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REPRESENTING IN-BETWEEN: LAW, ANTHROPOLOGY, AND THE RHETORIC OF INTERDISCIPLINARITY

*Annelise Riles**

This article considers how lawyers and nonlawyers discuss the contribution of interdisciplinary scholarship to the law as a means of rethinking the relationship between these disciplines. The article first examines the arguments of the nineteenth-century lawyer Henry Maine and of the twentieth-century anthropologist Edmund Leach on the subject, and notes the difference between Maine's emphasis on "movement" from one theoretical discovery to another and Leach's emphasis on creating relationships between disciplines by exploiting a "space in between" the two. Then, turning to contemporary scholarship in legal anthropology, "Law and Society," and the sociology of law, the article critiques the rigid opposition between disciplines at the heart of much of this scholarship and argues that the task of relating law and anthropology as disciplines, or law and society as social forms, has now lost its rhetorical force. The article concludes that the current contribution of interdisciplinary scholarship to legal studies lies in the tension it discloses between reflexive and normative modes of engagement with legal problems.

INTRODUCTION: THE RHETORIC OF IN-BETWEEN

This article considers what anthropological ideas, methods, ways of writing, or ways of seeing might contribute to legal debates in the coming years. There is a rich tradition of cross-disciplinary work in law and anthropology for at least a century, and the movement between disciplines—a movement that in our mid-twentieth-century idiom blurs the distinction between law and culture—currently seems poised to make imperative contributions. Oddly, however, anthropologists interested in law and lawyers working on questions of culture lately have experienced their enterprise as professionally marginal-

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ized, devoid of theoretical innovation, even uninteresting.[1] I am curious as to why this might be true, as to what makes the image of this or that mode of inquiry exciting, innovative, or important at particular moments, what this indecision might tell us about how knowledge works for us, and what we might do with it. I call this an interest in the rhetoric of interdisciplinarity.

I come to this question through the lens of the anthropological method, as I see it—that is, by looking closely at points of comparison that emphasize the contingency of my own representations about the nature and project of interdisciplinarity. One need not follow Malinowski to far away islands to find such points of comparison, however: as anthropologists increasingly recognize, they abound in our own tradition. The adventure lies as much in shifting the focus, in looking from a different angle back on ourselves, in opening another view. In

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1. Not only do professional organizations such as the American Anthropological Association's Association of Political and Legal Anthropologists suffer dangerously small membership numbers, but a surprising amount of recent work in Law and Anthropology and Law and Society begins and ends with derogatory views of the field. Francis Snyder opened his 1981 review essay on Law and Anthropology with the blunt assertion that "[t]he relationship between anthropology and law is often viewed as problematic and tenuous," Francis G. Snyder, *Anthropology, Dispute Processes and Law: A Critical Introduction*, 8 BRITISH J.L. & SOC'Y 141, 141 (1981), and continued by pointing to the weak institutional support for research in Law and Anthropology and the lack of influence of anthropology on the law. Likewise, Peter Sack, in the introduction to a recent survey volume in Law and Anthropology, observes:

> "Anthropology" drifts along, manned by a multiplying but demoralized crew which tries to move it at the same time into every conceivable direction. At any rate, anthropologists are preoccupied with saving themselves and their discipline and are unlikely to play the prince who will deliver the princess of western legal theory from a hundred years of positivistic coma.

Peter Sack, *Introduction* to LAW AND ANTHROPOLOGY xx (Peter Sack & Jonathan Aleck eds., 1992). After reviewing the dire projections of other Law and Society scholars about the status of the field, Rita Simon and James Lynch conclude:

> [T]he assessments of [these scholars] seem to be essentially correct but overstated. The sociology of law as a field of study has not produced an integrated and inclusive body of knowledge. There is little grand theory. Isolated case studies seem to predominate, and the courts place little weight on empirically based research findings. Nonetheless, in the recent past, attempts have been made to develop a theory of the law, and while it is not complete, it is a useful step in the right direction.

Rita J. Simon & James P. Lynch, *The Sociology of Law: Where We Have Been and Where We Might Be Going*, 23 L. & SOC'Y REV. 825, 843 (1989).

Finally, in their introduction to *History and Power in the Study of Law*, a volume intended to rethink and revitalize the field of Legal Anthropology, anthropologists Jane Collier and June Starr ponder the question of the identity of Legal Anthropology with marked ambivalence about the place and objectives of their work. They call both for a continued separate "subdiscipline" of Legal Anthropology and for a reintegration of Legal Anthropology "not as a subdiscipline 'apart from' social anthropology, but as a theory-building 'part of' social anthropology"—the latter reflecting a widespread feeling among anthropologists that Legal Anthropology has not been an area at the center of theoretical innovation in the discipline that it was for an earlier generation of anthropologists. Starr and Collier are equally ambivalent about the point of intrusion of their arguments in legal debates. They gesture toward an affinity with the Critical Legal Studies movement but note that only "some contributors to this volume" see a convergence of theoretical interest there, and they say little about how they hope their work will be received among legal academics. June Starr & Jane F. Collier, *Introduction* to HISTORY AND POWER IN THE STUDY OF LAW: NEW DIRECTIONS IN LEGAL ANTHROPOLOGY 1, 6 (June Starr & Jane F. Collier eds., 1989).

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my case, as an advocate for interdisciplinarity, this can mean circling back on my own arguments through the layers of tradition such arguments know. I begin, therefore, by reaching back to consider the strategies of canonical figures of both law and letters for interjection into other disciplinary conversations.[2] A look at these strategies, from the representation of one's work as a "radical reappraisal" of the legal field[3] to the call for more scholarly, academic study of the law,[4] demonstrates the way in which we as lawyers, academics, and anthropologists located in a particular political/cultural milieu, see and represent the world. In other words, I mean to consider these arguments as culturally situated subjects of anthropological study.

I focus first on two intriguing figures whom we might claim for a tradition of legal anthropology, Henry Maine and Edmund Leach—two writers who at first sight might be assumed to share nothing at all.[5] First, the differences, rather than the similarities, between Maine's mid-nineteenth-century and Leach's mid-twentieth-century scholarship now capture the attention of anthropologists and lawyers

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2. I focus here solely on the rhetorical contribution of interdisciplinary work in Law and Anthropology to legal debates. Regrettably, I must omit the equally compelling story of the intrusion of legal thought in anthropological debates, but this remains a project for a later day.

3. *Book Jacket* for PETER FITZPATRICK, THE MYTHOLOGY OF MODERN LAW (1992).

4. SALLY FALK MOORE, LAW AS PROCESS: AN ANTHROPOLOGICAL APPROACH (1978).

5. Such inapposite juxtapositions highlight interesting questions about the construction of perspective that have become the subject of recent anthropological theory. The intriguing aspect of such questions lies in its blurring of subject and lens as the method of investigation itself becomes the subject of investigation. In a study of changing conceptions of the context of the anthropological argument from the nineteenth century to the modernist period, Marilyn Strathern confronts a similar problem by pointing to her own difficulties in finding a context for these anthropologists within her own contemporary framework. The problem of the piece becomes both methodological (how does an anthropologist study historical change in ideas?) and ethnographic (how do anthropologists, as participants in the cultural productions of contemporary Euro-American culture, take up perspectives on their world):

> For a non-historian, the disconcerting point is this: If one looks hard enough one can find ideas anticipated long before their time, or one can trace their similarity through time. Yet, when one looks again, and considers other ideas, the sense of similarity vanishes. . . . On what basis is one to foreground some, relegate others to background context?

Marilyn Strathern, *Out of Context: The Persuasive Fictions of Anthropology*, 28 CURRENT ANTHROPOLOGY 251, 253 (1987).

Unfortunately, after setting up this delightful double-view, Strathern resumes her anthropological persona and chooses to focus singularly on the methodological problem of how to correctly define relations between events. This leads her to make what, in the language of her article, might be described as the typical modernist anthropological call for attention to context when she concludes that the weight given to ideas during their own period will resolve which are important and which are not:

> If the sequence of ideas is always so ambiguous, from where does our dramatic sense of shifts and gulfs come? It must come from the place those ideas have in our practices. Thus we should look not at whether this or that person could conceive of other cultures in this or that way—whether the idea of ethnocentrism existed or not—but at the effectiveness of the vision, the manner in which an idea was implemented.

Id.

This issue of context is central to the rhetoric and projection of anthropological intrusions into legal debates. One of the aims of this article, therefore, is to point to another resolution to the methodological problem Strathern highlights.

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alike.[6] Likewise, the disciplinary divide that separates these figures—Maine being primarily associated with law and Leach being primarily associated with anthropology—now also commands considerable symbolic weight. One might also focus on the political gulf between Maine, the antipopulist proponent of aristocratic rule, and Leach, the quietly subversive 1960s leftist. While Maine is busy creating the feel of a discipline, field, or tradition of ethnological jurisprudence, Leach inherits a clear demarcation of law and anthropology and takes on the task of working the space in-between.

Yet if we put these differences aside for a moment, some interesting parallels in method emerge. Both treat the project of interdisciplinary investigation and communication *itself* as a fertile ground of theoretical and methodological innovation, rather than an accident of subject matter. Significantly, Maine and Leach never lose sight of the implicit comparison that an anthropological perspective inevitably draws with the researcher's own society, and both treat their own arguments as phenomena worthy of anthropological analysis. For both Maine and Leach, each in their own way, the analytical reflexivity that inheres in the invocation of another discipline and other societies forces a new perspective. Where Maine's methodical innovation is the artisan-like piecing together of anthropological and legal information, Leach treats the challenge of communicating an anthropological point of view to a legal audience as an opportunity to develop a commentary on the practice of interdisciplinary scholarship itself.

In addressing the question of what interdisciplinary methods in law and anthropology might contribute to law, I invoke a theoretical gap that plagues much thinking about the law. Legal scholarship devotes many pages to the relationship of law to society—to the way in which legal categories perhaps reflect, shape, or transcend the categories of society at large.[7] Yet this body of scholarship, whether of the classical or critical vein, almost universally operates in the realm of grand and generalized assumptions without precise consideration of how ideas or fragments of ideas migrate across the boundary that, we believe, distinguishes law from everyday life. Without a theory of how knowledge migrates from law to society and back again, lawyers are left with nothing but hunches that a causal relationship between legal and social categories exists, that there is in fact a difference between

6. *See, e.g.*, MODERNIST ANTHROPOLOGY: FROM FIELDWORK TO TEXT (Marc Manganaro ed., 1990); Mary Beard, *Frazer, Leach, and Virgil: The Popularity (and Unpopularity) of "The Golden Bough"*, 34 COMP. STUD. SOC'Y & HIST. 203 (1992); Nathaniel Berman, *"But the Alternative Is Despair": Nationalism and the Modernist Renewal of International Law*, 106 HARV. L. REV. 1792 (1993).

7. *See, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978); LAWRENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES (1990); ROBERTO M. UNGER, LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY (1976); Duncan Kennedy, *The Effect of the Warranty of Habitability on Low-Income Housing: "Milking" and Class Roles*, 15 FLA. ST. U. L. REV. 485, 485-519 (1987).

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the two, and that change in one field in some way engenders change in another. A critical ethnographic consideration of the cross-fertilization between law and anthropology therefore reveals some surprising insights about the way in which ideas move among disciplines and, in particular, about how social categories come to be translated into the language of law.

In part II, therefore, I offer such an ethnographic perspective on the movement of ideas across disciplinary boundaries by considering in close detail the rhetorical strategies of Henry Maine and of Edmund Leach. I am interested not only in what these authors tell us about the phenomenon of interdisciplinarity, but also in what innovations we can take from them. Then, in part III, I suggest some parallels in contemporary strategies for interdisciplinary scholarship and point to a series of familiar patterns in contemporary rhetoric about interdisciplinarity. Drawing on anthropological ideas about the character of modern knowledge, I consider why this formulation of interdisciplinarity provided a powerful justification for this work and, likewise, why it can no longer produce the rhetorical effect it once did. I argue that anthropological methods of legal studies have been defined by their concern with identifying relationships—relationships between disciplines or cultures, relationships between *law* and *society*, relationships between real people instead of abstract law, or most recently relationships between rhetorical positions. This commitment to relationships as the subject and method of anthropological study of law also implies a relativist *perspective*. Authors from Henry Maine to Sally Falk Moore toil to illustrate that when one compares contemporary European or American legal problems to the legal systems of other societies, one begins to appreciate the former as one particular cultural reality.

This relativism often is understood as a counterpoint to normative argument about the law as, for example, when an argument about how best to protect the legal rights of property owners is countered with a query about the assumptions about the nature of property and ownership taken for granted in the legal argument. Yet this relativizing or reflexive mode of thinking about law is not an argument against normativity, nor does it stake out a claim for itself. It operates in a different genre than argument or claims or positions. Although the task of uncovering and defending relationship perhaps no longer is tenable as a defining point of interdisciplinary work, I conclude that this movement between normative and reflexive genres, as incommensurable modes of thinking about law, is a highly salient aspect of contemporary legal thought. The contribution of anthropological studies to law, then, becomes to solidify and elaborate that movement, to make it apparent and explicit, and to provide an intellectual mechanism for its experience and representation.

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I. What *Is* Legal Anthropology?

The shape and texture of anthropological contributions to law necessarily depend on understandings of the meaning of Legal Anthropology. Accordingly, it is worth outlining the self-image of anthropologists of law through and against which my account takes its shape. The standard history of the discipline taught in most first-year anthropology courses begins with the late-nineteenth-century fascination with the diversity of cultures uncovered during the colonial period. Using evolutionary models of human development, anthropologists took as their subject of study peoples whom they understood as vestiges of earlier stages of European evolution.[8] In the twentieth century, the discipline of anthropology has defined itself primarily by the close study of non-European societies through prolonged fieldwork.[9] The method has been to address debates of theoretical importance (to the researcher's own society) through a long-term immersion in another society's experience. The variety of methods generally have shared an interest in hidden, perhaps unconscious, and general (as opposed to individual) meanings, which anthropologists call "culture," and the mid-twentieth-century task has been to compare and contrast these cultures. Thus, as anthropologist Carol Greenhouse was able to state with confidence in the opening lines of her article in the *Yale Law Journal*, "anthropology is the study of the significance of cultural difference."[10]

Since the mid-70s, many anthropologists have returned the focus to their own discipline through critical engagement with the theory and practice of the ethnological encounter itself. This has also taken the form of historical analyses of the colonial project and the relationships between colonialism and anthropological knowledge.[11] For some, this critical turn has meant a shift to studying Euro-American communities rather than distant and exotic societies.[12] Yet for most,

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8. *See, e.g.*, James G. Frazer, The Golden Bough (1913); Edward B. Tylor, Primitive Culture (1874).

9. *See, e.g.*, Bronislaw Malinowski, Argonauts of the Western Pacific (1922); *see also* Functionalism Historicized: Essays on British Social Anthropology (George W. Stocking ed., 1984).

10. Carol J. Greenhouse, *Just in Time: Temporality and the Cultural Legitimation of Law*, 98 Yale L.J. 1631, 1631 (1989).

11. *See, e.g.*, Colonialism and Culture (Nicholas B. Dirks ed., 1992); Jean Comaroff & John L. Comaroff, Of Revelation and Revolution: Christianity, Colonialism, and Consciousness in South Africa (1991); Johannes Fabian, Time and the Other: How Anthropology Makes its Object (1983); Frederick Cooper & Ann L. Stoler, *Tensions of Empire: Colonial Control and Visions of Rule*, 16 Am. Ethnologist 609 (1989); Martha Kaplan & John D. Kelly, *Rethinking Resistance: Dialogics of "Disaffection" in Colonial Fiji*, 21 Am. Ethnologist 123 (1994).

12. *See, e.g.*, Recapturing Anthropology: Working in the Present (Richard G. Fox ed., 1991).

