dignitary harms, and invasions of privacy all have built into their doctrines discrete black boxes where final disposition can rely heavily on local cultural questions. In nuisance law, such deference is identifiable in the requirements of *significance* and *unreasonableness* in the invasion of another’s use and enjoyment of land.<sup>163</sup> Under Restatement §821F nuisance allows liability “. . . only to those to whom it causes significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose.”<sup>164</sup> Under §822, “One is subject to liability for a private nuisance if . . . his conduct is a legal cause of an invasion of another’s interest in the private use and enjoyment of land, and the invasion is either intentional and unreasonable.

159. Vosburg v. Putney, 50 N.W. 403, 403 (1891).

160. Joseph H. King, *The Tort’s Restatement’s Inchoate Definition of Intent For Battery, and Reflections on the Province of Restatements*, 38 PEPP. L. REV. 623, 626 (2011).

161. See, e.g., ABRAHAM, *supra* note 101, at 2, 23–26; see also DAN B. DOBBS, THE LAW OF TORTS § 24 (2000).

162. See ABRAHAM, *supra* note 101, at 23–26

163. RESTATEMENT (SECOND) OF TORTS § 821F (1979).

164. *Id.* § 822.

“Unreasonable” in this rule has come to be analyzed using a multi-factor balancing test that weighs gravity of the harm against utility of the conduct.<sup>165</sup> While arguably any balancing test opens up analysis to increased case-by-case discretion and non-doctrinal reasoning, this one is particularly designed to defer assessment of nuisance to local culture. Public policy justification for this move is strong: in conflicts over land use “place” matters and local custom over time is the best marker of that.<sup>166</sup> Hard, fast rules on reasonable use designed by remote judges would burden the kind of dynamism English and American capitalist economies traditionally needed to support constant growth. Not unlike the flexibility built into strict liability law over time, nuisance exhibits the same change-friendly derivative<sup>167</sup> qualities through judicious deferral to cultural considerations rooted in “place.”

Integration of cultural black boxes in dignitary and reputational harms is nearly too obvious to mention and has been alluded to more frequently. In the case of defamation, this is most apparent in the analysis of “defamatory matter.”<sup>168</sup> There the plaintiff must show that the language used in a statement would have a tendency to harm her reputation among a significant and respectable minority of the community.<sup>169</sup> A minority rule limits this “community” definition to “right thinking people.”<sup>170</sup> Lyrissa Lidsky has argued that these definitions afford significant flexibility to judges both for arriving at a final outcome on defamation, as well as the subsidiary question of *which* “subcultures” will be legitimized in the eyes of the law.<sup>171</sup>

Defamatory matter illustrates a fascinating quality of jurisprudence—particularly in relation to the work of anthropology. It raises the question of whether law at this site is, or should be, concerned with normative values or

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165. *Id.* § 826.

166. *See, e.g.*, Setha M. Low & Denise Lawrence-Zuniga, *Locating Culture*, in *THE ANTHROPOLOGY OF SPACE AND PLACE: LOCATING CULTURE* 1–48 (Setha M. Low & Denise Lawrence-Zuniga eds., 2003).

167. I use *derivative* in its mathematical sense accounting for changes in change over time.

168. RESTATEMENT (SECOND) OF TORTS § 559 (1977) (“A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”).

169. *Id.*; *see also* Lyrissa Lidsky, *Defamation, Reputation, and the Myth of Community*, 71 WASH. L. REV. 1, 7 (1996) (“[C]ourts rarely resort to polls, surveys or even witness testimony to determine the values held by the community segment but instead rely on their own personal knowledge and common sense.”).

170. *See, e.g.*, *Loder v. Nied*, 89 A.D.3d 1197, 1198–99 (explaining that a statement is defamatory if it “tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him [or her] in the minds of right-thinking persons, and to deprive him [or her] of their friendly intercourse in society”).

