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Law as Culture: An Invitation

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Introduction

> The creation of legal meaning takes place always through an essentially cultural medium.
> —*Robert Cover*

Parables of the Law

In the 1950s an Australian aboriginal man named Muddarubba threw a spear and killed an aboriginal woman when she called him by a name that refers to male genitals. You may, the white judge told an all-white jury, find the aboriginal defendant innocent. If, however, you think that even by the standards of his own group he should not have killed the woman, you must find him guilty of murder. But if, notwithstanding our own belief that such killing is wrong, you think that what this man did was acceptable by the precepts of his own group, you may find him guilty not of murder but of the less serious offense of manslaughter. The decision, he concluded, is up to you.

Late in the Second World War, a German woman's neighbors told Nazi officials that she was making defeatist statements. The woman was accordingly sent to prison, from which she was released at the war's end. The woman then sued her neighbors. By denouncing her to the existing regime, she argued, the defendants had violated a provision in the law code, which long predated the Nazi era, that allows one to sue another for acting "against good morals" (*contra bonos mores*). Accordingly, she asked the court to exact some sanction on her neighbors for having subjected her to the Nazi imprisonment.

A Japanese man was residing in New York City. He had lived in the United States on other occasions and was actually quite knowledgeable about American law. But, as he told a colleague, he always wondered which agency of government you were supposed to go to if no one in the apartment building would talk to you.

Coming to Law

The history of human beings begins before the history of being human—and with it begins a crucial aspect of how we might usefully think about law.

Since the 1920s, paleontologists have made a series of stunning discoveries and have drawn from them a no less stunning conclusion. It began when scientists discovered the remains of early hominids who were capable of making and using tools. Previously, scientists had assumed that such behavior could not occur before we were fully human. But as the evidence grew, two inferences became inescapable. First, the capacity to make tools was part of a larger process of establishing the categories of one's everyday experience and manipulating these categories through the symbols that make them manifest. Thus, organizing work groups along lines of kinship or gender or, eventually, being able to communicate emotions and commands through speech, were, like the fabrication of tools, critical to being able to successfully conceptualize and work one's world. Moreover, this categorizing capacity—the key feature of the concept of "culture"—was not something that happened *after* we became human but something that actually *preceded* our present speciation. Thus, the acquisition of the capacity for culture, through the selective advantage it offered, contributed enormously to our evolution into *homo sapiens.*

The conclusion that follows is of enormous significance: Human beings possess the capacity to create the categories of their own experience, and this capability, having largely replaced instinct, came before—and was instrumental in creating—the animal we have become.

Culture—this capacity for creating the categories of our experience—has, in the view that will be central to our concerns, several crucial ingredients. As a kind of categorizing imperative, cultural concepts traverse the numerous domains of our lives—economic, kinship, political, legal—binding them to one another. Moreover, by successfully stitching together these seemingly unconnected realms, collective experience appears to the members of a given culture to be not only logical and obvious but immanent and natural. This sense of orderliness operates at both a conceptual and a relational level, organizing our view of daily life as commonsensical and our ways of orienting our actions to others as systematic and workable. Features that may not seem to be linked are, therefore, crucially related to one another: Our ideas of time inform our understanding of kinship and contract, our concepts of causation are entwined with the categories of persons we encounter, the ways we imagine our bodies and our interior states affect the powers we ascribe to the state and to our gods. In short, we create our experience, knit together disparate ideas and actions, and in the process fabricate a world of meaning that appears to us as real.

Law is one of these cultural domains. Like the marketplace or the house of worship, the arrangement of space or the designation of familial roles, law may possess a distinctive history, terminology, and personnel.

But even where specialization is intense, law does not exist in isolation. To understand how a culture is put together and operates, therefore, one cannot fail to consider law; to consider law, one cannot fail to see it as part of culture.

The moment we approach law in this fashion—the moment we start to think in terms of connections—the questions we ask and the theories we apply reveal themselves as deeply intertwined. When Muddarubba reacted to the woman's utterance by throwing a spear at her, was he envisioning her use of that word as a challenge to his manhood—and with it his ability to provide for his dependents in a difficult environment? Or was it, like using an epithet to one's commanding officer, a challenge to the authority structure that has allowed the tribe as a whole to survive? What sense of the order of the world is set in play for Muddarubba—or, crucially, for the women in their society—by this utterance, and how can we translate the concepts through which their world is composed from one cultural and legal system to another? When the German woman sought relief for the moral wrong she said was done to her by neighbors, to whom did the court turn since, as they said, "good morals" should be gauged by the views of those members of society who are deemed "just and equitable"? Indeed, in what ways did that assessment partake as much of their commonsense assumptions about human nature and human relation-

ships as of the history of German legal thought? And when the Japanese visitor found himself alone in a strange country, what sort of response to his question about the appropriate agency to help would have made sense to him; what is it he thought that law, by virtue of its capacity to summarize his experience, should be able to do about his disturbing sense of loneliness?