Surprisingly, some of the Law and Anthropology literature still exhibits vestiges of resistance to the idea that anthropology can be about something other than the primitive. In his introduction to a volume on Law and Anthropology, for example, Peter Sack asserts that the

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the ethnographic study of other societies has been reconfigured as a means of critical engagement with the ethnographer's own society. Anthropologists George Marcus and Michael Fischer summarized the state of the discipline nearly a decade ago:

> [I]f the locus of order and the source of modern anthropology's major intellectual contribution to scholarship were to be identified, it would be the ethnographic research project itself, bracketed by its two justifications. One is the capturing of cultural diversity, mainly among tribal and non-Western peoples, in the now uncertain tradition of anthropology's nineteenth century project. The other is a cultural critique of ourselves, often underplayed in the past, but having today a renewed potential for development.[13]

Anthropological work devoted to law and legal institutions has known a similar history. Modern legal anthropology is often said to begin with the publication of Bronislaw Malinowski's *Crime and Custom in Savage Society*,[14] a study of the legal institutions of Trobriand society. Malinowski self-consciously heralded a new era in his emphasis on actual observation of primitive law through extended fieldwork, and on "the study by direct observation of the rules of custom as they function in actual life."[15] The work set the tone for anthropological studies of law in the years that followed for both its method of analysis and its vision of primitive law. Malinowski's empiricism,[16] defined in opposition to what Malinowski saw as an earlier generation's conjecture about historical evolutionary processes, emphasized a kind of relational reasoning: "The explanations here given consisted in an analysis of certain facts into simpler elements and of tracing the relations between these elements."[17] The subject matter of Malinowski's discovery, then, was the *cultural context* of law rather than a set of rules,[18] and it was this emphasis on context and processes of develop-

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coherence of anthropology as a discipline distinct from sociology, for example, depends upon the admittedly "offensive" delineation of the primitive or noncivilized as a subject of anthropological investigation. He argues that

> [w]e can remove the sting which [such a distinction] contains by replacing the loaded contrast between 'civilized' and 'uncivilized' with a neutral contrast between 'western' and 'non-western' societies—understood in a geographical (not cultural) sense, to avoid, if we can, subsidiary complications arising from the (cultural) 'westernization' of (geographically) non-western societies.

Sack, *supra* note 1, at xvi (citations omitted).

13. George E. Marcus & Michael M.J. Fischer, Anthropology as Cultural Critique: An Experimental Moment in the Human Sciences 20 (1986).

14. Bronislaw Malinowski, Crime and Custom in Savage Society (1926).

15. *Id.* at 125.

16. *Id.* at 3.

17. *Id.* at 127-28.

18. *Id.* at 125.

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ment rather than custom and rules[19] that engendered his appreciation for the rationality and complexity of primitive legal institutions.[20]

In the 1950s and 1960s, anthropological debates about the nature of social control and social organization centered around the anthropology of law. Through the observation of disputes in non-Western societies, anthropologists sought to understand whether all societies had law or its equivalent.[21] Following Malinowski, these writers argued for an appreciation of the rationality of all mechanisms of dispute resolution no matter how different from Anglo-American law. Drawing sometimes quite explicitly on the work of Anglo-American jurists, these writers focused on how legal institutions functioned to maintain social control.[22] It was a time of great hope for legal anthropology: Laura Nader began her seminal 1965 article with the grand claim that "[i]t is my belief that we are just now on the growing edge of an anthropological understanding of law in its various manifestations."[23] She refers to the "intellectual productivity" in the field in the late 1950s to explain Paul Bohannan's claim that " '[t]he literature in legal anthropology is small and almost all good—neither claim can be made for very many other branches of the subject.' "[24]

The 1960s also saw the emergence of vigorous debate about the relationship between legal and anthropological methods. Some scholars drew enthusiastically upon the work of legal theorists, while others vehemently rejected the application of Anglo-American legal categories to the study of non-Western societies. From this dispute over the disciplinary methods came one of the most significant epistemological controversies of the period, most sharply associated with a conflict between anthropologists Max Gluckman and Paul Bohannan, although it drew in virtually every legal anthropologist of the day. The dispute centered around whether or not Western legal terms could be used to understand and compare non-Western legal systems, with Gluckman arguing they could, and Bohannan responding that such categories did violence to the representation of another society's culture.[25] The ultimate question was not about law, but about what it meant to apprehend and represent a culture different from one's own, about the problems of cultural translation and cultural comparison, and indeed, about what constitutes knowledge of a society. Although Bohannan

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19. *Id.* at 123.

20. *Id.* at 21.

21. *See, e.g.*, PAUL BOHANNAN, JUSTICE AND JUDGMENT AMONG THE TIV (1957).

22. *See, e.g.*, MAX GLUCKMAN, THE IDEAS IN BAROTSE JURISPRUDENCE 7, 11 (1965).

23. Laura Nader, *The Anthropological Study of Law*, AM. ANTHROPOLOGIST, Dec. 1965, at 3.

24. *Id.*

25. *Compare* Paul Bohannan, *Ethnography and Comparison in Legal Anthropology*, *in* LAW IN CULTURE AND SOCIETY 401 (Laura Nader ed., 1969) *with* Max Gluckman, *Concepts in the Comparative Study of Tribal Law*, *in* LAW IN CULTURE AND SOCIETY 349 (Laura Nader ed., 1969).

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sought an ever-fuller appreciation of native linguistic categories, and with it the development of a cultureless language to be used for the purpose of comparison of such native categories,[26] Gluckman emphasized that another society can only be understood using categories native to the anthropologist and his audience, that without such categories comparison is impossible, and that anthropological representation always involves an appeal to the anthropologist's own categories, whether acknowledged or not.[27] As Sally Falk Moore emphasized at the time, the conflict implied a "much deeper difference in approach and interest of the two men concerning what the categories [of law in another society] *mean*,"[28] and she aptly summarized the debate with a question of epistemology: "When one gets to these special concepts, what does one know?"[29]

In the 1970s, the focus of Legal Anthropology shifted to what became known as legal processes. Rather than seeking to elaborate the rules of adjudication in Western and non-Western society, anthropologists reasoned that it would be better to understand the processes through which disputes are resolved and norms eventually are elaborated. One important corollary of this trend was an emphasis on legal pluralism, or the alternative regimes and structures of law that were taken to inhere in any society.[30]

By the 1980s, however, debates about rules and processes,[31] about the universality of law or its equivalent, and about mechanisms of social control[32] had ceased to stimulate debate. Legal anthropology, as noted above, suffered a crisis of identity and saw a waning of interest in its methods and subject matter. Those who saw new possibilities for anthropological studies of law turned to interpretive rather than empirical methods. Clifford Geertz, for example, trumpeted a "hermeneutic tacking between two fields"[33] in which the task of the lawyer-anthropologist would become the artistic project of "cultural translation."[34] Likewise, a number of advocates of legal plu-

26. Bohannan actually suggested "Fortran or some other computer language" as the most likely candidate for a language of comparison free of cultural values of its own. Bohannan, *supra* note 25, at 415.

27. *See* Gluckman, *supra* note 25, at 353.

28. Sally F. Moore, *Comparative Studies, in* LAW IN CULTURE AND SOCIETY 337, 346 (Laura Nader ed., 1969).

29. *Id.* at 348.

30. *See, e.g.*, LEO POSPISIL, ANTHROPOLOGY OF LAW 98 (1971); Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM 1, 3 (1981).

31. *See, e.g.*, JOHN L. COMAROFF & SIMON ROBERTS, RULES AND PROCESSES: THE CULTURAL LOGIC OF DISPUTE IN AN AFRICAN CONTEXT (1981).

32. *See, e.g.*, Marilyn Strathern, *Discovering "Social Control,"* 12 J.L. & SOC'Y 111 (1985).

33. CLIFFORD GEERTZ, *Local Knowledge: Fact and Law in Comparative Perspective*, *in* LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 167, 170 (1983).

34. *Id.* at 218.

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ralism added discourse studies to their interpretive repertoire,[35] and a handful experimented with postmodern theory.

With this in mind, I want to disclose at the outset my views on the prospects for interdisciplinary work in law and anthropology in fairness to those who would interpret them in the mode of disappointment rather than of possibility. As with legal scholarship, it is impossible to speak with any sense of confidence of a singular anthropological canon or method. This initial admission demands that we resist any claim that anthropology can insert itself into legal debates as yet another tool in the lawyer's toolbox, as Law and Economics scholars, for example, have claimed that economic theory can do. This is not because the world of anthropology, like the societies anthropologists study, is so distant from the law that the voyage cannot be made, but rather because there simply is no single Other to be found once one gets there. Letting the (in this case disciplinary) Other speak, even bringing the Other into our midst, cannot promise the thrill that it once did. Indeed, this problem lies at the root of much of the failures of the literature I consider below.

To rephrase this claim in a critical rather than pessimistic tone, grand and absolutist claims about the value of injecting anthropology into law overlook the fundamental similarity in the epistemological and political impasse at which both disciplines currently find themselves. An approach that promises to deliver anthropology to law, like a strange gift from afar, rests upon an exaggeration of the disciplinary divide. Abandoning such an approach may allow us to see this divide *itself* as the product of *shared assumptions* among lawyers and anthropologists about the distinction between law and society, between East and West, between logic and interpretation, between science and politics, between reality and imagination. Such distinctions might better serve as the subject of critical investigation than as the common starting point of dialogue across disciplines.[36] This complicity among lawyers and anthropologists in maintaining the symbolic importance of disciplinary boundaries affords a great opportunity. I understand the movement between disciplinary perspectives and the discomfort and challenges such movement entails as offering the same order of theoretical possibilities as fieldwork in distant worlds once

35. *See, e.g.*, JOHN M. CONLEY & WILLIAM M. O'BARR, RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE (1990); SALLY E. MERRY, GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS 9 (1990).

36. Michael Herzfeld recently has pursued a similar project by focusing on the shared symbolism of writing and literacy that appears both in anthropological texts and in the Greek community he studies. His objective is to understand the role of written language in political contests for the creation of shared meanings rather than to organize his argument around the traditional ethnographic opposition of one's own culture to the culture one studies. *See* MICHAEL HERZFELD, ANTHROPOLOGY THROUGH THE LOOKING GLASS: CRITICAL ETHNOGRAPHY IN THE MARGINS OF EUROPE 22-23 (1987).

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provided. Nowhere are these possibilities better demonstrated than in the work of the masters of the discipline considered below.

II. Points of Comparison

I begin with two points of comparison on the question of what anthropology might contribute to law. I borrow the structure and presentation of my argument from a classic anthropological perspective: the two points of reference I have chosen, namely the rhetoric of Henry Maine and Edmund Leach, I assume to share a basic commonality that allows differences between them to become visible, even significant.

One could put aside differences of epoch in order to note disciplinary differences between these figures. Maine, of course, was a lawyer and might be taken as the representative of arguments within legal circles for interdisciplinarity. Leach, then, becomes the representative of anthropological arguments, the career anthropologist caught addressing a legal audience. Yet running counter to a disciplinary opposition, as part III reveals, it is Maine rather than Leach who is claimed by contemporary anthropologists of law as revered ancestor, and it is Maine's rhetoric which best prefigures contemporary strategies.

Alternatively, one might hold disciplinary divides constant to note the movement through time from one epistemological position to another. In this formulation, the writings of Maine and Leach are not comparable entities; they do not share the same framework. A comparison of Maine and Leach's views on interdisciplinarity makes little sense if the very notion of *discipline*, and indeed, of *inter*—of movement between—is utterly alien to Maine and his project. Rather, Maine's organizing framework—the notion of a grand synthesizing theoretical framework generated by historical perspective—and Leach's organizing framework—the notion of bounded, discrete entities, whether cultures or disciplines which must be related and mediated—are phenomena specific to particular moments. Perhaps the possibility of comparison breaks down; or perhaps the rhetorical grip of comparison loses its hold.

Yet I am getting ahead of myself. The initial question is what Maine and Leach reveal about the contribution of anthropology to law. I propose, as a first tack, to consider how Henry Maine convinces his audience that ethnology has a contribution to make to law. As noted in part III, Maine's argument for the relevance of interdisciplinary work remains exceptionally healthy to this day.

A. *The Historical Jurisprudence of Henry Maine*

The search need reach no further for a method of legal scholarship that might be claimed retroactively as anthropological than a canonical figure of nineteenth century jurisprudence. Henry Maine

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joined the law faculty at the University of Cambridge in 1847 as the Regius Professor of Civil Law at the unthinkably young age of twenty-five.[37] From the beginning, his passion was to reform legal teaching so as to broaden students' knowledge of legal history, to encourage theoretical thinking about the law. He campaigned for changes in legal education, such as a joint degree in law and history,[38] and a formal legal curriculum emphasizing history, comparative law, and philosophy; although by his own admission, his own knowledge of these topics failed to meet academic standards. He regarded legal practice as boring detail work and practicing lawyers as shortsighted technicians, and chose to supplement his teaching income through newspaper editorial writing rather than legal practice. His biography is replete with the recollections of students initially bored and dissatisfied with the law who became Maine's private students and spent long hours in his office discussing literature, philosophy, and politics.[39]

With the publication of *Ancient Law*[40] in 1861, Henry Maine turned to historical and primitive legal traditions to elaborate a grand theory of the role of legal thinking in the evolutionary progression of societies and of the role of social progress in the development of law. Much research remains to be done concerning this manifesto for a new method of jurisprudence,[41] from its influence on particular fields of British and American legal scholarship, such as international law[42] and property law, to the role of colonial culture and politics in shaping its themes.[43] Maine's lofty ideals of legal theory on a grand scale may

37. RAYMOND C.J. COCKS, SIR HENRY MAINE: A STUDY IN VICTORIAN JURISPRUDENCE 9 (1988).

38. *Id.* at 11.

39. *Id.* at 26.

40. Citations in this article are to HENRY S. MAINE, ANCIENT LAW (Lawrence Rosen ed., U. Ariz. Press 1986) (1861).

41. For a good summary of the substance of the argument of *Ancient Law*, see Stephen G. Utz, *Maine's Ancient Law and Legal Theory*, 16 CONN. L. REV. 821, 824-38 (1984).

42. Maine's contribution to international law deserves greater consideration than it has received to date. In addition to his career as a colonial administrator and as a theorist of historical jurisprudence, Henry Maine was a central figure in nineteenth-century international legal doctrine. International law and its relationship to the Roman *jus cogens* figures prominently in Maine's theory of legal evolution as outlined in *Ancient Law* and in his later works. Late in his life, Maine held the Whewell Professorship of International Law at Cambridge University. His work is cited approvingly by the great nineteenth- and early-twentieth-century treatise writers on the subject although it is virtually unknown to contemporary theorists of international law. *See, e.g.*, THOMAS J. LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW (5th ed. 1895).

43. The relationship between Maine's method and the politics of both colonialism and English class conflict deserves far more detailed consideration than it has received to date. His notion of what constituted science was staunchly antipopulist. He defended the historical rule of the aristocracy, despite its abuses, for example, on grounds that it became the repository of scientific jurisprudence because of its knowledge of writing, "the only expedient by which accurate preservation of the customs of the race or tribe could be at all approximated to." MAINE, *supra* note 40, at 12.

Likewise, Maine's rhetoric is rooted in the significance of the divide between the European and the colonial subject. For example, his argument for the supremacy of a code-based legal system over a case law system reaches its apex in his comparison of Roman and Hindu society:

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seem odd and old-fashioned to the contemporary reader; yet to his contemporaries, the method represented a fresh and potent point of intrusion into the central debates of the time, from positivist theory to problems of governance in the colonies. The catalog of endless facts and arguments about diverse legal traditions that is *Ancient Law* would become an overwhelmingly popular success[44] and would sweep Maine into a prestigious administrative post in the Indian colonial government from which he could test his ideas about the evolutionary progression of societies.

By the time of Maine's death thirty years after the publication of *Ancient Law*, however, the intellectual climate seemed to have passed him by. His famous text no longer was read in law faculties for its comparative method.[45] Legal historians had turned to more specialized studies which foreshadowed Bronislaw Malinowski's denunciation of Henry Maine and his "speculative methods."[46] As early as 1893, a supporter found it necessary to plead for the continued relevance of Maine's project:

> [T]he full-grown scholar, in the ardour of wrestling with particulars, is apt to think that the generalities of his masters were childish things; but after a dozen years of finding out that even original research is not infallible, one may come round to think that a large view, an intellectual eye for country, is a guide not to be despised after all.[47]

The substance of Maine's argument has fared no better with time. Although Maine's celebrated phrase "from Status to Contract" is cited in slogan form in the footnotes of a number of law review articles, few of these refer critically to his ideas. In the rare situation in which Maine's work is used in a more immediate way, his writing becomes the emblem of such diverse positions as legal realism[48] and the call for a return to evolutionary theory in law.[49] All of this has led one legal commentator to conclude that "[t]here is no such thing as a 'Mainian' school of legal thought. He is not remembered as the crea-

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> We are not of course entitled to say that if the Twelve Tables had not been published the Romans would have been condemned to a civilisation as feeble and perverted as that of the Hindoos, but this much at least is certain, that *with* their code they were exempt from the very chance of so unhappy a destiny.

