TWO

Lawyers and Anthropologists

> The collision of force with opposing force is what sheds flying sparks of illumination. That is why the ideal is habitually set off against the positive, identity against time, the free against the determined, reason against passion. . . . we need only call up the fundamental classic antitheses of legal theory . . . Justice and Power, Freedom and Order, Security and Change.
>
> *Edmond Cahn*

Although this chapter is about lawyers and anthropologists, I have never sought to make an interdisciplinary field out of law and anthropology (although my work is informed by other disciplines), nor have I hoped to amalgamate the work of lawyers and anthropologists (although we inform each other's work). Indeed, I am skeptical, if not contemptuous, of lawyers who claim the title of anthropologist merely because they are studying the law of everyday life or native peoples; they may find the experience stimulating, but they have little grasp of what ethnographic work entails. I know of no anthropologists who claim to be lawyers solely because law is their subject of study;

thus my current perspective on the contemporary cacophony in legal and anthropological scholarship on law and in society prompts me to argue for separate but equal arenas: we do different things. We have much to learn from each other, but if we try to do each other's work, the work suffers from our naïveté and inexperience. Hence, if I refer to our relationships *as if* our disciplines had separate and autonomous existences, even though they do not, I do so for the simple satisfaction of better comprehending what we share and what we have to teach each other by virtue of the distinctiveness of our respective disciplines, even when the lawyer and the anthropologist are one and the same person.

I also wish to recognize the key ground common to the legal and anthropological disciplines that I am about to discuss. Both disciplines originate in Western thought, in particular worldviews. Such worldviews, no matter how "developed," become especially trenchant when Western lawyers and Western anthropologists find themselves on foreign soil, where they are both, whether they realize it or not, representing distinct Euro-American interests in their relation to other cultures. A sort of Euro-American bias in anthropology—a romantic notion of indigenes' presumed relation to the law—was wonderfully apparent during a 1997 American Anthropology Association symposium on intellectual property. Participating anthropologists had gone to the field to study everything from tourism to identity, only to be reoriented by the issues central to indigenous people—national and international property law. Intellectual, cultural, and biological properties were endangered, and indigenes pulled both lawyers and anthropologists into their orbits.

One final point at the beginning of this chapter has to do with why the disciplines have come to intersect so frequently. Unlike lawyers and astronomers, or anthropologists and investment bankers, lawyers and anthropologists keep crossing paths: in the library, in the field, at development conferences, in political situations. Lawyers were among the first to contribute to the ethnology and ethnography of law in order to respond to inquiries about comparative law and the problems of cultural subjectivity. Both disciplines confront power in the relationships between subordinates and superordinates, and anthropology all the more, since "tradition" and law have commonly been used as political stratagems in colonial settings (Colson 1974). But, above all, our work overlaps in breadth and scope. Anthropologists and lawyers can be generalists. As the American jurist Oliver Wendell Holmes once put it, the law is "one big anthropological document" (1920: 212).

This second chapter illustrates the intersection between anthropology and law by reference to examples of the intersection or invention of the subject matter that has brought our two professions together over the last century. I have chosen these examples from research on law conducted (1) in the latter part of the nineteenth century in the United States, when European colonialism reigned worldwide and when the United States' takeover of Indian lands was being completed; (2) during the 1930s and 1940s in the United States, when industrialization had taken root, bringing with it immigration and prosperity, as well as economic depression; and (3) in the United States and England over the past twenty-five years, during which time Euro-American hegemony peaked and confronted future decline.

This chapter contains the seeds of the two that follow: first,

the value of the multiple lenses—comparative, historical, and ethnographic—generated by a succession of questions that required custom-made field and analytical methodologies and, second, the Euro-American controls inherent in hegemonic models in law that are discovered by firsthand experiences in the field. Throughout this chapter, the increasing importance of the civil plaintiff becomes plain in a law that since the rise of the nation-state has overall been less than hospitable to the plaintiff. But I am getting ahead of my story, in which for me the sociology of knowledge plays an important part.

The dynamics of law study had its beginnings in the nineteenth century, when anthropology was still forming as a discipline. Law, on the other hand, had had disciplinary status for centuries. Scholars who figure in the nineteenth-century were independent thinkers, lawyers and anthropologists who, it has been said, pulled the bottom out of history, a history previously dominated by biblical origins, and who fearlessly addressed the large-scale issues of their times. Those who first investigated the difference between Western and non-Western law were largely armchair intellectuals, but they nevertheless collected enough data to begin to document differences; law was stratified variously by some into stages like savagery, barbarism, and civilization—stages that are still found in Western thought processes and law and development schemes.

In the first six decades of the twentieth century, field ethnographers made significant headway in the understanding of law in particular societies, starting from the premise that those societies were discrete units. Although an interest in particular societies may have been in part a reaction to the grand armchair theorists of the nineteenth century, the premise that societies

were self-contained and set apart was also to produce a counterreaction. With the shrinking universe before us, and with the continuing diffusion and reuse of Western legal ideas in colonies and former colonies, anthropologists and legal scholars now move beyond the particular to examine the larger patterns of change that have in part resulted from Western economic expansion and the rise of East Asian economies.

THE NINETEENTH-CENTURY DEBATES

The nineteenth century provides us with numerous distinguished lawyers—among them Sir Henry Maine, an Englishman; Lewis Henry Morgan, an American; J. F. McLennan, a Scotsman; and Johann Bachofen, from Switzerland—who worked with historical and comparative methods to develop a science of society. Although Morgan was the only one among them who was also a firsthand observer of indigenous peoples, there is hardly a history of anthropology that does not count these figures as forerunners in the field, while always, of course, making reference to but not including Freidrich Karl von Savigny, the Germanic historical school of jurisprudence, and the Italian scholar Giambattista Vico. The nineteenth century was a turbulent period, a period when divisions between lawyers and anthropologists, between advocacy and objectivity, and between reform-minded and ivory tower scholarship had not yet been established.[1] These were men who used their scholarship

1. See Mary Furner's *Advocacy and Objectivity: A Crisis in the Professionalization of American Social Science, 1985–1905* (1975). She devotes much attention to economics in the 1880s, a decade when first-generation professionals wrestled with the social questions associated with industrialism.

as a means to understand their changing political present and the global impact of industrialization. It was a time when lawyers were among the leading anthropologists, when lawyers were scholars who used historical and evolutionary schools of thought to make sense of their world. Both schools—historical and evolutionary—were controversial; both created uncomfortable reactions among their wide-ranging publics.

In 1861, Sir Henry Maine examined historical materials from Europe and India, arguing that changing relations in law, notably the transition in emphasis from status to contract, were a result of societal shifts from kinship-based communities to territorially organized nations. Those who followed Maine contended that in accordance with dominant modes of subsistence, human societies were scaled along a progressive sequence of legal systems that developed gradually from self-help to penal or compensatory sanctions associated with government law.

According to Maine's biographer, the historical school was an irritant, especially as it was portrayed by Maine. Its social critics attacked the comparative historical methodology: "A hundred years ago people used to ask whether a thing was true; now they only want to know how it came to pass for true." The same critics referred to the "abuse of a method which in the hands of Maine and others had been producing such dazzling results." Others spoke of a "joint-stock-mutual-puff-and-

admiration society" (Feaver 1969: 137). It is not surprising that there was contention. The nineteenth century was a time when the laboring class was pitted against the capitalists, the aristocrats were pitted against the more democratically inclined, religion was pitted against science, and older histories with short chronologies were pitted against newer ones with chronologies stretching into prehistory.