It is no mystery that law is part of culture, but it is not uncommon for those who, by profession or context, are deeply involved in a given legal system to act as if "The Law" is quite separable from other elements of cultural life. Lord Mansfield could famously say that the law "works itself pure," while Lon Fuller could assert that since good is more logical than evil, the result of the reduction of contradiction through common-law reasoning will necessarily be "to pull those decisions toward goodness." And certainly believers in a given religion may envision the precepts of its attendant law as universally true. But context is crucial: When we hear a court speak of "the conscience of the community," "the reasonable man," or "the clear meaning of the statute," when we watch judges grapple with parenthood as a natural or functional phenomenon, or listen to counsel debate whether surrogate motherhood or a frozen embryo should be thought of in terms of "ownership," we know that the meaning of these concepts will come not just from

the experience of legal officials or some inner propulsion of the law but from those broader assumptions, reinforced across numerous domains, that characterize the culture of which law is a part. And when we seek law outside of specialized institutions—when a kinsman mediates a dispute or members of a settlement use gossip or an informal gathering to articulate their vision of society—the terms by which they grasp their relationships and order them will necessarily be suffused by their implications in many interconnected domains.

In each instance, law is so inextricably entwined in culture that, for all its specialized capabilities, it may, indeed, best be seen not simply as a mechanism for attending to disputes or enforcing decisions, not solely as articulated rules or as evidence of differential power, and not even as the reification of personal values or superordinate beliefs, but as a framework for ordered relationships, an orderliness that is itself dependent on its attachment to all the other realms of its adherents' lives. Different societies may play up one or another institution as a vehicle for creating and exhibiting this sense of order—whether it be in the elaborate rituals of Bali or India, the theater of tragedy and comedy in ancient Greece, or the drama of a British or American trial—but nowhere is law (in this sense of ordered relationships) without its place within a system that gives meaning to its people's life.

> Law doesn't just mop up, it defines. It doesn't just correct, it makes possible. What it defines, the meaning frames it sets forth, is an important force in shaping human behavior and giving it sense, lending it significance, point and direction. [We can view] law not so much as a device or mechanism to put things back on track, when they have run into trouble, but as itself a constructive element "within culture," a style of thought, which in conjunction with a lot of other things equally "within culture"—Islam, Buddhism, etc.—lays down the track in the first place.
> —Clifford Geertz

We can, therefore, approach a variety of legal systems looking for the ways in which, as part of their larger cultures, each finds itself having to address certain common problems. Among these are the ways in which social control is fabricated through a mix of "formal" and "informal" mechanisms, the ways in which facts are created for purposes of addressing differences and rendering the process of determining truth and consequences consistent with common sense, the means by which reasoning applied in one domain (like the law) remains linked to the style of reasoning that binds other elements of the culture together, and the ways in which law may create a sense of an orderly universe well beyond its role in addressing whatever dis-

putes may arise. Seen in this fashion, some unusual features begin to present themselves, features that we will return to as we weave our way through a number of these common legal concerns. Three in particular are, however, worth noting at the outset.

Metaphor, Fact Creating, and Cosmology

The first has to do with the role of metaphor. This may seem a more appropriate subject for a book on literature than law, but metaphor may well be the key mechanism through which all of the crucial connections among cultural domains take place. To speak of one's body as a "temple," home as a "castle," intellectual life as "a marketplace of ideas," or equality as "a level playing field" is far more than mere wordplay: Such metaphors connect what we think we know with what we are trying to grasp, and thus unite, under each potent symbol, those diverse domains that must seem to cohere if life is to be rendered comprehensible. Indeed, if, as an aspect of our species' nature, thought is not intrinsic, closeted in some "secret grotto of the mind," but extrinsic, living in the publicly worked symbols that give it momentary materiality, then metaphors are central to the creation of thought and to binding diverse categories into a manageable whole. And even if the organization of our categories does not simply replicate the structure of our relations, the linkages—of style, identity, and strength—are integral to the capacity of people to ori-

ent their own thoughts and actions in terms of those they encounter. As we look for the telltale place of culture in law and the inescapable role of law as culture, we will necessarily have to consider the role of metaphor as a unifying agent.

