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Introduction

Legalism, Anthropology, and History: a View from Part of Anthropology

PAUL DRESCH

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'Legalism' in the volume's title is not meant especially as a term of art. Nor do we intend the derogatory sense of 'pettifogging'. Following Lloyd Fallers (Fallers 1969, cf. Huxley 1997: 316), we need a non-pretentious word for themes that recur both in societies that conceptualize law discretely (hence 'law and society') and in others that decline to do so. These themes include an appeal to rules that are distinct from practice, the explicit use of generalizing concepts, and a disposition to address in such terms the conduct of human life. They do not always coincide with what Joseph Raz (1973) called a 'legal system'; far less do they account for everything one might call 'law', although the latter term provokes our concerns in the present volume. We must feel our way. This essay does not impose a model, therefore, but tries by stages to isolate a topic from existing literature. The end-point can be stated briefly.

If law suggests transcendent values in terms of which conduct is judged, legalism spells out the terms employed, and it directs us towards classification more than towards power. The word 'power', as indeterminate in reference as the Polynesian *mana*, exerts an unsettling attraction on academic writers; but equality, subordination, mystification, and discontent all depend upon how the world of human affairs is classified and how such classifications of the world are accepted, contested, or manipulated. (To distance action too far from categories, meanwhile, implies an analytic individualism that few of us could willingly accept.) The themes to which Fallers drew attention are not distributed evenly across human life. They do, however, direct us towards parallels with such general concerns as language, relatedness, and cosmology. They invite us to consider how the moral world is apprehended, which neither anthropology nor history

has recently taken as its focus in this domain, and we find ourselves with much to do.

Although good work on law has been done at the boundary between anthropology and history for the modern period,[1] one often knows the outcome before reading. Seldom does either subject give pause for thought. Even E. P. Thompson's discussion of legal forms in eighteenth-century England (Thompson 1975: 258ff.) provoked little more than dissent on *a priori* grounds, and serious reflections on 'law and society' for recent centuries are as likely to be found in law-journals as in works of history (see e.g. Sugarman 1992, Lacey, N. 2001, 2009), which suggests a certain marginality to historians' concerns; indeed, if one asks, 'What have historians done on law?' then for most times and places it is hard to cite more than specific studies.[2] For other periods than the modern, history of course appeals sometimes to anthropology when discussing law and legalism (e.g. Wickham 2003). Anthropologists, however, have less to offer than one might have hoped. Chris Fuller thus lamented in 1994 that, while Maine and Durkheim had seen law as a distinctive subject, current anthropologists favoured disputes and power and treated law as illusion or as obfuscation; legal reasoning was not a popular topic (although now see Riles 2005), and talk of rules—a crucial part of legalism in the Fallers view—was dismissed impatiently. Geertz's account of law as a form of imagination (Geertz 1983) was meanwhile too little focused to have wide effect. Most literature, as Fuller points out (1994: 10), developed instead under the influence of 'legal pluralism', an approach that owes more to conventional sociology than to anthropology (or indeed to history) and describes the world in falsely obvious terms of norms and instrumental aims.[3] The drawbacks are plain in ethnographic writing. History is the

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[1] See especially Starr and Collier (eds.) 1989. For an assessment of legal anthropology at the time, Just 1992. Current interests can be judged from the choice of articles for reprinting in Mundy (ed.) 2002. See also Pottage and Mundy (eds.) 2004, Freeman and Napier (eds.) 2009. For a retrospective view, Moore 2001.

[2] Journals that deal with both history and law (e.g. *Law and History Review*, *Tijdschrift fur Rechtgeshidenis*) seem not to form part of most historians' usual reading. Medievalists seldom follow *Etudes d'histoire du droit médiéval*. The problem is not that authors fail to mention law, but that the 'concept of law' tends to be discussed only in specialist literature, whether that on specifically legal history or that on the history of ideas. Literature on violence (e.g. Halsall ed. 1998, Kaeuper ed. 2000, Drake ed. 2006) appears more central to a common syllabus, despite there being excellent overviews of legal history, e.g. Ourliac and Gazzaniga 1985 for France, Baker 2007 for England. An exception to the general picture may be studies of late antiquity (see e.g. Humfress 2007, 2012).