Sir Henry Maine's "academic conservatism" was concerned with the old and the new, with the undesirability of democracies when stripped of their emotional appeal. He compared democracies with an aristocracy of intellect as the political ideal, an ideal, an aristocracy, in which there would be no scope for demagogues to challenge the future of British imperial hegemony and British domestic policies. Maine was striving for a social history:

> We of western Europe might come to understand ourselves better. We are perhaps too apt to consider ourselves as exclusively children of the age of free trade and scientific discovery. But most of the elements of human society, like most of that which goes to make an individual man, comes by inheritance. It is true that the old order changes, yielding place to new, but the new does not wholly consist of positive additions to the old; much of it is merely the old very slightly modified, very slightly displaced, and very superficially recombined. (Feaver 1969: 152)

Across the waters in the United States, Lewis Henry Morgan also had his political concerns, although his were with democracy, not aristocracy, and with evolutionary, not historical, theory. Again the biographers describe the historical context for

debate. The concerns of Morgan the Whig did not always concur with those of Maine the Tory. Morgan, a lawyer for business investors in railroads and minerals in Michigan, was caught up with his contemporaries in the task of delineating the gulf between the civilized and the uncivilized. Native Americans were to be admired. After all, the polity of the Iroquois Confederacy had inspired Morgan's position on the relative importance of democracy over property: "Democracy in government, brotherhood in society, equality in rights and privileges, and universal education, foreshadow the next higher plane of society to which intelligence and knowledge are steadily tending" (Feaver 1969: 163). Yet many thought of the Iroquois as savages, as uncultured and un-Christian.

In his studies of Native American social organization, Morgan's analytical categories came from law, his theories from evolutionary thought. Following Sir William Blackstone (1897), Morgan recognized Iroquois laws of descent by contrast; they followed the female line. Morgan used a lawyer's form to understand the league of the Iroquois, the confederacy of the Six Nations that was their polity. He examined American Indian treaties and advocated for native peoples while at the same time recognizing the savage intellectual who, as he put it, created a system of wonderful complexity. He concluded that inequality was social rather than innate (Resek 1960: 52). For Morgan, "economic man was a transient in history." By contrast, Maine had argued in his Rede lecture, "Nobody is at liberty to attack several property and to say at the same time he values civilization" (Feaver 1969: 163). The two men were locked in opposing camps.

From firsthand experience, Morgan understood the signifi-

cance of the transformation of communal property into private property in the American West. He was witness to the granting of public lands to railroads, and his biographer, C. Resek (1960: 104), comments: "In regions where Indian tribes once roamed freely, a civilized government claimed, then distributed natural resources, and finally sanctioned their private ownership. The quest for property in Upper Michigan had destroyed tribal life, brought on corporative wars, and produced marked changes in Morgan's character. Property was obviously a powerful force in human relations." Morgan's firsthand observations about property were not limited to Native Americans. Resek, quoting from Morgan's *Journal of a European Trip, 1870–1871,* reports that Morgan had only scorn for the conditions in Europe because of the extremes of poverty and wealth: "The aristocracy ride and the people carry them by their industry. . . . the poor were defrauded of their just rights before they were born" (122). Morgan was an intellectual and an activist; though offered the opportunity to be a professor, he did not think he had the disposition. He ran for the New York State Senate not because he wanted to be a politician but because he wanted to be (but never was) commissioner of Indian affairs. For him, there were wrongs to be righted.

Theoretical differences between Maine and Morgan stem most obviously from Morgan's familiarity with Native American peoples and from his observations about the notions of descent and property, observations based on original fieldwork among a group that was organized along matrilineal principles. Maine was concerned with "ancient communities" as they impinged on his contemporary world, which was organized along

patrilineal principles. The year after publication of his *Ancient Law* (1861), he joined the colonial establishment in India as legal member of the Supreme Council of the Governor-General, and later he became vice chancellor of the University of Calcutta. He was never interested in "savages," and when he writes to Morgan, he refers to himself as a "Professor of Jurisprudence" and makes disparaging reference to the "anthropologists."

Morgan apparently had a nervous disposition; Maine, as described by Robert Lowie (1937: 50), was "the embodiment of serene wisdom coupled with unusual subtlety." He was an armchair anthropologist who, disregarding the disparities in wealth in the English countryside, dedicated himself to comparing Roman law and contemporary Western legal systems with early Indo-Germanic law. Ethnography influenced only a very small part of his thinking. He was a historian dealing with "the real" as opposed to an evolutionist making speculative use of ethnographies. In his *Ancient Law,* Maine treated law as inseparable from kinship, religion, and morality. A historical functionalist, he has a place in history that is justified by the fact that he enlarged the scope of comparative law and clarified such concepts as tort and crime, status and contract. He took issue particularly with Morgan's theories of matrilineal descent, which he felt were "repugnant to basic facts of human nature" and the idea of patrilineal authority based on the sheer physical superiority of the male of the species (Feaver 1969: 167). To say mother right came before father right was to challenge the patri-monogamous family as an essential part of the evolutionary models that stipulated set stages of transformation.

Imagine the scene: Two nineteenth-century schools of thought about matriarchy and patriarchy promulgated by male lawyers, in an age when equality and its opposite were burning issues. Morgan, the upstart American, described a striking form of descent in which children were assigned to the mother's tribe and in which property, titles, and offices were passed through the matriline; the son did not succeed the office of the father and did not inherit his father's property, only his mother's. In a society dominated by Victorian male household heads, assertions that women had once been the politically powerful sex appeared to be wild-headed, free-for-all, sloppy scholarship. Morgan staunchly defended his views and even invited Maine to come to the United States to see for himself. Today we recognize the existence of different lines of descent, but in the first half of the nineteenth century, what was thought possible was intimately connected to subjective experience. Particularly with regard to the history of property, Maine turned to India for corroboration, Morgan to the Native American peoples among whom he lived and traveled.

Disagreement was plentiful between these and other lawyer-anthropologists. McLennan the Scotsman, Bachofen the Swiss, and Maine the Englishman, for example, were heralding widely divergent views on the legal position of women. Maine took the position that women "had had no individual personality in early times, and that while similar conditions continued to prevail in Western progressive societies there had been a constant widening of the personal and proprietary liberty of women"; in contemporary India, he noted, the wife remained bound to the legal personality of her husband (Feaver 1969: 142–43). Maine's

position was in direct opposition to Bachofen and McLennan's theses of early matriarchal ascendancy.

Several recent critiques in anthropology underscore the degree to which Maine's immersion in the ideas and assumptions of his own culture led him to conclusions about the progressive evolution of legal forms, conclusions that were not supported by the facts (Kuper 1985; Starr 1989). June Starr, an anthropologist and lawyer who has studied the status of upper-class Roman women as it related to their ability to control property, scrutinizes Maine's use of this data in his *Ancient Law.* She concludes: "Females were not free of paternal and male guardianship. They did not have control of their property or even their own persons in the second century A.D. as Maine had asserted. . . . Although Maine shifted his positions later, in *Ancient Law,* he had stated: 'Ancient law subordinates the woman to her blood-relatives, while a prime phenomenon of modern jurisprudence has been her subordination to her husband' " (Starr 1989: 357). Starr goes on to point out that "much of the impetus for women to gain voting rights in Great Britain and the United States in fact grew out of the laws that restricted married women from controlling their inherited property" (358). She goes to the trouble of correcting Maine's conclusions for her anthropological audience because she (as well as Kuper) believes that his hold on anthropologists is still strong. Refuting Morgan's description of Iroquois social organization would be much more difficult, although his evolutionary scheme has been attacked by anthropologists more severely than has Maine's progressive evolution of legal forms.