> [T]here is in cultures a strain toward conceptual consistency or logical integration, and in social systems a strain toward functional integration in the sense that normatively governed patterns of interaction complement each other. . . . Both "society" and "culture" are abstractions from the same phenomenon—social action. As [Gilbert] Ryle puts it, ". . . the styles and procedures of people's activities *are* the way their minds work and are not merely imperfect reflections of . . . the workings of minds." But the requirements of cultural consistency and functional integration are somewhat different. Putting one's thoughts in order and putting one's affairs in order are rather different activities for either a person or a community. They proceed along different lines, but tend to react upon one another so as to produce not a one-to-one matching of ideas and social relations, but rather a continuing process of mutual adjustment and challenge.
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> —Lloyd A. Fallers,
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> *Law without Precedent*, 1969, 316

A related consideration is the way any society, or institution therein, creates facts. Again, this may seem an odd way of putting the matter. Why not say "discovers" the facts, or even "acknowledges" them? But if, as category-creating creatures, we are constantly forging the units of our own experience, then "facts," like anything else, must be fabricated, connected, rendered obvious. So, as we will see, the common law may have developed its form of reasoning in association with its culture's ways of viewing essential human nature, its ways of construing people's inner states as part of a particular religious history, and its rules of evidence in association with changing visions of economic and political "certainties." By contrast, the law of many Islamic or Asian cultures may turn on issues of moral equivalence or social hierarchy, each culture fashioning a baseline from which, out of the totality of sense and imagination, a believable way of grasping facts can be forged. If culture is by definition constitutive, so too must law be formative and not simply formed.

And third, while analyses of law tend to focus on conflict and resolution, rule-making or rule-applying, one can—without in any way downplaying these aspects—also see law as contributing to the formation of an entire cosmology, a way of envisioning and creating an orderly sense of the universe, one that arranges humanity, society, and ultimate beliefs into a scheme perceived as palpably real. Edward Levi once wrote that law "has absorbed within itself a view of the nature of

human beings, and of how their acts and the incidents which overtake them may be classified for favor or penalty." He could have added that in doing so it reflects and creates a still broader sense of the order of all one's experience. We may, as Clifford Geertz suggests, "conceive of law as a species of social imagination," not just, or even primarily, as a vehicle for keeping society functioning: Law, as part of that imagination, may help us grasp the world in which (to use Annie Dillard's phrasing) "we find ourselves so startlingly set down." Thus to consider the styles of legal reasoning or the structure of cultural assumptions built into many legal precepts is to offer both a window into the larger culture and, no less importantly, to gain an often undervalued window into legal processes themselves.

In the course of these pages, then, our focus will remain on the kinds of problems that face any legal system and how these issues move in tandem with the features of their broader cultures. The trick, of course, is neither to engage in some quest for the universal nor to approach each legal system as an exercise in butterfly collecting. Instead, it is to focus on connections, to keep turning the kaleidoscope so that as different legal and cultural systems appear we appreciate how differently they may arrange the connections among their parts. In the process we will, necessarily, be attending to the multifarious forms of cultural/legal integration that only such comparison can make visible. We will also be able to consider some of the legal and social

theories that have been central to Western jurisprudence in the light of a broader comparative framework. And throughout we will see how quite different orientations can reveal possibilities and relationships that are vital to the most practical as well as the most theoretical of legal concerns.

Law and Custom

Legal systems must have some way of attending to concepts, values, and remedies which, even if they are not explicitly included in the law's design, are indispensable to the law's legitimacy and its capacity to respond to change. The breach of contract between a buyer and a seller will serve as an example.

In the United States the legislation dealing with such agreements is largely embodied in the Uniform Commercial Code, one of whose provisions (§ 2-302) says that if a court finds a contractual clause to have been "unconscionable," the court may refuse to grant enforcement. Few American lawyers know that this provision was, in all likelihood, actually inspired by a practice of the Cheyenne Indians. Karl Llewellyn, the main author of the statute, had worked with anthropologist E. Adamson Hoebel on a study of precontact Cheyenne law and was struck by their provision of rules that seemed to be vague and yet were filled up with meaning as particular cases arose. Out of the "crucible of conflict" (as they called it) the authors pointed to a number of instances in which seemingly amorphous concepts relating, say, to violations of the collective

hunt or impermissible "borrowing" of another's horse, were given concrete and innovative interpretation within the broad framework of the governing concept. Llewellyn modeled the unconscionability provision with a similar thought in mind—that even those who do not share a given trade can recognize that contractual terms could prove to be excessively one-sided, harsh, or contrary to regularities developed within their community, and that the statute should allow room for flexibility consistent with these practices.