[3] The original idea behind legal pluralism was simply that state law in colonial and post-colonial settings was not the only law in evidence (Hooker 1975, also perhaps Vanderlinden 1971); the claim to diversity was soon made widely (Griffiths, J. 1986, Merry 1988, Griffiths, A. 2002), and the bibliography is vast. Nearly all of it, however, is surprisingly alike. For the criticism that pluralism counts almost everything as law and concentrates on nothing specific, see Roberts 1998; for its lack of interest in law as a mode

older subject, however, and by far the larger, and let us place it first when discussing the problems anthropology and history share, most of which turn on unwillingness to engage with legalism as, in Geertz's phrase, a 'manner of imagining the real'. To clear the ground we can best begin with a topic that tried Fuller's patience.

LAW AND 'DISPUTE SETTLEMENT'

In 1986 Wendy Davies and Paul Fouracre published an impressive collection on *The Settlement of Disputes in Early Medieval Europe*. The main contributions to understanding are made between the lines, and despite Patrick Wormald's keen assertion at the start that, while German writers of the nineteenth century had drawn romantically on the letter of early law, '*we* begin with law in action,' what now seems valuable is less what we learn from *placita* about actions and the course of events than what we learn from events about the meaning of a *placitum* (the convention and the documentary form alike) in post-Roman Gaul or Carolingian Italy. There is more at issue here than a passing conjuncture, for the same effect is evident in a recent collection whose aims are different. Many contributors to *Law and the Illicit* (Karras et al. 2008) pay homage to Edward Peters, to whom the work is dedicated. 'The problem of law and the illicit,' he says in an introduction, 'indicates the absolute centrality, not only of various kinds of law, but also of the idea of lawfulness itself in most aspects of early European life.' The 'idea of lawfulness' wins little space in the chapters, however, where law mainly features as suppressing disagreement (cf. Hudson 2010). As with the Davies and Fouracre volume, there seems a disjunction between ideas or institutions, broadly conceived,[4] and 'law in action', with the balance of interest lying with the former.

One can see how disputes and their settlement (or indeed suppression) might draw us toward unrewarding detail, merely one event and then another, not least where compromise is little rationalized by those

of thought, Fuller, C. 1994: 11. Hooker 1975 was more richly textured and concerned itself with formal conflict of laws.

[4] Promising, marrying, and taking vengeance are institutions; but so are kin-groups, guilds, or kingdoms, and there is a tendency to treat the latter cases as quasi-physical objects, as though built from Meccano or Tinker Toys, thus predetermining what we count as an explanation. Pocock's comments (1961: 64) on 'kinship structures' are of general relevance.

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involved. Fredric Cheyette[5] thus described part of early France as follows:

> Even when a charter gave the prize to one side the other was almost always paid off. No one left empty-handed. The practice of giving everyone something was indeed so prevalent that it is impossible to reconstruct any objective rules of decision on the basis of arbitral judgments in lower Languedoc, at least before the mid-thirteenth century (Cheyette 1970: 293).

One doubts that rules predict outcomes at, say, royal courts of the fourteenth century much better than at *ad hoc* congregations of mediators in the twelfth or eleventh. The ways that decisions were spoken of were usually distinct, however, as much in the detailed forms of argument offered as in claims, or the lack of such claims, to 'top-down' authority. The effect on historians is to gloss chronologically not just a difference in sources but a far broader choice of approach. Before the rise of 'professional' law (Reynolds, S. 2003), or perhaps of 'political' governance (Bisson, T. 2009: 493–4), there would thus be a period in Europe when legalism was not conspicuous and depictions in terms of ideas might be judged unworkable, reducing us, as some might think, to accounts of 'what really happened' or of what we suppose lay behind events. Stephen White, for example, described 'feuding and peace-making in the Touraine around the year 1100', drawing on charters from Noyer, and having cited various definitions of feud and suggested generalizations from his own material, described seven feuds (White 1986). After sixty-eight pages of a richly footnoted article, the reader knows a great deal about certain family connections and holdings of land, but is unsure what to do with the information. Factual regularities divorced from local ideas are not self-explanatory.[6]