What is of interest today is the persistence of the male bias

that led to erroneous conclusions in Sir Henry Maine's work. In their excellent work titled *Women and Colonization,* editors Etienne and Leacock (1980) point out that the Victorians looked upon women in non-Western societies as oppressed and servile beings who would eventually be liberated by attaining a progressive, civilized life. In twentieth-century anthropology, this same male bias, if in a more sophisticated version, still prevailed, not only among distinguished male anthropologists such as E. E. Evans-Pritchard and Claude Lévi-Strauss (Etienne and Leacock 1980: 1–3) but also among some feminist anthropologists, such as Sherry Ortner and Michele Rosaldo (1–5). A paper on the Seneca by Diane Rothenberg in this same 1980 collection shows how male bias (including Morgan's) has led to misinterpretation of the relation between the sexes and the meaning of the observation that the land "belonged" to the women.

Today the issues sound familiar: the nature of nature, the nature of progress, the role of political democracy in the absence of economic democracy. For Maine and Bachofen, democracy was repugnant; for Morgan and McLennan, it was an inspiration. But it is clear in reading nineteenth-century work, especially the ethnographic work, that they all considered progressivism a creed (as it is considered today), whether it came about by legal reform (Maine) or material betterment (Morgan). The ethnologizing of the past was linked to their legal anthropologies as well as to their visions of the future. In all cases, the veracity of history was at stake; so too was what Bachofen called "cultural subjectivity." New worlds were opening up, world conditions were rapidly changing, and ethnocentrism was (and remains) deeply entrenched.

FIELDWORK AND REALISM

In the early twentieth century, two of anthropology's distinguished scholars were engaged in debate about the boundaries and meaning of law. By 1926, Bronislaw Malinowski had broken with past armchair methods and used firsthand ethnographic field observations to destroy widespread myths about law and order among preliterate peoples. His work on the connection between social control and social relations foreshadowed a generation of anthropological research on how order could be achieved in societies lacking central authority, codes, and constables. He pushed the boundaries of law to include more than the formal or informal rules and restrictions; for example, he included theories of reciprocity, exchange, or binding obligations. Malinowski's contemporary, A. R. Radcliffe-Brown, instead used a jurisprudential approach, following Roscoe Pound's definition of law as "social control through the systematic application of the force of politically organized society" (Radcliffe-Brown 1933: 202). Radcliffe-Brown's approach, which defined law in terms of organized legal sanctions and concluded that some "simpler" societies had no law, had very little impact on the ethnographies of future generations of anthropologists studying stateless societies.

For a while, the question of whether all societies had law was hotly debated. If law is defined in terms of politically organized authority, as Radcliffe-Brown and his adherents would have it, then not all societies can be said to have law. Only those societies that have created legal institutions of government such as courts and constables have law. But if—following Malinowski—law is defined as the processes of social control by which

any society maintains order and discourages disorder, then all societies can be said to have law, and social control becomes more or less synonymous with law. Under this definition, all societies can be said to be "civilized." Once again, the conflict is between hierarchy and more egalitarian democratic relationships.

The debate over the boundaries and meaning of law is, of course, an old one in other disciplines too. In political theory, for example, one tradition identifies the laws of a society as the minimal rules of conduct acknowledged by the members of that society, whereas the opposing tradition identifies the laws of a society as the formal commands of the governing authority of that society. Thus, Locke posits that there is law in primitive societies, and Hobbes argues that there is no law without a state political organization. Marxian theory takes a divided stand on this question. More recently, legal realist Karl Llewellyn was passionately against narrowing the field of law. As he stated his position: "So I am not going to attempt a definition of law. . . . A definition both expands and includes . . . and the exclusion is almost always rather arbitrary. I have no desire to exclude anything from matters legal. In one aspect law is as broad as life" (Twining 1973: 591). But anthropological field-workers soon moved beyond the issue of definition and contributed to an understanding of this question by extending our knowledge of human variation and sociocultural transformations. Today most anthropologists of law do not define law in any narrow way, although they may speak of universal attributes of law (Pospisil 1958). Nor do they attempt to impose on their data Western distinctions such as those between crime, tort, delict, sin, and immorality. In line with the argument over the culture-

boundedness of Western jurisprudential categories, few anthropologists apply the private/public distinction cross-culturally. Instead, ethnographers adopt, for purposes of analysis, the analytical or folk categories of preferred theories (Bohannan 1957). And so it was with *The Cheyenne Way.*

In 1941, when many Americans were still reeling from the effects of the 1929 stock market crash and the violence and conflict that had erupted on the European and Pacific stages, people were thinking about wars to end all wars, about how to make a better world, and about how to make laws fit with the fast-changing realities of mass production and mass consumption. That year marked the publication of *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* by Karl Nickerson Llewellyn, a Yale-trained, flamboyant, and crusading professor of law at Columbia University, and E. Adamson Hoebel, a modest professor of anthropology. Together the two scholars, one a leader in the school of legal realism, the other influenced by the relativist and functionalist schools of anthropology, began a new inquiry into law and its relation to culture and society. Their theory of law was based primarily on lawbreaking. Their book is an excellent introduction to the more-general thought processes of Karl Llewellyn, processes tempered by the Cheyenne and stimulated by the political and economic ferment of the 1930s in the United States.

The Cheyenne Way was an achievement of cooperation between a distinguished law professor who admired the craft of law practice and who emphasized the investigation of trouble-cases, and a seasoned anthropologist for whom trouble-cases were central to the analysis of law in its cultural context. The endeavor was extraordinary because the setting for Llewellyn

and Hoebel's investigation was among an American Indian people and because an explicit purpose of their cultural analysis was to subject Western ideas about law to comparative scrutiny.

The Cheyenne had originally inhabited the woodland lake country of the upper Mississippi Valley and were among the westernmost speakers of the Algonkin languages. By the beginning of the nineteenth century, and as a result of the often violent contact between the Cheyenne and European and American culture and the United States government, the Cheyenne had adopted a new economy based on horse culture and buffalo hunting. It was an economy that caught white people's imagination. Although Llewellyn and Hoebel were not the first to study the Cheyenne, they thought it necessary to supplement the published data on the Cheyenne with their own fieldwork among the northern Cheyenne of the Tongue River Reservation at Lame Deer, Montana. They worked together during the summer of 1935; the following summer Hoebel returned to Montana for additional materials. But *The Cheyenne Way* does not set out to present a full outline of the history and culture of the Cheyenne. Rather, it focused on comparing modern and primitive law.

By the time Llewellyn arrived in New Haven as a student, William Graham Sumner had already had a long career at Yale. Sumner's political sociology had incorporated the comparative method of European anthropologists and ethnographers. Sumner also recognized the all-important function of extralegal methods of social control. His *Folkways* (1907) was widely read, and his ideas about ethnocentrism and his critique of belief in the superiority of one's own society to that of others were having impact. For Llewellyn, folkways (the current ways of doing

things in a society to satisfy human needs or desires) became law-ways, and he came to share Sumner's firm conviction that ethnography should be preeminent as the "data" and substance of social analysis. At Yale Law School Llewellyn came into contact with the early exponents of what would later be called legal realism: W. N. Hohfield, W. W. Cook, and A. L. Corbin.

Legal realism was a challenge to the formalism of Christopher Columbus Langdell, who had become dean of Harvard Law School in 1870 with a mandate from the president of Harvard University to revolutionize the law school. Langdell's most far-reaching innovation was the introduction of the case method for teaching law. Langdell considered law a science that proceeded inductively, using cases as primary sources. The concepts and principles of law unfolded through a series of cases from which the genius of the common law was extracted. But only some cases were useful for his purpose; the majority of cases were useless and worse than useless for the purpose of systematic study.