But where does one go to fill "unconscionability" with content? We could make the decision turn on whether the deal was "fair," but that might just replace one unknown with another. We could refuse to change the agreement, short of some actual fraud, mistake, or duress, because so general a doctrine as unconscionability may appear paternalistic, an interference with responsible negotiation. Indeed, we could regard the whole idea as an artifact of the romanticism about the democratizing force of men of commerce that Llewellyn drew from his Germanic roots or his American involvement (as one commentator put it) as "part of a 1930s radical, collectivist milieu." We could try to map this concept directly onto actual commercial relations or try to use it as a vehicle for conducing some ideal of commercial behavior. Or we could think of it, for example, as being similar to the German constitution's protection of "human dignity," "honor," and "personality"—a way of connecting collective self-image and

communal identity. If parties deal with one another regularly, should fairness or the custom in their trade take precedence over the actual agreement, or some generalized weighing of what facilitates or hinders a valued social relation? Should a poor person unable to purchase an object except at a confiscatory price be shielded by the unconscionability statute, and if so, what is the theory of freedom of contract, individual will, and the nature of society itself with which the law would be operating? Whatever course we choose certain assumptions are being contested under this legal rubric, whether it is the idea that people are basically free to exercise their own will or that, since we can never specify all the constraints from which one ought to be free, we should avoid direct interference with an individual's choices. And if, as some scholars claim, actual cases reveal no clearly shared principles of substantive contract law in the United States, is it because those principles are absent or is it that, far from producing vast uncertainty, social and conceptual factors yield sufficiently acceptable practices to allow ongoing relationships to take primacy over imagined rules? In any legal system, then, the articulation of a broad standard may, as Llewellyn posited, be infused with specific cultural content, whether from the confines of a distinct trade group or from the application of cultural assumptions that lend legitimacy and meaning to any decision.

As one looks at the equivalent of propositions like unconscionability in other cultures, one can readily see some of the broader cultural factors that render

such generalized concepts capable of specificity. Similar provisions in other countries reflect local history and culture: Britain's laissez-faire approach to contract, which draws no clear distinction between someone who takes advantage of the deal and what the broader socioeconomic impact of permitting it may be, is still visible in the limited remedies available for contracts that seem to favor one party more than another. France uses contract law, for example, to give considerable emphasis to the maintenance of family patrimonies against dissipation by a testator. Postwar Germany, whose rules on unconscionability are more explicit than those in the United States, has taken a more protective state view when the differential of bargaining power or experience appears unfair. Local issues may also take on special significance: The Israeli Supreme Court found unconscionable the contractual requirement that only Hebrew dates may be used on a tombstone; French courts have sought to extend the nation's statutes outlawing Holocaust denial to instances involving the murder of Armenians in the early twentieth century or to the posting of advertisements on the Internet for the sale from abroad of Nazi memorabilia. Some American commentators refer to their own unconscionability statute as having "only symbolic impact, an occasional bow in the direction of our incoherent hearts desires." Since an unconscionability provision is also to be found in the Uniform Premarital Agreements Act (as it earlier had been in the Indian Claims Commission Act of 1946), courts in the United

States may have to decide if a change in circumstances warrants revision of the initial expectations of husband or wife, a position French contract law, by comparison, has largely rejected. Like so many other domains of law, unconscionability offers an insight into a whole realm of cultural and philosophical assumptions. It may be most valuable, then, to see legislation in each of these instances as lying at the nexus of law and culture—a telling indicator of how specialist and everyday assumptions interact, such that the meaning of each is not fully comprehensible without the other.