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[5] Cheyette is an important yet elusive presence. Even Susan Reynolds, whose capacity to range the literature is unparalleled, found when reissuing *Kingdoms and Communities* (first edition 1984, second edition 1997) that 'In 1984 I inexplicably failed to cite Cheyette, *Lordship and Community* [1968], whose introduction anticipated several points I made' (Reynolds, S. 1997: xi). Cheyette's article on the origins of the state (1978) is in a volume that few will come across; another valuable piece (1963) is tucked away in a politics journal. For medievalists' more conventional writing on dispute see Brown and Górecki (eds.) 2003.

[6] White elsewhere (e.g. 1995) begins to delimit the boundaries of dispute and law, and a good example of grasping 'feud' is given by Jenny Wormald, discussing Scotland (Wormald, J. 1983): by mapping key terms in several literatures she maps as well the assumptions that gave feud its sense. See also Miller 1990, although Icelandic sources are so rich that comparison is difficult. Hyams (2003) carefully finesses feud as a subject, and both he (ibid. 73–8) and White in his later work (2009) point to poetry and epic as a source to grasp the values of heroic conflict: merely tracking the exchange of violence is not enough. Hyams's *Rancor and Reconciliation* deals in detail with much that the present chapter suggests in general.

This was very much the problem with the Manchester school of anthropologists, founded by Max Gluckman. Working closely with each other on south-central Africa after World War Two, they built up a fund of detail that in its way rivalled sources on medieval France. But what to do with it? Many of the school's members favoured what later was called the 'method of extended cases',[7] but even at an early date J. A. Barnes reported (approvingly) on the work of his colleague Clyde Mitchell with the Yao in these terms:

> Like a Russian novel, an account of this kind is sometimes hard to follow, particularly for a reader without practice in tracing genealogical connections, but it makes possible a much greater understanding of the mechanisms by which these matrilineal groups usually hold together but sooner or later break up (Barnes, J. A. 1958: 15).

'Understanding' may not be the ideal word. Where disputes are concerned, as in later work elsewhere they often were,[8] we are left to consider who exactly was related to whom and how the many forms of relation might be glossed by others, how this person and that had got along with their fellows or failed to do so in the previous weeks or months (even decades, if one has the records), and how many chickens were taken in the end from where. What is explained seems often trivial. The world all sounds dimly similar, while the roots of action locally are hard to grasp because local ideas have been leached out.

John Bossy's *Disputes and Settlements* (1983) shows where our problem lies. Roaming across a vast tract of time, although not beyond Western Europe, the (historian) contributors provided excellent papers. Few stuck closely to their brief, but Bossy asked an anthropologist who worked on Africa, Simon Roberts, to write an introductory chapter, and this, as it happens, is much in the Manchester tradition of persons held together

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[7] For references to the method, see Werbner 1984. The idea of following cause and motive through a 'case' has a powerful common-sense appeal, and Chris Wickham's account of twelfth-century Tuscany attributes to anthropology something of a breakthrough here. When we come to 'cases', however, we find uncharacteristic jumps of imagination over evidence: working out a dispute at Lucca thus 'relies in part on supposition' (Wickham 2003: 71), and with disputes over patronage of a church 'we can construct a plausible story' (ibid. 96). The anthropologists are usually on shaky ground. To make 'the method of extended cases' work well needs an unusual type of (legal) evidence. For a careful example see not an anthropologist or a Europeanist but a student of Islamic law, Powers 2002: 23–52.

[8] A. L. Epstein thus equated law and dispute-settlement in New Guinea: 'Another possibility would be to focus on indigenous concepts and classifications' (Epstein (ed.) 1974: 5), but that possibility received short shrift. (For how 'law' may disappear, in fact, when one considers Melanesian concepts see Strathern 1985). The best account of the school's beginnings remains Werbner 1984. For a recent account that reproduces in complex language most of the initial problems, Evens and Handelman (eds.) 2006.