Id. at 18.

44. COCKS, *supra* note 37.

45. *See id.* at 183-89.

46. *See* MALINOWSKI, *supra* note 14, at 3 (criticizing Maine for his "narrow adhesion to the patriarchal scheme").

47. *Sir Henry Maine as a Jurist*, 178 EDINBURGH REV. 100, 121 (1893).

48. *See* Alan D.J. Macfarlane, *Some Contributions of Maine to History and Anthropology*, *in* THE VICTORIAN ACHIEVEMENT OF SIR HENRY MAINE 111, 122-23 (Alan Diamond ed., 1991) (noting Maine's view of property as a bundle of rights).

49. E. Donald Elliott, *The Evolutionary Tradition in Jurisprudence*, 85 COLUM. L. REV. 38, 43-46 (1985).

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tor of some general analysis of law. . . . [T]here is no consensus about what constituted the core of his writing."[50]

From his death to the present day, therefore, Maine has been remembered more as a rhetorician than a theorist. Contemporary legal anthropologist Lawrence Rosen writes, in a forward to a recent edition of *Ancient Law*, that "much of the book's appeal results from its combination of stylistic clarity and bold assertion,"[51] and a late nineteenth-century commentator wrote:

> He is brilliant and fascinating; he throws out new ideas at every turn; but he does not build up a symmetrical doctrine; he does not emphasise the main lines of his architecture as a French theorist would, but almost conceals them by luxuriant illustration. . . . Maine's work is not architectural but organic. His ideas are not presented in the form of finished propositions that can be maintained and controverted in the manner of a thesis. Rather they appear to grow before our eyes, and they have never done growing.[52]

Likewise, anthropologists interested in law are most apt to invoke Maine not for his views but for his position in-between disciplines,[53] and for his ability to fashion a rhetorical strategy that "got through" to lawyers, if only for a while,[54] while at least one lawyer has condemned Maine precisely for the success of his rhetoric:

> What Maine gave to jurists and legal historians specifically . . . was the idol of comparative analysis that rapidly became the hallmark of academic trendiness. Maine bequeathed a strong sense of academic chic to later scholars by his imaginative use of comparative law. Many jurists jumped on this intellectual bandwagon to give their work, often prosaic, the touch of relevance Maine had pioneered. These imitators usually lacked the insight and

50. Raymond Cocks, *Sir Henry Maine: 1822-1888*, 8 LEGAL STUD. 247, 247 (1988).

51. Lawrence Rosen, *Foreword*, *in* MAINE, *supra* note 40, at vii-xx.

52. *Sir Henry Maine as a Jurist*, *supra* note 47, at 101-02.

53. *See, e.g.*, Greenhouse, *supra* note 10, at 1632.

54. In a review of a recent biography of Maine, for example, anthropologist Adam Kuper notes that anthropologists still find themselves making the same devastating critiques of law as did Maine, and that these critiques to this day continue to go unheeded:

> Maine was a pioneer in England of a relativist and historical view of law. This can be a radically subversive approach to the subject, and it is still not very popular with the lawyers, who prefer to believe in eternal verities. As Cocks points out, the leading philosophers of law can still be criticised in much the same way as Maine criticised Bentham and Austin, and he offers a brief critique of Dworkin to make the point. Yet he concludes that although Maine's example is so potent, it has not been followed. "The role of history in modern jurisprudence is almost totally unexplored; and the significance of this is made apparent when the reader of today turns back to Maine's works and finds that they can be used to destroy orthodox views and replace them with an awareness of great diversity in the history of law." Perhaps legal anthropology might contribute to the same project.

Adam Kuper, Book Review, 24 MAN 535, 536 (1989) (reviewing COCKS, *supra* note 37).

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style that made *Ancient Law* a classic for scholars and general public alike.[55]

If Maine then is to be remembered as a master of language, what is the power of his rhetoric? What was the appeal of this infusion of Roman marriage rituals and Indian family structure into debates about positivist jurisprudence? Reading Maine in light of contemporary interest in the intrusion of the social sciences into legal studies reveals some surprisingly familiar strategies.

1. The Organization of the Narrative: A Sequenced Sense of Change

One of the first impressions of *Ancient Law*, from a contemporary perspective, is the vastness of the subject matter. *Ancient Law* feels like a dusty tour of the attic of a momentous house, as Maine guides us through an astounding collection of material organized simultaneously around several disparate themes. First, Maine offers a history of contemporary law—in its entirety. The chapters move from legal technologies, such as codes and fictions, to jurisprudential topics including natural law and positivist theory, to a history of almost every major subject of the common law—contracts, criminal law, property, the law of wills and estates, international law. In case the magnitude of the feat is wasted on his reader, Maine points out at every juncture the "complexity" and "heterogeneity" of the material he has organized.[56] "It may seem at first sight that no general propositions worth trusting can be elicited from the history of legal systems subsequent to the codes," Maine notes at one point. "The field is too vast."[57] And, indeed, the scope of this legal argument is meant to achieve the effect of a subject mastered in its entirety.

To a contemporary reader, this sense of entirety foreshadows the role of structure in Maine's argument: an overall framework into which every piece of information can be placed. Such a grand sense of structure, of course, now strikes us as doomed to fail, for we are now sober realists about the universal applicability of any theory, regardless of its pretensions. How could one master framework account for the full diversity of legal forms? Yet as the commentary above implies, whatever its argument, Maine's *rhetoric* does not produce the feeling of structure, of a total system of order grasped from one all-encompassing viewpoint. The feeling of the text, rather, is one of *movement* and *change*.

The grand theme of *Ancient Law* is change, legal and social. Maine traces the progression of European society, and the relation-

55. Richard A. Cosgrove, Book Review, 34 AM. J. LEGAL HIST. 190, 191 (1990) (reviewing COCKS, *supra* note 37).
56. *See, e.g.*, MAINE, *supra* note 40, at 42.
57. *Id.* at 21.

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ship of this progression to the legal regime that governed the society at each stage of development, by comparison to other societies frozen at earlier stages on the one hand and by reading legal texts as records of evolutionary stages on the other. By uncovering which aspect of Hindu law caused Hindu society to cease to develop as European society did, for example, he gradually uncovers the elements of European law that have allowed European society to continue to evolve.[58] This organization of history into one coherent story line folds together such topics as the relevance of the biological stock of a particular race, the evolutionary progression of political forms from kingship to oligarchy to democracy, the place of philosophers from Rousseau to Montesquieu in the evolution of European society, and the role of writing in social progress. Maine's famous theme of social progression from status to contract is only one of a multitude of disparate observations about social change contained in *Ancient Law*.

This theme of change also provides the organizing rhetorical device of the work. Rather than offer the argument in its totality from the opening pages, Maine makes his reader experience this transformation or progression through the account itself. Maine's argument about progress unfolds as he traces the evolution of forms, such as legal fictions and doctrines of equity. The narrative feels like a voyage, as at one point "we come everywhere in Europe to an era of oligarchies"[59] or at another "[w]e arrive at the era of Codes."[60] A proliferation of biological metaphors[61] emphasizes that each form contains the seeds of all other forms[62] as we watch it evolve from one form to another. This sequenced process of investigation is what ultimately distinguishes Maine's method. He is most explicit about this in his critique of Bentham and other legal positivists: "The mistake which they committed is therefore analogous to the error of one who, in investigating the laws of the material universe, should commence by contemplating the existing physical world as a whole, instead of beginning with the particles which are its simplest ingredients."[63]

Yet this effect of constant transformation emphasizes the continuity of forms through time, the connection of legal phenomena to previous eras; it depends for its success on a notion of an unchanging core—a "something" that progresses through time—which Maine finds in both society and human nature. Maine tells the reader, for example, that a certain change results in the fact that "society gradu-

58. *Id.* at 15-16.

59. *Id.* at 9.

60. *Id.* at 13.

61. *See, e.g.*, *id.* at 9 (referring to "law in the germ"); *id.* at 19 (discussing the "seeds of development").

62. *Id.* at 3 (the early forms "contain, potentially, all the forms in which law has subsequently exhibited itself").

63. *Id.* at 115.

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ally clothed itself with a different character,"[64] as if there is something stable called "society" that can be clothed in different forms. Likewise, Maine often resorts to human nature as a source of causal explanations. The importance of this notion of an unchanging core to the possibility of Maine's progress thesis is illustrated in Maine's critique of Montesquieu.[65] Maine reverently describes Montesquieu's argument about the relationship of legal and social forms in *L'Esprit des Lois* in a way that might equally well characterize the arguments of legal anthropologists of our own generation. Noting Montesquieu's interest in those customs which shock the European reader with their strangeness, he writes: "The inference constantly suggested is, that laws are the creatures of climate, local situation, accident, or imposture—the fruit of any causes except those which appear to operate with tolerable constancy."[66]

In Maine's view, the flaw in Montesquieu's position is precisely its failure to note the underlying core of uniformity that makes sense of different or changing social forms:

> Montesquieu seems, in fact, to have looked on the nature of man as entirely plastic, as passively reproducing the impressions, and submitting implicitly to the impulses, which it receives from without. And here no doubt lies the error which vitiates his system as a system. He greatly underrates the stability of human nature. He pays little or no regard to the inherited qualities of the race, those qualities which each generation receives from its predecessors, and transmits but slightly altered to the generation which follows it.[67]

With the benefit of modernist hindsight, one might respond to Maine that Montesquieu's emphasis on distinct and whole social units does not negate an underlying universality even as it emphasizes diversity. The interplay between universality and particularity—or, in Maine's terms, between the stable core and the change it reveals—is a theme that continues to pervade the rhetoric of cross-disciplinary work in legal anthropology, long after a position more akin to Montesquieu's than to Maine's has become the norm. Yet if a stable totality is of fundamental importance to Maine, one grasps it only through the process of moving from one historical point to another. The pattern of this totality, moreover, relates more to processes of change than to law or society itself.

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64. *Id.* at 9.

65. CHARLES DE SECONDAT, BARON OF MONTESQUIEU, THE SPIRIT OF THE LAWS (Anne M. Cohler et al. eds. & trans., Cambridge U. Press 1989) (1748).

66. MAINE, *supra* note 40, at 112.

67. *Id.*

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2. *The Contribution of Method: Science over Mere Conjecture*

A central aspect of Maine's strategy lay in presenting his approach as an infusion of methodological sophistication into an embarrassingly backward legal discipline. In step with the Victorian fascination with everything scientific, Maine presented his own ideas as making the same kind of contribution to legal understanding as natural scientists made to the understanding of the physical and biological world:

> The inquiries of the jurist are in truth prosecuted much as inquiry in physics and physiology was prosecuted before observation had taken [the] place of assumption. Theories, plausible and comprehensive, but absolutely unverified, such as the Law of Nature or the Social Compact, enjoy a universal preference over sober research into the primitive history of society and law; and they obscure the truth not only by diverting attention from the only quarter in which it can be found, but by that most real and most important influence which, when once entertained and believed in, they are enabled to exercise on the later stages of jurisprudence.[68]

Maine's writings often portray this scientific method as a process of uncovering, of digging beneath the surface to find a deeper and more fundamental layer of reality.[69] In the opening pages of the text, for example, Maine likens himself to a geologist:

> If by any means we can determine the early forms of jural conceptions, they will be invaluable to us. These rudimentary ideas are to the jurist what the primary crusts of the earth are to the geologist. They contain, potentially, all the forms in which law has subsequently exhibited itself.[70]

Maine returns again and again to the roots of words—to the history of the language—to uncover secrets about the hidden part of shared experience.[71]

Maine expresses a healthy dose of disdain for "the unsatisfactory condition in which we find the science of jurisprudence"[72] which, he repeatedly claims in the most insulting tone, compares unfavorably

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68. *Id.* at 3.

69. Indeed, one contemporary anthropologist recently has observed that "[Maine's] insistence on the need to look beneath the surface for the true character of other people's institutions—even if he sometimes gets them wrong or fails to follow his own injunction—is one of the more general features of his appeal to anthropologists." Ray Abrahams, Ancient Law *and Modern Fieldwork*, *in* THE VICTORIAN ACHIEVEMENT OF SIR HENRY MAINE, *supra* note 48, at 185, 191.

70. MAINE, *supra* note 40, at 3.

71. "[U]ntil philology has effected a complete analysis of the Sanskrit literature, our best sources of knowledge are undoubtedly the Greek Homeric poems, considered of course not as a history of actual occurrences, but as a description, not wholly idealised, of a state of society known to the writer." *Id.* at 2.

72. *Id.* at 3.

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even with the jurisprudence of distant ancestors.[73] He paints a picture of a discipline deep in methodological crisis,[74] and he offers a diagnosis in the sad fact that "what has hitherto stood in the place of science has for the most part been a set of guesses."[75]

This claim for a new advanced method allows Maine to present himself as outside and above the debates that divide legal academics. Such differences fold into sameness in the face of the more powerful distinction between, in this case, a historical and an ahistorical understanding of the world. For example, Maine lumps together the positivists and the naturalists with the argument that "these two theories, which long divided the reflecting politicians of England into hostile camps, resemble each other strictly in their fundamental assumption of a non-historic, unverifiable condition of the race."[76]

Like Maine, anthropologists of law today continue to view their work as a sophisticated and technical method of uncovering the complex reality of social processes.[77] Anthropologist-historian Alan Macfarlane, for example, writes that "Maine, like other great thinkers, was able to stand back and question his own society's assumptions, and to see the apparently natural as cultural. This is anthropology's main task today. . . . Like Durkheim later, he saw that in order to understand the complex, one should understand the simpler."[78] We will see many more invocations of science, reality, and the unmasking of the natural as cultural in justification of an anthropological intrusion into legal debates. Suffice it to say that such arguments enjoy a healthy precedent in Sir Henry Maine.

3. *The Epiphany of Self-Recognition*

If lawyers find their discipline denigrated in Maine's account, they also find a more subtle reaffirmation of their categories of analysis. The rhetorical effect of Maine's return to legal categories might be described as an epiphany of self-recognition, for in the text the

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73. *See, e.g.*, *id.* at 71 ("[M]odern speculations on the Law of Nature betray much more indistinctness of perception and are vitiated by much more hopeless ambiguity of language than the Roman lawyers can be justly charged with.").

74.

> There is such wide-spread dissatisfaction with existing theories of jurisprudence, and so general a conviction that they do not really solve the questions they pretend to dispose of, as to justify the suspicion that some line of inquiry, necessary to a perfect result, has been incompletely followed or altogether omitted by their authors.

MAINE, *supra* note 40, at 114.

75. *Id.* at 109.

76. *Id.* at 110.

77. Indeed, for many schooled in modernist traditions of Legal Anthropology, it may come as a surprise to discover these themes in the work of an earlier era, because the advent of modernist anthropology is so often associated with the infusion of a scientific approach and an interest in truths 'below the surface.'

78. Macfarlane, *supra* note 48, at 136.

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reader recognizes her own position reasserted from another point of view.

One simple example of this epiphany of self-recognition is a familiar device of colonial literature. Maine's survey of the diversity of social forms finishes by affirming the colonial image of European cultural superiority. This superiority, moreover, is presented as a surprising and exciting revelation.[79] Thus, Maine's distant journeys return his audience to center stage. They provide a new understanding, a new proof, of what the audience already intuitively knows.