The unconscionability example may also pose one of the many ways in which law and custom are related. In commercial relations in communities that are either tight-knit or dominated by particular interests, obligations may be very uniform and recourse to shared expectations given authoritative application. The "mixed jury" of early England brought together merchants from a trader's home country with local people, and thus helped to move the jury from being grounded in the truth known to locals and towards the determination of facts by officials. The International Institute for Conflict Prevention and Resolution (CPR), which has signed up hundreds of corporations who agree to alternative mechanisms for resolving disputes, saved these companies over $150 million dollars in court costs and legal fees between 1990 and 1992 alone. Such arbitration may, however, come at a price: Case law is not developed, arbitrators profit from their business, collec-

tive claims go unaddressed, and mediation is not free of charge. It has also been noted that although diamond or grain merchants in the present day may be bound by their colleagues' understandings, they may still press the edges as new opportunities and ambitions intrude. Courts may develop standards for applying what lies beyond the existing statutes—whether it be the longevity of the practice or its social and economic value to the community—and may, as they have at different moments in history, even defer to tribunals of knowledgeable merchants or elders. Courts, like their constituents, often accept without further proof that past actions predict future conduct, or that social status correlates with appropriate levels of compensation or support. These may, of course, also be the very issues that are contested in court, as among members of the population, but that is only to suggest how central cultural assumptions are to any form of social action. Similarly, colonial powers and their successor states have often sought to codify custom even at the risk of reifying it or merely incorporating the views of those who exercise the greatest influence at that moment.

What is often missing, however, from analyses of law's relation to custom is the wider range of cultural forces that may affect their interaction in any given situation. In their study of Tswana law in southern Africa, for example, Comaroff and Roberts demonstrate that the scope of customary law often appears to outsiders as lacking in organization and consistency. But the ab-

sence of highly differentiated rules and customs may actually contribute to the negotiated relationships that allow flexibility within social situations. Process takes precedence over rules, and "the fallacy of the rule" (as Pierre Bourdieu has termed it) leads one to imagine that custom in such a case is more like legislation than a repertoire of possibilities. If, as Edmund Leach argued, one of the prime functions of law is to keep us from crossing existing social boundaries, custom reinvigorates both ambiguity and alternatives to the flow of power. In what Sally Falk Moore has called the "semi-autonomous domains of law"—which can coincide with industries or territories, tribal units or university disciplinary boards—the ordering of law and local practice is far more dependent on the culture of the group involved than on the mere imposition of rules from a sovereign. When, therefore, some African states have written into their codes a provision that "customary law shall apply in any civil case where, regard being had to the nature of the case and the surrounding circumstances, it appears just and proper that it should apply" (to cite the example of Zimbabwe), we need to know the logic of repercussions that informs both the choice of this principle and the realities of its implementation. By comparison, the disenchantment with customary law that occurred in twelfth-century Europe was, as we shall see, connected with the rise of the cities, the uncertainties of social arrangements, and the "discovery of the individual"—all of which cast cus-

Fig. 2. Moroccan scribe in the marketplace, ca. 1930, prepares documents for a legal case. (*Morocco: A Country of Islam* [Casablanca: Éditions Maurice Bory, n.d.].)

tom in a new and less satisfying light. Seen in this way, the history of custom becomes part of the history of culture and not simply part of law.

A good example of the relation of law and custom to cultural practice may be found in Islamic law. Western scholars of the sacred law (*shari'a*) usually ignore custom because it is not categorized as a source of law in Islam, focusing instead on those legal scholars who emphasized analogic reasoning, consensus, or the authorized collections of noteworthy sayings by the

Prophet Muhammad himself. Yet, interestingly, in every Muslim legal system there is also some local version of the proposition that custom may take precedence even over that which is in the sacred law: In the words of a characteristic formulation, "Whatever is dictated by custom is as if dictated by law." As we shall see in more detail later, Islamic law presses decision-making down to locally knowledgeable figures and draws local practice directly into its assessment of persons and events. If, then, we start to connect this approach to other aspects of Islamic (particularly Arab) cultures, some comprehension of the meaning of custom in law begins to present itself.

Briefly, in Arab culture one is constantly arranging relationships in a highly personalistic way: In social life, as in the view of humankind presented in sacred text, the focus is constantly on the consequences that the arrangement of social ties has for creating a community of believers and fending off potential chaos. To know a person is to know his local ways of forming ties to others and the most likely nature of his networks of indebtedness; to know how to address potential disputes is to know the ways in which people in a given locale or type of arrangement may be encouraged to use when negotiating their own relationships. Traditionally there was no appeal in Islamic law because no one could claim final certainty, and facts were largely a function of the credibility of witnesses, a credibility that itself came from these witnesses being so involved

in webs of relationship that they would be loathe to risk their reliability through false oaths. Thus, to come full circle, custom is a kind of unmarked category; it runs through the whole of the legal system without having to be set out as a separate source of the law. Because Western scholars have operated mostly from a civil law baseline—in which custom is generally not recognized as law until it is formally drawn within the ambit of the law—the role of Islamic custom as an important informative factor in many proceedings has often escaped emphasis. Whether it is in the implementation of moral ideas or the incorporation of social relations generally, the understanding of Islamic law, like any other system, is thus inseparable from the expression and enactment of the categories that define and vitalize the culture at large.