(or not) in statistical patterns. Anthropology began, says Roberts (1983: 3), 'with a central focus upon institutions. Social life was seen as a matter of compliance with rule: normal behaviour was rule-governed behaviour, and settlement institutions were there to put things right if temporary malfunction in the form of a dispute developed.' Faced with the obvious inadequacy of this approach, the subject had veered 'towards the actions and strategies of real people . . . ; instead of being rule-governed, men were seen as self-seeking, co-operating with each other only out of enlightened self-interest' (ibid. 4); and if a seeming contradiction between 'rule-centred' and 'processual' accounts was unsatisfactory in turn, the answer was to be sought in linking the 'bustle of a small face-to-face community' to a wider tale of states and empires.[9]

'Rules' here, one notes, are the rules of elementary mechanics, not rules in the sense that Hart examined in *The Concept of Law* (cf. Fuller, C. 1994: 12). 'Descriptive' rules of the kind that the physical sciences draft are falsified by contrary cases, rules as distinct from habit mean we feel that something is amiss when people fail to follow them (we may perhaps not be able to formulate the rule clearly if asked), while 'prescriptive' rules of the kind that often jurisprudence deals with, and that interested Fallers, may be endlessly contravened or have endless exceptions and still be valid (Hart [1961] 1994: 56, 83, 187). Rules for Roberts are descriptive rules that should predict what happens. Plainly they are seldom followed by 'real people' and we therefore do better to concentrate on patterns of dispute.[10] The terms in which people act are not at the foreground of analysis.

At the end of *Disputes and Settlements* Bossy points out that neither process nor prediction accounts for themes that colour sixth-century Gaul as well as eighteenth-century southern France and sixteenth-

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[9] Roberts in earlier work (Roberts 1979, Comaroff and Roberts 1981) had come down very much on the 'processual' side and thus decided that a discrete anthropology of law was an error. Part of the reason, perhaps, was the site of fieldwork in southern Africa. For an account of why a basic structure of Tshidi society to do with unilineal descent and close-range marriage (a structure they have in common with many groups in the Middle East) should from one point of view seem a matter of categories, from another of rules, and from another of strategizing individuals (hence 'process') see Comaroff 1982. Historians' enthusiasm for 'the processual approach' seems boundless (Wickham [2000] 2003: 303–6, Reynolds, S. 2003: 350–1).

[10] Different meanings of 'rule' are often conflated, as are two senses of 'norm' (one statistical, one moral). Wickham's description of early medieval codes as 'normative texts like sermons . . . written for specific, interested reasons' thus leads not only to a caution (perhaps gratuitous by this date) against 'a basic presupposition that there was, across any given society, . . . a set of fixed rules, which everyone normally followed' but to a recommendation that we 'dispense with the misleadingly simple norms of the codes' (Wickham 1992: 226, 227. See also idem 2005: 383–4). These are surely distinct issues. The stated (moral) norms themselves may be important.

century Castile, or England as much as Andalusia. An 'idea of lawfulness' recurs, not least an ideal of prescriptive rules upheld. Roberts had cautioned against assuming that one way of settling disputes is inherently more attractive than another or that a scheme of evolution is at issue, and Bossy took a usefully different tack across long-term history:

> I do not think it will be violating Roberts' principles to say that three extremely powerful images have governed the resolution of disputes in the West since the disintegration of Roman authority: the image of feud; the image of charity; and the image of law (or the state) . . . (Bossy 1983: 287).

States, one must say at once, are not the only source of law in the sense at issue; neither are feud and law separate. Nonetheless, Bossy's 'images' are organizing concepts that informed the actions of those involved as potentially they inform the understanding of historians. They force us to think, therefore, what is meant by 'a feud' or by 'law', or indeed by an act of charity; and they allow us to think how worlds differ conceptually but can be made intelligible each to the other. Process and prediction are secondary.