Although the new Langdellian method had its value, legal realists criticized it for severing the ties between the study of law, American scholarship, and everyday life. The method was, by its formality, strictly segregated from scholarly life. The formal style stressed order and logic in the law. At the beginning of *The Common Law* (1881: 1), Oliver Wendell Holmes, a contemporary of Langdell, wrote that "the life of the law has not been logic, it has been experience." This statement was to become an identifying mark of the school of legal realists of the 1920s and 1930s.

Karl Llewellyn, Jerome Frank, and others battled against a jurisprudence of concepts and for one of experience (see Hull

1997). Legal realism sought to represent the whole by means of the parts, which were thought to evoke a cultural and social totality. The realist judges and writers had little tolerance for legal tradition for its own sake. Law had to be an all-around working tool that questioned the rules, the citations, the fictions, and the apparent rationalities stemming from deductive reasoning. The philosophy of Langdell, they argued, had no place in a dynamic American context. Dissent became a more common practice, prevailing over the United States Supreme Court's usually unanimous decisions. The realist movement brought law back into the world of intellectuals, into the scholarly life of a less specialized, narrow sort, and had some influence on law school curriculums. Not all were convinced by the realists, and for some it was an unreal realism, but the realist context helps explain why *The Cheyenne Way*—in spite of its extravagant style, its often involuted expression, and its lack of attention to the ethnographic literature—was so significant (Malinowski 1942: 1237, 1250).

The relationship between Llewellyn and Hoebel began in 1933, when Hoebel was a twenty-six-year-old graduate student in anthropology at Columbia University in New York. It was an exceptional time in anthropology. Franz Boas and Ruth Benedict were the leaders in the field, but neither was interested in Hoebel's idea of studying the law of the Plains Indians: since the Plains Indians had no well-defined government structures, why would they have something called "law"? Malinowski's widespread theories about the universality of law, long known to readers outside anthropology, had, it seemed, not yet penetrated the thinking of Columbia anthropologists. Karl Llewellyn was then Betts Professor of Jurisprudence at Columbia University Law School. At age forty, he was already a well-known advocate of the controversial school of legal realism. He had been exposed to sociology and anthropology while studying at Yale and abroad and had found in those disciplines ideas that were congenial to his legal realism program.

Llewellyn and Hoebel's work has been described by many as the most successful example of an interdisciplinary collaboration. According to William Twining's (1973) biography of Karl Llewellyn, Llewellyn spent only ten days in fieldwork among the Cheyenne, but it was he who contributed the basic theory and who was the source for the case-method approach. Hoebel was the field-worker, experienced in the culture of the Plains from earlier work with the Comanche and the Shoshone, and he collected the data for the ethnographic portions of the text. Thus the collaboration was a meeting of realistic jurisprudence and functional anthropology. Both Llewellyn and Hoebel were gifted writers with a knack for the poetic turn of phrase and the apt anecdote to portray cultural systems, but they had very different personalities. Llewellyn is often described as robust, contentious, vigorous. Hoebel is known for a more modest, composed style and his preference for order and harmony. Their differences made for good collaboration, but the engine was clearly Llewellyn's.

In *The Cheyenne Way,* Llewellyn and Hoebel devised a methodology for studying what was then called "tribal" law—the detailed study of actual disputes. For them, it was apparent that where there are no books, there is only law in action. The work was based on the law-jobs theory, a harmonious juristic model,

which posits that in all human societies, group survival and cooperative activity depend on the satisfactory settlement of dispute or on its prevention.

The Cheyenne Way differed from Llewellyn and Hoebel's later collaboration on the law-ways of the Keresan Pueblos of the Southwest. The aims of that investigation, which was undertaken by invitation of the special attorney for the United Pueblos Agency, were to be practical. The recording of Keresan Pueblo law would support its continuance and defend it against those who would question and destroy traditional ways. The very act of recording and publishing Pueblo law would *supposedly* protect the people's autonomy.

Llewellyn became especially interested in the contradictions of the Pueblo experience, which combines theocratic, communal, and totalitarian features. As he stated, he wanted to investigate

> the relation of religious freedom to a Church-State Unity and the problems of toleration, tolerance, and repression of dissenting views. . . . Or the problem of maintaining or adjusting an ingrained ideology without disruption of its values, with a younger generation affected by a wider and utterly diverse ideology; and of producing peaceful relations with an utterly diverse neighboring, and to some extent predatory, culture. Or, the manner and degree in which officially unrecognized changes creep in under maintenance of the older ideology and forms. (Twining 1973: 568)

Hoebel had other interests, including his wish to test Ruth Benedict's tantalizing idea that the Pueblos had a system of social control enforced not by coercive physical sanctions but rather

by an intense degree of personal internalization of norms of social cooperation (Hoebel 1969).

In *The Cheyenne Way,* Llewellyn and Hoebel's interests dovetailed more than they did in the Pueblos study, where Llewellyn was increasingly a practitioner, drafting codes and giving advice while Hoebel remained detached and, some say, less sympathetic to the Pueblos and less interested in Llewellyn's involvement in the practical aspects of the project. In discussing the partnership, Llewellyn's biographer put it this way:

> The success was due in part to common, in part to complementary, characteristics. Both men were interested in jurisprudential questions and this provided an identity of objectives, the absence of which is the first obstacle to this type of collaboration. Both favoured the closer integration of the social sciences. Temperamentally they were well suited: each had a touch of the poet. . . . in other respects their characters were complementary, never more so than in the matter of obtaining a balance between imaginative insight and hard fact. Llewellyn's genius lay in devising new approaches, he was less fitted for applying them systematically. His inclination and aptitude for sustained fieldwork were limited. Hoebel, on the other hand, was both by training and temperament an excellent fieldworker . . . and he was prepared to accept the role of disciple of Llewellyn's theories. . . . If Hoebel had been a rebel against Malinowski's functionalism, or if Llewellyn had been a more orthodox lawyer, collaboration would have been harder and much less fruitful. (Twining 1973: 568)

Llewellyn was a man with scope, a man who wanted a diverse playing field. Nothing less would allow him the wide

angle needed for cultural critique, cultural improvement, or simply cultural illumination. A passage from the last chapter of *The Cheyenne Way* indicates what he and Hoebel had in mind: "What the Cheyenne law-way does for Americans . . . is to make clear that under ideal conditions the art and the job of combining long-range justice, existing law, and the justice of the individual case, in ways reasonably free of the deflecting pressures of politics and personal desire, need not be confined to the judging office. It can be learned elsewhere and learned rather generally" (Llewellyn and Hoebel 1941: 335). Realistic law was to be integrated into every aspect of society. Legal formalism, however, was a disintegrating force. Llewellyn was an uncompromising foe of such formalism, an advocate of a practical, experiential jurisprudence rather than an obscure or philosophical one. Collaboration with an anthropological field-worker suited him perfectly, for without a written law, experience perforce became central.

Llewellyn had only a peripheral interest in the Cheyenne, and the ethnographic in general, but he recognized the primitive as a powerful frame within which to represent alternative possibilities for juridical planning to an American readership. If, on Llewellyn's side, the German romantics with their ideal of holism and the interweaving of all the parts into the whole were crucial to the realist's law, then the failure of the legal realists and the functionalist anthropologists of their day to see eye to eye was no surprise.