Family Resemblance

Some analysts have tried to capture these variant aspects of legal systems within a specific taxonomy. Like biologists they have sought to show relationships and key indicators by grouping the different forms of law into specific typologies. But often the result has been misplaced. We can certainly speak of Anglo-American "common law" or Continental "civil law" as historical developments, but as types of law we may find their key

features to be present in systems not otherwise thought to share identifying features with these taxonomic categories. Other commonly used categories, like "religious law" or "primitive law," have almost no analytic utility. The reason is that the criteria of inclusion may not point out important relations of structure or function: It would be rather like categorizing animals by the hair on their legs or the number of teeth in their mouths. Instead, if, like modern biologists, we see variation as central and forms as the result of processes rather than the manifestation of pure or deviant types, a rather different taxonomic foundation may be suggested. For what may be more akin to having a spine or an exoskeleton, in categorizing legal processes, are the ways in which power is distributed among various social institutions and the ways in which changing cultural conceptualizations are given authoritative recognition. Seen in this fashion, we may spot connections that previously escaped our notice, and even avoid reifying the dichotomy of "formal" and "informal" legal institutions.

Specifically, we might group legal systems into three broad categories: those that treat law as an arm of central governance and only recognize sociocultural practices as law when they have been incorporated within the centrally controlled system; those that distribute power widely among counterbalancing institutions and rely on low-level institutions to draw changing cultural practices within their purview; and those that seek to maintain the legitimacy of established practices as a ve-

hicle for sustaining the traditional social structure itself. We can denominate these three as civil law, common law, and traditional legal orders—bearing constantly in mind that whatever analytic merit they possess lies in their capacity to reveal relations we had not previously seen, rather than in any claim to being fixed realities.

Once again the example of Islamic law is instructive here. Because of its attachment to a sacred tradition, many comparativists speak of Islamic law, along with Jewish, Hindu, and other text-based systems, under the category of "religious law." But reference to supernatural sanction is not the key indicator—power and culture are. To build useful categories we need to ask the two questions noted above: How is power distributed and how are local practices absorbed into each system? Thus Islamic law actually may better be thought of as a kind of common-law system: Fact-finding and decision-making are pressed down to a range of witnesses, local experts, and textual advisors, while local culture is brought within the ambit of the law through the direct implementation of custom and common practice by these same figures. One of the reasons, it may be suggested, that in such places as the Sudan, Pakistan, and postrevolutionary Iran the state has been unable to simply implement an invariant form of fundamentalist Islamic law may be that, as a type of common-law system, Islamic law is not an arm of the state and is deeply attached to changing local circumstance; hence any attempt to render it a simple instrument of the state is bound to

be undercut by its actual implementation at the local level. Islamic fundamentalists, ironically, may have made a category mistake about their own religion's law.

Legal systems do, of course, borrow from one another, just as other forms of cultural borrowing occur, so the question may be posed: How much of the larger cultural context needs to be moved along with a legal feature for such a transplant to work? For example, in the 1920s several midwestern states in America adopted a Scandinavian model of conciliation that has long proved effective in some of those countries for avoiding formal court proceedings. Since many of the people in these states were themselves of Scandinavian origin and since several of the states went so far as to write into their constitutions the requirement that such conciliation be tried before certain lawsuits, it would seem the program had a good chance for success. In fact, it collapsed within a few years. While the reasons are somewhat unclear, it appears that the pressures of local members of the community on the parties to conciliate rather than litigate had not taken root as in Scandinavia, and that the increased individualism of American culture led people to be more willing to end relationships through litigation than grudgingly ignore certain disputes for the sake of ongoing association. Just as Islamic fundamentalists may have erred in imagining that Islamic law is a kind of civil law system instead of a common-law variant, so too the cultural rootedness of a legal borrowing may or may not work

depending on the commonsense assumptions and cultural role of legal proceedings at least as much as any professed efficiencies.

Indeed, the meaning and success of various conciliation or mediation mechanisms may depend, like legal transplants, on their broader context. Several examples—of an African procedure said to track an effective psychological technique, a conciliation mechanism employed by a Jewish organization located in New York City, and the so-called educative model of the former Soviet Union—will help to illustrate the range of connections that may be operative.