ONE

# Evolving an Ethnography of Law

## *A Personal Document*

An ethnographer who sets out to study only religion, or only technology, or only social organization cuts out an artificial field for inquiry, and he will be seriously handicapped in this work.

*Bronislaw Malinowski*

I began my first fieldwork in 1957, during a quieter, slower period, a time when an anthropologist had some degree of isolation—or so it appeared. I was supported by a Mexican government grant of approximately $1,200 to cover all expenses for nine months' fieldwork in Oaxaca, Mexico. My project was to study a region as yet unexplored by either anthropologists or historians, and to focus on the question of settlement densities in order to find out how settlement patterns affect forms of social organization. The project was a fairly general one, but then my training had been general rather than specialized. When I arrived in Oaxaca, I learned of the work of the Pa-





paloapan Commission, a Mexican development agency, and of the work of that commission in the Rincón Zapotec area, where I was headed. The engineer in charge of road building took me into Rincón Zapotec territory, at least as far as the road went, and left me there at the end of the road with the locals.

As I walked along a mountain trail behind two monolingual Zapotec guides, I wondered what on earth had brought me to this remote place. I was dimly aware of the settlements enfolded by the mountains in view. Orchids bloomed in abundance that May before the rainy season began. Suddenly we were in Talea, a large village of vivid green contrasted with the adobe houses, surrounded by coffee plants in flower. My guides led me to houses of friends of the engineer, a family that had tentatively agreed to take me in. Those first few days were paradise. Not only was I finally in the field, but the place was breathtakingly beautiful.

But then the village's Catholic priest accused me from the pulpit of being a Protestant missionary. The engineer from the Papaloapan voyaged from Oaxaca to vouch for me, but his corroboration of my story helped only a little. The rosy beginning had been spoiled, and the suspicions were to be followed by other accusations. Tension grew worse when I became sick with malaria and hepatitis. Fieldwork is a series of trials and errors and tribulations; one cycles from anguish to exultation.[1]

Today when my students go to the jungles of Peru, Bolivia, Guatemala, Indonesia or Mexico, they trip all too frequently over

1. In 1970, a brief description of my first two field experiences, "From Anguish to Exultation," was published in a collection of such reports titled *Women in the Field* and edited by Peggy Golde.

NGOs (nongovernmental organizations), corporate enterprises, missionaries, military personnel, tourists and treasure seekers, and native peoples who want something in return for serving as research material. As times change, as questions and methodologies change, it becomes doubly important for the anthropologist to be eclectic, flexible, and free of any rigid canon.

In these changing times, when trends are so powerful and when anthropologists have allied themselves with other disciplines working on law and society, something has disappeared from the essence of anthropology and ethnography. While questioning the assumptions of the researcher and using analytical frames of a wide-angle variety, we seem to ignore crafting experience. Everyone must, it seems, start anew. Perhaps some useful ideas that several generations of anthropologists have taken for granted should be reaffirmed more clearly. Bronislaw Malinowski put it to us many years ago: "An ethnographer who sets out to study only religion, or only technology, or only social organization cuts out an artificial field for inquiry, and he will be seriously handicapped in his work" (1926:11). Malinowski's admonition is especially relevant to the ethnographic study of law (or the study of law as an anthropological document) today, when it is fashionable to equate ethnography with qualitative work or with "hanging out," or to understand law only in relation to its most immediate and specialized context. My training as an anthropologist led me to approach the study of law in a manner altogether distinct from that of a psychologist, sociologist, or researcher with principally legal training. In my first exposure to Rincón Zapotec society, I faced a baffling set of unknowns that left me without a frame of reference. Nevertheless, by heeding Malinowski's admonition and the obser-



vations of other ethnographers, I was able to remove my own notions of law in my first work among the Zapotec and somewhat later among the Shia Muslims of south Lebanon. When thrust into another society, one can either fall back on one's own culture and transpose it onto the other and get into a real mess, or one can be an ethnographer. At that moment, underpinning everything was ethnography.

When I entered anthropology, I found that conflict had had and continued to have an ambivalent place in sociocultural anthropology. Turn-of-the-century British anthropologists working in Australia had thought they must return to camp if there was fighting among the Aborigines instead of staying to observe, but by midcentury in British anthropology, the Manchester school, led by Max Gluckman, was arguing that social conflict was functional for the maintenance of social systems. At the same time, in the United States, anthropologists Bernard Siegal and Alan Beals represented conflict as a dysfunctional process produced by strains and stresses in the social system. In the early 1960s, the sources of conflict, as well as its functional value, were conceptualized in terms of broad understandings of social organization, religion, economic interdependence, and political structures. By 1968, Ralf Dahrendorf had extended the argument to point out that societies are held together not by consensus but by constraint, not by universal agreement but by the coercion of some by others. Nevertheless, by the 1970s, the dialogue over conflict and harmony was shifting once again. Conflict was now portrayed as uncivilized. The study of law was then marginal in anthropology. Yet even as I attempted to breathe new life into the field of anthropology of law, I predicted that the field would die if our work was successful, ex-

actly because—as Malinowski has advised—artificial fields of inquiry seriously handicap the ethnographer. Pushing the boundaries is what anthropologists do if they are not trapped in topical or other specialities, or in hegemonic paradigms.

## FIELDWORK SITES

My fieldwork sites have been diverse, but among the Rincón Zapotec peoples, I learned to study disputing in law courts in the context of the wider social and cultural organization of two small villages. I did so almost by accident, because my first research topic centered on spatial organization and social control. I found the best indicators of differences in my comparative study of two Zapotec mountain villages, one dispersed, the other compact, in court materials (Nader 1964b). It was among these Zapotec-speaking peoples that I met the plaintiffs who introduced me firsthand to the justice motive. It was here also that I had the immersion so often connected with traditional fieldwork and with doing what it takes to write an ethnography—I spent eighteen months or more there between 1957 and 1969 and have made intermittent visits since 1969. Although long-term ethnographic work does not guarantee success, it allows the possibility of getting at process (rather than just patterns) and allows the ethnographer to identify with, as well as observe, those they study and among whom they live.

In 1957 among the Rincón Zapotec, I was working with several assumptions about order and disorder and working more or less within what some call a positivist model: this model holds that disputes for any particular society are limited in range (that is, not all societies fight about all the possible things



human beings could fight about); that a limited number of formal procedures are used by human societies in the prevention or settlement (or avoidance) of grievances (e.g., courts, contests, ordeals, go-betweens); and finally that there will be a choice among a number of modes of settlement (negotiation, mediation, arbitration, adjudication, "lumping it," and so on). Resolving or managing conflicting interests and remedying strife situations are problems that all societies have to deal with, and usually peoples find not one but many ways to handle grievances. What are those ways and do they interrelate?

A number of empirical questions also guided my early work. What did people fight and argue about publicly? Who initiated disputes, and what was the outcome for the individual as well as for the society? Within what groups were disputes concentrated? How did disputes at one level of organization affect those at another? And what were the manifest and hidden jobs of the law, and how were they related to the social structure? I envisioned a qualitative and quantitative sampling of dispute cases. The law case was my focus because I knew that the case in some form (dramatic or mundane) is present in every society: there are always parties who articulate complaints against others (though whether I would discover any particular procedure such as adjudication was uncertain). Furthermore, I thought that mapping the component parts of a case would produce results that could prove useful as a springboard for comparative work. This was the heyday of componential analysis, and I was attracted by the idea of transposing the linguistic notion of a scant number of units to the law case. Little did I realize that the passion of the litigants could not be converted into minimal units.

In the 1950s, the case method was the dominant method in legal anthropology and, for that matter, in other areas within anthropology, both as a means of collecting data and as a tool for analysis. The case method in legal contexts was popularized by Llewellyn and Hoebel (1941). Their use of the case (a focus on a particular action in law) to elicit how the law regulates, prevents, and cleans up "social messes" appealed to me, even as I realized its inadequacies. Later J. F. Holleman (1986) illustrated the limitations of such a method by referring to troubleless cases—matters that are not disputes, such as patterns of land use and allocation that result in hierarchical relations. Holleman contends that dispute cases are unduly restricted and are bound to lead to an "uneven coverage of the total field of law" (118), a fact that I was deeply aware of in the early 1960s. In recent decades, as von Benda-Beckmann (1986) is quite correct in observing, anthropologists have tended to focus on the coercive side of law, perhaps as a reaction to the preceding era of equilibrium models.

My concern with the case method converged on the boundedness of the case, as it was being used by Hoebel and Gluckman, rather than on its ripple effect. Focusing on the trouble-case does not necessarily prevent the researcher from examining the case in the context of the wider social and cultural processes. Indeed, the use of an extended case method led back into the broader realm of control and order. This expanded meaning of "trouble" indicated that the ethnography of law was "a theory-building part of social anthropology" (Starr and Collier 1989, 6), that dealt with more than "law."