171. *See* Lidsky, *supra* note 169, at 8 (“The intuitive nature of this inquiry raises the question of whether and to what extent courts should consider sub community values . . .”).

description.<sup>172</sup> If the answer is description, then this demands we use community values embedded in the “defamatory matter” analysis to faithfully capture the way local cultures classify people as good and bad. If we believe law should behave normatively in this context, the analysis allows judges to shape community values by sanctioning local views they determine to be socially valid. In practice, the latter occurs either through the minority rule of “right thinking persons” or through the majority rule’s selectivity in recognizing groups that are “substantial” or “respectable.”<sup>173</sup>

Finally, invasion of privacy torts are identifiably similar in at least one respect: their rules—in most jurisdictions, four separate actions all directed at the protection of individual right to solitude or control over image—have within them a conspicuous objective element that measures individual harm against community norms. Thus, intrusion on seclusion, public disclosure, and false light all require that the harmful invasion must be “highly offensive” to the average reasonable person.<sup>174</sup> This is a critical element of the privacy theories because, in addition to the subjective experience of such invasions, the plaintiff must show an objective wrong—that most others in his community would be not only disturbed, but “highly” disturbed by the conduct.<sup>175</sup> This aspect of the rule requires a trial judge to first consider whether reasonable jurors could disagree on this question, and then the jurors themselves to reflect upon the degree of offense in a way inscrutable to the legal process that has led to that point.<sup>176</sup>

Between nuisance, defamation, and invasions of privacy, analysis for liability centers upon the classification of conduct as harmful. Through the concepts of “substantial and unreasonable,” “defamatory matter,” and “highly offensive,” that classification often becomes a cultural consideration inscribed into, and enshrined in, formal rules.

#### b. Negligent Harms

Finally, in negligence, tort law is interested neither in the determination of intent, nor in the classification of intentional conduct as harmful, but in the determination of *breach*—nonconformity with a standard of care.<sup>177</sup> Standard of care in these instances is defined by one of only a few principles,

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172. See *id.* at 9 (showing that this clearly accesses the normative-descriptive tension common to Tort Law, “the underlying question is whether the defamatoriness inquiry should focus on actual community values and prejudices or whether, as it currently does, the inquiry should impose normative restrictions on what values it will recognize”).

173. *Id.* at 9, 21; see also DOBBS, *supra* note 161, at 1127–28.

174. RESTATEMENT (SECOND) OF TORTS §§ 652B, 652D(a), 652E (1977).

175. RESTATEMENT (SECOND) OF TORTS §§ 652B cmt. d, 652D cmt. c, 652E cmt. c. (1977)

176. See, e.g., *Wilcher v. City of Wilmington*, 60 F. Supp. 2d 298, 303 (D. Del. 1999) (“ . . . a determination of whether a particular intrusion is ‘highly offensive to a reasonable person’ is often left to the consideration of a jury . . .”).

177. See ABRAHAM, *supra* note 101, at 51.

each of which requires the positioning of the actor in his or her “community.”<sup>178</sup> For most cases, this is the fictional community of average “reasonable men,” and the law places final determination on this in the hands of jurors whose reasoning is typically be shielded from review.<sup>179</sup> In others it may be an industrial or professional peer group. In some instances, this may involve twelve lay persons deciding highly technical issues such as whether medical or engineering standards were followed. Deference to lay wisdom in the form of negligence law’s reliance upon the “reasonable person” is simply a final example here of the cultural black boxes constructed under tort law.

Through strict liability, and intentional and negligent theories of fault liability, black boxes maintain deference to cultural questions in a very precise, compartmentalized fashion. They ensure not that the law will have a normative grip on ambient society, but that difficult questions the law cannot resolve will be punted back to the more dynamic and derivatively functional realm of culture. As I am suggesting, even when decided by judges, these questions are rhetorically differentiated in a manner that reflects law’s deliberate management of its own autonomy. While these observations alone offer some insight, the key question is how legal anthropology should approach and incorporate them given the relatively wide gulf between the disciplines.

#### VI. PATHWAYS TO RAPPORT

Law’s deference to culture at the very heart of its rule statements—evident at least at the site of Anglo-American tort law—is self-reflexive. This is because, as suggested above, law too far removed from local culture lacks the capacity to change with change, that culture so ingeniously possesses. The little black boxes apparent in the examples above are not accidents inscribed into doctrine in need of further explanation; they are sites at which law has deliberately deferred to the wisdom of the “laity” and asked not for

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178. RESTATEMENT (SECOND) OF TORTS § 283 cmt. c (1965). The relevant portion states:

The chief advantage of this standard of the reasonable man is that it enables the triers of fact who are to decide whether the actor’s conduct is such as to subject him to liability for negligence, to look to a community standard rather than an individual one, and at the same time to express their judgment of what that standard is in terms of the conduct of a human being. The standard provides sufficient flexibility, and leeway, to permit due allowance to be made for such differences between individuals as the law permits to be taken into account, and for all of the particular circumstances of the case which may reasonably affect the conduct required, and at the same time affords a formula by which, so far as possible, a uniform standard may be maintained.