Another instance of this rhetorical strategy appears in the text's play on familiar cognitive categories. Despite his disdain for legal methods, Maine begins by assuming a series of categories familiar to his audience, such as the relationship between an opposition of East to West and an opposition of religion to law;[80] he concludes by reaffirming these oppositions from another point of view. Maine assures his audience, for example, that "the severance of law from morality, and of religion from law, [belong] very distinctly to the *later* stages of mental progress."[81]

The moment of self-recognition in the text that is most significant for present purposes is the manner in which law always returns to center stage. Law is the assumed and constant analytic frame, and although Maine criticizes the role of law in holding back social progress, his legal audience need never doubt the relevance of Maine's project to their own. Whatever else changes, Maine's argument always refers to law, and Maine sets out to find law's equivalent in every society at every stage. As Maine notes in relation to the aristocratic stage of legal development, for example, "The important point for the jurist is that these aristocracies were usually the depositories and administrators of law."[82] However strange the facts may seem, they fit into an argument which reaffirms familiar categories in the guise of critique.

Maine's strategy, therefore, involves a clever play on the notion of innovation in legal scholarship. Maine presents a "gap" between law and society which threatens progress. In progressive societies, he tells us,

> social necessities and social opinion are always more or less in advance of Law. We may come indefinitely near to the closing of

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79.

> It is only with the progressive societies that we are concerned, and nothing is more remarkable than their extreme fewness. In spite of overwhelming evidence, it is most difficult for a citizen of western Europe to bring thoroughly home to himself the truth that the civilisation which surrounds him is a rare exception in the history of the world.

MAINE, *supra* note 40, at 21.

80. "Contrary, too, to the course of events in the West, the religious element in the East tended to get the better of the military and the political." *Id.* at 10.

81. *Id.* at 15.

82. *Id.* at 11.

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> the gap between them, but it has a perpetual tendency to reopen. Law is stable; the societies we are speaking of are progressive. The greater or less happiness of a people depends on the degree of promptitude with which the gulf is narrowed.[83]

The theory posits a sense of urgency. Law must learn from and accommodate more progressive ideas and trends outside the discipline. At the same time, Maine's argument remains at all moments intelligible to a legal audience because, no matter how much it posits a position outside, it continues to take the assumptions of mainstream legal scholarship as its own. This dual strategy—on the one hand an appeal to the outside, to reality, to science, and on the other hand a presentation of an opportunity for the epiphany of self-recognition—is a clever intrusion in legal debate which will be repeated frequently in the generations that follow. The appeal to the outside creates an imperative function for the scholar, while the opportunity for self-recognition assures a level of commonality that makes difference intelligible and significant.

4. *The Relativizing Perspective*

Perhaps most of all, however, Maine can stand for the notion that the contribution of anthropological investigation to law lies in the benefit of taking another perspective, of seeing legal institutions and problems from a wider, longer, more comprehensive perspective. Maine is perhaps most often associated with one of the hallmark positions in sociological studies of law, the fight against legal positivism.[84] A critic of Bentham and Austin, Maine argued that the positivist conception of law as the command of the Sovereign, the dominant view of the day, was characteristic only of a "mature jurisprudence." Attacking the Benthamites as ahistorical, Maine contended that positivism could describe but one situated moment in European evolution, and could account neither for the European past or future nor for the present of other societies.[85]

Maine's charge, therefore, was not that Bentham's ideas were false or even inappropriate tools for the legal framework of the day. In fact, as a colonial administrator, Maine based many of his legal

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83. *Id.* at 23.

84. *See, e.g.*, ALAN HUNT, EXPLORATIONS IN LAW AND SOCIETY: TOWARD A CONSTITUTIVE THEORY OF LAW (1993) (arguing that the critique of legal positivism is one of the great contributions of law and society scholarship).

It is worth remembering, when we associate Maine with the anti-positivist tradition of sociological studies of law, that unlike many of those who might claim him as an ancestor today, Maine's critique of positivism was *not* in the name of legal pluralism. On the contrary, his own view was that the positivist faith in the character of the judge allowed for *too much* pluralism in the legal system by locating the law in the decisions of numerous disparate judicial figures. Better to place one's faith in a legal code, Maine contended. MAINE, *supra* note 40, at 7-12.

85. MAINE, *supra* note 40, at 7-8.

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opinions on positivist arguments for the authority of the Crown.[86] Rather, Maine simply advocated a different perspective on Bentham's conclusions. Although he argued vigorously that this shift in perspective had practical legal implications,[87] one might ultimately appreciate his insights as more of an entreatment to see one's own position from another point of view. Maine's rhetoric emphasizes at each juncture that what his readership takes as the normal, unquestionable state of legal affairs is in actuality a very particular scenario. "One does not readily get over the surprise which they occasion when looked at from a modern point of view,"[88] he writes. Maine notes that even the scholar's own viewpoint is particular, which makes the encounter with other legal systems seem strange: "under our present mental conditions, we are unable to comprehend" them.[89] This, Maine emphasizes, is because we have a perspective, a point of view, that informs the way we apprehend other legal systems. We have what he calls a "modern eye."[90]

From this standpoint, every assumption is open to relativization. The great Roman codes of law, for example, can be understood as nothing more than descriptions of Roman custom.[91] Likewise, although lawyers imagine that law guides society, Maine notes that it

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86. Henry Maine, The Kathiawar States and Sovereignty, Mar. 22, 1864 (Minutes), *reprinted in* SIR M. E. GRANT DUFF, SIR HENRY MAINE: A BRIEF MEMOIR OF HIS LIFE 320, 324 (1892). Maine argues in these minutes that Britain retains sovereignty over Kathiawar territory under international law not only because Britain's claim meets the legal criteria for sovereignty, but also because

> even if I were compelled to admit that the Kathiawar States are entitled to a larger measure of sovereignty, I should still be prepared to maintain that the Government of India would be justified in interfering. . . . There does not seem to me to be the smallest doubt that, if a group of little independent States in the middle of Europe were hastening to utter anarchy as these Kathiawar States are hastening, the greater Powers would never hesitate to interfere for their settlement and pacification in spite of their theoretical independence.

Id. at 324.

87. In particular, Maine saw in international law a body of doctrine ripe for the application of his ideas. As he wrote in a series of "Cambridge Essays" published in 1856,

> We cannot possibly overstate the value of Roman Jurisprudence as a key to International Law. . . . Knowledge of the system and knowledge of the history of the system are equally essential to the comprehension of the Public Law of Nations. . . . If International Law be not studied historically—if we fail to comprehend, first, the influence of certain theories of the Roman jurisconsults on the mind of Hugo Grotius, and next, the influence of the great book of Grotius on International Jurisprudence—we lose at once all chance of comprehending that body of rules which alone protects the European Commonwealth from permanent anarchy, we blind ourselves to the principles by conforming to which it coheres, we can understand neither its strength nor its weakness, nor can we separate those arrangements which can safely be modified from those which cannot be touched without shaking the whole fabric to pieces.

Henry Maine, *quoted in* DUFF, *supra* note 86, at 16. For example, the positivists' arguments against certain aspects of the common law such as the use of legal fictions in judicial interpretation failed to appreciate the important role such fictions played in the progressive evolution of the law, he contended. *See* MAINE, *supra* note 40, at 25-26.

88. *Id.* at 115-16.

89. *Id.* at 20.

90. *Id.* at 15.

91. *Id.* at 17.

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is society that leads and law that often holds back progress.[92] Maine even demurs at one point as to whether progress is inherently positive[93] and notes the chauvinism of European attitudes toward less civilized societies:

> The lofty contempt which a civilised people entertains for barbarous neighbours has caused a remarkable negligence in observing them, and this carelessness has been aggravated at times by fear, by religious prejudice, and even by the use of these very terms—civilisation and barbarism—which convey to most persons the impression of a difference not merely in degree but in kind.[94]

It is worth noting, finally, that this perspectival relativism implies a method. Rather than engage in normative debate with the pillars of English legal thought, Maine chooses to examine their rhetoric, to analyze them as historical phenomena, to show how they have borrowed and adapted Roman legal thought for a new audience. His emphasis is upon what is beneath the surface, on language. Speaking of Blackstone, for example, he notes his debt to Roman ideas: "It is however from the disguises with which these conjectures sometimes clothe themselves, quite as much as from their native form, that we gain an adequate idea of the subtlety with which they mix themselves in human thought."[95] Blackstone has become a subject of analysis as well as an interlocutor. This relativism even extends to the relationship between elements in Maine's own argument.[96] Although the initial problem of *Ancient Law* is to explain diversity and change in legal systems, with social change serving as an explanatory device, this relationship is reversed at several points. The problem becomes social change, and law becomes the mechanism of explanation.[97] The relativizing rhetorical move appears again and again in interdisciplinary work. It entreats the legal audience to understand the particularity of its assumptions by looking at the material from another point of view.

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92. *Id.* at 21; *see also supra* note 83 and accompanying text.

93. *Id.* at 71 ("Ancient literature gives few or no hints of a belief that the progress of society is necessarily from worse to better").

94. *Id.* at 116-17.

95. *Id.* at 110.

96. *Cf.* ROY WAGNER, SYMBOLS THAT STAND FOR THEMSELVES 5 (1986).

> Cultural relativity, like Einstein's, is often no more than the relativity of coordinate (or reference) systems, of language, ethos, acquired "feel" and habit. To Know it, experience it, one gets used to living somewhere else, with "other" people. This is an introduction to the issue. But trope or metaphor, the self-referential coordinate, is relativity compounded; it introduces relativity *within* coordinate systems, and within culture. Thus expressions within a culture are relative to, innovative upon, and ambiguous with regard to, one another. A model founded upon these relations is, if it is systematic at all, a mobile, fluid, and an undetermined system.

Id.

97. *See, e.g.*, MAINE, *supra* note 40, at 118.

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5. *Whither Disciplinary Identity?*

Among Maine's many rhetorical strategies, none are arguments about disciplines or interdisciplinarity. Anthropology was not a discipline as such in Maine's day; perhaps it is cheating a bit to even claim Maine as an anthropologist. Maine has no strong conception of disciplines as methodologically or topically differentiated pursuits; the idea of bridging a gap between them, of exploiting the space in-between, as implied in the term *interdisciplinarity*, is foreign to his enterprise.

If this is the case, in what sense can we see Maine as an antecedent? And what are we to make of this appeal to the lawyer's own categories on the one hand, and his relativizing moves on the other? As Alan Macfarlane has written with respect to another conflict in Maine's work, the tensions in Maine's thinking provide the most useful legacy to contemporary scholars:

> I think we proceed further if we see the contradictions [in Maine's thought], which we still face today, as necessary and productive tensions. It was necessary for Maine *both* to believe in a certain evolutionary framework *and* to show, in practice, the exceptions to the evolution. Evolutionism provided the guiding hypothesis, the assumption of links, which he could then explore, but only partially confirm.[98]

If we were to reinvent Maine as ancestor, then, we might focus precisely on the ambiguous relationship between his empiricism and his talent for evocation. This position is familiar to Edmund Leach as well.

B. *Edmund Leach's Disciplinary Terrorism*

If Henry Maine is remembered as rhetoric's practitioner, then Edmund Leach is its student. An unquestioned giant among a passing generation of social anthropologists, Leach is often credited with introducing structuralism into the British anthropological debates of the 1950s and 1960s. Trained under Bronislaw Malinowski and later a Lecturer in anthropology at the University of Cambridge, Leach reinvigorated the studies of such traditional anthropological concerns as kinship and political organization by considering patterns of organization and thought as linguistic structures rather than unmediated realities.[99] Unlike many of his peers, Leach was fascinated by the categories of his *own* culture,[100] and his attention often turned to

98. Macfarlane, *supra* note 48, at 140.

99. *See, e.g.*, EDMUND R. LEACH, CLAUDE LEVI-STRAUSS (1970); EDMUND R. LEACH, CULTURE AND COMMUNICATION (1976); EDMUND R. LEACH, GENESIS AS MYTH, AND OTHER ESSAYS (1969); EDMUND R. LEACH, POLITICAL SYSTEMS OF HIGHLAND BURMA: A STUDY OF KACHIN SOCIAL STRUCTURE (1986).

100. For example, Leach raised a good deal of controversy with his linguistic explanations of the stories and creeds of the New Testament. *See, e.g.*, EDMUND R. LEACH, *Virgin Birth*, *in* GENESIS AS MYTH, AND OTHER ESSAYS 85 (1969).

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anomalous taboos against those things, persons, and practices that failed to fit these categories.[101]

Like all anthropologists of his generation, Leach believed strongly in the value of studying small-scale non-Western societies—in the fundamental unity of humanity that made possible an appreciation of its diversity. Yet students of modernist anthropology may find that Leach's views on the meaning of cross-cultural investigation complicate our picture of the era. Leach ultimately understood ethnography as a project of self-discovery—of reflection onto ourselves—even as he valued it as a means of learning more about others. In this sense, Leach might be revered today both for his faith in the empirical study of distant societies radically different from our own and for his belief that "social anthropologists are bad novelists rather than bad scientists."[102]

In the spring of 1976, Johns Hopkins University invited Leach to deliver a series of lectures on a topic relevant to the study of law. Leach's lectures, subsequently published as the short monograph *Custom, Law, and Terrorist Violence*,[103] are now largely ignored among anthropologists as a minor work of a great scholar.[104] Anthropologists and lawyers alike might do well to reconsider this piece, however, for it represents a careful and creative reflection on the meaning of interdisciplinary dialogue as well as a masterful strategy of intrusion into another discipline's debates. Think of it as anthropology applied.[105]

In the preface, Leach writes that he viewed these lectures on a legal topic as a dual opportunity to achieve "two somewhat different ends":

> I wanted to show the lawyers of Johns Hopkins that perhaps the anthropologists might have something to say that would be of interest, and I wanted to show the younger members of the lively, but only recently inaugurated, Department of Anthropology that British Social Anthropology, as originally conceived by its found-

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101. *See, e.g.*, EDMUND R. LEACH, CULTURE AND COMMUNICATION (1976).

102. EDMUND R. LEACH, SOCIAL ANTHROPOLOGY 53 (1982).

103. EDMUND R. LEACH, CUSTOM, LAW, AND TERRORIST VIOLENCE 3 (1977).

104. The book apparently has been cited in print only once in the last 10 years, and then only for its surface-level (and admittedly commonplace) assertion that customary norms are open to multiple interpretations. *See* Nigel Rapport, *Ritual Speaking in a Canadian Suburb: Anthropology and the Problem of Generalization*, 43 HUM. REL. 849, 858 (1990). See also Maurice Bloch's claim, typical of the view of many anthropologists, that Leach's writing career "practically ended in 1964. After that Leach carried on publishing about this and that for another twenty-five years but nothing much of substance seems to have come out." Maurice Bloch, *Edmund Leach: A Bibliography*, 27 MAN 438, 439 (1992) (book review).

105. *Applied anthropology* is the anthropologists' term for consultation work on development and human rights projects. For some, this work represents the raison d'être of anthropology, the project that justifies its more arcane pursuits. However, Leach scorned such "development anthropology" as the resurrection of the relationship between anthropology and colonialism in contemporary guise. *See* LEACH, *supra* note 102, at 50.

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ing fathers Malinowski and Radcliffe-Brown, was not quite so irrelevant to their present concerns as some of their more radical contemporaries have recently proclaimed.[106]

The task, in other words, was the preservation and reinterpretation of the canon through a creative performance for restless graduate students on the one hand, and the expansion of the purview of that canon to another discipline through the more earnest instruction of lawyers on the other. The difficulty lay in executing two disparate rhetorical intrusions at once. Reaching for a topic of popular fascination, Leach fashioned what at first might appear as a quite direct and even unambitious application of anthropological insights to a practical problem of international law. As he put it, "Does the traditional anthropological analysis of primitive law and custom help us in any way to understand the contemporary phenomenon of terroristic political violence?"[107]

Leach delivered two lectures, each named after one of the two mythical founders of modernist anthropology.[108] The first, entitled "Crime and Custom in Savage Society,"[109] takes its name from Bronislaw Malinowski's famous book of the same title published in 1926 and often described as the first modern work in legal anthropology. The second lecture, "Public and Private Delicts in Primitive Law," invokes the principal work of legal anthropology of Malinowski's archrival, A.R. Radcliffe-Brown.[110]

The story of modern anthropology takes much of its narrative structure from the public debates and the private conflict between these figures.[111] In structuring his lectures around this conflict, Leach turns to a familiar story, like a favorite family scandal, that nevertheless piques the listener's interest no matter how many times it is told. As a student of rhetoric, Leach knows how to tell a good story; he opens by positioning himself as the bearer of enticing secrets: "There are now only a small handful of professional anthropologists still in active practice who heard the gospel of British social anthropology as it was originally preached by the founding fathers Malinowski and Radcliffe-Brown," he asserts monumentally, "and I am one of those."[112] Like any good anthropologist, he simply reveals what these figures knew—simply translates the native's point of view—on the subject of law. Yet he notes with an air of sly enticement:

106. LEACH, *supra* note 103, at 3.

107. *Id.* at 6.