I was influenced by Elizabeth Colson's work on the dispute cases of the Plateau Tonga of Zambia (1953), in which she indicated how crosscutting loyalties contribute to order, something A. L. Kroeber had recorded in his early study of the Zuni Indians (1917). In many societies, conflicting ties of loyalty, in addition to ties based on reciprocal exchange, function to pressure disputing parties to end their quarrels. Colson described the way these processes of control relate to structural or kinship considerations, and to the importance of a litigant's strategies for manipulating the structure. Her work centered not so much on law as on other processes of social control, not so much on decision-making actors as on the entire system of control in which actors operated in roles of primary, secondary, or tertiary importance. That the Tongans were acephalous politically—that is, they had no centralized political organizations—had less bearing on the manner in which they handled conflict in this instance than did the cross-linking features of their social organization.

The idea of generating comparisons meant that I would have to develop concepts and ideas that were more or less transcultural; Western jurisprudential ideas would not do as categories for use in comparing "non-Western" cultures. In the 1950s, the stage was already set for the debates on ethnographic representation and translation by the exchange between Max Gluckman and Paul Bohannan. Gluckman (1955) analyzed the Lozi's legal rationality through their legal decisions, but he underlined the similarities of Barotse and Western legal institutions by using Western legal terminology (e.g., right-duty, reasonable man, corpus juris, etc.). He wanted to show that the Barotse were not "savages," that their legal concepts were sophisticated. He also tried to grasp the changes this system was undergoing by looking at the flexibility and the "certainty of the uncertainty"

in the verdicts of judges, and he used the importance of time and exchange to explain legal change. Bohannan's *Justice and Judgement among the Tiv* (1957) starts by describing the structure of courts in Nigeria. Though Bohannan explains the colonial origin of the system of courts in Nigeria, he presents the coexisting indigenous and nonindigenous courts as separate systems. In this scheme, his insistence on calling the Tiv's a folk legal system makes sense. Lack of codification or systematization of "law" and "custom" among the Tiv made it impossible for him to compare the Western folk term "law" with any Tiv term or concept. Bohannan emphatically points out that "Tiv have 'laws,' but do not have 'law'" (57). They settle disputes not according to rules, which do not exist, but according to their cultural understanding. The aim of Tiv laws was to obtain rights.

Behind Bohannan's and Gluckman's inquiries is a concern for the authenticity of our ethnographies. How much do we as anthropologists alter our subject matter when we attempt to describe, analyze, or compare? In the end, whether we apply Western legal concepts depends on whether we understand law as autonomous or embedded. If, on the one hand, law were independent from society, then law could be universal. Western categories are independent of their original context. On the other hand, if law were dependent, then applying Western legal concepts would distort ethnographic data. From this point of view, the case method was a problem. In other words, I thought long and hard about what it would take to carry out an ethnography of law and what the pitfalls might be. And there were certainly pitfalls.

Among the Mexican Rincón Zapotec, my study of social relations and social groups took me into the town courts, and the town court cases took me outside the court into the community and into other communities, especially if the disputes were between inhabitants of different villages. This kind of expansion is what is meant by the extended case method. In addition, however, I closely observed daily activities bearing on subsistence, life cycle, politics, music, health and sickness, kinship, fiestas, and projects of development. Again, I was aware that in ethnography, focal concerns must be broadly contextualized. In my focus on disputing, I used the extended case approach that had been found useful in African work, carried out interviews, engaged in participant observation, gathered census data, and used archival documents—anything (quantitative or qualitative) that I could get my hands on—in order to produce what we then thought of as a holistic ethnography. I took seriously the admonition that setting out to study only law (in whatever form it might take) cuts out an artificial field for inquiry that handicaps scholarly research. An ethnographic study of law is more than a study of judicial institutions, and legal systems themselves constitute only parts of larger systems (Nader and Yngvesson 1974). Ethnography is the science of context.



I reiterate that, as viewed from anthropology, the law cannot usefully be isolated from other social and cultural systems of control that serve many purposes—from settling conflicts to pacification to creating conformity with norms, or to outright warfare. The values that are tested, changed, and consolidated in the law are not necessarily or even exclusively "legal values" They may be religious, aesthetic, or economic values. The law may function to maintain an unequal distribution of power or material wealth, or it may be used to bring about a more nearly

equitable distribution of resources. Litigation may be a means of social control, or it may be a game that links social units in a common social activity. In other words, an anthropological study of law knows no boundaries, and therefore it challenges preconceived notions about the autonomous nature of law, notions that it is "unaffected by social and economic relations, political forces, and cultural phenomena," notions that mask the existence of ideological myths (Kairys 1982: 6).

Fieldwork, then, is more than participant observation, and producing an ethnography of law entails a good deal more than collecting cases. Of course, any ethnography will be only partial, but I aimed for the most holistic (though partial) ethnography of law that I could produce (Nader 1990). I made more than a dozen trips back to the Rincón while thinking and writing about these issues. My film *To Make the Balance* (Nader 1966) moved my attention from social relations to styles of court procedure (Nader 1969a), and in 1981 the Public Broadcasting Associates and I made a second film, titled *Little Injustices,* in which we tried to contrast Zapotec complaint handling with that of an industrialized country, the United States. I came to understand the Zapotec situation better partly because over the years I became involved in other studies of law in the United States and elsewhere.

After all was said and done, what resulted from my work with the Zapotec was more than a localized ethnography (Nader 1990). It was a thick description that theorized what I term the "harmony law model," a configuration of compromise, reconciliation, and win-win solutions. It was a study in the political economy of legal cultures. To understand the hegemony, I had put to one side the possibility of yet more ethnographic research



and set about the task of examining historical and comparative documents that dealt with Christian missionizing and European colonialism, subjects that I and others had ignored in earlier decades. Only then could I develop a more comprehensive theory of village law. What I discovered was the use of the harmony law model as a means of pacification through law, first as a requirement of conquest, then as a counterhegemonic response by the indigenes to more than five hundred years of dealing with colonization.

My first Zapotec study taught me the basics of ethnography: not all fieldwork is ethnographic (as when one depends solely on survey research, for example), and "fieldwork" and "ethnography" are terms that should not be used interchangeably. Nor should ethnography value qualitative over quantitative methods. Both are needed. I also understood better why anthropologists are averse to spelling out their fieldwork methods with greater prior specificity. We needed to prepare for the unexpected, and we needed to be flexible in order to do so. Our stance was not to be static or rigid. We were taught that searching for the "native's point of view," that is, differentiating between what people say they do and what the ethnographer observes they do, and doing so in depth and with a wide angle, require a set of techniques and methods for gathering and analyzing data that includes not only "background issues" but also both quantitative and qualitative divides. An ethnographer could be both positivist and interpretivist, a sociocultural scientist and a humanist simultaneously. Relevant to the period was the reissue of Gregory Bateson's *Naven* (1958). Bateson's arguments against false paradigm oppositions suited my eclectic temperament.

I started by trying to figure out how the mountain Zapotec courts worked in southern Mexico. I needed to know something about the organizational context in which they were set. After my early work on the social organization of two Zapotec villages and the systems of social control of which the courts were a part (Nader 1964b), I became interested in participation patterns in the courts, and the data collection became even more systematic: I collected court records and an analysis of these records to answer the how many, who, and what questions. My most striking findings lay in the broad array of participation and particularly in how women used the courts (Nader 1985). In the process of this counting work, I noticed that a high litigation rate was accompanied by a harmony ideology, a pattern of dispute settlement dominated by compromise and conciliation. Why? There were internalist explanations of a structural-functional sort: the people were so divided that they needed a culture of harmony to hold them together, or some such explanations related to cultural control. I could see no justification for setting the problem up as a hypothesis for testing. Harmony was a cultural theme that penetrated the talk of village life but not the behavior observed in courtroom encounters. It struck me that I could not adequately address this question either by thinking harder about the Zapotec data I had collected or by collecting more data; the answer was not to be found in an internalist analysis, whether structural-functionalist or mentalist. It struck me that different ways of knowing do come in waves in anthropology, although they might be used simultaneously. Eric Wolf, in *Europe and the People without History* (1982), had noticed: "The more ethnohistory we know, the more clearly 'their' history and 'our' history emerge as part



of the same history" (19). I realized that the interest in small-scale and seemingly autonomous communities gives way to comparisons between seemingly autonomous communities and, later, to an interest in the diffusion of ideas pertaining to law, diffusion that has Europeans emerge as part of the same history as that of the contemporary Zapotec. Though I had been able to describe law and the uses of harmony law models among the Talean Zapotec, my analysis gathered power only when I placed the particular in a global context, one in which Christianity and colonialism and the resistances and adaptations to these global movements were incorporated and brought to bear on our understanding of the small scale.