The point is that Llewellyn and Hoebel shared intellectual roots they might not have shared if Llewellyn had been a more orthodox lawyer of his time or if Hoebel had been a less broad-gauged social scientist. But they both had their blind spots. *The*

Cheyenne Way deals synchronically with the historical period between 1820 and 1880. In the cases Llewellyn and Hoebel considered, individual interests, particular personalities, and the general interests of the whole group lay behind the rules, both legal and nonlegal, used to arrive at solutions. Cheyenne dispute settlement resulted in the reordering of society. They attended to the law-jobs that any group faces in the process of becoming and remaining a group: multiple informal modes of control like those found in any society reinforced the law-ways and were used to "clean up social messes" (20)

The unrealism of this kind of functionalist realism stems from an inability to deal with Cheyenne law as an open system. Their book ignores the harsh realities of the effects on Cheyenne law of the white people's conquest and the decimation of the Cheyenne people through disease and forced migration. That the Cheyenne were left in turmoil by what, in the Pueblos context, Llewellyn willingly called a "neighboring predatory culture" is barely alluded to in *The Cheyenne Way.* Llewellyn and Hoebel were not interested in what genocide does to law-ways. Rather, in 1941, theirs was a sense of romance and discovery, an insight into Cheyenne culture as it bore on their own culture.

One can see both their romantic vision and their critical purpose in their comments on the pipe-procedure type of settlement:

> For if a law technique is to make its way without the aid of centralized will and force to drive it through, it must not only be effective socially, but must also make personal appeal. . . . The spread of a pattern of process—or rule—by growth and contagion, by what one may term the more

> democratic processes, is quite another matter from its spread by way of authority. One can match the delay in the contagion of the superior Cheyenne technique of chief-and-pipe with the nonsuccess or slow spread of many of the finest pieces of case-law hit upon in the last half-century by one or another of the multi-headed courts among the United States. (47)

Trouble-cases, they believed, provided "the safest main road into the discovery of law" (29).

The Cheyenne had no legal professionals and scarcely anything like fixed rules of law, but they were not automatons. They could innovate and, under new circumstances, create new law. They provided an example of the cultural malleability of human institutions and by example showed that certainty and form need not be sacrificed to achieve flexible justice. Solutions to modern problems were to be found in other cultures.

The 1920s and 1930s appear now as a time of reassessing dominant ideas and of borrowing across disciplines, and the intellectual stimulus provided by this borrowing changed readership patterns. World War I, the 1929 stock market crash, and the Great Depression that followed had caused uncertainty and major changes not easily explained by existing theory about social order. For students of American anthropologist Franz Boas, cultural critique was grounded mostly in the study of Native Americans, through whom writers could show that there were different ways to order society that were at least as rational as ours. Few fields in the 1920s and 1930s were untouched by the critical insight provided by this ethnographic encounter with other peoples, an encounter that showed us a way of better understanding our own culture.

In *The Cheyenne Way,* Llewellyn and Hoebel treated individual cases as emerging from problems that required solutions, the basic general task of handling trouble-cases being to maintain order. They rejected the idea of law as the sum total of abstract rules; besides, some societies use rules only sparingly: "The trouble-cases, sought out and examined with care, are thus the safest main road into the discovery of law. Their data are most certain. Their yield is richest. They are the most revealing" (29). But if trouble-cases define the norm, their value lies in the revelation of the command that prevails in the pinch. The notion of justice is key. Cases are not merely opportunities for the elaboration of doctrine; rather, laws are imperatives that stem from community life. The case method was a key to the law in motion: law emerges from the morality, decency, and good taste of a people. Law-ways are not set down as things apart; instead, they cling close to tribal life as it evolves.

Some scholars insist that the case method, with its focus on institutionalized dispute settlement or conflict resolution, is unduly restrictive if one is interested in getting a picture of the full range of sociolegal occurrences or in grasping differential knowledge of the law. The incidence of full-fledged conflicts of a conceptual or moral order may be high in some areas, such as the regulation of sex and marriage, and extremely low in others, such as property disputes; and the overemphasis on conflict leads to an uneven coverage of the total field of law, especially substantive law. For these critics, the "troublefree" cases of the working systems of property or marriage, for example, become a necessary check on the trouble-case rather than the other way around. There may be an unstated assumption in the anthropology-of-law literature that law knowledge is uni-

formly distributed and free-flowing, but lawyers know it is not so (Dwyer 1979: 313).

But for Llewellyn, instances of voluntary observance of law constitute invaluable units of analysis because these cases are more apt to round out the feel for and the feel of the law picture (Llewellyn and Hoebel 1941: 40). As a methodological instrument, the trouble-case has limitations for the study of substantive law and its practice, and in fields of law where litigation is rare, researchers may get a skewed idea of law if they focus on the trouble-case. In such circumstances, the study of troublefree practice rather than trouble-cases may indeed be, as Llewellyn and Hoebel wrote, "the safest main road into the discovery of law" (1941: 29).

Nevertheless, *The Cheyenne Way* challenged accepted social science theory. For example, it refuted Durkheim's theory that law moves from punitive sanctions to restitutive sanctions as modern social structures evolve from primitive structures. Although according to Durkheim's evolutionary scheme the Cheyenne were classified among the "primitive" peoples of the world, their law-ways were actually "developed" because restitutive sanctions predominated over punitive ones. Furthermore, Llewellyn and Hoebel also broke new paths with the notions of "drift" and "drive" as they operate in the dynamics of law. Llewellyn and Hoebel brought us to focus on relatively unnoticed changes that have a cumulative impact, as distinct from more recognized, conscious drives for change.

The legal and political context in which Llewellyn and Hoebel wrote gives their work special significance beyond its contribution to social science. The theory of law that Llewellyn was developing was a blow to law school education as it had

been practiced before and since Langdell. Llewellyn's theory was also a critique of American judges and the inability of our system to bend with the dynamics of a changing world. The laws of other peoples have often been studied with the expectation that such study would either sustain or challenge current views of law at home. In the seventeenth century, an emphasis on natural law inspired interest in foreign law to prove the universality of natural law principles of the home system. In the eighteenth and nineteenth centuries, many thought that the essence of law was to be found in rules and believed that legislation was a creative force to be used in the molding of society.

In Llewellyn and Hoebel's time, the case system was at the center of legal debate. Cheyenne cases illustrated the idea that the meaning of law was to be found in the wider cultural processes; cases were not isolated instances independent of society. Llewellyn and Hoebel's view of the legal process led them to argue that, even in our own culture, we should include under the rubric of law much more than what is decided by judges in the courts. To see the Cheyenne, then, is to see a good deal of Anglo-American law. The wonderful proficiency that the Cheyenne displayed in handling friction can be instructive in an evaluation of the American system of law and its practitioners. Llewellyn and Hoebel made an important and original contribution by combining, in one volume, the study of "modern" and "primitive" law in such a way that the work of the Cheyenne judges demystified the model of Anglo-American legal reasoning. The ethnographic data provided examples of how law as process operated in synchronism with conventional wisdom. If the Cheyenne were capable of "juristic beauty," then conventional Anglo-American jurisprudes should be capable of

humility in the task of reconsidering juridical purpose. Understanding that some cases restored harmony not through the exercise of authority but by means of compromise challenged the notion that order is achieved solely by courts, constables, police, and the law writ through adversarial and punitive procedures.