*Id.*

179. Gender bias in this codified formulation is a rich topic best left to another discussion.

an explanation of that wisdom.<sup>180</sup> Viewed in this light, the predominant explanatory offering of legal anthropology to academic law—be it reparatory or critical—is often moot. Or, it might be said, it fulfills a demand where one may not exist.

It is not simply that formal Western law recognizes in ways described above the improvised wisdom of everyday life and limitations of its formalism. It is that the law, its practitioners, teachers, philosophers, and authors, all exert considerable albeit unspoken effort to separate the cultural considerations from the formal rules. This effort represents perhaps the greatest expenditure of human capital in legal education. Law's purpose, in short, is not to *explain* reality but to shape it—hence increasing reliance upon the neighboring disciplines.<sup>181</sup> Given this, legal anthropological appeals for greater attention and impact in law must be very specific about the explanatory offerings they present and be cognizant of the precise points of contact between law and culture prescribed by the former through its ultimately sovereign authority. Assuming the desirability of a legal anthropology influential upon law, a well-tailored message is now more necessary than ever.

That message, I am suggesting, ought not to take the form of “law as culture.” Legal anthropology may be interested in law ‘wherever it lies,’ and law may be ‘practiced’ by a wide variety of actors, but these do not make law synonymous with, or a subset of, culture. Continuing to assert otherwise does not interpellate a greater law audience, and understanding this requires understanding law's reason for existence and the specific tactics of its practitioners. Reluctance toward this understanding in anthropology has been surprising given the usual preference for insider perspectives in most other corners of the discipline.

Such difficulty stems from the duality of law as both a discipline (or epistemic community) and a profession (or practice).<sup>182</sup> In arguing for a greater rapport of legal anthropology through the surrendering of a “law as culture” approach, this article has largely ignored this duality, and a proper distinction between them is better left to another discussion. Anthropology

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180. “Social host” rules are a good example of this. In *Kelly v. Gwinnell*, the New Jersey Supreme Court wrote:

This [c]ourt senses that there may be a substantial change occurring in social attitudes and customs concerning drinking, whether at home or in taverns. We believe that this change may be taking place right now in New Jersey and perhaps elsewhere. It is the upheaval of prior norms by a society that has finally recognized that it must change its habits and do whatever is required, whether it means but a small change or a significant one, in order to stop the senseless loss inflicted by drunken drivers. We did not cause that movement, but we believe this decision is in step with it.

*Kelly v. Gwinnell*, 476 A.2d 1219, 1229 (N.J. 1984).

181. See, e.g., Posner, *supra* note 5, at 771 (“[N]othing in a conventional legal education—nothing gleaned from a close reading of judicial opinions, statutes and rules—equips a person to notice, let alone to measure, explain, temper, and adjust to, and increase in the demand for judicial services.”).

182. See, e.g., DWORIN, *supra* note 6, at 10.

too is both an epistemology and practice; it is based on a belief that experience is the most faithful source of knowledge and that fieldwork is most efficient in attaining this in geographically remote situations.<sup>183</sup> However, in both epistemology and in practice, the priorities of goal-oriented, formal reasoning make ongoing use of the little black boxes in legal doctrine described above. To make a relevant and utile explanatory offering to law in both of these contexts, legal anthropology might attend to—even if only with provisional fealty toward the insider approach—the rigorous formalism that characterizes Western law and neutralizes the benefit of “law as culture.”<sup>184</sup>

To achieve this, several ruptures are necessary. First, the subfield might further break from its “primitivist” past to develop new tools for understanding the complexity of law in the current world system. Up to this point few efforts have managed to disaggregate the anthropological object known as “law.” Classic legal anthropology continues to influence present day conversations and studies aimed to understand Western legal concepts and processes largely by studying non-Western norms and dispute resolution systems.<sup>185</sup> Those works tended to suppose the “primitivism” of non-Western native systems and described them from the outside first through armchair ethnology and later through ethnographic fieldwork.<sup>186</sup> As the

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183. See JAMES DONOVAN, *LEGAL ANTHROPOLOGY: AN INTRODUCTION*, XIII (2008) (“The sea change represented by Malinowski for anthropology generally not only legal anthropology was his long fieldwork among the Trobriand Islanders, conducted in the native language, for primarily scientific purposes. The systematic and meticulous record of his research was qualitatively superior to the travel logs and missionary reports that to that point had provided most of the information available to theorists working from their overstuffed armchairs . . .”).