It was the search for higher levels of understanding that inspired me to move from local to global. My methods took on more in the style of a natural science approach: *the questions were driving the methods.* To understand the meaning of harmony within a persistently litigious population, I had to search the historical literature for data on colonial and contemporary interactions between missionizing Christians and styles of disputing. To comprehend the worldwide diffusion of an ideology of harmony required comparative consciousness and awareness of the diffusion of idea systems, as well as a realization that the mountain Zapotec village that I was studying reflected hundreds of years of colonial experience continuing into the contemporary period. I moved from studying mechanisms of *social* control with an emphasis on social relationships to studying mechanisms of *cultural* control with greater attention to the ideational, mechanisms that may have emanated from locales a great distance from the isolated mountain village. This new realization made me rethink the critiques of structural-

functionalist approaches. The "enduring structures" described by anthropologists were part of the natives' presentation of self to outsiders, part of their adaptation to systems of domination. Viewed in this light, indigenous legal systems appear to be in equilibrium, or balanced, or harmonious. The realization that the social and cultural fields were broader than the small community compelled me to include dynamic forces that played upon and affected community contours that, though not constructed by the mountain Zapotec, were now being used by them.

Of course, harmony can come in many forms: it may be part of a local tradition of intimacy and interconnectedness or part of systems of control that have diffused across the world along with colonialism, Christianity, and other macroscale systems of cultural control such as psychotherapy. The basic components of harmony as ideology are the same wherever it appears as cultural control: the emphasis on avoidance and conciliation, the belief that conflict resolution is inherently good and that its opposite, continued conflict or controversy, is bad or dysfunctional, the belief that peaceful, orderly behavior is more civilized than confrontative behavior, the belief that consensus is of greater survival value than controversy. Such beliefs are deeply embedded in Western social science literature, and every few decades we get a plea to notice that it is "not the presence but the absence of conflict that is surprising and abnormal" (Dahrendorf 1968: 127).

The story of ideology formation is at the start nebulous. In the case of harmony among the Talean Zapotec, I speculate in my book *Harmony Ideology* (1990) about how ideologies of control evolved from a colonial Spanish America, and I extrapolate



from the comparative evidence on colonialism and customary law more generally. There is little doubt that the missionary activities in Oaxaca past and present and the zeal of the missionary orders affected the basic ideological structures of the native populations. The Spanish conquest was in good part a spiritual conquest (Ricard 1966), and the "missions of penetration" spread into areas where Spanish political control had not yet been installed.

An examination of village social life and the workings of village law courts among the mountain Zapotec reveals the heritage of penetration. The processes of internal and external forces appear in the interconnectedness of social organization and in the actual disputing process in and out of the Zapotec court system. We come to understand the broader meaning of the use of harmony and equilibrium as political strategies and as ideologies. We also come to understand how such processes of equilibrium and conflict can influence the theories of the people who study them—the anthropologists. My conclusion that among the Talean Zapotec a hegemonic harmony tradition stems from Spanish and Christian influence (a tradition apart from organic harmony) led me to propose that the uses of harmony are political. But could I verify this conclusion? By what means could I confirm my interpretations?

Anthropological theory is shaped not only by the Western world but also by the ideologies presented by informants. That such ideologies may have had Western origins in the first place becomes even more interesting as we attempt to trace the sources of anthropological ideas and to answer the question of why Taleans employ the principles of harmony and balance in dispute settlement and in dealings with outsiders. Although

initially I focused on how the "natives" use harmony, the issue has brought me to an exploration of harmony ideology as a tool of cultural control in colonial and neocolonial contexts.

Changes from harmony law models to confrontational or adversarial law models and back have been documented by historians for a number of societies. In sixteenth-century Castile, compromise, the ideal and preferred means of ending disputes, shifted to the adversary process with changes set into motion by economic expansion and population growth (Kagan 1981). In New Guinea, the opposite may have been happening (Gordon and Meggitt 1985), and in the United States there have been oscillations between harmony and adversarial styles in law (Auerbach 1983). Differing cultural constellations, both indigenous and European, indicate the double impact of Christian missions and colonial courts on the consequent ubiquity of harmony law models. Harmony law models are coercive when they mandate unity, consensus, cooperation, compliance, passivity, and docility—features often taken for granted as humankind's normal state and considered benign. And when Martin Chanock (1985) uses the term "missionary justice" to call attention to the fact that, from the early 1800s, missionaries in Africa were heavily involved in the settlement of disputes, combining biblical law with English procedures as they knew them, he is implying that compromise in colonial African "customary law" became the politics of adjustment and the politics of survival.

Materials from the Pacific region indicate that harmony law was similarly shaped and institutionalized there. Before colonial pacification, a tolerance for or even an enjoyment of quarreling was observed in New Guinea. More recent research documents how evangelical rhetoric affected disputing processes, undercutting traditional means of social harmony and replacing them with Christian harmony. In contemporary Papua New Guinea, ethnographers describe the stratigraphy of legal influences within the added state dimension (Gordon and Meggitt 1985) and in response to economic development. It is in the Fourth World that we can see today the daily shaping power of religion and economics on law.



In an elegant description of present-day examples in Indonesia and Papua New Guinea (PNG), David Hyndman (1994) illustrates how a state faced with a debt crisis favors investors who plunder natural resources and cast indigenous peoples in the role of subversive criminals, peoples seen by anthropologists as having taken up arms to protect their cultural and ancestral homelands. The Indonesian state and PNG, in collusion with transnationals, entered New Guinea to mine gold and copper in a process that Hyndman calls economic development by invasion. The cost of resisting invasion is heavy. In New Guinea, local peoples fought the foreign presence, blockading airstrips and blowing up pipes running from the mines. Lives were lost, property destroyed. Forced resettlement often followed, and local people became trespassers in their own land. Hyndman's story documents one invasion after another, and he notes ironically that Third World colonialism has replaced First World colonialism. Those who resist are considered criminals and are prosecuted under state laws favoring investors.

But law evolves, and contradictory legal values do not always remain in collision. Observations of mountain Zapotec court activity in Mexico indicate that some Zapotec operate with a harmony law model that is similar to legal systems often found where colonialism and Christianity have moved together.

Among these people, enduring relations, culture structures, and world systems interact in ways that result in legal styles of conciliation that have structural equilibrium as their goal. But what may have entered as part of a hegemonic system of European control has evolved in Zapotec country into a counterhegemonic system that serves to solidify social integration at the local level and to erect a legal defense system against encroachment of superordinate control in the form of the state. This picture is now undergoing dramatic change as Mexican resources become internationalized under international trade agreements such as NAFTA and GATT, and our interests, and perhaps our scholarship, will mirror these changes, as will those of the mountain Zapotec.

My second fieldsite was located in Lebanon. Indeed, I always seemed to be working in more than one fieldsite at a time. I went to Lebanon in the aftermath of the landing of the U.S. Marines in 1958. During the summer of 1961, supported by a small grant from the University of California, I located a Shia Muslim village in south Lebanon near both the Syrian and the Israeli borders, a village in which I collected oral cases of conflict using Arabic, in which I was relatively fluent, as the primary language. It was a preliminary to a more general inquiry into the contemporary state of Islamic law in rural settings, an inquiry that unfortunately was aborted by the Israeli military occupation of southern Lebanon a few years later.

My argument was straightforward. Given that Islamic law was originally of chiefly urban origin, I wondered whether customary law predominated over Islamic law in rural settings. In spite of the short duration of my fieldwork, in two and a half months I was able to answer my original question: an ethnog-



rapher can be more efficient the second time around because of prior experience with observational techniques and interviews, and self-confidence. I was also able in a short time to generate a model of rural-urban networking around customary law, which unlike Islamic law, operated across the religious lines of Islam and Christianity (Nader 1965b). Although the future of customary law is even today not clear in the Middle East, or in Africa or elsewhere (indeed the very definition of customary law is in question), this short field experience, more than my secluded stay with the Zapotec, sensitized me to the different layers of law that are present wherever anthropologists go. Far from being neat and parallel, these layers of the law merge and diverge, reflecting an intermingling of legal practices (as in south Lebanon) that is continuous and ongoing everywhere in the world, including the United States. Nevertheless, together these two field experiences provided data for comparison of two relatively homogeneous communities of similar size and population, both with cash crop economies, coffee and tobacco, both homogenous in religion—Catholic Zapotec and Shia Muslim; together they allowed me to understand better the connection between social organization and institutions for conflict management. It was a neat "controlled" comparison: one village was characterized by dual organization and the absence of third parties, the other by cross-linkages and a court system.