One reviewer put it more specifically:

> The abundance and intricacy of current material has made us sharp on the doctrine, the rule, the mooted point. But the larger issues of office and outline we are prone to neglect. Intent upon them and for want of a better laboratory the authors are driven back to the usages of a more direct people. . . . It has taken a brilliant use of a superb technique for the authors to say that the life of the law is not observance but function . . . a sermon to the brethren of the American bar. (Hamilton 1943: 233–34)

In sum, then, the jurist and the anthropologist found what they were seeking. A vital part of the juristic-anthropological method is using a wide-angle lens to examine the courts, the judges, and the rules of law themselves. The salient task is to determine how well the law fits the society it purports to serve and how able the law is to meet new contingencies in that society. In the best-case scenario, the institutionalized form limits its arbitrariness and passion. Though criticism of legal dogmas of the past may result in a *theory* of law as the expression of the social opinion of the generation whose law it is, realistic jurisprudence offers a way of fusing the notion of *practice* with the notion of "standard," by arguing the superiority of method over content. But anthropologists or outsiders to the jurisprudential debates do not readily grasp the broader intellectual significance of *The Cheyenne Way*—that is, they do not recognize it as a critique of law school education and as a criticism of American judges and the seeming inability of our system to meet the challenge of rapidly changing circumstances.

The shift of scholarly attention from an emphasis on systems of social control to systems of disputing, from positive inducement to the handling of norm violation after the fact, was a predictable result of the narrowing of the subject matter and collegial interaction between anthropologists and American-trained lawyers. Whereas Malinowski (1926) had deliberately formulated a wide-angle framework for understanding law in society, Llewellyn and Hoebel restricted the focus to public forums. Using a technique adumbrated by others, Llewellyn and Hoebel's work on the Cheyenne marked the beginning of many years of concentration on the "trouble-case" approach, with social scientists examining how law breaking is handled in a society. Thenceforth, the unit of analysis was the case, and more often than not, the case as handled through public means. Not surprisingly, this kind of specialization resulted in theories that were more static, more correlational, less concerned with change, even though anthropologists were often studying societies in states of rapid change brought on by political, religious, and economic colonialism.

THE PERIOD OF EURO-AMERICAN HEGEMONY

From the late 1960s to the mid-1990s, lawyers and anthropologists intersected frequently as the sheer numbers of both in-

creased. Some lawyers became anthropologists. Some anthropologists became lawyers. But more often than ever before, academic lawyers moved away from technical law toward the impact of the law on everyday life, and in so doing practiced a kind of social science. Others never integrated but instead expanded their domain of interest, literally providing results for the other disciplines through a manner of independent invention, rediscovering, for example, what anthropologists already knew (Zorn 1990). We bumped into one another in the field—in Africa, in New Guinea, in Latin America, on international development projects. We met at law reform conferences in the United States, and we founded scholarly movements such as the Law and Society movement. Critical Legal Studies (CLS) followed with more *picante,* that is, more bite. In short, political and scholarly boundaries became blurred, and so did interests. The politics of law was now a serious intellectual endeavor.

For Llewellyn and Hoebel, far from the political hellholes of their country, the way of the Cheyenne was a catalyst for rethinking the meaning of the interconnections between law and culture. In recapitulating the 1920s and 1930s, contemporary academic intellectuals may have a sense of being there, for the present is also a period of reassessment of dominant ideas across national and disciplinary boundaries and a time to rethink, among other things, the place of law. In the 1990s, law was a matter of global proportion in both its constructed and indigenous forms. After supplanting France and Germany during the 1950s as the leading legal system within the Western legal tradition, American legal culture has now achieved worldwide leadership status (Dezalay and Garth 1996; Mattei 1997: 226–27, 233).

Today there is a new generation of legal realists. CLS is an intellectual movement whose intent is to examine the ideology and practice of Anglo-American law. Once again CLS scholars have adopted cultural analysis as a method; although they seldom partner with anthropologists, and they have no intent to study the exotic other. Instead, they are exoticizing the contemporary American scene. Using ethnographic and literary techniques, they examine legal education, discourse, and tradition and the social effects of law. Their purpose goes beyond realistically describing a working system. Many aspire to understand law as cultural hegemony (Kairys 1982). Ipso facto, documenting hegemony means that they no longer perceive cultures as closed and bounded. There are no harmonious Cheyenne as an escape. Nor are they rethinking interconnections. Their work is paradigm busting. Social theory has replaced social science. David Kairys is clear about why: "As law and justice are increasingly distinct and in conflict," there is "more questioning and interest regarding the social role and functioning of the law than in any other period over the last fifty years" (1982: xi). The concern was to identify law's core, its autonomy; the focus of critical thought was legal ideology. Critical race theory and feminist legal theory were among the results of the CLS movement, which was largely confined to law schools and the law case.

The critical thought of the CLS movement repudiates the idealized model of law operating with a routinized decision-making process and continues in the venue of the legal realism school. According to CLS scholars, the idealized model is false, nonexistent: "The problem is not that courts deviate from legal reasoning. There is no legal reasoning in the sense of a legal

methodology or process for reaching particular, correct results"; for the CLS group, democratizing the law means increasing "popular participation in the decisions that shape our society and affect our lives" (Kairys 1982: 3). In so arguing, these scholars expose the fact that under the present system, "powerful, largely corporate, interests, the patriarchal, authoritarian family, and, in selected areas, government officials are not to be interfered with, by the courts or by the people." "Traditional jurisprudence," they argue, "ignores social and historical reality with myths about objectivity and neutrality" (4). They reject notions of technical expertise and objectivity that serve as vehicles for maintaining existing power relations. Thus, CLS scholars are mainly lawyers, are mainly based in the United States, and mainly write about their own law.

The Law and Society movement gathers in scholars from law, the fields of social science—sociology, anthropology, psychology, criminology, political science, history—and the humanities, scholars who locate their work both nationally and internationally. For them, law is not autonomous but embedded in society and explained by forces outside the law. Originally, the law and society scholars took their impetus from the United States' development and modernization activities, dubbed by one author as "legal imperialism" (Gardner 1980). The Law and Society movement was initially reformist in nature. Its proponents believed that law could be used to achieve social change and to remedy inequality and injustice. They ascribed to Western law the intention of promoting freedom and democracy, of enhancing social equalities in the Third World. Some lawyers in former colonial sites, such as Papua New Guinea or in Africa, began to map the separate domains of customary and Western

law in preparation for the creation of new nation-state law. However, when these development lawyers came home, their experience abroad translated for some into law and society work at home (Friedman 1986). There were, of course, exceptions, such as Richard Abel of UCLA Law School, who in addition to his legal training earned a degree in anthropology and pursued myriad interests in Africa and as well as in the United States.

Some scholars came out of the law and modernization efforts with cross-disciplinary training and for a time effected change in law school curricula. For example, in 1971, David Trubek organized the Law and Modernization Program, in which I was a half-year teaching partner, at the Yale Law School. Trubek, who was very much a part of the law and modernization project in Brazil that James Gardner (1980) chronicles, and I taught a core course heavily oriented toward Weberian social science and ethnographic theory and methodology, and many interesting students participated in the course. The Yale Law School program financed, for example, the fieldwork in Rio de Janeiro of Boaventura de Sousa Santos, who was trained in law and philosophy. Using ethnographic techniques, he studied a squatter settlement, a favela he calls "Pasagarda." Later on in his career, he was involved in the CLS movement and in the exploration of the notion of "informal justice." In his book *Toward a New Common Sense: Law, Science, and Politics in a Paradigmatic Transition* (1995), Santos localizes power in the state, in law, and in science. He speaks of the "plurality of legal orders" in the context of globalization. The book is his contribution toward a paradigmatic theory of legal change.