Similar considerations are raised by Peter Coss's *Moral World of the Law* (2000). Here the brief was to consider what happened in and around law courts. One of the volume's interesting features was Wendy Davies's statement that she had been surprised to find the early Middle Ages in Europe fit the topic. Courts at this period, if one wants to call them courts, tended to be crowded occasions where more was going on than 'law' and specialists were not much in evidence; '[o]n the other hand, it is not too difficult to think of rules and rituals' in this sort of context, and surviving records 'suggest that there were considerable similarities of procedure across time, space and language group' (Davies, W. 2000: 50, 51).[11] Despite this, law was not a discrete domain intellectually or as a practice. But the question of law's 'autonomy', as Coss remarks, recurs from classical Athens to renaissance Florence and beyond. Early Europe is not just an outlying case. Nor does law masquerade as all of life in other cases. Elsewhere in the volume, the line between 'law and the illicit' recurs in Martin Ingram's account of slander in Tudor and Stuart England;[12] and,

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[11] The term 'court' (*curia*, or an equivalent) seems at this period not to be used in the modern sense, but rather of kingly and episcopal seats and followings. But Davies stresses how proceedings *ex lege*, in whatever setting, appealed to supposedly settled values and specified rather carefully who was oath-worthy or law-worthy.

[12] The illicit, of course, might denote a great deal, and Ingram (2000) deals only with the line between morality and one domain of law: not all insults, as colloquially understood, were in the common law slander (cf. Milsom 1981: 379–92, Baker 2007: 436–47). Where the line is drawn appears often arbitrary, but a line often is drawn. Islamic tradition, for instance, sees a wide range of acts as morally dubious but not against the law (Weiss 1998: 164–8).

whether in Paul Brand's description of the English 'Common Bench' *c.* 1300 or Paul Hyams's of pan-European rhetorics of justice (the broadly 'Roman' *ius commune* that flourished from the twelfth century to the sixteenth), one forms an idea of what 'law' meant for whom in which context. We are dealing again with ideas and assumptions. The same advantages are evident as in the Bossy volume.

The range of possibilities opened up by this approach is caught in the subtitle of Patrick Wormald's collected papers (Wormald, P. 1999), 'law as text, image and experience'. Law certainly is lived or experienced, and not just 'lived under', although our sources can be thin on this score. As text, of course, law poses questions of the value ascribed to rules and formulae by those who lived with them distantly in mind as well as by those who in part lived through them. And as image law may be greatly important without laws being followed or applied in detail. An excellent example is Wormald's own of law-making by post-Roman Christian kings in northern Europe being something post-Roman Christian kings should do, to follow *exempla romanorum*, without assurance of practical results. This does not mean the codes are meaningless except as gestures. Law can be venerated yet not be intelligible, even venerated because it is not intelligible.[13] But these early medieval texts are a case among many where the wording can be presumed to have made sense at least to those notables who may have heard texts read: whatever the indeterminacies of *mundbryce*, *hamsocn* and the rest, one could hardly have spoken in such terms where vengeance, compensation, and protection were unknown.[14] The pursuit of assumptions and ideas seems promising. We should first

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[13] One thinks here of Roman provisions on searching for stolen goods *per lancem et licium*, carrying a platter and clad in one's loin-cloth (or a girdle? or a headband? No one seems sure). This was law, says Gaius, drawn from the XII Tables, but makes not the slightest sense. 'The whole thing is ridiculous: for one who will not let you search with your clothes on is not going to let you do so with them off, especially when, if you search and find in this manner, he is brought under a heavier penalty' (Zulueta 1946: 215). This law had at least, as Aulus Gellius puts it, 'fallen asleep'. For an extreme case see Tibet, where a medieval text, 'ornately bound and ceremoniously consulted' but perhaps not intelligible even to the judges, sat in courtrooms of the twentieth century as somehow part of current law (Pirie 2010: 214).