In Lebanon I also watched how informal systems operated. Busloads of villagers would arrive at a political intermediary's house early in the morning and be ushered into the bedroom, where husband and wife were still in bed having their first cup of coffee. Wives were sympathetic listeners to these highly mo-

tivated potential plaintiffs. It was a well-thought-out and accepted strategy to enter the most personal place in the house of a potential intermediary to plead one's case (during which the wife could also intervene on behalf of the complainant). Nothing so personal occurred among the Zapotec, although informal contacts were often made prior to court appearances.

## THE BERKELEY VILLAGE LAW PROJECT

The experience of working in Lebanon reinforced the importance of comparison, but I also realized that because each worker was working independently, much of the ethnographic material on law could not be used easily. There was a need for some kind of common framework of inquiry. The idea of using comparison as a method for discovery in the 1960s inspired the Berkeley Village Law Project (Nader 1995; Nader and Todd 1978). Already in the 1960s and 1970s, widespread controversy over the fairness of the American justice system and similar controversy over the fate of indigenous legal systems in the newer nations adopting Western notions of development made the cross-cultural study of law processes a significant and timely subject. The ethnography-of-law approach that I had developed from study and practice was applied and expanded by students working in very different communities. This work reflected an inclination of anthropological interest toward including the cultural as well as the social foundations of order, as well as interest in the reactive processes of law (von Benda-Beckman 1986: 92). The resulting book, *The Disputing Process* (Nader and Todd 1978), is about what people in different cultures do with their "legal" problems in the context of nation-state law. The work



was not limited to the study of official legal procedure available to litigants; it was delimited by the avenues actually chosen or developed by the litigants themselves.

Over a twenty-year period, graduate students from Berkeley went to fourteen different locales to study the disputing *process*.[2] My students examined disputing processes using standards of fieldwork of long duration, still concentrating on the collection and analysis of dispute cases within the context of social and cultural organization in small, relatively bounded communities. I visited four of these field-workers in the fieldsites in Lebanon, Liechtenstein, and Mexico. Our most important findings centered on conditions under which different forms or styles of dispute management occur. For example, mediation between parties of greatly unequal power does not work. Again, context provided clues as to why styles of conflict decision-making varied within each culture, as well as between cultures. In the process, it also became clear that rapidly developing countries were changing anthropological views that the local level was in any way isolated from the impact of larger political and eco-

2. Several of these anthropologists published monograph-length books on this work: Klaus-Friedrich Koch, *War and Peace in Jalémó: The Management of Conflict in Highland New Guinea* (1974); Phillip C. Parnell, *Escalating Disputes: Social Participation and Change in the Oaxacan Highlands* (1988); June Starr, *Dispute and Settlement in Rural Turkey: An Ethnography of Law* (1978), and *Law as Metaphor: From Islamic Courts to the Palace of Justice* (1992); Nancy Williams, *Two Laws: Managing Disputes in a Contemporary Aboriginal Community* (1987), and *The Yolngu and Their Land: A System of Land Tenure and the Fight for Its Recognition* (1986); and Cathy Witty, *Mediation and Society: Conflict Management in Lebanon* (1980).

nomic structures. Believing that prior approaches to dispute management put too much emphasis on equilibrium and shared interests, the anthropologists in the Berkeley Village Law Project studied disputing processes as part of networks of shifting social relations and cultural paradigms. Unlike other anthropological studies of law, the work followed a common model in data collection, focusing on dimensions of disputing as they affected the litigant's choice of remedy agent: the network of social relations, the control of scarce resources, the distribution of power, the aims of the participating actors, access to forums, timing, cost, the cultural dimension, and the degree of incorporation into national legal systems.

The ten ethnographers who wrote chapters for *The Disputing Process* present a wide diversity, from groups that have virtually no contact with nation-state law to societies that exemplify the increasing incorporation of state law into local traditional systems, from societies with little or no use of third parties to societies that make regular use of courts or other third-party mechanisms. Between 1965 and 1975, members of the Berkeley Village Law Project encompassed ethnography of law in fourteen locales—Jalé of Indonesian New Guinea; a Scandinavian fishing village; urban Ghana; a Sunni Muslim village; a multireligious village in Lebanon; and peasant villages in Bavaria, Turkey, Sardinia, Zambia, and Mexico, as well as locales in the United States, Ecuador, Liechtenstein, and Australia that were not reported on in the volume. Each study analyzes the ways in which disputes are settled primarily from the point of view of the litigant(s). And while much of the behavior is familiar and linked to the concerns of people in modern nation states, the authors set out to explain why the disputing process looks



different to each of the participants, how different procedures are limited, what factors affect access, and the manner in which nation-state law intersects with local-level law. The Berkeley project was an achievement in systematic intrasocietal comparison. By probing agency and power relationships within these various societies, the work provides pointed contrasts on how law functions in more-complex arenas, but it was not the end of the story. Laurel Rose (1992), the last anthropologist of the Berkeley project, broke new ground with her work on ideology and land dispute strategies.

## MOVING ON: THE BERKELEY COMPLAINT PROJECT

The fieldwork that paralleled the Berkeley Village Law Project was a break from the usual small and localized anthropological fieldsite. For the first time, I began to work in the country of which I was a citizen and to ask how people in a mass society like the United States complain about products and services and with what consequences. *The Disputing Process* was about disputes between people of the same culture, who for the most part knew each other and were expected to interact in some fashion in the future regardless of the outcome of the dispute. I then turned to disputes between people who were strangers to each other. This study, based on work in the United States between 1970 and 1980, again involved numerous researchers who looked at what Americans did when they had or perceived that they had no access to law. Central to the organization of this project was the complaint letter. Americans are probably the most prolific complaint-letter writers in the world.

I began this work in the early to mid-1970s, somewhat by chance; I was given the opportunity to examine a large corpus of letters written by people who felt they had been shafted by the system, and I realized that these letters threw a powerful searchlight onto what was happening as Americans faced the evolution of a system of justice in a world in which face-to-face relationships were almost non-existent. Some of my colleagues argued that there was no way anyone could turn such material into the basis for ethnographic inquiry; the challenge for me was to find one. Students were attracted to this project and came from universities and colleges around the country (Harvard and Williams, among others), as well as from Berkeley: students who had fresh minds and were prepared to tackle big issues, students who were still imbued with a belief that they could make a difference in the world. This project required me to pay attention for the first time to the law literature of this country: as always, when an anthropologist enters new territory, he or she must master a new body of literature.

From the letters, my students and I learned that people who felt unfairly treated and yet had no access to legal protection sought redress through a variety of "third-party intermediaries," from neighborhood consumer complaint offices to media action lines, to department store complaint desks, to unions, to consumer action groups, to their congressional representatives, to the White House Office of Consumer Affairs. The persistence and inventiveness in their pursuit of justice, even after they had seemingly exhausted all avenues, was extraordinary. Thereupon, we began the ethnographic profiling of the numbers of these complaint cases, as well as the organizations to which they were taken for hearing. The extended case histories



of these complaints indicated a legacy of frustration, of mistrust, of apprehension. The implications of the uneven struggle that took place daily in a million ways between individuals and institutions, I observed, were adding up to no less than what someone called the "slow death of justice" in the United States. Those complaining were, after all, believers in "the system," and as one complainant said in the *Little Injustices* film, "There's gotta be some justice somewhere."

Who were these complainants? How did they plan their strategies? How did they learn where to take a problem pertaining to law? Most of our research was invested in these life histories of consumer complaints about corporate products and services and what people thought was a big or little injustice, and what alternatives existed in government, unions, organizations, the media, and grassroots efforts. Our investigations revealed a mass phenomenon in which large segments of the population, reflecting all socioeconomic groups, are exposed to low-profile, undramatic, petty exploitations that may have serious consequences: a defective stove that burns down a home or a lemon car that leaves the family breadwinner paralyzed. When there is no access to law, extrajudicial processes develop directly in response to the decline in activity of the civil plaintiff. The U.S. courts have so far refused to extend to civil litigants the constitutional right to counsel that is guaranteed to criminal defendants.

Our conclusions were not relevant solely to United States citizens. Struggles in our highly evolved industrial country over the problems of how to achieve consumer satisfaction in terms of health and safety as well as dollars invested were emerging in similar ways worldwide with the global spread of consum-

erism. If one follows the birth of fledgling consumer complaint mechanisms worldwide, one does begin to believe that there is indeed a justice motive (Lerner 1975) operating universally.