From a more grounded, nonacademic perspective, neither

Critical Legal Studies nor Law and Society is as immediately involved in activism as Lewis Henry Morgan, the movement efforts of Karl Llewellyn, the law and economics neoliberal activists, or the public interest law activists. Indeed, it is only the exceptional instance, such as those community groups found in Madison, Wisconsin, in which academic contributors interact with other law movements, such as the public interest law movement. Public interest work does not generally attract much attention from anthropologists or law school professors in terms of either activism or published work. Disdain of such work is justified by some because of the reformist rather than revolutionary goals of public interest people, by others because they think public interest work is revolutionary rather than reformist. Interestingly, the only major figure of our times who called his own law project revolutionary was President Reagan. However, he did not admit to the economic implications of his law project.

The Law in Economics movement is most commonly associated with the Chicago School of economics and Judge Richard Posner. This movement is one of two examples in which a social science paradigm, namely, economics, replaced legal jurisprudence in United States antitrust law. (The other example, from psychology, I mention later in relation to Alternative Dispute Resolution.) Ellen Hertz's analysis of this paradigm shift is counterintuitive:

> Why have lawyers, usually amply able to protect themselves, allowed the legal subdiscipline of antitrust jurisprudence to be taken over by an economic paradigm? Indeed, this phenomenon is not limited to antitrust law: it has repercussions in tort law, contract, property, and environmental law as well. The answer, I believe, lies in *the declining faith among legal scholars that law is or should be an autonomous discipline* [my emphasis]. This critique of law comes from many directions—critical legal studies, feminism, law and economics, law and literature—and it is generally a move one might applaud. However, in this instance . . . one of its effects has been to weaken the law's ability to take a position on the morality of business. (1991: 2)

According to Hertz, who is herself both a lawyer and an anthropologist, this phenomenon is not law *and* economics, nor is it law *and* anthropology. It is about the shifting dynamics of hegemonic paradigms—Chicago School economics and the Harvard School antitrust paradigm, and the readiness with which President Ronald Reagan replaced heads of the Department of Justice's antitrust division, the Federal Trade Commission, and many federal judgeships with Chicago economists, thereby turning around antitrust enforcement 180 degrees.

Old-style neoclassical economics at the University of Chicago began in the 1930s and 1940s with people like Frank Knight and Henry Simon and then moved into the new Chicago School of the 1950s, 1960s, and 1970s (led notably by Aaron Director, with students such as Posner and Robert Bork). This history of the two periods is crucial because it shows how the new Chicago School economics have altered, even perverted, the original ideals of neoclassical economics by taking its theoretical assumptions—that market information is equally available to all; that corporations will constantly strive for higher profits, lower costs, and more efficient production; that entry into industry is costless—as accurate representations of the real world, in spite

of numerous and famous critiques of these assumptions by economists such as Joan Robinson. What was initially viewed as a "radical fringe" (Posner's term) came to be taken seriously and—buttressed by the assertion that antitrust law was stifling American business in a strongly competitive international environment—eventually replaced the Harvard School antitrust paradigm. This book is not the place to elaborate this story, but anthropologists might be intrigued to explore what makes certain paradigms succeed in the absence of "fact or evidence" and how such paradigms change the rules of the legal game.[2]

Public interest law is the name given to work done in the public (not private) interest by lawyers mostly outside the academic world, and often associated with the work of Ralph Nader. American public interest lawyers work on structural issues, such as health and safety, that involve not only the courts but also other branches of government. Their interest is often preventative. Discussions of their efforts have appeared in a plethora of books written for the public (e.g., R. Nader 1965; Wasserstein and Green 1970; Green 1975; R. Nader and Smith 1996), and often their efforts are documented in the *Congressional Record,* in current journals, and in the national and international press. Unlike the academics who write about daily life but are removed from it, public interest lawyers are actively lobbying for change. And sometimes their opponents are part of yet another law movement—law and economics—which has also only peripherally involved anthropologists.

2. The anthropological reader might gain some courage in such an endeavor by reading Richard A. Posner's "A Theory of Primitive Society, with Special Reference to Law" (1980). Although it is an example of primitive thinking, a combination of hubris, half-truths, essentialisms, and distortions, the article is nevertheless stimulating, much in the way science fiction is. Posner has anthropomorphized the market and reduced "primitive society" to a recipe in order to prove that the legal and other social institutions of primitive society are economically rational because they value efficiency.

Public interest lawyers work for a just society as defined by the high expectation levels of those who founded this great political democracy. They are motivated by the fact that the number of claims filed in the United States today (nine out of ten wrongfully injured people do not file a claim) is low compared with the number of civil suits per capita filed in the early nineteenth century. They are concerned with economic barriers to justice and with the attempt to preempt the common law of torts. Because the consumer is a focal concern, public interest lawyers treat standard contracts of adhesion and the attendant giving up of rights to go to court as perversions of justice. The public interest professionals see lawyers as the architects of justice in our society, as people with a mission to address the maldistribution of power and its relation to justice issues.

Of these four movements, the Law and Society movement is the site of most of the overlap between anthropologist and lawyer academics, mainly in the context of the Law and Society Association; and as I noted, with the exception of minor forays, such as testifying in Indian land claims, facilitating mediation, or laying bare sham mediation procedures, we anthropologists are not commonly found in direct action research relative to law in the United States. The anthropologists who are members of the Law and Society Association overlapped with the lawyers' project. A number of anthropologists began to work in the United States, which few had done previously, or at least

they worked in the Western world, on issues of increasing interest to law professors. Anthropologists Sally Merry (1990), Barbara Yngvesson (1993a), and Carol Greenhouse, Barbara Yngvesson, and David Engle (1993) worked on issues of class, region, and local communities. Although what they wrote can be read in the tradition of cultural critique, some anthropology of law as practiced in the Law and Society Association lost the primacy of a comparative perspective gained from fieldwork in non-Western sites. Other anthropologists went abroad—to Tibet, the Pacific, the Caribbean, Africa, and elsewhere—and they produced the first of a genre of anthropology of law in the context of globalization. For the first time, anthropologists were forced to address the limits of their naïveté, and in this regard the American Bar Foundation in Chicago became a catalyst.[3]

Elsewhere, too, we find new thinking. Most Italian law and society scholars are trained in the law and are less nation-centered than their American counterparts but well-read in the anthropological literature. Some of the Italian work carried on in the Horn of Africa is interdisciplinary: it includes not just lawyers but also historians, political scientists, sociologists, and anthropologists. They seek to reveal the dynamic and unstable relationships between transplanted "modern" and "traditional" legal systems (Grande 1995). The role of law is, of course, a key to understanding the dynamics of power not only in the Horn but also, for instance, in the European community. The ethnography of law requires an understanding of those who seek to construct larger legal orders with fixed and uniform legalities. Such work includes as objects of study the modernizers, the colonizers, the neocolonized, and those who still heavily depend on customary proceedings even as found in international conferences. The contemporary "civilizing mission" of law by Africans, by Europeans, and by Americans is more than a story of crises in legal pluralism. It is a story about cultural transformation, sometimes discovered through the analysis of legal documents (Riles 2000).

3. See, for example, Lazarus-Black and Hirsch, *Contested States: Law, Hegemony, and Resistance* (1994).

Nevertheless, what is at times referred to as an "epistemological crisis" in the academic studies of law directs attention to dichotomous discourses. Law is many things—it is a *reflection* of society eternally new; it is *molded by* economics and society; it is an *instrument* used by people in power, people whose hands are on the controls; it is a *rational* actor's model associated with empirical research, functionalism, and defense of the status quo. Those who oppose such views stress the role of ideology, that is, the symbolic as well as instrumental uses of law in which ideas play a major role. Because the arena is here full of contingencies, ambiguities, and uncertainties, the law and its participants are granted a degree of autonomy. From such a viewpoint, law becomes a semi-independent source of authority and not just a reflection of the balance of power, and the anthropologist pushes the analysis of law toward a more interactive and comparative model.