108. *See id.* at 5.

109. *Id.*; *cf.* MALINOWSKI, *supra* note 14.

110. *See* A.R. Radcliffe-Brown, *Primitive Law*, 9 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 202 (1933).

111. *See, e.g.*, FUNCTIONALISM HISTORICIZED: ESSAYS ON BRITISH SOCIAL ANTHROPOLOGY (George W. Stocking ed., 1984).

112. LEACH, *supra* note 103, at 5.

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> But I ought to emphasise from the start that my viewpoint is prejudiced.
>
> I was a direct pupil of Malinowski and whatever I may say in criticism of his attitudes must be understood against the background fact that I consider him the greatest and most original of social anthropologists. By contrast, I have never had any admiration for Radcliffe-Brown. Both in the flesh and in his writings he seemed to me to be something of a fraud.[113]

As befits the text of an enthusiastic convert to structuralism, the lectures take their organizational frame from the opposition between these figures. His problem is how to relate two entities—two canonical figures, two disciplines—how to contrast them, and how to resolve the contradictions which the contrast brings to light. Leach's approach, in methodological and rhetorical terms, is far removed from Maine's sequenced movement from one temporally defined point to the next.

The first lecture, organized as a commentary on Malinowski's book, begins with "the narrow pedantic and old-fashioned theme"[114] of *customary law*, and of the relationship of *custom* to *law*. As Leach defines the issue one wonders what the anthropologist might possibly have to offer a legal audience: "Social anthropology is the study of customary behaviour. . . . *Laws*, in our kind of society, are there to be enforced. . . . *Custom* is altogether more vague."[115]

If, as Leach tells us, anthropologists study custom, not law, is there any analogy to be made between custom and law—between the subject of the anthropologist and the subject of the lawyer? Lawyers already know a great deal about the distinction between law and custom, and Leach immediately refers to the argument that his audience anticipates, as the audience did from Henry Maine: Laws are the purview of a select group of societies, Leach notes, while most of the world is mired in custom. Yet in what is now viewed as a classic modernist break with the evolutionary spirit of such an argument, Leach refuses to move to the prefigured conclusion that the rule of law is an emblem of progress.[116] On the contrary, says Leach, custom can itself be a fertile source of change, for "what we choose to remember about tradition can quite rapidly be adapted to changing circumstance."[117] A new dispute has erupted since Maine's day, it seems. There is a conflict between *disciplines* at issue. Leach does not hesitate to take

113. *Id.* at 5-6.

114. *Id.* at 6.

115. *Id.* at 6-7.

116. "But you should not infer from this that modern, innovating, law-*making* societies are always go ahead and progressive or that those which emphasise the permanent validity of traditional values are always reactionary and conservative." *Id.* at 7. This rejection of evolutionary narratives is a classic defining emblem of modernist anthropology, and in making this point, Leach is placing himself squarely in the tradition of Malinowski and his successors.

117. *Id.*

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sides. Suddenly, it is the static nature of law, and with it the discipline devoted to it, rather than custom and anthropology, which finds itself on the side of backwardness.

From this starting point, Leach initiates a basic Malinowskian theme, namely that seemingly exotic, strange, or morally contemptible behavior can, on closer examination, be understood as just as rationally motivated as our own. The corollary to this respect for the viewpoint of others, Leach emphasizes, is a realization of our mutual obligations: "Malinowski's anthropological innovation was his repeated emphasis on the rather obvious fact that human individuals are never by themselves. . . . This principle of reciprocity underlies, and indeed defines, all social systems."[118] Yet if traditions are open to multiple interpretations, and if seemingly irrational interpretations can be understood as sensible, Leach proceeds to ask, how do certain interpretations, or views, continue to dominate in any particular society over time? In a break with Malinowski, Leach answers that those who hold power must coerce the rest to accept the traditional interpretation, and Leach names the instrument of such coercion, whatever form it might take, as *law*. In the case of the Trobriand Islanders whom Malinowski studied, Leach notes, this instrument is sorcery:

> What matters in societies such as that of the Trobriand Islands is what is *believed* about sorcerers rather than what they actually *do*, or how often they actually do it. If you *believe* that a particular individual is a sorcerer, or has command over sorcerers, and that, on that account, this individual has the power to damage yourself, you will adjust your behaviour accordingly.[119]

And it is from this relativist vantage point, where reality is culturally defined, that the terrorist, the savage of today, suddenly seems less strange than before:

> If you still find this style of discourse confusing simply substitute for my opening sentence: "If you believe that a particular individual is a sorcerer" the equivalent phrase: "If you believe that a particular individual is a member of the Secret Military Intelligence" and substitute "a member of Secret Military Intelligence services or Secret Police" for "sorcerer" all the way through, then perhaps you will get my point.[120]

Having preached relativism to his lawyer audience, Leach turns to the theoretical surprises he has saved for his anthropological colleagues. If functionalism has given us this anti-evolutionary tolerance for diversity, he argues, it has also burdened us with a static and unitary notion of the social group.[121] This view treats the boundaries between groups as unmediated realities rather than linguistic constructs,

118. LEACH, *supra* note 103, at 14.
119. *Id.* at 16.
120. *Id.*
121. *Id.* at 8-9.

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and ignores the fact that "all social boundaries are conventional. Real social groups are always fuzzy at the edges."[122] Again, Leach calls the maintenance of pure categories *law*: " 'The law,' by which I here mean the customary rules of society, however they happen to be formulated, then pretends that it is normal for everything to be tidy and straightforward. The law says who must submit to whom and in what context. The law seeks to eliminate ambiguity."[123]

Leach effectuates an important shift here. From the initial presentation of two a priori entities, law and society, he now directs attention to the boundaries that separate these categories and, in particular, to the space "in-between." His insight is that the boundaries that define the initial entities are fuzzy and indeterminate. This insight is intended as a critical move: to associate law with the maintenance of boundaries at the expense of the space in-between is to issue a powerful critique of law. This anomalous space in-between is understood to be ambiguous, confusing, and yet creative. It is a source of power. Quoting Foucault, Leach points out that the persons and ideas that occupy this ambiguous space will be considered abnormal, separate from the ordinary world.[124] As such, from James Bond to Hamlet, they are both God and criminal, "permutations of divinity, madness, criminality and legitimacy."[125] From this point of view, Leach concludes, the terrorist is not only our equal in the sense of Malinowski's rational Trobriand savage, but what the politically minded academic must aspire to be:

> If we act in defiance of custom or reinterpret custom to suit our private convenience we commit a crime; yet all creativity, whether it is the work of the artist or the scholar or even of the politician, contains within it a deep-rooted hostility to the system as it is. On that account, creativity is mad, it is criminal, but it is also divine. Human society would have died out long ago if it were not for the fact that there have always been inspired individuals who were prepared to break the rules. This is the dilemma which faces all those whose self-appointed task is to uphold the constitution and protect society from the vandalism of those who seek its destruction.[126]

The second lecture turns to the political implications of this space in-between. Leach begins with his own loss of confidence in the moral and technological superiority of his society:

> When I first began to study anthropology the gulf between modern society and primitive society seemed very wide and very

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122. *Id.* at 9.
123. *Id.* at 19.
124. *Id.* at 18 (quoting MICHEL FOUCAULT, MADNESS AND CIVILIZATION (Richard Howard trans., 1965)).
125. *Id.* at 19.
126. *Id.* at 20.

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> simple. *We* conducted our affairs in terms of rational clear-cut categories of true and false, right and wrong; *they* were all tangled up in the confusions of magical superstition. But in the contemporary world where the Manson Family and the Baader-Meinhof gang compete for publicity space with South Moluccans, the IRA, and expatriate Palestinians, the confusions of magical superstition may contain lessons for us all.[127]

If the primary question in the previous lecture was how does law come to be obeyed, the question in the second is how does one know what constitutes law in the first place. The second lecture signals a shift from a faith in the universal rationality of all men—in the possibility of accepting all men into the fold—to a loss of confidence in the European perspective itself. It shifts from a liberal call for absorption of all difference into a confident and accommodating self to a confusion of that very self through contact with another.

Leach organizes his second lecture as a commentary on Radcliffe-Brown's ideas of primitive law as *legal* ideas. "[L]ike many professional lawyers," Leach tells his audience, Radcliffe-Brown began with abstract ideas borrowed from Roman law about fundamental and universal distinctions between public and private delicts recognizable in every society.[128] In this scheme, familiar to every lawyer, public delicts are offences committed against some higher authority—homicide, theft—whereas private ones concern conflicts between equals—breaches of contract, or conflicts over marital fidelity, for example.[129] Again, Leach locates his critique of such a universal opposition not in the opposition itself—for as a structuralist he has a good deal of faith in the universality of oppositional thinking—but in the arbitrariness of the opposing categories. In many societies, he notes, the very transgressions that we classify as private would be considered public and vice versa.[130]

With this in mind, Leach turns back to a classic topic of international law, the distinction between Law and War.[131] He begins by noting that we think of the rules of law and war as mirror images of one another—killing being the norm in one and the aberration in the other, for example. It is difficult to claim that this opposition makes sense in all cases, he argues, because killing is an aberration in some cases of war, although it sometimes is sanctioned in peacetime. If the opposition is arbitrary, we might displace it equally well with another opposition, namely, the distinction between wars among equals on the one hand, which he likens to law or to 'private' conflict, and wars of conquest on the other which he likens to war or 'public' conflict. The

127. *Id.* at 22.
128. *Id.* at 22-23.
129. *Id.* at 23-24.
130. *See id.* at 24.
131. *Id.* at 25.

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first, based on notions of mutual respect, are "ritual games" governed by set rules; but

> [b]y contrast, *wars of conquest*, in which the object of the exercise is the large scale capture of slaves or the establishment of colonial settlements, follow a quite different pattern. The conquerors look upon their enemies as "people wholly unlike us," mere animals, towards whom no ordinary rules of courtesy and fair play need apply.[132]

Turning to the history of conquest, Leach notes that it is characterized by an extreme and rigid differentiation of self from other. In this sense, he claims, the terrorist's actions are analogous to the war of conquest, for they demand the utter dehumanization of one's adversaries. He takes two terrorist acts—the 1975 bombing of LaGuardia Airport and the 1945 bombing of Hiroshima—as examples:

> Both these examples of wholly indiscriminate terrorist killing required that the bombers, an unknown criminal in one case and the President of the United States in the other, should think of the potential victims of the bomb as "people quite unlike us," sub-human others, people to whom *my* rules of morality do not apply.[133]

Leach concludes that it is this extreme linguistic dichotomization of self and other, rather than any particular failure to adhere to the rule of law, that defines the terrorist mentality and act. He argues that the law responds to such ambiguous forms of warfare by reasserting traditional notions of right and wrong:

> Judges, Law Courts, Policemen are there to impose an appearance of universal consensus whenever the symptoms of the lack of consensus begin to become apparent. That way, the conservative *status quo* can be maintained. Criminals must be recognised as criminals and not allowed to become heroes. Some of you may think that you can sense a certain radical undercurrent in what I have been saying. If so, I would not want to contradict you.[134]

Leach finishes by returning to his original topic of terrorism and the rule of law and to his plea that we refuse the counter-terrorist mentality that would posit an extreme gulf between ourselves and others. Recalling the Crusaders' fantasies of Mongol princes with dog heads, he concludes:

> The problems of how to make a legal system embrace those who do not accept the values which that legal system presupposes are very real. But the point of my sermon is simply this. However incomprehensible the acts of terrorists may seem to be, our

132. *Id.*
133. *Id.* at 30.
134. *Id.*

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judges, our policemen, and our politicians must never be allowed to forget that terrorism is an activity of fellow human beings and *not* of dog-headed cannibals.[135]

Leach leaves us, then, with a number of points that resist resolution. Although the first lecture began with the unity of mankind under the banner of rationality, it ended with a plea for ambiguity. Although the second lecture began with a crisis of faith in the possibility of universally applicable categories, it ended with a plea for inclusion of all difference in the fold of selfhood. Likewise, Leach offers us several perspectives on the terrorist, and he puts these many constructs to a number of rhetorical uses. At times, the terrorist, like the savage, is to be understood as our equal, to be accepted under our rational umbrella. At other moments, the terrorist stands for the better part of any society, whether it be our own or that of the savage. And at yet other times, Leach associates the terrorist with the savage, and makes our difference from both depend on refusing a radical dichotomization of self and other. The full effect is of a tension between a plea for ambiguity as difference and plea for inclusion as sameness, and also of an appreciation of this tension itself as rhetorical strategy.

To understand all that Leach is up to in these lectures, I think, we must turn to his own structuralist methods.[136] In this respect, Leach admonishes us from the start to look beneath the surface of the text: "At a superficial level I am simply concerned to take a backward look at what these masters of my subject had to say on the subject of law."[137] It is a prejudice for the modern anthropological project, of course—for searching below the surface, for uncovering symbolic meanings, for understanding what the subject perhaps does not see even in his own words.

What, then, does Leach hope to communicate to his legal and anthropological audiences about the possibilities of interdisciplinary work? Like Maine, Leach makes clear that anthropological study of law is valuable because, through comparison and analogy with societies different from ourselves, we uncover insights about our own situation. Any discussion of primitive societies, then, is always allegorical:

> In this context of politicised violence, hero, prophet, madman, criminal, have become totally confused. I would ask you to keep this background of topical events in mind as you listen to what I now have to say, for otherwise it may appear that I am presenting a singularly prosaic account of the generalities of

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135. *Id.* at 36.

136. Leach introduced Claude Levi-Strauss's ideas to British social anthropology, and his analytical approach is rooted in the uncovering of binary oppositions mediated by taboo third categories. One of Leach's emphases was the way in which such binary oppositions become superimposed on one another so that the dichotomies themselves become linguistically linked. *See* sources cited *supra* note 99.

137. LEACH, *supra* note 103, at 5.

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> primitive law and custom. My purpose is to do rather more than that.[138]

In other words, the relativization of perspective once again defines the anthropological contribution.

In contrast to Maine's relativizing approach, however, Leach focuses on the discipline, its definition, and the relation of entities it demands. Like the a priori opposition of Malinowski and Radcliffe-Brown in this account, the existence of disparate entities called law and anthropology and the competition between the two is assumed. The problem for the ingenious and maverick scholar is how to relate the two, how to exploit the space in-between, how to combine disciplines into a new whole. Leach will succeed only if he manages to create something which will appeal *both* to the lawyers and the anthropology graduate students in his audience. And at the same time, he must maintain a reflexive, relativizing perspective on the very enterprise of interdisciplinary work. Indeed, the relativizing perspective is the mode of production.

One of the principal insights which Leach garners from cross-cultural comparison is that group identity is a matter of cultural construction. To claim that a distinction between groups such as lawyers and anthropologists is a matter of cultural construction is not at all to claim that such a distinction is false. Indeed, for example, Leach himself engages enthusiastically in a classically anthropological derision of economists.[139] Yet the insight of Leach's structuralism is that such well-defined oppositions engender ambiguity.

From this standpoint, we might return to the title of Leach's monograph, *Custom, Law, and Terrorist Violence*, as a commentary on the space in between the discipline of custom and the discipline of law as a kind of terrorist space—a space of political critique, of confusion through imagination which, like Leach's terrorist, reflects what is best in ourselves.[140] We might understand Leach's initial subject of customary law, "a topic which some well-informed experts have declared to be a contradiction in terms anyway: laws are not customs and customs are not laws,"[141] as an embrace of the disciplinary hybrid, the ambiguous territory between custom and law.[142] At the same time, however, Leach's lesson for young scholars bored with the tradition of Social Anthropology involves a clever invocation of the rhetorical

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138. *Id.* at 21-22.

139. "No doubt there are still plenty of enthusiastic neo-colonialist *economists* who believe that the 'development' of the Third World according to a Western model will be to the long-term advantage of everyone. But economists live in a world of their own; the *anthropologists* have become sceptical." *Id.* at 13.