Both Berkeley projects cast law in the context of operating processes of social and cultural control, and our understanding of these controls was again to be cast in the broader dynamic of the culture and social spheres of the locales in question. The complaint study focused on the interaction of different law actors or users of law and the networks they spawned. We developed a processual model by which we pursued the social dimensions of a case beyond the borders of the manifest dispute to classes of complaints normally hidden from view until they appear as class actions, as with the asbestos and the Dalkon Shield cases. The approaches included an analysis of power relations, and the interaction between the users and their power relative to one another became key factors in understanding how users change, or fail to change, the asymmetry. The focus on remedy agents to whom one carried a complaint was limited and allowed for numbers of field-workers using traditional anthropological methods to examine a number of remedy agents who worked in response to the complainant. Much had been written about the problem of no access or delayed access to U.S. courts, and various remedies had been offered, some leading to the development of small claims courts, regulatory agencies, and public interest law firms. But with the exception of Gellhorn (1966) and a small number of other researchers, few had asked exactly how people with no access to law handled their complaints. What we began to uncover was only the tip of the iceberg. Much has been written about alienation but not much about the actual means by which people became alienated.



Much had been written about the silent majority, but no one knew whether Americans were silent or whether they were silenced, for we had no adequate knowledge about where Americans spoke and were heard.

One theme running through the book that resulted from this work, *No Access to Law: Alternatives to the American Judicial System* (Nader 1980), was that of consumers deeply disillusioned with government and corporations. Typically, consumers who did complain had begun their search for remedy as firm believers in "the system"; they believed it would give them redress. After enduring rebuffs and getting the runaround, they lost faith, often retreating into anger, or apathy; but sometimes they went all the way, learned about the system, and won. Although our research was geared to discover instances in which third-party handlers were successful, we concluded that our society had not evolved effective systems for dealing with grievances that may be small but have critical consequences. In other words, law had not adapted to the transformation of a rural society into a mass industrial society. In conclusion, the researchers rank-ordered the effectiveness of intermediaries in handling grievances. Among the third-party intermediaries we examined—including a local better business bureau , a state insurance department, an automobile manufacturer, a labor union, a congressional office—the most effective were those rare organizations, such as department stores, that provided complainants with face-to-face opportunities to resolve their disputes.

This several-year study of mass consumer phenomena yielded both observations and recommendations. All the ethnographers were citizens of the country they were studying

(that is, they had the right to know), and the funding agency encouraged a search for successful solutions to marketplace complaints. The study itself was an early multisited research project that used ethnographic work to survey how Americans complained and with what consequence (Nader, *No Access,* 1980), a subject that forced me into the law library. The book was followed by the PBS documentary on my work, *Little Injustices* (1981). This film, in the Odyssey series, contrasted easy access to remedy in a small Zapotec community with problems of access in the United States. Interestingly, television stations in more than seventy countries purchased the film.

Although the work documented in *No Access to Law* was basically ethnographically horizontal, a follow-up story about a single complaint introduced an innovative method. The examination of an American father's complaint to government agencies about why the synthetic material of a shirt worn by his son had burned so quickly, contributing to grave injury, generated a model of work that followed the history of a product, a history that involved regulatory agencies, manufacturers, and election monies during the Nixon presidency. The study of that one complaint documented a density of horizontal interaction at the top among the power holders in American politics and business to the exclusion of any significant vertical interaction between power holders and the victims of power transgressions. I refer to this model as "the vertical slice" (Nader, "Vertical Slice," 1980).

These different fieldwork experiences underscore a significant point: not only do different approaches yield new knowledge, but the knowledge so acquired works together to provide a manner of achieving understanding that is a distinct improvement on any single approach. Ethnography requires multiple approaches, in and out of the field. But it is the question that makes any methodology relevant in the first place.



## OBSERVING LAWYERS AND LOCATING LEGAL HEGEMONIES

After my first three or four field experiences, I turned to a completely different set of experiences for insights into the meanings of something we in the West call "law." I began to read Michel Foucault and Antonio Gramsci on discourse and hegemony, and Edward Said's work on how framing of the "other" is influenced by unquestioned assumptions in Western scholarship, i.e., legal orientalism. I moved from notions of organization, agency, structure, and social relations to culture, specifically using the concepts of ideology and hegemony in reference to particular types of controlling processes. As a result of professional invitations, I began to interact with the American Bar Association at conferences. These conferences were in a sense fieldwork, although they were often brief engagements supplemented by library research and the following of legal policy debates in newspapers and journals. For example, in the 1960s, at a number of meetings between local bar groups and citizen groups, I found myself acting as translator for the two groups. Later, when invited to the National Judicial College in Reno, Nevada, I had the opportunity to observe judges who were, unbeknownst to them, participant observing in a jail cell. I watched them yelling, "Where's a chair, where's a goddamn chair?" The purpose of this volatile (and now impermissible) experiment was to allow the judges to discover the connections between judicial action and its

effects on the people who stand before judges for sentencing. The judges had not realized there were no chairs in jail. In the 1970s, conferences on law and development were also plentiful, as was optimism about tinkering with developing countries by means of legal transplants, an easy, fast, and cheap fix; a developing country need only buy a code book.

By the mid-1970s, complaints about access to law and about the inefficiencies of U.S. courts were so rampant that privileged solutions began to coalesce. In 1976 I was invited by the office of the chief justice of the U.S. Supreme Court to the Pound conference in St. Paul, Minnesota, a much-cited conference piggybacking on Dean Roscoe Pound's famous 1906 critique of the American justice system. As I have written elsewhere (Nader 1989), it was a rich experience, and somehow I do not believe that Dean Pound would have approved. Some of the pieces to the materials I had been puzzling over began to fit together. This conference was organized to discuss "a better way" to solve the problem of access to law. It was about how to distribute legal goods in response to social movement complaints about no access for civil rights, environmental rights, consumer rights, women's rights, native peoples' rights, and so forth. It was about the creation of new forums and, most certainly, about how to deal with the legal consequences of the social movements of the 1960s. It was also a conference for beleaguered judges, a venue for them to complain about their workplaces and the lack of support, financial and otherwise, that they had to endure.

The potential cases generated by the 1960s social movements identified a new set of law users who had previously had little access to the courts. At the Pound conference these potential and real cases were referred to as the "garbage cases" (not an



uncommon reference in legal policy circles), and it was argued that the courts should be reserved for the important cases. That there had to be "a better way" was the theme of Chief Justice Warren Burger at the conference and throughout the decade. That better way was alternative dispute resolution (ADR), a method for settling these new types of cases out of court in mediation sessions or possibly in arbitration. I was struck by the language the chief justice used and by the techniques he was using to convince the bar and the public that this alternative would relieve the American justice system of the overload coming in as a result of social activism. By the end of the conference, exhortation had clearly triumphed over reasoning, and rhetoric over substance: the new users of the court threatened the status quo. I began to outline a user theory of law.

A user theory of law (Nader 1985) stems from an assumption that the user, particularly the plaintiff user, is the driving force in law, not an abstraction like the courts or judicial decision. In this view, the direction of law depends mainly on what people are enabled and motivated to use the law to do. The trend toward a user theory of law emphasizes the role of the individual in molding social institutions. The drift of a legal system is thus prefigured by (among other things) use or non-use patterns that cumulate in a particular direction (Nader and Yngvesson 1974; Nader 1985). Law clearly comprises more than judicial or legislative institutions; it also includes the social and cultural organization of law.

By the time of the Pound conference, it was generally understood that law everywhere is variable within societies rather than constant. Cases between intimates are treated in one way, cases between strangers in another, and cases between people

of unequal power in yet another. Yet, in some Middle Eastern villages and in the United States, the patterns of social control vary according to the social status of the parties involved in the dispute (Starr 1978; Yngvesson 1993). Among the Jalé of New Guinea, the social distance between the parties predicts the extent to which self-help operates within options ranging from dyadic conflict to war (Koch 1974). But the intent of ethnographies of law to describe and explain the processual models found within a society was to avoid the essentializing or caricaturing of societies that results from studying only the most salient or accessible means of disputing and to indicate the dynamic components in the life of the law. Within each society, patterned uses of disputing styles, such as penal, compensatory, therapeutic, and conciliatory, were part of the cultural analyses (Black 1976) in ethnographies of law, although not necessarily reported in four-fold tables.