The self-conscious attempts of legal scholars to break with instrumentalism have spawned a whole host of dichotomies: meaning versus behavior, hegemony versus hermeneutics, ideology versus practice, meaning versus material relations, structure versus practice. Yet in the process of trying to save postempirical social science from Machiavellianism, from being "all

politics," some have gone beyond mere posturing and have taken a curious position of interpretive analysis without politics.

In sum, there has been a virtual revolution in thinking about law by lawyers and anthropologists in these different contexts. The law and modernization movement (or legal development) sought (and still seeks) to democratize the so-called Third World by exporting European and American legal education and legal codes and statutes, thought to be an inexpensive kind of development that is currently being reapplied in Eastern Europe, India, Africa, and elsewhere. The Law and Society Association made a niche for scholars who in the 1960s and early 1970s were few and marginal in their home schools. The CLS movement led to a progressive examination of the assumptions of American law and legal education, an examination that revealed that the law was more political than neutral. Public interest lawyers were researching the realities of corporate crime and violation of law in the United States—in relation to air, water, land, regulatory agencies, dams, and air and auto safety among other topics—and around the globe as they monitored the behavior of multinational corporations abroad. The Chicago-style Law in Economics movement loosely paralleled the Reagan revolution and what continues to follow from it. There were exciting discoveries, such as the finding that law is still a powerful vehicle for cultural transmissions or legal imperialisms or counterhegemonic forces. However, finding on home ground the same patterns that we encountered abroad brought a crisis of contradictions.

To my mind, many of these intellectual movements may now be approaching dead ends, sometimes because, as in the law and society work, the research is more and more replicating the

very thing many sought to escape—boundary controls. The CLS movement has its own problems, often caught in disembodied literatures and narrative techniques that center on discourse-based positions to the exclusion of other factors found in action. Nevertheless, my many conversations with law school colleagues have made it clear that mainstream legal thought that was absorbed with narrow technical views has been severely shaken, both conceptually and methodologically. And for me, all this activity, both in an out of the academic world, has been stimulating and inspiring. What needs to be done has become clearer.

From the perspective of anthropology, which may have given more than it received during the past thirty years of intellectual gymnastics, we have profited. Anthropologists learned about the power of law and the power *in* law, something that is obvious to lawyers. The view from below has expanded upward and outward. Anthropologists consistently underestimated (and still do) the role of legal ideologies in the construction or deconstruction of culture writ large. However, we now include legal transplants, missionary justice, USAID or foreign aid programs, UN-sponsored international conferences with their legal documents, and economic globalization as part of the local ethnographic picture. In other words, the broadened intellectual context that anthropologists are working in today is at least part of our active thought, whether in understanding the impact of colonialism, or the Cold War, or the competition for world resources. Earlier anthropological notions of cultural critique and comparison, of culture and local knowledge, and the various ideas about pluralism have moved horizontally into sister disciplines. Anthropologists are in a strong position to reap the-

oretical harvest from this ferment and to explore new ethnographic ground.

For example, anthropologists and legal scholars are currently generating a most interesting body of work by combining history and ethnography. They now ask questions that were avoided during earlier periods: How has law served the "civilizing mission" of colonialism, and how by such means are societies of the Third World and the law of the West being transformed? How has cultural reformation become part of the strategies of local elites? In other words, how have small-scale legal events, shaped by large-scale transformations, become instruments of the global social system? If this historical work is depoliticized by means of structural arrangement discourse, it is also clearly encompassing power models. That is, both the blindness and the transformative aspects of colonialism are there in the literature along with contemporary contestations. The view that is still with us today, of colonized peoples as primitive and disordered and in need of being transformed by plans that are fixed, abstracted, and disembodied, is part of the culture of expanding capitalist economies with which such transformation is more compatible. Changing intellectual styles that are more inclusive and less restrictive raise questions about notions of customary or modern law and imposed and indigenous law as diverse systems of law work for various interest groups.

Over the past twenty years, historical and comparative research into law and colonialism has had a major intellectual impact, its central achievement being the enlarged and innovative perspective of law professors who overlap with anthropologists in "the field." There are dangers as well as benefits

here, a point well elaborated by James Gardner (1980) in his book *Legal Imperialism: American Lawyers and Foreign Aid in Latin America,* in which he analyzes the consequences of the exportation of a legal model that is flawed both for Latin America and for the United States. Perhaps the best autobiographical statement of professional invigoration is that of Marc Galanter (1989); in his *Law and Society in Modern India,* he revisits the manner in which his experience in India forced him to rethink American law problems. The unlearning of fundamental assumptions and conceptual frameworks has not fully worked itself out; but in American law schools the contradictions are clearer, and the fight is on as the field of inquiry continues to expand rather than contract. The language in which law is being cast is increasingly part of society-wide debates, which, as earlier comments indicate, are double-edged, as in the intersections between anthropologists, lawyers, Aboriginal women, and participants at human rights conventions, for example.[4]

And so, as we begin the twenty-first century, both lawyers and anthropologists are once again, as were their nineteenth-century forebears, concerned with global scale economies, with history, with power, with democracies and plutocracies, with contested domains, and with evangelical missions. The bottom may have fallen out of history in the nineteenth century, but twentieth-century legal scholars were still debating clashing notions of the

4. Diane Bell, an anthropologist who has long studied gender, law, and power among Australian Aborigines, asks, "How is it that lawyers have become the new paternalists? Why is it that the limits of the rights to be enjoyed by any one group is what white male lawyers find reasonable?" (1992: 356).

role of law in the nature of change; and the bottom may be falling out of law as we enter the twenty-first century. Indeed, one of Italy's distinguished comparative law experts, Professor Rodolfo Sacco (1996), is entirely correct in urging a macrohistoric perspective, one that goes far beyond the recent past as found in legal history written as usual. Professor Sacco reminds us, as does the anthropological literature on law, of other legal traditions past and present, traditions in which the function—that is, the use—of law was precedent to any individual design. Law can exist and evolve without lawyers as sovereign power, or even without the state. The state has not always existed, and various systems of law can and do coexist or compete. Contemplation of the life of the law in our contemporary world perforce returns us to an earlier time when power was conferred in the exclusive economic interest of those who held it. Should not a legal "history" turn to the future to question what may from the past not appear self-evident today? It may be obvious to conclude that the way law is constituted and the way it is portrayed work side by side with the law in action, but, if not, I hope this observation will become clearer in the pages that follow.

THREE

Hegemonic Processes in Law

Colonial to Contemporary

> The popular element "feels" but does not always know or understand; the intellectual element "knows" but does not always understand and in particular does not always feel.
>
> *Antonio Gramsci*

Placing the law firmly within the more general categories of social and cultural control, or controlling processes more specifically, has been one of the most important results of enlarging the stage and multiplying the tools for discovery. Recognizing the multiple jurisdictions of law—"indigenous," colonial, religious, or nation-state law—underscores the idea that law is often not a neutral regulator of power but instead the vehicle by which different parties attempt to gain and maintain control and legitimization of a given social unit. Nor is law that which stands between us and anarchy, for the lack of state-centered legal systems has not been found to be associated with anarchy. On the contrary, in stateless societies, law is associated with powerful plaintiffs rather than with powerful lawyers. And needless to say, the study of law cannot be divorced from ideologies that make control of law a prize.