184. See DWORKIN, *supra* note 6, at 12–13:

Some critics will be anxious to say at this point that our project is not only partial in these various ways but wrong, that we will misunderstand legal process if we pay special attention to lawyers’ doctrinal arguments about what the law is. They say these arguments obscure—perhaps they aim to obscure—the important social function of law as ideological phenomenon demands, these critics say, a more scientific or sociological or historical approach that pays no or little attention to jurisprudential puzzles over the correct characterization of legal argument . . . . This objection fails by its own standards. It asks for social realism, but the kind of theory it recommends is unable to provide it. Of course law is a social phenomenon. But, its complexity, function, and consequence all depend on one special feature of its structure. Legal practice, unlike many other social phenomena, is *argumentative* . . . . This crucial argumentative aspect of legal practice can be studied in two ways or from two points of view. One is the external point of view of the sociologist or historian, who asks why certain patterns of legal argument develop in some periods or circumstances rather than in others, for example. The other is the internal point of view of those who make the laims...they want theories not about how history and economics have shaped their consciousness but about the place of these disciplines in argument about what the law requires them to do or have . . . . Both perspectives on law, the external and the internal, are essential, and each must embrace or take account of the other.

185. See *supra* note 32.

186. See Hoebel, *supra* note 32, at 62, 66 (describing generally the evolutionism in Morgan, Maine and others).



interpretivist approach came to dominate ethnography, it took the insider perspective on norms and dispute resolution defining this in terms of legal subjects generally—not only law makers and law enforcers.<sup>187</sup> This approach seemed suitable in the tribal societies of North Africa, Indonesia, or the South Pacific, where members of legal communities participate in the operation and structure of their own governing systems. In short, law could best be understood from the native's point of view in studies where its arbiters (elders, tribal councils, shamans) are its subjects (villagers, tribesmen) and imperialism in its various forms is considered—if at all—an externality.<sup>188</sup>

A similar approach has been transposed onto studies of Western, modern law through the advent of disciplinary power as a conceptual tool.<sup>189</sup> This tool has maintained dominance because it opens up the social study of law to increasingly obscure, subtle, and sometimes ingenious sites of fieldwork or historiography.<sup>190</sup> Nevertheless, as I am suggesting, the predominance of disciplinary power in legal anthropology has attenuated the voice of the subfield for at least two basic reasons. First, the persistence of legal anthropology's genealogy in "primitive law" may hinder creativity in approaching modern day, complex legal systems. Despite the relative eclecticism of the subfield and its studies, the one feature common to most legal anthropologies becomes their *emergence* from the history of legal anthropology. The tautology of this characterization suggests stagnation in a field trained upon a fast changing and highly complex area of the social world. This entails acknowledging the autonomy of formal law in the West in a way that distinguishes it considerably from earlier norms and dispute resolutions observed in early legal anthropology. Second, this genealogy retains influence even as the studies of which it consists have been discredited, the societies it described since re-characterized, and those same societies transformed by economic globalization. In short, "primitive" law no longer exists, if ever it did. The failure to account for and describe that which replaces it in the world system has been a hindrance to the relevance of legal anthropology in academic law.

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187. See, e.g., Geertz, *supra* note 68, at 182.

188. See, e.g., Vincent Pecora, *The Limits of Local Knowledge*, in *THE NEW HISTORICISM* 259 (H. Aram Veesser ed.) (1989) ("Geertz's professed belief in a 'civil, temperate, unheroic, politics' would be unexceptionable, were it not prone at the same time to narrativize such qualities through the maturing of 'naïve' nations-in-transition into Western-style parliamentary democracies; because of his desire to penetrate, like Max Weber, what the social actors 'thought they were up to,' the fact that pro-Western 'civil' and 'temperate' politics could be imposed from 'outside' is never really considered to be a possibility.").

189. FOUCAULT, *supra* note 108.

190. See, e.g., Dominic Boyer, *The Medium of Foucault in Anthropology*, 58 *THE MINNESOTA REVIEW* 265, 265 (2003) ("Foucault's pervasiveness is largely unparalleled in anthropology, almost to the point that, like oxygen, one takes his ethereal yet nourishing presence in everyday disciplinary life almost for granted.").