140. *See id.* at 20.

141. *Id.* at 6.

142. *See* LEACH, *supra* note 102 (attacking the ossified nature of the discipline, praising interdisciplinarity, and contending that he addresses himself only to younger scholars who do not have a stake in the debates of their elders).

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power of tradition itself. The divide between Malinowski and Radcliffe-Brown, for example, provides an excellent rhetorical framework for an essay, a means of capturing attention. Likewise, the classical opposition between Law and War can be resaddled as a commentary on laws of conquest.

Yet is such invocation of familiar categories simply a matter of cynical irony, of calculated strategy in service of some other end? Or, stated another way, is Leach only teasing his audience when he makes the deadpan claim that the terrorist and the savage must be understood as rational beings, that the terrorist is no "dog-headed cannibal"? To read the underlying message of Leach's text merely as an inside joke would miss, I believe, the innovation of the piece. We are better off when we appreciate the coexistence of seemingly disparate perspectives. First, an earnest point: Both the terrorist and the savage are rational human beings. Second, a critical move on this point: The terrorist represents what is best in ourselves. And third, the ironic faith in both positions at once. I am reminded here of a now-classic definition of irony as "about contradictions that do not resolve into larger wholes, even dialectically."[143]

I set out in this section to relate two perspectives on the contribution of interdisciplinary work in legal anthropology—that of Henry Maine and that of Edmund Leach. Leach provides a methodological model, for his task is to compare and ultimately to combine a priori entities as well. What kind of new framework might encompass them both? From the midcentury point of view that Leach offers, the nineteenth century seems like a different order of theoretical phenomena.

Leach offers us a series of new themes that will pervade the arguments of the next generation of scholars seeking to bring anthropology to law. Anthropology now is a source of political or moral *critique*. The notion of critique was utterly absent from Maine's rhetoric. Rather, he carefully expanded, improved, deepened the elaboration of jurisprudential theory. Likewise, Leach locates the creative enterprise in a new project of confusion, of imagination, of hybridization of received categories. Gone is the movement from point to point. Here, the outer poles are prefigured; they are known at the outset, and they are grasped in their totality from one perspective. The creative task is not to move from one to another, therefore, but to discover new ambiguous spaces in-between. Finally, Maine's scholar was a serious and well-schooled scientist who would bring a new rigor to legal scholarship; Leach offers us the maverick, a creative, somewhat dangerous terrorist, an outsider who passes for legal insider, and whose product is the recombination of new anomalous forms.

143. Donna Haraway, *A Manifesto for Cyborgs: Science, Technology, and Socialist Feminism in the 1980s*, *in* FEMINISM/POSTMODERNISM 190, 190 (Linda J. Nicholson ed., 1990).

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From the vantage point of Leach, then, the eclecticism we see in Maine's assembly of endless disparate facts about legal systems and societies around the world looks like the effect of an emphasis on the overall structure and on the unity that makes diversity possible. Leach's oppositions and recombinations, in contrast, place the units to be combined in the foreground. The unifying structure—the oppositional thinking that orders these bounded units and ultimately brings to light the space in-between—has receded into the background. And yet the interplay of unity and diversity, of universality and particularity, is as central to Leach's rhetoric as it was to Maine's.

III. Interdisciplinary Strategies

We might now give our discussion of Maine and Leach a greater sense of immediacy. What contribution can anthropological insights make to legal theory as it stands today? Can these figures provide us with a vision, with a position from which to stand? If we lawyers understand anthropologists as practitioners of rhetoric, can we also understand them as advocates for a project we might wish to take up or defend against? It is time, some readers may feel, for some normative claims on behalf of interdisciplinarity. Enough reflexivity, enough contemplation, some may say.

An alternate way to articulate the contribution of anthropology to law is to ask the following questions: What relationship exists between legal and anthropological methods of investigation? What is the relationship between law and society? How will anthropological methods elucidate that relationship? To get to the point of an article such as this one, to make an argument, in other words, is to make claims about relationships. This was true for Leach as well, as he struggled to relate the entities of anthropology and law by managing a space in-between. A classic approach to answering these questions, in turn, would be to relate the disciplinary past to the present: Leach delivered his Johns Hopkins lectures at the high point of a moment of discipline building in legal anthropology that, it seems, is no more. We might, therefore, trace the development and decline of legal anthropology, making evident the connections from one historical moment to the next as a means of claiming a contemporary identity.

I propose, rather, that we begin by reconsidering this task of relating—of relating disciplines, or of discovering relationships where lawyers see rules—and ask where this project of relationship building leaves us today. Legal anthropology, Law and Society, the anthropology of law, all have defined themselves at various moments since the 1970s as a project about "the relationship of law to society."[144] This task of relating is so much a part of the identity of the interdisciplinary

144. Sally F. Moore, *Law and Anthropology*, *in* 1969 Biennial Review of Anthropology (Sally F. Moore ed., 1970).

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scholar that it is difficult to imagine it otherwise. How and why does this project work for us? What kind of a project is it?

We saw in part II that Leach's argument reflected a new concern, vis-á-vis Maine, with relating disciplinary and social entities.[145] This part first considers more closely the character of this project of discovering and forging relationships by analyzing a wide selection of contemporary writings in the anthropology of law. I then consider how this emphasis on relationships itself has changed from the 1960s to the present with the help of the contrast between two important anthropological lectures delivered to the faculty of Yale Law School. The rapid exhaustion of relationships as a topic of study and disciplinary cause then brings us back to the question of what one can stand for in interdisciplinary studies of the law at this juncture—to the question of normativity in interdisciplinary studies. In order to answer this question, it becomes necessary to understand the nature of normativity in the tradition of the anthropology of law, and I argue that one of the most salient features of this tradition from Henry Maine to the present day is an interplay between normativity and reflexivity as modes of knowledge. The movement from one mode to another—from normative argument to reflexive consideration and back again—provides the most significant contribution to legal scholarship today.

A. *The Project of Relationships*

What ideas define this interdisciplinary project of discovering relationships? At the risk of belaboring the obvious, we first might remember from Leach's lectures that the relationship between disciplines finds its genesis in a notion of law and anthropology as entities apart.[146] Anthropologist Laura Nader's influential review essay of the 1960s, for example, virtually celebrates the "striking difference" between anthropological and legal approaches.[147] Likewise, although Francis Snyder concludes pessimistically about the possibility of delineating anthropological methods from sociological ones, he takes heart in the solid distinction between law and anthropology.[148] There, at the opening moment of theory, these separate disciplines almost cry out for a relationship to be drawn between them.

145. *Cf.* JOHN L. COMAROFF & SIMON ROBERTS, RULES AND PROCESSES 5-6 (1981) (replicating Leach's analytical structure by arguing that anthropological approaches stand for a firm dichotomy between law and anthropology as disciplines).

146. Peter Fitzpatrick, *Is It Simple To Be a Marxist in Legal Anthropology?*, 48 MOD. L. REV. 472, 485 (1985) (noting the historical specificity of the connection between *law* and *society* that has become the basis for much cross-cultural comparison in Legal Anthropology).

147. Nader, *supra* note 23, at 14.

148. Snyder, *supra* note 1, at 160. For Snyder, as for many others, the points of differentiation—the points at which anthropology stands to contribute theoretically to law—lie in attention to ignored aspects of the legal system and in what Snyder terms "an emphasis on micro-analysis and the use of an extended-case method." *Id.*

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Yet if disciplines are a priori separate entities, they also are incomplete. Indeed, the very separation of legal methods of inquiry and the methods of other disciplines affirms the incompleteness of each kind of knowledge. This incompleteness finds expression in the notion that one must always turn outside, that a need exists for "Law and . . . ." Law itself is not enough. It does not take everything into account; its representations do not coincide with the social reality it represents. And, while disciplines are separate and incomplete, they also are phenomena of the same order: there is a fundamental similarity of scale that makes differences significant and conversation possible.

If we understand legal scholarship as incomplete, then intellectual productivity depends on taking steps toward completeness. The successful scholar is busy finishing the picture, making new forms, building toward progress. This project of completion, in turn, requires the scholar to recombine disciplinary opposites, such as law and anthropology, into a new in-between form. It might involve the development of a subdiscipline or the building of a forum of interdisciplinary conversation.[149] Or it might involve, as in Leach's case, fashioning oneself as the dangerous and ambiguous character with one foot in each camp. In each case, however, we understand that the academic is productive, and therefore important, if she or he helps complete the picture by finding relations between partial forms.

For many writers, law is partial or incomplete in one very particular way: A gap separates law from the real world and anthropology, as the study of real societies, stands to close that gap by relating law to society. Richard Abel speaks for many anthropologists when he writes that "[l]egal theory is not readily adapted to the new interdisciplinary endeavor (though it has nevertheless been extremely influential), for it tends to be highly normative, ethnocentric and divorced from social reality."[150] And Leo Pospisil summarizes the ensuing task of the anthropologist:

> [A]ny penetrating analysis of law of a primitive or civilized society can be attained only by relating [law] to the pertinent societal structure and legal levels, and by a full recognition of the plurality of legal systems within a society. After all, law as a category of social phenomena cannot be considered (as it traditionally has been) unrelated to the rest of the organizing principles of a society.[151]

149. *See, e.g.*, Chris J. Fuller, *Legal Anthropology, Legal Pluralism and Legal Thought*, 10 ANTHROPOLOGY TODAY 9, 12 (1994); Felice J. Levine, *Goose Bumps and "The Search for Signs of Intelligent Life" in Sociolegal Studies: After Twenty-five Years*, 24 L. & SOC'Y REV. 7, 9-14 (1990).

150. Richard L. Abel, *Law and Anthropology* (reviewing SOCIAL ANTHROPOLOGY AND LAW (Ian Hamnett ed., 1979)), 28 AM. J. COMP. L. 128 (1980).

151. POSPISIL, *supra* note 30, at 126.

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Defining interdisciplinary work around this reality deficit greatly appeals to a legal audience, although it perhaps fails to cater to those lawyers who would turn to another discipline as one appeals to the feminine imagination—for flourish, for flavor, for creative alternatives rather than a dose of reality.[152] Nevertheless, this strategy allows a common dialogue precisely because it appeals to shared assumptions at the core of each disciplinary tradition. I would credit the strategy with a measure of success.

Many academics respond to the incompleteness of legal knowledge by presenting their work as empirical, real world investigation. Advocates for the intrusion of anthropological insights into legal debates often emphasize the rootedness of ethnography in practice and in the social life one can observe in action, as opposed to the detached, often naive theories of legal scholars. Like Maine, they emphasize that the sophistication of anthropological methods of apprehending reality will raise the caliber of legal debates.[153] Fifteen years ago this response took the form of an analogy between the anthropologist's method and the method of the pure scientist. Laura Nader and Harry Todd, for example, reminded us that "[t]he world provides us with a laboratory of experiments in its forums of dispute."[154] Likewise, Leo Pospisil ardently asserted that

> the anthropology of law is a *science* of law and therefore empirical. Theories should be supported by all relevant facts or at least a representative sample of all facts (meaning phenomena perceived by our senses) available. Scientific theories should be distinguished from scientific hypotheses and presented as ideas that can be ultimately proved by empirical methods.[155]

Anthropology was crucial to legal thinking, therefore, because it provided the means of testing, in the real world, the ideas that lawyers developed in the seclusion of their ivory towers.

Although most anthropologists no longer champion this vision of their discipline as hard science, many continue to emphasize the rootedness of their theory in conversations with real, average, common people, and they continue to stress the empiricism of their method. Anthropology provides a means of hearing the outsider-native's point of view on the nature and functioning of law. As Conley and O'Barr proclaim, "The greatest strength of [our] method is its

152. *See, e.g.*, Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1300 (1992).

153. Anthropologist June Starr recently has gone so far as to review a portion of Henry Maine's sources to prove that legal rights under the Roman regime were not exactly as he presumed them. *See* June Starr, *The "Invention" of Early Legal Ideas: Sir Henry Maine and the Perpetual Tutelage of Women*, *in* HISTORY AND POWER IN THE STUDY OF THE LAW 345 (June Starr & Jane F. Collier eds., 1989).

154. Laura Nader & Harry F. Todd, Jr., *Introduction* to THE DISPUTING PROCESS—LAW IN TEN SOCIETIES 40 (Laura Nader & Harry F. Todd, Jr. eds., 1978).

155. POSPISIL, *supra* note 30, at 191.

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intense empiricism. In an important sense, the litigants set the agenda for the research."[156] In the real world, anthropology functions as empirical practice, as opposed to the theoretical, and therefore incomplete, arguments of lawyers.

A corollary to this vision of law's incompleteness is that anthropological or sociological research provides a desperately needed empirical antidote to the unsophisticated ruminations of legal academics. For example, anthropologist Sally Merry positions Legal Anthropology as the empirical arm of the Critical Legal Studies tradition.[157] After reporting the results of her investigation into the views of real-life litigants about the meaning of justice and the experience of litigation—views always implicitly understood to contrast with the theories of legal academics—she presents the views of these representatives of reality as a critique of the centrality of law in Critical Legal Studies theory:

> Definitions of legal rights in social relationships are constructed by litigants and court officials as they deal with day-to-day problems in the court. Since the law includes competing categories and definitions of justice, it cannot perform the simple hegemonic function postulated by critical legal studies scholars; this hegemony is limited insofar as it is locally constructed and ideologically plural.[158]

This critique typifies the real-empirical rhetorical strategy. Merry's claim is that although the theories of left-leaning lawyers are generally correct—here she agrees that the law does perform something of a hegemonic function—an investigation into the reality of the courtroom reveals more diversity than this blanket theoretical claim would allow. The insight, like the empiricism, is modest but firm. Anthropologists do not simply theorize about the meaning of justice: they ask real people what justice means. Anthropologist Peter Just mildly ridicules his colleagues who have abandoned more concrete methods of observing cases as "hermeneuticists" and "hegemonicists" who "seem to me to be losing touch with law as something that happens in the real world, with law as event, as experience, as ethnography."[159] Ethnography has merged with experience here. It is real, practical truth, defined against theory.

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156. CONLEY & O'BARR, *supra* note 35, at xii.

157. Sally E. Merry, *Everyday Understandings of the Law in Working-class America*, 13 AM. ETHNOLOGIST 253 (1986).

158. *Id.* at 266-67. Sally Falk Moore makes the same point:

> In Western legal theory the sovereign power, the ultimate legal authority in a polity, can legislate on any matter, and can exercise control over any behavior within the state. But it must be clear to everyone that on this point legal theory and practical affairs are far apart. In legal theory, the power of law to control behavior can be infinite. In practical fact it is highly circumscribed.

MOORE, *supra* note 4, at 7.

159. Peter Just, *History, Power, Ideology, and Culture: Current Directions in the Anthropology of Law*, 26 L. & SOC'Y REV. 373, 383 (1992).

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One way anthropologists describe their task of relating incomplete social forms is by advocating greater attention to social context. The legal text, rule, or decision, they argue, cannot be understood without considering the totality of cultural factors that give it meaning. Sociologists Susan Silbey and Austin Sarat argue, for example, that "[o]ur claim is broad but simple: Legal institutions cannot be understood without seeking the entire social environment."[160] Likewise, Merry states that "[l]aw is embedded in social structure and culture and cannot be understood in isolation."[161] Leo Pospisil puts the argument in distinctly disciplinary terms: "[I]n contrast to some of the other social sciences, [anthropology] does not arbitrarily carve out from human culture a segment such as the economy, political structure, law, personality structure, or 'social relations', but conceives and studies human culture as an interrelated whole."[162]

This advocacy of context over text builds upon a vision of society as a whole.[163] Law is a part of a totality and should be conceptualized as such. The task of relating disciplines, of completing legal knowledge, then, is also a task of completing the picture of society as a whole. What makes this vision so rhetorically satisfying is that when one performs the task of relating legal and anthropological knowledge, the missing piece of the puzzle one discovers is none other than relationships themselves. Maine's epiphany of self-recognition now is pressed into the new service of relationship-building. In a recent work entitled *Rules Versus Relationships*, John Conley and William O'Barr find that their analysis of the "fundamental question of the place of the law in the larger cultural context"[164] in American society leads precisely to the surprise discovery of social relations:

> The various official discourses of law deal primarily with rules whose application transcends, at least in theory, differences in personal and social status. In striking contrast to this focus on legal rules, lay litigants speak often about personal values, social relations, and broad conceptions of fairness and equity in seeking resolution of their difficulties through legal channels.[165]

Relationships between real human beings that encircle the law inevitably become the contextual subject matter.