[14] Rosamond McKitterick argues that laws really were applied in Carolingian France (for the opposing view, Wormald 2001: ch 2/1), and she offers the important general argument that issuing laws would only make sense 'if the value of written law and the symbol it represented were understood' (McKitterick 1989: 39). We can often go further and assume the particular statements made were intelligible when first promulgated. We should also note a point Wormald (1999: 9) draws from Wallace-Hadrill, 'the tendency … for one barbarian law-maker to copy another': from an early date there seems to be an idea of what 'law' should look like, and this apparently extends to the other end of what Wickham (2005) calls 'outer Europe', for instance to Hungary (Bak, Bónis, and Sweeney 1989). Approaches to law that depend upon purely local concerns are seldom adequate. Even the early English texts may owe more to borrowing than at first appears (Jurasinski 2001).

pause, however, to ask what 'dispute settlement' blocks from view and why legalism specifically may be of interest.

EMPIRICISM, SOCIETY, LEGALISM

If Gluckman produced work of lasting worth, it is found in the less schematic ethnography of 'Barotse jurisprudence' (e.g. Gluckman 1965), and historians' attachment to his 'Peace in the Feud' remains a puzzle.[15] Gluckman and J. M. Wallace-Hadrill were at Manchester together, and someone concerned to make sense of allusive texts with little 'context', as Wallace-Hadrill had to, might of course have been intrigued by a colleague who knew of African settings that sounded in some ways like early Europe. But caution should have been provoked by the structure of Gluckman's book. 'The Peace in the Feud', printed also in *Past and Present*, forms Chapter One of a volume (Gluckman 1955) whose last chapter is entitled 'The Bonds in the Colour-bar' as if what held apartheid South Africa together was not mainly a system of oppression, which Gluckman notes, but overlapping ties among blacks and whites: 'This is so obviously unshowable that finally the attempt to resolve thesis and antithesis in terms of the thesis breaks down' (Pocock 1961: 81–2).

The 'peace in the feud' idea begins from the seeming problem of stateless society. If one starts with an assumption that societies are cohesive (what that means might be hard to explain when pressed) and one is used to the claim that government is what allows order, then a society without kings or parliament must surely be sustained by some surrogate of state administration, a surrogate soon found in the 'cross-cutting ties' of kinship and in a 'balance' among segments.[16] More generally, and as time went on, this was subsumed in the idea of 'social control', which as Strathern points out late in the day is not a safe concept to apply universally (Strathern 1985; see also Harrison 1989): the asocial individual who

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[15] The peace in the feud has attracted such excellent writers as Patrick Wormald (1999: 196); Paul Hyams (2003: 14) does not dismiss it. The idea is thought worth mention in work on France at different periods (e.g. Carroll 2003, Smail 1996), and is invoked for archaic Greece (Berent 2000). How much Gluckman really influenced Wallace-Hadrill is in doubt (Wood 2006), but we should all be better off if we admitted that Gluckman's idea is not coherent. For the original interest by historians see Wallace-Hadrill, J. M. 1958.

[16] In the heyday of structural-functionalism there was much talk of 'corporate groups'. As with norms, 'corporate' ran together two different meanings: a group that was one legal personality, which some indeed were in not too strained a sense, and a group that really acted as one, which almost none did. Moore (1969) shows how complex 'legally' even an apparently simple idea of shared unilineal descent may be (cf. Seagle 1941: 46). Where groups are not solid units the symmetry at issue is moral or conceptual, not a balance of power or numbers.

requires constraint is an idea specific to time and place, a complement to visions of the modern state.[17] Gluckman and his followers took such individuals as largely given, however, and assumed anthropology's job was to explain empirically their interaction, thus reducing statements about types of event to statements about the course of events, marginalizing local ideas as if the social were something one could count statistically.[18] The bond in the colour-bar and the peace in the feud were likely analytic outcomes.

A good place to grasp this idea of observation and neutral record is Gluckman's 'Social Organization of Modern Zululand', the first of three early essays of his reprinted as 'Analysis of a Social Situation'. The beginning is redolent of a lost age:

> In 1938 I was living in the homestead of Chief's Deputy Matolana Ndandwe, thirteen miles from the European magistracy and village at Nongoma and two miles from Mapopoma store. On January 7th I awoke at sunrise and, with Matolana and my servant Richard Ntombela, . . . prepared to leave for Nongoma to attend the opening of a bridge, . . . [On the way] we gave the policeman, who is a member of a collateral branch of the Zulu royal family, the salutes due to a prince (*umtwana*), . . . Matolana upbraided the prisoner, saying he would have no *izigebengu* (scoundrels) in his district (Gluckman [1940] 1958: 2–3).