Particular disputing processes were explained in terms of their own cultural attributes and their relationship to the culture and wider social forces that determine the number of available options. By the late 1970s, involvement in other activities had made me aware of the way in which local systems had to be thought of as open systems responding to the power structures of international order. In response to the idea that the nature of people's relationships imposes restraints on their settlement processes (Gluckman 1955), we challenged the notion that persons in multiplex relations adjudicate less. In disputes involving scarce resources, individuals may value the resources more than they value social relationships, and they may be willing to sacrifice a social relationship with their opponent in order to gain access to the contested resource (Starr and Yngvesson



1975). The disputants are active makers of the disputing process; different issues and not fixed relationships determine the strategies disputants employ. Noncompromise outcomes commonly resulted from disputes over land or other important materials, or over access to power and influence within the community—all of which are, or are perceived as, scarce resources. As I participated in international agencies and projects, I learned the way in which colonial systems and, later, newly independent countries, inspired by Western models of development, undercut local ideas of property and attempted to introduce American ideas of law into other countries. When injustices became too great—as in Iran, where land rights were revised—a revolution was provoked.

The concept of users as players in a dispute drama at the microlevel is an interesting component in the macropicture because this concept looks at strategy in third-party decision making and challenges the assumption that the third party is neutral or all-powerful. This concept is an important one also because it overturns the previous picture of the passive plaintiff at the mercy of a judge or jury and indicates the larger importance of these social dramas. If we are to better understand the plaintiff role, the justice motive (Lerner 1975) must become central to incorporating the perspective of all the parties to a case. Examining the interactions between people in disputes expands the analytical framework within which process and power become indispensable variables. Users interact in broader processes by which they may become disempowered. The notion of community law as being itself autonomous may be misleading in a globalized world in which various trading blocks may impinge on the very constitution of local life and, in the form

of multinational institutions, change patterns of subsistence, order, and disorder. Throughout the years, the dominant schools of thought waxed and waned, but the general thrust was moving anthropological projects up and outward, away from a grounding in purely residential communities. Concern with differential power was building steam in the academy but not in the media or at professional conferences.

## THE SELLING OF ADR

In the years after the Pound conference, the public became immersed in the rhetoric of ADR, a rhetoric in which language followed a restricted code and formulaics that combined clusters of meaning. My linguistic training was put to good use. ADR's proponents accomplished the pattern of assertive rhetoric by making broad generalizations, being repetitive, invoking authority and danger, and presenting values as facts. Because of his authoritative position as chief justice, Warren Burger set the tone for the language that characterized the speeches and writings of others, the tone for the selling of ADR. He warned that adversarial modes of conflict resolution were tearing the society apart. He claimed that Americans were inherently litigious, that alternative forums were more civilized than the courts; and the cold figures (meaning statistics) of the federal courts led him to conclude that we are the most litigious people on the globe. The framework of what I call coercive harmony began to take hold. Parallels were drawn between lawsuits and war, between arbitration and peace, parallels that invoked danger and suggested that litigation is not healthy (Nader 1989).



Although Burger's assertions were partial truths, his ADR movement could easily be construed as antilegal, a program for discouraging newcomers to the courts. He predicted that his better way, that is, ADR, would not take hold until the end of the century. Actually, however, it took hold and became institutionalized with such speed that many lawyers and social scientists were caught off guard. At this point in the work, I asked myself, was I doing ethnographic work when I was observing, participating, and writing about the Pound conference;[3] debating the seminal question What if *Brown v. Board of Education* had been mediated? at the 1999 American Bar Association meetings; zeroing in on African customary law at the meeting of American law schools in 2000; or explaining ADR to the National Association of Family Mediators some years earlier?

The questions became even more complex. After years of observing the ADR movement and its many ramifications, I had come full circle from the Zapotec research, which had concluded that harmony ideology was part of a pacification movement that originated with Christian missionaries and colonizers. Now I was observing another pacification movement that used the same tactics of "coercive harmony." Harmony law models placed new pulls on the American justice system, and attacks on the American tort system were ubiquitous. At the same time, the ADR movement was going transnational. I sensed this from reading publications on international trade as well as observing Third World newcomers at conferences on

3. Others have also published ethnographic descriptions of such conference experiences involving "the production, evaluation, dissemination, and collection of documents" (Riles 1998: 378).

"new" mediation techniques for Third World peoples. I began researching ADR as a soft technology of control, looking first at international river disputes (Nader 1995) and more recently at trade phenomena (Nader 1999). Though I might claim that I was participant observing at international conferences and international trade meetings, it was clear that in addition to meetings, library research had now become a key method for documenting the dissemination of a hegemony that had so quickly and so efficiently permeated a variety of institutions in the United States (schools, prisons, corporations, medical institutions) and that had then apparently moved out as part of the trend toward the Americanization of global law, which includes international law, as well as trade agreements, and more. In other words, the context for studying harmony law models was broadening to include transnational entities.

## ZEROING IN ON POWER

Shifting the analysis of law toward its interactive elements meant that power differentials could not be ignored (Starr and Collier 1989). As anthropologists moved from the local arena into national and global spheres, where the social and physical distance between litigants was greater, disputing was increasingly recognized, as in the colonial setting, as occurring between strangers of unequal power. The self-conscious focus on power also underscored previous judgments that the case approach alone was not enough to sustain the analyses. Inequality often limited case action. State law, growing industrialization, and the separation of production from consumption have had as durable an effect on dispute resolution as did the change from



nomadic to agricultural societies. Law in face-to-faceless societies that are characterized by highly unequal distributions of power does not always lend itself to the same solutions for handling disputes used in small face-to-face communities, where power differentials are more transparent. The study of law in face-to-faceless societies requires new, in addition to tried and true, methods for eliciting disputing profiles (Nader, *No Access,* 1980).

Paradoxically, ethnographic studies of law often remove law from the center of the study because in small-scale societies, where people share common social and political linkages (the sorts of places anthropologists have been apt to study), generalized social control rather than formal law results. In such settings, gossip and public opinion help deter socially harmful behavior and serve to direct disputes. Yet the more attentive we become to settings where formal written law or governmental control reigns, in places where the nation-state is fully developed, the more our studies center on the tension associated with hegemonic law and exclude other systems of law or control more generally. The traditional ethnographic studies of particular societies no longer suffice, although the ethnographic perspective is still being creatively applied to a dynamic understanding of law in complex societies, or what Bill Maurer (1996) recently referred to in the context of the Caribbean as the postmodern condition of creolization, transnationalism, and globalization. The anthropologist shifts the lens from bounded notions of social structure, family, and kinship to hybridity, globalization, and the movement of people and commodities across national borders.

Maurer worked in the British Virgin Islands (BVI), which

is still a dependent colony of the United Kingdom, though it has its own laws and legislature. I found his ethnography especially interesting because when it was published, I was following the diffusion of ADR hegemony in local, national, and transnational settings. In his ethnography, Maurer was able to integrate many of the questions that I had thought about only in succession. He was doing something different from earlier ethnographies of law. He concentrated on the role of the state in the construction of BVI society and citizenship by means of law, exploring the paradox of a self-governing colony or dependency with its own laws and legislature. British common law, which is the foundation of BVI law and order identity, links up with the BVI legislature, which provides the basis for global financial offshore services. For Maurer, the distinction between law and custom is not always clear, because past legal practices become present customary practices, to the extent that the writing of BVI's national law has entrenched colonial rule and reinforced the world economy by creating a respectable tax haven for global financial markets. Furthermore, to compete for global capital, BVI revised its laws in 1990 so that tax havens became subject to outside monitoring, yet another paradox of increasing nationalism in an era of globalization. Maurer sees law and custom not as in opposition but as mutually constitutive, a point he makes in addressing the family-land issue; the crucial link between law and identity is the 1981 British Nationality Act, which, by limiting citizenship to legitimate children of citizens, made paternity central to legal and economic status. Maurer has moved a long way from the isolated indigenous community.

Before the postmodern period, some anthropologists looked



at contemporary nation-states for legal phenomena functionally equivalent to those found in small-scale societies, phenomena such as negotiation, in order to examine social behavior such as cross-cultural negotiation (Gulliver 1979). Others looked for differences between traditional and modern settings, differences that had implications for evolutionary theory (Collier 1973; Moore 1986). Still others compared the management of economic grievances in face-to-faceless societies with the management of the same in the small, intimate face-to-face communities that for a century had been scrutinized by anthropologists (Nader, *No Access,* 1980). The search for an understanding of legal relations as they have changed over time, and particularly with the development of modern nation-states, is more a result of historical insight than of a dynamic concern with the contemporary period.

Perhaps both styles can be productive for insight and discovery. In my work, I have observed that the plaintiff role atrophies with the introduction of the nation-state because the state assumes the plaintiff role in criminal cases and the "real" plaintiff becomes the victim. Other anthropologists use a combination of approaches to investigate changes in culture that shape ideas about law and litigation quite independently of hegemonic forces, for the shaping of a perception of the law is itself a significant power gain for the civil society (Greenhouse 1986). We now are deeply interested in historicizing ethnography. Just as we innovated with the extended case method, situational analysis, social dramas, process, networks, actors, and meanings, we now move out of residential locales; and intellectual gains are the result.