We noted in part II that one of the changes from Maine's mid-nineteenth-century scholarship to Leach's mid-twentieth-century arguments involved a redefinition of the interdisciplinary project as a

160. Susan S. Silbey & Austin Sarat, *Critical Traditions in Law and Society Research*, 21 L. & Soc'y Rev. 165, 165 (1987). Likewise, Peter Just considers the attention to context to be one of the great theoretical innovations of the 1980s. *See* Just, *supra* note 159, at 375.

161. Sally E. Merry, *Anthropology and the Study of Alternative Dispute Resolution*, 34 J. Legal Educ. 277, 278 (1984).

162. Pospisil, *supra* note 30, at x.

163. *Cf.* Marilyn Strathern, After Nature 73-77 (1992).

164. Conley & O'Barr, *supra* note 35, at xiv.

165. *Id.* at 1.

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project of discovering, representing, and building relationships. Since its innovation, the theme and project of relationships itself has undergone significant change. Consider, for example, two parallel discussions of the relationship between law and anthropology as disciplines, and of the relationship between *law* and *society* as the subject matter of interdisciplinary work, presented in 1963 and 1983 respectively. In each case, the occasion was Yale Law School's Storrs lectures, an annual event at which the faculty turn to an eminent scholar "outside" legal academe to provide fresh insight into the law—to help complete the picture, in other words. Two anthropologists have taken the Storrs podium in its history. In 1963, Max Gluckman, a great promoter of disciplinary cross-fertilization and a pillar of Legal Anthropology, presented a series of lectures later published as *The Ideas in Barotse Jurisprudence*.[166] Twenty years later, Clifford Geertz unveiled his anthropological method of legal studies in a lecture that would become the centerpiece of his book, *Local Knowledge*.[167] In each case, we observe prominent anthropologists crafting significant projects through dialogue with a legal audience.

For both scholars, the discovery of relationships becomes the defining feature of interdisciplinary analysis. Each treats this discovery, and especially the complexity of the social relationships surrounding the law, as an intellectual innovation.[168] Where Geertz dazzles the reader by tacking between intersections, Gluckman opts for "multiplex relationships" to describe his innovation. For each, relationships are not merely a self-evident phenomenon, but also an innovative discovery, and, even more importantly, a self-evident good. They exist, they are worth discovering, and they deserve our support.

Yet one could be forgiven for failing to see a common project in these two works, and Geertz himself frames his argument as a generational assault, repudiating Gluckman and the empirical tradition he takes him to represent at every turn.[169] First, there is a marked difference between the two authors in how they understand the disciplines of law and anthropology to relate to one another. Max Gluckman wants to build a relationship between disciplines at the level of theory and method. He embraces legal theory even as he seeks to refine it: the lectures represent the Barotse of Southern Africa through the filter of his reading of the jurisprudence of the Legal Realists, and he does not conceal his excitement about jurisprudential ideas. It is worth noting that Gluckman even takes his view of relationships in

166. GLUCKMAN, *supra* note 22.

167. GEERTZ, *supra* note 33.

168. Indeed, it is remarkable, given Gluckman's banner of multiplex relationships, that every wave of scholars to follow him has denounced him as an advocate of "rules" as opposed to relationships and claimed the cloak of relationships for themselves. *See, e.g.*, JANE F. COLLIER, LAW AND SOCIAL CHANGE IN ZINACANTAN 246-47 (1973).

169. *See id.* at 233.

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part from Hohfeld and Corbin's ideas about property,[170] and even goes so far as to organize his subject matter into such Anglo-American legal topics as property law, tort law, and contract law. In this sense, we might understand Gluckman in the Maine tradition of interdisciplinarity, and indeed, Gluckman himself claims that "I am not sure but that 'Footnotes to Sir Henry Maine's *Ancient Law* would be a more accurate title for this book.' "[171] The literal manifestation of this relationship between disciplinary theories, for Gluckman, is the hope of a sub-discipline of Legal Anthropology in which lawyers and anthropologists themselves would form intellectual relationships and build a new academic community.

For Geertz, however, faith in a relationship between disciplines founded in the combination of legal and anthropological theory and method no longer is possible. Legal theory has no place in his project. Geertz rejects at the outset the possibility of a "centaur discipline" of Legal Anthropology,[172] and he limits the possible intersection between disciplines to the *subject matter* of law—to shared interest in legal institutions and practices—rather than in theory or methods of investigation.

Twenty years later, Geertz presents the task of the anthropologist among lawyers in drastically different terms. He too sees the possibility for a friendly interdisciplinary collaboration. He distances himself from the outsider stance of some anthropologists of law in favor of

> a less internalist, we raid you, you raid us, and let gain lie where it falls, approach; not an effort to infuse legal meanings into social customs or to correct juridical reasonings with anthropological findings, but an hermeneutic tacking between two fields, looking first one way, then the other, in order to formulate moral, political, and intellectual issues that inform them both.[173]

When one turns away from the relationship between disciplines to the relationships within and about the law that Gluckman and Geertz take as the subject of anthropological inquiry, one also finds a marked change in the twenty years that separate their projects. For Gluckman, the task is to relate law to social structure. He understands his innovation to concern "the relation of legal ideas to the general social system of a tribe."[174] Legal categories, such as property or tort, are more or less constant across social differences; however, the values that permeate these doctrines differ—values that can be understood only by viewing law in social context:

170. *See* GLUCKMAN, *supra* note 22, at 75 ("Recent jurisprudential analysis has insisted that all legal relations are between persons and therefore, as Corbin puts it, 'there can be no such thing as a legal relation between a person and a thing' " (citation omitted)).

171. *Id.* at xvi.

172. GEERTZ, *supra* note 33, at 169.

173. *Id.* at 170.

174. GLUCKMAN, *supra* note 22, at xiv.

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> [Legal c]oncepts are *absorbent* in that they can draw into themselves a variety of raw facts of very different kind. They are also *permeable,* in the sense that they are at any one time permeated by certain principles, presumptions, prejudices and postulates, which the judges hold to be beyond question. Many of our own legal concepts exist among the Barotse: law, property rights, marriage, and wrong, but they are permeated by quite different presumptions, derived from Barotse society as a whole.[175]

The task of legal anthropology, then, is first to relate law to social context, and then to relate legal systems by comparing how values permeate doctrine differently in various societies.

Again, Geertz polemically rejects this kind of relationship-building. He favors something more intricate, more artistic, more subtle. His project is to discover the relationship between specific *pieces* of law and culture, to locate particular intersections among rhetorical positions, and to move from one such intersection to another. He advocates a kind of shattering of *law* and *society* into a multitude of component forms through

> the disaggregation of "law" and "anthropology" as disciplines so as to connect them through specific intersections rather than hybrid fusions; the relativization of the law/fact opposition into a various play of coherence images and consequence formulae; the conception of the comparative study of law as an exercise in intercultural translation; the notion that legal thought is constructive of social realities rather than merely reflective of them; . . . all these are products of a certain cast of thought, one rather entranced with the diversity of things.[176]

Rather than law and social structure, Geertz chooses to elucidate "the relationship between fact and law."[177]

The point of intersection of law and anthropology now has become the extreme locality, and the complex methodological move that looks like a turn to aesthetics is achieved through a move to the particular:

> Indeed, it is here that the ant-hill level conversation between anthropologists, absorbed with the peculiarities of ethnographic cases, and lawyers, absorbed with those of legal ones, that I proposed in the first part of this essay as the most practical way for these dissimilar aficionados of the local to assist one another with, if not precisely common problems, anyway cognate ones, is most urgently needed. Legal pluralism, attracting the lawyer because it is legal and the anthropologist because it is plural, would seem to

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175. *Id.* at 24.

176. GEERTZ, *supra* note 33, at 232.

177. *Id.* at 170.

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be just the sort of phenomenon neither could leave safely to the care of the other.[178]

If the units of analysis are newly fragmented, the technique of relating them closely resembles Gluckman's: Geertz begins with the notion that facts and law, the entities he hopes to relate, exist everywhere. The differences among cultures simply inhere in the way these entities are related.[179] The task of relating the units thus flows from the definition of the problem. Geertz observes that where Western society treats facts and laws as separate entities, other traditions treat them as inseparable.[180] Geertz thus demonstrates again that a relationship between forms, that lawyers might perceive as separate, in effect binds them together.

Yet if the move to the particular does not involve a methodological innovation, it *is* designed to involve a perspectival one. The experience of moving from the general to the specific, or of taking Geertz's tour from Western law to Islamic law to Hindu law and back again, is designed to invoke the experience of changing perspectives. The point of relating intricate pieces ultimately is precisely such a relativistic move:

> We are learning—more I think in anthropology than in law, and within anthropology more in connection with exchange, ritual, or political symbology than with law—something about bringing incommensurable perspectives on things, dissimilar ways of registering experiences and phrasing lives, into conceptual proximity such that, though our sense of their distinctiveness is not reduced (normally, it is deepened), they seem somehow less enigmatical than they do when they are looked at apart.[181]

And from this relativism of movement from the general to the particular, Geertz ultimately finds it possible to relate disciplines in the grand overarching way he denies Gluckman: "law is rejoined to the other great cultural formations of human life—morals, art, technology, science, religion, the division of labor, history . . . without either disappearing into them or becoming a kind of servant adjunct of their constructive power."[182]

Geertz's innovation on Gluckman typifies current changes in the interdisciplinary task in several senses. The first involves the newfound plurality of legal forms. The problem no longer is simply the relationship of law to society or of law to anthropology; rather, law and society have fragmented into many pieces which also require the elucidation of the intricate relationships between them. Contemporary anthropologists invariably claim, for example, that when one

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178. *Id.* at 224-25.
179. *Id.* at 175.
180. *Id.* at 184-215.
181. *Id.* at 233.
182. *Id.* at 219.

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views the law from an anthropological perspective, when one examines law in context, one discovers law as a *plurality*. In a recent article entitled *Contextualizing the Court*, anthropologist Barbara Yngvesson argues that the contribution of ethnography to law lies precisely in attention to "a plural reality" of "local understandings" which will recapture "the agency of 'powerless' citizens in constructing the law."[183] Similarly, anthropologists often seek to demonstrate to their legal colleagues that law is not singular but a multitude of systems which relate to one another. In the 1970s, anthropologists framed this fascination with pluralism in terms of recording and typologizing what Nader calls "the range of variation" in legal mechanisms.[184] Today, this pluralism is so commonly accepted that it can be assumed. For anthropologist Chris Fuller, legal pluralism is such a fundamental reality that it hardly deserves to be pointed out at all: "[B]ecause the coexistence of plural legal or normative orders is a universal fact of the modern world, the concept points to nothing distinctive . . . ."[185]

The discovery of this "universal fact" of legal pluralism is perhaps the only logical step to take after one has defined the project of interdisciplinarity as the relation of disparate entities. Once a relationship has been drawn between law and society, and once legal knowledge and anthropological knowledge have been pulled into relation with one another, what else remains but to find new divisions or fragmentations which require new relationships? Yet as the statement above implies, pluralism now has become such a fundamental reality that anthropologists can no longer take credit for its innovation. Rather, pluralism is not an anthropological accomplishment but a "universal fact," a basis against which diversity can be celebrated and disparate disciplines, cultures, methods, or perspectives can be brought together.

Like the incompleteness of law, the new-found complexity of legal pluralism appeals successfully to a legal audience. Indeed, the notion of legal singularism would seem as absurd to lawyers as anthropologists. This pluralism becomes the province of interdisciplinarity, however, because it is by relating entities and by discovering relationships—by a method of holism—that it comes to light. One only sees a plurality of legal forms when one puts law in the context of relationships. And, this notion works through a connection between the understanding that knowledge itself is plural—that there are both anthropological and legal ways of knowing, for example—and the notion that society is complex.

183. Barbara Yngvesson, *Contextualizing the Court: Comments on the Cultural Study of Litigation*, 24 L. & SOC'Y REV. 467, 468 (1990).
184. Nader, *supra* note 23, at 4.
185. Fuller, *supra* note 149, at 10.

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Geertz's project also characterizes much contemporary work in that, at the very moment of increased partitioning and recombining of *law* and *society* as the subject matter of legal anthropology, there is a sense that a theoretical relationship between the methods and models of the two disciplines can no longer be drawn—that true collaboration, as Gluckman sought thirty years ago, has become impossible. This is because the vantage point from which the task of relating disciplines occurs is no longer a space in-between. The *project* of forging relationships between disciplinary positions now has become a *position* of its own. Relationships themselves are outside the law, and an emphasis on relationships has become precisely what *separates* law and anthropology as disciplines, and lawyers and real people as members of society. The tone of critique in these works, already nascent in Leach's text, now reaches a fervent pitch. It now becomes commonplace to assert that "[l]aw and society [scholarship] has always imagined itself to be a critical enterprise, outside of the mainstream of legal discourse, participating at a remove while offering an alternative epistemology and sociology of law."[186] Likewise, Conley and O'Barr now view the point of their work to be "Rules *versus* Relationships";[187] they reinterpret relationships as the emblem of a "powerless style" of discourse characteristic of legal outsiders,[188] and they even claim Henry Maine as the forefather of an extreme disciplinary opposition, a "fundamental cleavage" founded in "a fundamental distinction between legal arrangements predicated on social status and those premised on contractual arrangements between autonomous individuals."[189] If Maine moved from one position to another, taking each up in turn, and Leach positioned himself in a dangerous space in-between, the contemporary work of relating disciplines takes place on the outside. With the theoretical difference between law and anthropology defined precisely in terms of the emphasis one discipline gives to relationships in contrast to the other, it no longer is possible to create a theoretical relationship *between* disciplines because the very operation that would need to be performed—the discovery of a relationship—already is the identity of one of the two entities to be related.

If Geertz's argument signals a loss of faith in the interdisciplinary scholar's ability to combine the theories of each discipline, is there hope for the current effort to break *law* and *society* into myriad component parts and relate these anew, as Geertz sought to do with his turn to fact and law? In this respect, I think, the two disciplines share a moment of theoretical impasse, for in manipulating one dichotomy after another, the scholar has the sinking sense that all the possible

186. Silbey & Sarat, *supra* note 160, at 165.
187. *See* Conley & O'Barr, *supra* note 35.
188. *Id.* at 173.
189. *Id.* at 173-74.

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positions are prefigured.[190] As noted at the outset, practitioners of legal anthropology now pessimistically perceive the possibilities of their discipline. Likewise, although it is now increasingly fashionable for lawyers to turn outside their discipline for grand insights, they do so with increasing wariness. The image of what anthropology might have to offer, the totally new insight, the epistemology-bursting perspective, never seems fulfilled.[191]

Every combination and recombination, every construction and deconstruction seems already prefigured. Just as the "whole" of culture now has ceased to do the work of organizing our arguments, the "whole" of the discipline certainly no longer seems worth supporting or opposing. But neither do its parts. The effect of this change is that there no longer is much rhetorical force in claiming dangerous or creative spaces in-between. How can Leach's disciplinary terrorism be maverick if the opposition he bridges is no longer real for us? How can Geertz's shuttling between fragmented points of relation feel innovative if the parameters within which these points lie are entirely familiar from the start? To claim that there is nothing new to combine, or that relation no longer works, is to relinquish the identity of the productive scholar—who is productive because he or she makes new forms.

B. *Normative and Reflexive Knowledge*

As noted at the opening of this part, one must stand for something in an article such as this one; reflecting on the arguments of others in itself is not enough. If the task of relationship building in interdisciplinary scholarship has lost its force, therefore, I now must argue for an alternative. This understanding pervades the works we have considered from Henry Maine to the present day. The imperative to harness observations, as here about the state of interdisciplinary scholarship, into a claim, as here for a future direction of interdisciplinarity, and the difficulty experienced in doing so, characterizes much contemporary interdisciplinary work.