And so it goes on, with a plethora of Zulu terms, through the opening of a new bridge attended by the (very unequal) notables of the black world and the white. Much analysis followed the description. It was the descriptive phase, however, that enlivened Gluckman's followers, as if by avoiding explanation in terms of institutions (and of rules) one could leave the reader to deduce the assumptions informing what one saw—what a 'hymn' was, what a chief was, what a 'royal salute' was.[19] In a manner

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[17] One cannot so much as glance at early European law codes without encountering appeals to secular order, and the idea of *homo homini lupus* is old. But the persons addressed are of their nature bound up with kin and status. The asocial individual as the subject of law is of recent provenance (Lacey, N. 2000: 28). The danger of history or anthropology simply reproducing modern ideology is plain.

[18] From an early date this frustrated anthropologists of a more reflective temper. Pocock (1961: 77–8) was followed by e.g. Ardener, who noted how Evans-Pritchard's analysis of 'knowing' in the case of witchcraft was taken as being instead about social control, how opposition (in the Nuer case) was rewritten as conflict, and exchange (in the work of Mauss) was reduced to transaction (Ardener [1971] 1987: 55–6). Drawing on formal linguistics, he distinguishes between paradigmatic and syntagmatic analyses. A simpler distinction between analysing types of event and the course of events captures most of what we need.

[19] Historians will be familiar with unthinking persons simply writing in chronological order all they know of a subject, and lacking a sense of implication. The anthropologists' equivalent is the 'event', where the writer fails to think how they recognized what they were looking at.

typical of empiricist work, ideas pushed out the front door at the start of the piece have to be brought in again through the back window, as they do in much 'processual' writing.

Empiricism is the idea that the world is given to direct experience and, as in school-room science, one has only to eliminate sources of confusion (to establish 'no parallax' conditions, as it might be), then observe and record. But human life is not like that. An elementary case to cite is Granet ([1933] 1973) on etiquette and cosmology in the classical Chinese scheme. Differentiating left hand from right here distinguishes people from animals (perhaps from barbarians, also); Chinese males greet one with left hand over right, as distinct from females who do so with right hand over left; unless the person is in mourning, when the hands are reversed, so a male greets one right hand over left. To act intelligibly in classical China (or to follow many a Kung Fu film) thus requires the equivalent of mastering a decision-tree that defines what a gesture means. Similarly one has to know what a 'Zulu Chief' is, or a 'District Officer,' to understand what one sees at the opening of a bridge. This in turn requires, for our purpose, deducing the assumptions that govern the terms' use, without which observation and record will only impose our own common sense on what we see.[20]

Legalism brings this issue into focus and at the same time complicates it, for laws (in the plural) make categories explicit: a 'mother's brother' does this and a 'sister's son' does that; 'women' belong here and 'men' belong there; if a 'free-man' should lie with a woman not his own then one thing, and if a 'slave' should do so then another. These may not be the effective categories in a given event (people may speak in terms of rank, let us say, and act in terms of skin-colour or spatial propinquity); these are not descriptive rules. But talk of 'what really happened' omits the fact that the world is classified morally by those involved, who are aware in some degree of what they are doing.[21] The difference between this and a

[20] Persons are not external to the world they live in but fall also within this logic of assumptions, and talk of 'strategizing individuals' (e.g. Wickham 2003: 194, 209) thus finesses a great deal. The image of the strategizing person is more prominent in some societies than others (cf. Comaroff 1982), and Bourdieu's talk of 'strategy' (as if 'rules' were resources to be used by individuals) provides merely the complement of what he claims to oppose, a world of supposedly predictive rules. Isolating 'individuals' from 'society' like this leaves one with morally hollow individuals (James 1973) and makes the sources of action very hard to grasp.