Throughout my work, I developed and refined methodolo-

gies that suited the questions I was pursuing, but I do not think I could have accomplished much without that first intensive period of Zapotec fieldwork. In the 1960s, 1970s, and 1980s, I wrote several articles designed to expand thinking about methods in anthropology in particular and the social sciences more generally: "Perspectives Gained from Fieldwork" (1964a), "Up the Anthropologist" (1969b), "The Vertical Slice" (1980), and "Comparative Consciousness" (1994) among them. Although I valued the "how" of anthropology, the methods were not the purpose, only the means; they were subordinate to critical questions. Though I was not overly self-conscious about what I was doing, it became increasingly apparent that my essays were providing intellectual justification for pushing beyond the invisible boundaries of what was acceptable, what constituted the anthropology of law, and even beyond anthropology and ethnography, particularly in the more traditional sense of their being tied to a single locale and to acceptable methodologies such as participant observation. There were interesting questions that required more than participant observation.

In the 1970s, federal and state government in the United States, in concert with tribes and corporations, began to push for negotiated settlements in cases involving issues ranging from religious freedom and reparation to water, game, and fishing rights. Some years later, ADR entered the reservations via national Indian conferences, professional networks, and governmental and private institutions, the argument being that ADR was more compatible than litigating with "traditional" native culture and society. By the 1990s, I had spent about ten years researching and publishing on issues related to U.S. domestic energy practices, only to discover that ADR now took



center stage in the struggle over nuclear waste storage on Indian lands (Nader and Ou 1998).

The study of indigenous law as it is affected by state and international power centers assumed major importance only recently. During the colonial period, law was created by clashes of interest between colonizers, and their missionizing activities, and the colonized. The method of control in Africa was indirect rule; in the United States, it was assimilation projects until Iraq. Though the effects of foreign contact on "indigenous" law as shaped by the historical, social, and cultural features of the various societies seem obvious now, earlier anthropologists often seemed unaware of these effects.

In 1998, J. Ou and I discussed the current significance of a legal history that includes idealizing legal styles. The portrayal of self or of others is not benign, which is why representation became central to critical ethnographies. During the early days of the Red movement in the 1960s, Native Americans accepted the romantic vision of their culture as peaceful and harmonious, as able to compromise and search for win-win solutions. Such representations are part and parcel of the legal stratagems, sometimes bilateral, sometimes unilateral, that contending actors use to gain power. For example, federal bureaucrats make economic recommendations that are sold through a win-win discourse associated with the harmony legal model. Idealizations of Native Americans play an important part in legal power plays, especially those centering on the quest for scarce resources or those specific to environmental contamination.

It is axiomatic that barriers to thinking anew about an anthropology of "law" have to be removed by exoticizing what many thought was natural. If the study of the harmony law

model, for example, leads us to a study of religious proselytizing, then that is where we should go. If an understanding of complaints leads us to moral minimalisms and the construction of suburbia, so be it. If the study of ADR takes us abroad and into the political economy of disputing and trade with China or Libya, that is where we should be. If an understanding of law, of why a young child's shirt burned so quickly, takes us into the Nixon White House to examine election bribery, that is where we should pursue the question. If customary law is being revived in Africa, history should inform us about the origins of "customary law" and its relation to law and development projects. And if a study of the nuclear waste problem takes us to negotiations on Indian reservations, that is where we should go.

## LAW AND DEVELOPMENT

In Africa, colonization resulted in the creation of "customary law," which was later studied by anthropologists as if it were solely indigenous and relatively untouched by European peoples (Chanock 1985). Today, however, studies pay specific heed to state ownership and control of property, to technology transfer, and to the effects of demographic policies and policies that regulate natural resources, all of which involve analysis of external as well as internal processes. Such reappraisal was all part of the reappraisal of anthropology that resulted from the demise of the colonial system and the rise of law and development projects, of which I was frequently a friendly critic.[4]

4. In the early 1980s, the Social Science Research Council's sponsored research on postcolonial appraisals was published in *Property, Social Structure, and Law in the Middle East,* edited by Ann Mayer with an introductory essay by Laura Nader (1985).



Arab countries have inherited legal systems from the colonial period that were heavily shaped by European legal systems. From the colonial experience there emerged a model of foreign intervention that used legal procedures as instruments of political and economic management, much in the way that the law and modernization movement uses such procedures today. Scholars point to the role of national law in emphasizing the continuity between colonial regimes and the new nations. This continuity of increased state power and of the centralizing power of the state through law is occurring in countries with social structures as different as those of Morocco, Tunisia, and Zambia. Whatever is perceived as threatening to the consolidation of the state, whether it be kinship alliances or landholdings or local control over water, is being undermined, sometimes gradually, sometimes drastically, by national law and also by supragovernmental institutions. Looking over these layers of inheritance, one gets a clear view of the various pathways Arab states followed toward centralized and Western-like legal systems and why: European systems offered greater control than did the decentralized systems of customary or Islamic courts, and legal orientalism was penetrating.

In this respect, both historical documents and contemporary observation are useful in recognizing law as an agent of social and cultural change. In precolonial Tunisian oasis society, for example, water ownership rather than land ownership formed the basis of power and prestige (Attia 1985). Water ownership, water distribution, and the management and upkeep of the

intricate networks of canals and drainage ditches of the irrigation system required disciplined social organization. Transactions and work related to irrigation systems were regulated by customary law and managed by a hierarchical, castelike social structure of leading families and serfs tied to them in a quasi-feudal relationship. Changes in the concept of water as property accompanied the increased powers of the central government. The French colonial government's seizure of control of water management initiated the collapse of oasis society and the private ownership of water; and following independence, the Tunisian state continued the colonial pattern by abolishing private water ownership and use rights and bringing them under state ownership. State control of water ownership marked the ascendancy of the centralized government over regional power groups and, by means of the courts, destroyed the traditional rights of ownership and management of water. Thus, the transfer of water wealth among social groups was linked to the development of capitalist structures of production, which opened the door to transnational companies and the advent of neocolonialism.

In North Africa, colonizers regarded law as a fundamental tool in the appropriation and reorganization of land tenure (Leveau 1985). In Algeria, colonizers not only expropriated land by law but also dismissed the traditional inalienable character of land property in order to create a fluid land market. As a result of these legal measures, the Algerian social structure was deeply affected by the superimposition of individual property rights upon the previous collective property, a superimposition that is happening worldwide. The colonial methods applied in Algeria were also tried in Tunisia, the result was the expansion



of the French administration. Gradually, by regarding natural resources such as land and water as legally independent from each other, the colonial state appropriated resources that were intimately linked to land. In this manner, Algerians were left with rights of use over only those natural resources that they had previously owned. Moreover, cooperative relationships between the colonizers and the Algerian bourgeoisie with regard to land issues heightened internal social inequalities that increasingly proletarianized peasants and tribes.

The use of law as a political instrument was not, of course, restricted to the colonial era. In the 1960s (the "development decade"), as colonialism was being dismantled in many parts of the world and as the Cold War was warming up, American lawyers were sent to Costa Rica, Brazil, Chile, Colombia, and Peru to extend legal assistance to the so-called Third World. "Legal aid" projects previously tested in countries such as India, Burma, and Japan and on the African continent were complementary to development projects sponsored by large United States developmental agencies preoccupied with the expansion of communism in the Third World. Most of the lawyers involved took with them *idealized* images of democratic law that clashed with the contrasting social, economic, and cultural features, for instance, of Latin American countries, most of which were not democratic. Nevertheless, the transfer of American legal models to these countries succeeded with respect to the American method of teaching law, the model of pragmatic lawyers, and the idea of law as instrumental (Gardner 1980). Those who benefited initially from this transfer were the lawyers and the elites, although populist legal reform movements in Brazil, for example, are ongoing.

Legal engineering was envisioned as a tool for social engineering. One aim was to further business transactions in liberal economies, an aim that presupposed predictable legal practices. Politically, such legal engineering was assessed as essential in the nation-building process and the spread of democratic institutions. Agencies such as the Ford Foundation, the United States Agency for International Development (USAID), and the International Legal Center provided millions of dollars to implement this project of legal engineering, and prestigious lawyers from private and public American universities as well as many authorities from diverse public institutions contributed to the design of the project. Owing to their vertical perspective on development and their blind overenthusiasm, which often failed to take into account the culture of the "receiver societies," the project took on an imperialistic character. Knowledge of local contexts is deemed relatively unnecessary if the goal is to remodel Third and Fourth World societies in the image of developed societies. Anthropologists were learning from historians and sociologists how colonialism had worked on "law."