A second rupture should be envisaged at the site of social construction or interpretation. While it will remain true that legal norms and concepts such as “fact,” “guilt,” or “justice” ramify differently as local knowledge in local settings, this insight confers little benefit upon teachers, students, and practitioners of formal law. The reason for this, identified above in specific doctrines of tort law, is that spaces for local meaning themselves become formalized in what I call “legal black boxes” of culture. These spaces serve a twofold function: (1) maintaining the legitimacy of sovereign power in its accommodation of difference, and (2) permitting standardization of rules and their wider application by legal experts in discrete circumstances. If this dual process requires expertise in order to operate, it has no problem generating a vast corps of experts in law schools across North America, England, and Europe. Indeed, the legal education experience prepares students for precisely this clinical application of law.<sup>191</sup> The doctrine learned, therefore, is inscribed at one level of generality higher than most cultural considerations in order to allow their subsequent particularized application to specific fact patterns.

This means that the social constructed-ness of legal meaning is already built into modern doctrinal law. Attention to it, as much legal ethnography of late aims to create, is less productive than it once was. Today, lawyers know tacitly or openly that they are engaged in mythologies and fictions.<sup>192</sup> Signaling this does little to alter the way that lawyers, jurists, and judges give meaning to people’s problems in ways that often feel like resolution. If this observation is significant it is only because, at the end of the day, contingency of the “Real,” and acknowledgement thereof, does not resolve what people experience as practical, material problems. Law, in other words, is a contingent social institution that acts in and upon a contingent social field, but it is rarely experienced as such when human bodies and lives are at stake.

## VII. CONCLUSION

Taking these suggestions seriously, legal ethnography could reorient its gaze. But, if privileging disciplinary power has led field research away from

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191. See Mertz, *supra* note 101; see also Bix, *supra* note 5, at 983. In relevant part, Bix stated: Legal education is relevant to questions about the autonomy of law, not only in the sense that this is the context in which forms of legal reasoning are passed on within the profession, but also because the training itself may express the forms of knowledge and decision-making that are considered distinctive for law, or at least for one particular legal system.

*Id.*

192. See, e.g., Eben Moglen, *Legal Fictions and Common Law Legal Theory*, 10 TEL-AVIV UNIV. STUD. IN LAW 35 (1991).

institutions, spaces, and inscriptions of formal law, the solution might not be a complete return to studies of sovereign power at locations such as the legislature, courthouse, law library, or State Bar.<sup>193</sup> Yet these sites should serve as navigational pylons reminding the researcher that while law ramifies in local settings, it continues to emanate from, and be constrained by, sovereign authority in these locations. To ignore this is to make a tactical error with political consequences; it is to suggest speciously that law is everywhere. While this might have been true in tribal communities (which anthropology itself undermined), it proved false once those communities came under colonial rule and once metropolitan sovereign authority consolidated into nation-states. Under our modern regimes of law in global governance, the denial of persistent—albeit occulted—sovereign power has permitted large scale episodes of greed, corruption, violence, and procedural injustice. One solution, I hold, is to reground ethnographic fieldwork in legal institutions, doctrine, and enforcement to focus upon the provisionality of law's autonomy. If it is not equivalent to culture, and if culture is inscribed into its rules and excised via legal black boxes, then ethnographic approaches might explain how the labor-intensive process of this separation succeeds at the precise sites where sovereign power meets disciplinary power.

Law is not synonymous with culture; it still remains deeply rooted in governance, institutions, and sovereign authority. As such, it continues to have profound influence in the lives and bodies of people in ever increasing scope, and it succeeds in that influence because of what I have called the occultation of law under global governance. While legal anthropology has been at times a great interlocutor in discussions of law and society, its recent inability to capture the interplay of formal law with everyday meanings and practices has led to its marginalization among legal academics—the epistemic community most charged with what Llewellyn called the “questing” aspect of the law jobs.<sup>194</sup> With recourse to specific doctrines of tort law, this article has attempted to show ways in which formal law viewed *emically* already “black boxes” problems of cultural difference and meaning for practical reasons, so that continued assertion of this is of minimum consequence to law's refinement. In pointing this out, my hope has been to advocate reorientation in fieldwork on law, and to remind legal scholars of the great potential offered by well-grounded theories and methods in legal anthropology.

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193. See Bix, *supra* note 5, at 977. This advocacy for a partial return to sites of sovereign power inflects Bix's description of law's *relative autonomy*. *Id.*

194. Llewellyn, *supra* note 1, at 1375.