Indeed, one of the enduring characteristics of the tradition we have considered is precisely this transformation from what we might call a reflexive mode of knowledge into a normative mode and back again. Every work we have considered in the preceding pages has made its contribution to legal knowledge by approaching its subject reflexively. By this, I mean that insight always is produced by observing a topic in European or American law from another, wider vantage point. Maine, for example, reflects upon legal positivism from the

190. *Cf.* STRATHERN, *supra* note 163.

191. *Cf.* Silbey & Sarat, *supra* note 160, at 171 ("While we thought we were producing a new understanding of law, the bite was never all that critical because we never tried to undo liberal claims about the relationship of law and society.").

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point of view of the history of European civilization. Leach takes the problem of an international response to terrorism and recasts it in terms of violence in primitive societies. This reflexivity involves a broadening of perspective, and it often is achieved by a kind of movement beyond one's starting position to another position and back again, as when Geertz takes us on a tour of the world's legal systems[192] or when Maine moves through successive stages of historical development.[193] When contemporary interdisciplinary scholars argue for attention to the "outside," to "context," or to a "wider reality" beyond the law, I think they are conflating the metaphors we use to describe this reflexive mode of knowledge—metaphors of expansion and movement—with an "actual" outside.

Yet every author also understands him or herself to be staking out a normative claim. Maine is for a more academic tradition of legal scholarship, and he is against the democratization of legal institutions. Leach, likewise, has a political motive in treating the terrorist bombings of the 1970s and the atom bombing of Hiroshima as commensurates. This kind of normative claim, in contrast to reflexive knowledge, is achieved precisely by holding things constant, by refusing to move to another perspective even if one understands such movement as possible, and by constricting rather than expanding the scope of inquiry so that a sharp claim can be made. It is no wonder that we describe such normative knowledge using stationary metaphors—staking out a position, taking a stand, etc.

To make a claim about the future of interdisciplinary work in legal anthropology, then, is to be normative in the sense of this engagement between normative and reflexive knowledge. It is worth noting at the outset, however, that these two modes of knowledge are not *logically* contradictory. On the contrary—it is precisely Maine's reflexive reconsideration of modern legal institutions from a broader historical vantage point that gives rise to his antipopulism, and it is Leach's interest in understanding primitive society on its own terms that leads him to defend the terrorist's world view against the position of international law.

One of the defining aspects of the interplay between reflexive and normative modes of engagement is that each slips effortlessly, almost uncontrollably, into the other. There is no resting point at which one is reflexive or normative: we "know" that every relativism is actually an argument for something or other. Indeed, this knowledge gives rise to one of the classic modes of critique in the repertoire of both lawyers and anthropologists, as we expose the "position" or "argument" behind a certain reflexive exposition. The same is true of normative argument: we can always understand a normative claim

192. *See supra* notes 178-82 and accompanying text.
193. *See supra* notes 40-98 and accompanying text.

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such as a call for the universal protection of rights of expression, for example, to be the expression of a particular point of view, and indeed, as soon as such a normative claim is made, it seems to engender a reflexive turn.

It is not just that a normative argument produces a reflexive one. Rather, the very same knowledge, effectuated in a reflexive mode, invariably becomes normative. Maine's historicization of Bentham's positivism, for example, in turn becomes an *argument* against the universal application of positivism. Leach's reconsideration of the cultural construction of terrorism becomes a normative claim for the importance of attention to cultural difference itself. One of the defining aspects of the interplay between reflexive and normative knowledge in interdisciplinary scholarship, then, is the way in which each relativism in turn becomes its own *position*, which then is open to relativization again. A reflexive observation becomes an argument to stand by, and that argument then can be reconsidered in a reflexive way.

By way of example, we might consider a prominent article by lawyer and anthropologist Sally Falk Moore, *Treating Law as Knowledge: Telling Colonial Officers What to Say to Africans About Running "Their Own" Native Courts*.[194] Building on a career-long investigation into the British colonial legal system, its assumptions about African society, and the response it generated among the Chagga, Moore takes as her point of departure a 1957 British directive concerning the organization of customary courts among the natives of Tanganyika. The theme of the piece is the conflict between the British administrators and the village courts over British legal notions, such as res judicata and the Rule of Law as a rule of the written word, and the intended audience of the piece includes both lawyers and anthropologists.

The contribution of the piece is a reflexive reconsideration of what Moore takes as the Anglo-American faith in the rule of law. She writes in the article abstract:

> This article is presented at two levels throughout. On the surface it is a straightforward historical analysis of a directive to British officers . . . . On a deeper level the article uses the British colonial occasion to explore widely held cultural assumptions in Anglo-American law about the definability of "justice," the concept of time and timing in legal affairs, and the complex place of the idea of legitimate, authoritative, and permanent "knowledge" in legal institutions.[195]

194. Sally F. Moore, *Treating Law as Knowledge: Telling Colonial Officers What to Say to Africans about Running "Their Own" Native Courts*, 26 L. & Soc'y Rev. 11 (1992).

195. *Id.* at 11.

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Moore's ultimate target is the colonial government's obsession with rule making, with cataloguing African practices into a codifiable form.[196] In a classic relativizing spirit, she is concerned that we understand that notions of a "rule-governed judiciary" of the kind she finds in the texts of H.L.A. Hart,[197] and the obsession with written precedent on which it depends, are culturally specific ways of resolving conflicts, *not*—as she quotes her colonial directive to claim—natural law. This reflexive turn engenders many of the patterns we have observed in other contemporary works of Legal Anthropology: Moore emphasizes the rationality of African legal systems on their own terms[198] and in so doing discovers a social reality outside the law. She argues that the architects of the British colonial legal regime failed to understand that "[t]he Africa of reality had its own social and legal logic."[199] This African reality, moreover, is the realm of expertise of the anthropologist: "The colonials had to cope with the consequences of this 'localism' but did not understand the nature of local rural communities,"[200] she notes, owing partly to the fact that (unlike anthropologists) "most of them did not speak any of the many local languages."[201] She explains that "[t]he colonials did not picture these villages *as they were* .... Had they known what we now know about the internal political life of African neighborhoods and villages, they might have had a very different understanding of what was going on."[202] She even notes concerning the 1950s writing of a *Restatement of African Law*, that the law professor in charge saw the insights of anthropologists as too imprecise to be useful to courts engaged in modernization and nation building.[203]

This reconsideration of law from a wider perspective is also its own normative argument, a kind of lecture to lawyers about the cultural particularity of their world view.[204] The ultimate point Moore hammers home to her legal audience is the classic plea for attention to

196. This critique of lawyers' obsession with rules out of context has been a career-long argument for Moore. *See, e.g.*, MOORE, *supra* note 4, at 4 ("A central concern of any rule-maker should be the identification of those social processes which operate outside the rules, or which cause people to use rules, or abandon them, bend them, reinterpret them, sidestep them, or replace them.").

197. *Id.* at 222 (referring to H.L.A. HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY (1983)).

198. Moore, *supra* note 194, at 30.

199. Moore, *supra* note 194, at 11. Paul Bohannan anticipated Moore's thesis 35 years earlier. *See* BOHANNAN, *supra* note 21, at 212.

200. Moore, *supra* note 194, at 12.

201. *Id.* at 14.

202. *Id.* at 15.

203. *Id.* at 23.

204. The reality that Moore wishes lawyers to digest, it turns out, is hardly news. She is not the first to argue, for example, that "[*r*]*es judicata* is a declaration of the power of the court and is one of the practices that constitutes the bureaucratic-like character of judicial office," *id.* at 34, or that discussions about differences in cultural forms of knowledge are really discussions about the colonial and state power in ideological form. *Id.* Her critique of positivism and of rule-based adjudication will come as no revelation to her legal colleagues. Yet it is precisely these

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context. As she puts it, "[t]his circumstance raises a question in relation to the colonial instance that has far wider application: Is it possible to 'know' much about a legal system without knowing the character of the case-generating milieu?"[205] The answer for Moore clearly is no. Text is meaningless without context. This rhetoric in turn is organized around a severe and confident break between the legal and social spheres—both of the subject, the colonial administrator and the Chagga, and the subtext, the lawyer and the anthropologist. "Certainly the difference between the designed judicial institution and the 'event-evolved' set of neighborhood institutions is very great."[206] The effort of looking at the world of law from a broader perspective now has become the subject of an argument to Moore's legal colleagues.

Yet Moore does not stop with the lessons of anthropology for law. In a fascinating passage, she attacks the "fashion" of anthropological critiques of colonial practices that show the ignorance of colonial administrators about local practices: "As the colonial period has been safely over for more than thirty years, showing colonial flaws coupled with colonial arrogance is not only politically risk free, it is a rather conventional version of history for our time."[207] Claiming for herself a more "experimental" territory, she asserts an interest in "the cumulative historical production of institutions" that lies beyond such simple assertions of colonial failure.[208] Given the symbolic association of the legal academic and the colonial administrator in her text, one is left to wonder what this might mean for those who, like the vulgar critics of colonialism, engage in vulgar lectures to legal academics about the weaknesses of legal formalism and rule-based adjudication. The paper cannot come to a close, in other words, until Moore's normative claims on behalf of anthropological methods engender their own reflexive reconsideration.

The transformation of reflexive into normative modes and back again spawns a parallel transformation in the knowledge it produces. For example, we saw that anthropologists first reflected on law from a wider point of view and discovered relationships by doing so. These relationships soon became a position in themselves, outside the law. It was only a matter of time, therefore, before that position itself would become the subject of reflexive interpretation, as I have done in the pages above.

Yet if reflexive modes of knowledge engender normative knowledge and vice versa, these modes are *not alternatives* in the lexicon of

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pragmatist premises, founded on the insights of realism, that render the piece easily quotable in the footnotes of a jurisprudential argument.

205. *Id.* at 42.

206. *Id.* at 38.

207. *Id.* at 42-43 (citations omitted).

208. *Id.* at 43.

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lawyers and anthropologists, nor are they opposites. One cannot simply choose to relativize or to argue for something, as one would choose a Law and Economics approach or a Law and Anthropology approach to a legal problem, because each is understood to negate the possibility of the other. Likewise, it would be nonsensical to try to devise an approach that would combine normative and reflexive knowledge:[209] one cannot be a relativist and stand for something, it is often said. Each mode engulfs the entire enterprise of representation, so that if I write in one genre, I cannot invoke the other. This is because unlike disciplines or cultures, normative and reflexive modes of knowledge are not of the same order. They are not contained in a single frame, as *law* and *anthropology* are contained in the frame of disciplinarity, or as Barotse legal systems and Anglo-American law are contained in the frame of cultural difference. Taking a position and looking at things from a relativizing point of view will not create a relationship even if we want it to.

Reflexive and normative knowledge were not always incommensurable in this way. Henry Maine's peers would not have interpreted his appeal to a wider historical perspective as negating the possibility of normative argument about legal positivism or practical engagement with contemporary legal problems. Maine's failure to treat his argument and his reflexive analysis as incommensurable, I think, contributes to the contemporary view of *Ancient Law* as uninteresting scholarship at best and embarrassingly naive scholarship at worst. Leach might exemplify an epistemological change, vis-á-vis Maine, then. Although we saw that Leach quite consciously stakes out claims about the rationality of the terrorist even as he treats his own arguments about terrorism as objects of reflexive inquiry, there is a marked tension between these two modes of engagement, and the tension is resolved only by the irony in his assertion that savages are not "dog-headed cannibals"[210] that acknowledges the possibility of relativizing the normative claim even as it seeks to hold that claim constant. It has become necessary for Leach, as it was not for Maine, to appeal to a rhetorical device such as irony to keep what have become two incommensurable modes of engagement in view.

This incommensurability, still implicit in Leach's case, now itself has become a problem, a topic of furious debate.[211] One hardly can have a conversation about law these days without arguing about rela-

209. *Cf.* Marilyn Strathern, *Parts and Wholes: Refiguring Relationships in a Post-plural World, in* CONCEPTUALIZING SOCIETY 75 (Adam Kuper ed., 1992).

210. For Leach, this seemingly contradictory position took the form of his assertion that "the savage and the terrorist are rational beings"—that there is a Reality there that lawyers do not fully comprehend—and that what is most promising and exciting about the terrorist is his ambiguous position vis-á-vis the oppositions that govern our lives, such as the divide between disciplines themselves.

211. *Cf.* STRATHERN, *supra* note 163, at 4-5 (discussing the way in which analytical modes become explicit over time). It should be emphasized again, however, that the modes of knowl-

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tivism. The transformation of normativity into reflexivity and back again has become its own topic of normative engagement, in other words. We might consider this a key aspect of the contemporary epistemological moment for both disciplines.

The effect of this development is that being in favor of an interdisciplinary method of legal studies today means having faith in this transformation of one mode of knowledge into another. Or to rephrase the claim in more normative terms, what is best about contemporary interdisciplinary scholarship is the transformation of knowledge it engenders. Although this movement is not "real" in the sense of a reality outside the law, I am suggesting that it is worth taking seriously in its own right.

In this sense, Maine's appeal to movement and change, in which structure appears as reflection after the fact on the path of such movement, can be as much a model to us as Leach's more contemporary arguments in which structure is prefigured as an organizing frame. Yet this transformation of modes of knowledge differs from the movement both Maine and Geertz advocate in that normativity and reflexivity are not positions, places of the same order that occupy a single plane. At least at this juncture, no linear connection can be drawn between them nor can any descriptive thesis summarize the transformation of one into the other.

I do not mean to imply that this kind of transformation is unique to anthropological approaches to law. On the contrary, lawyers know that slippage from normativity to reflexivity and back again pervades legal thinking as well. Yet perhaps the tension between disciplines provides an apt metaphor for describing what we do not yet have other language to describe. Perhaps this incommensurablity becomes concretized, or institutionalized in the gulf between disciplines that both lawyers and anthropologists celebrate, so that interdisciplinary engagement between law, as the metaphorical province of normativity and politics, and anthropology as the metaphorical province of reflection and difference, provides a technology for experiencing and elaborating the incommensurability of reflexive and normative thought.

In the pages above, I have endeavored to trace a path through a series of claims for an anthropological, ethnological, or interdisciplinary study of the law. A consideration of this tradition leaves us with a number of possible observations. First, it leads to an appreciation of the extent to which contemporary anthropological appeals to reality outside the law, discovered through empirical observation of context, and through emphasis on real people rather than the theoretical structures of law, is predicated on shared notions among lawyers and anthropologists about the salience of the disciplinary divide. Ironically,

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edge I am describing are not analytical models; rather, they are the means through which such models, such as 'relationships' between law and society, are discovered.

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however, if the success of the rhetoric is predicated on a shared epistemology, then simply defending one side or another of a shared dichotomy—arguing for attention to context against the legal text, for example—can never offer an escape from the theoretical impasse created by the dichotomy precisely because the move is prefigured in the very structure of the dichotomy itself. Such an earnest—even in some cases strategically self-righteous—plea on behalf of the outside, whether it be the new methodological innovation or the "real world out there," may find itself welcome in both legal and anthropological circles but hardly seems poised to make ground-breaking contributions to either. We need an alternative to a move to the periphery that always prefigures a return to the center.

Second, in tracing the emergence of the project of discovering and elaborating relationships as the modern project of interdisciplinary work, we come to appreciate why this project also now fails to satisfy. This elaboration of relationships between disciplines, between law and society, or between ever smaller fragments of each seems predictable because it is. In order to work, the entities to be combined must already exist in a prefigured frame—disciplinary or cultural difference, for example—so that we know at the outset the parameters within which the new mix will take its form. The recent attempt to show scholarly productivity by finding ever more intricate, indeterminate, or subtle connections only heightens the sense of a project that now is spent.

If the question, therefore, is what we as lawyers gain by turning to anthropology, the answer is that we *gain* little. Anthropology no longer can claim to offer lawyers any missing pieces of their puzzle. Once we relinquish the notion that there is something to retrieve elsewhere, and the understanding of scholarly productivity as a task of completing an incomplete legal picture of society that it satisfies, we can turn our attention to the character of contemporary legal knowledge itself. Here, we can note the coexistence of normative and reflexive modes of engagement as each encompasses the sphere of inquiry so as to deny the possibility of the other as its own topic of normative argument in both disciplines. This development signals a hope for interdisciplinary scholarship, not as a source of real outside knowledge, but as a metaphor, a technology that elaborates an aspect of legal (and anthropological) thinking we are only beginning to understand.

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