The fact that social inequalities within these countries often stem from their subaltern position in relation to "core" countries was often ignored by underlying ideas of law and development as models to be imitated by Third World countries. This is apparent in various development projects funded by United States foreign assistance in the Middle East (Johnson and Lintner 1985). The Egyptian-American Rural Improvement Service (EARIS), the Jordan Valley Development Program, and the Rahad Irrigation Project in Sudan, implemented from the early 1950s to the early 1980s, were undertaken to foster agricultural productivity. The underlying assumption of all three projects—



an assumption apparently shared by development lawyers (e.g., Zorn 1990)—was that poverty was the consequence of lack of technology and, therefore, that technological innovation would guarantee the alleviation of poverty.

Given that these projects apparently sought to improve the welfare of rural inhabitants, one would expect them to affect local organizing structures. One aim of the projects was to create new communities and to promote resettlement in Sudan and Egypt, as well as to incorporate Palestinian refugees in Jordan. Developers designed new cities but later abandoned them when it became obvious that they lacked traditional institutions like village councils or family networks. Agricultural innovation that depended on water supply from dams affected fishing rights. Land reform applied in the Jordan Valley altered traditional property through land distribution, appropriation of mineral rights by the state, centralized control over water, overlapping legal jurisdictions, and so on. In Sudan, the Rahan Irrigation Project reduced the grazing lands that nomadic herdsmen used for their livestock. Furthermore, because the reformers overlooked the ethnic component of the areas assigned to the projects, their legal engineering often exacerbated local tensions. Development engineers were learning from anthropologists.

The creation of new institutions under the auspices of development projects also challenged the traditional system of dispute settlements. In Swaziland, where Laurel Rose worked in 1992, the development forces refused to grant centrality either to "tradition" or to traditional chief-made law and instead used state law to justify their own notions of the primacy of individual property ownership over communal ownership as part of

the economic and legal modernization project. In recognizing only national law, development projects failed to assess the legitimacy and operation of a multiplicity of legal systems that often competed or overlapped with state systems. Local groups became more tied to the state than they had been before through the imposition of new authorities and forms of social control. In the final analysis, however, these projects altered the coexisting foundations of religious law, customary law, and local law. Research on "customary law" illustrates that legal tradition is not petrified history; rather, legal tradition is constantly being invented. Anthropologists who have long worked with pluralistic or competing models (see, e.g., Mauss and Beuchat 1906 or later expositions by Pospisil [1971], Parnell [1988], and Merry [1988]) recognize that multiple models commonly evolve together and are rarely equal in power. Research on law and state power illustrates that, far from being neutral, law is often politically active, created by and for groups in power (Barnes 1961). This realization often separates anthropologists from development lawyers, who even today may still believe that "the rule of law" creates a level playing field that works out in practice.[5]

Once again, the methods should ideally be subordinate to the questions being pursued. Methods become eclectic because loyalty to a single technique, even something like participant observation, commonly stultifies research. In addition, the domain of law itself needs to be recognized as artificial, as a defect in sociological studies that unnecessarily bound their domain.

5. Idealization of law surfaced more than once at the May 2000 conference on law and development at the University of Sussex in England.



Indigenous systems of law that were described ethnographically as part of the indigenous culture and society are no longer described as closed systems. We have shifted our entire perspective on what constitutes indigenous culture and society, so that in the year 2005 we include legal transplants, missionary justice, USAID programs, economic globalization and empire as part of the ethnographic picture, and once again anthropologists show their discomfort with drawing boundaries.

## GLOBAL SYSTEMS AND HEGEMONIC THEORY

In the decades when anthropologists were refining their ethnographic techniques, the concentration on particularities pushed comparison, diffusion, and time to the margin. Comparison became part of the internal analysis of variations, while cross-cultural comparison, developed at Yale by George Peter Murdock, was considered fraught with methodological difficulties, especially boundary questions, and therefore best avoided. The longitudinal method had seldom been used in ethnographies of law based on particular peoples. Llewellyn and Hoebel (1941) considered cases spanning a seventy-year period in Cheyenne history, but they compressed them into an ethnographic present and ignored external forces of change such as conquest and subjugation of the Cheyenne by the U.S. government.

By the 1980s, ethnographers had developed ethnohistorical models of law that combined history and ethnography within the framework of power structures. Added consciousness about the position of the ethnographer in relation to his or her in-

formants and the work of world systems theorists led to the examination of external forces or macrostructures on traditional microstructures. Anthropologists still consistently underestimate the extent to which Western political and religious traditions structure the control aspects of law. This underestimation is all the more surprising given the role of law in the areas where we have traditionally worked. Not only is law central to the so-called civilizing process, it is also an avenue for creating culture and a vehicle for its transmission.

By virtue of the background of the analysts and their entrapment in culturally constructed and disciplinary preferred models, theoretical discussions of styles of law obscure how value laden the models are. Although researchers now more often acknowledge and examine the ideological components underlying their own studies of law, certain ambiguities reveal that studies of legal systems carry a cultural load, such as a preference for harmony legal models over conflict-based ones, for book law over traditional law, or for idealized law over practice. Enamored by the prospect of harmonious natives, anthropologists may in the past have exaggerated the argument that disputants with multiplex ties will try to compromise on their differences, just as many development lawyers are doing in the present. Such idealization may be used in surprising ways, ways not envisioned by those who embody them.

Anthropologists are alert to built-in biases. Scientific observers may be trapped by the thought systems of their own cultures, but they use different disciplinary lenses to screen data. The encounters between subordinate local political entities and dominant superordinate political entities did not immediately



lead anthropologists to situate their studies of local law in the context of transplanted European legal, religious, and economic global systems. Although throughout the past century, we tended to leave the Europeans colonizers out of the analysis, recent work in legal history (Chanock 1985) and ethnography has begun to utilize both history and comparison to illuminate global interactive processes that shape local law (Moore 1986; Nader 1990).

## EVERYONE WANTS TO BE AN ANTHROPOLOGIST, BUT IT'S NOT THAT EASY

In some ways the research trajectory of an anthropologist expands after the first long period of fieldwork. The work that follows is often not ethnography in the traditional sense but research that, though it moves beyond prolonged face-to-face research, is in many ways dependent on the researcher's having had a long period of study and residence in a well-defined place. It involves face-to-face engagements, knowledge of the language, participation in some of the observed activities, and an emphasis on intensive work with people rather than on survey data (which anthropologists may use as well). "Background issues" are frequently critical to the ethnographic thrust. Our traditional research techniques have been expanded by the use of tape recorders, film, and geologic surveys for mapping, but many ethnographers still go out in the field and stay for a long time. Writing anthropology about people as they are observed in their "natural habitat," some anthropologists describe eth-

nography as a craft that requires contextual specification and that seriously addresses the cultural translation problem in the final write-up of a book-length monograph.

Over the past twenty years or so, it has become fashionable to "do ethnography," as Arthur Kleinman pointed out in another context, however "lite" it may be. However, he adds that much of what is written discloses the writers' lack of serious training in ethnographic research. Ethnography, he emphasizes, is

> an anachronistic methodology in an era of extreme space-time compression. . . . it is seriously inefficient. In an era . . . witnessing the hegemony of analyses based in economic, molecular biological engineering . . . ethnography is not something one picks up in a weekend retreat. . . . it requires systematic training in anthropology . . . including mastery of ethnographic writing and social theory . . . and that, too, takes time. (1999, 76–88)

The attraction of the ethnographic method lies in its ability to come to terms with ramifications that bring with them unexpected moments of enlightenment.

For all the reasons that Kleinman proposes, the basic tenets of anthropological work need reiteration. We are presently working in an era of interdisciplinary and antidisciplinary moves, and as most readers know, disciplinary transgression is both a blessing and a curse; it can lead to repetition, imaginative thrust, or new knowledge. At this turn of the century, law is of critical importance to anthropology because of law's central role in transmitting hegemonies. At the same time, interdisciplinary work may result in decontextualized and dehydrated



borrowings from anthropology by researchers trained in other fields. The recent focus on law and everyday life, for example, is posed as a discovery, when indeed what is being reaffirmed is the direction of the anthropological study of law over the past seven or eight decades. If what we wish to encourage is thick understandings of law *in* everyday life, it might behoove us to comprehend what anthropology of law has meant in different historical periods. Some of the skills gained in studying local communities may transfer to new contexts, contexts in which lawyers may be our most intellectually compatible colleagues. Though much has been written about the dark side of law as a tool for domination, the lighter side of law projects possibilities for democratic empowerment. The life of the law is the plaintiff, who, perhaps unwittingly, makes modern history, whether it be in small democracies found in local communities, in contemporary state democracies, or in larger-scale configurations at the international level. By contesting their injustices by means of law or illegality or subversions, plaintiffs and their lawyers can decide the place of law in making history.