[21] Susan Reynolds develops a similar idea in *Kingdoms and Communities*. Although a break is placed at the mid-twelfth century, even for the earlier period she argues 'not only that the practice of law between 900 and 1140 fostered collective activity but that it fostered intelligent collective activity' (Reynolds, S. 1997: 36), something quite distinct from habit.

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simply 'processual' world is evident, not least, in the difference between rules and habit:

> What is necessary [for there to be a rule] is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard, and that this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgements that such criticisms and demands are justified, all of which find their characteristic expression in the normative terminology of 'ought, 'must' and 'should', 'right' and 'wrong' (Hart 1994: 57).

Distant though it is from Roberts's descriptive rules, this does not describe specifically a legal rule.[22] It covers a good part of human life. But it suggests obliquely the place of categories in legalism. One has to have an idea of, for instance, 'kinsmen' and of what they should do, as distinct from experience of my particular brother or my cousin, before one can complain of them not doing it.[23] Legalism makes such categories explicit.

Statements made in general terms about how the world is, and should be, allow the 'critical reflective attitude' that Hart writes of and at the same time confer meaning on 'foreseeable and approved actions' (Fuller, L. 1971a: 173), providing what Lon Fuller called a programme for living together (ibid. 183); the complement is a 'public' view of wrong, as distinct from private discomfort. More than this, one category and its attendant rules may be contrasted explicitly with others (the duties of kinsmen, let us say, may be set against those of neighbours) to produce an argument about rightful conduct. Legalism, at its simplest, is a discussion of moral order.[24] Its components, however, can be morally neutral. For example, lists of wound-prices or measures of land are a common aspect

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[22] Hart does not elaborate on the distinction between implicit and explicit rules. Suffice it to say that particular laws (categorical statements formulated by others) could entirely lack what Hart calls the 'internal aspect' of rules, although 'law' as a whole might require an attitude like that he describes. In fact as *The Concept of Law* progresses one finds oneself discussing more and more the position not of people at large but of law's specialist personnel—the lawyers, judges, and drafters of statutes (Hart 1994: 61, 115, 138). Frederick Schauer's discussions of rule-bound action (2007, 2009: ch 2) are useful here. The reference to 'public' and 'private', below, is intended to suggest his concerns with Wittgenstein and Winch.

[23] There can hardly be people who lack a terminology of relatedness. In practice, however, the degree to which societies use such terms as general categories, and thus formulate rules explicitly, is variable (Roberts 1979: 32). Were there space, one might explore both Melanesia and Amazonia as regions where generalizing statements are at a minimum.

[24] One might also say a 'management' of moral order, but whether this needs to be imposed on others is an open question. The 'penitentials' of early Europe (Frantzen 1983, Meens 2006) thus often form the background to secular law (Wormald, P. 2001: 216, 222, 331–2, 450): the proper penance, deduced legalistically by those qualified to do so, is sometimes imposed and sometimes must simply be adopted to pursue salvation. Lingat (1973: 54–5, 63–5) draws attention to penance in classical Indian texts, and to a rela-

of legalism (perhaps a very basic aspect), but the prices and measures themselves purport to be merely as they are.[25] How much, and in what way, such terms inform actions is a separate question. But frequently one finds a layering of commentary, as if some know better than others what the terms denote or should do.

Law often employs categories that, even more obviously than kin-terms, do not arise from the fact of sociality but instead provide 'costumes and relationships' (Finnis 1980: 283) into which actions and events are fitted. The couple 'vendor' and 'purchaser' is a case in point.

> Ego Diaz faemina, et vir meus Isimbertus consentiens nos simul in unum venditores Rosagno abbate emptore [I Diaz, a woman, and my husband Imbertus, consenting to this, we are as one vendor to Rostagnus, the abbot purchaser] (Cheyette 1978: 160).

The abstract nouns *venditor* and *emptor* allow the entry into everyday life of expert commentary and censure (a whole literature on 'property' and 'sale' comes into view),[26] the use of Latin suggests formality and a role for scribal expertise; but *any* such generalizing categories—in Provençale, in English, in whatever dialect—allow commentary and argument by others, and as Cheyette suggests, we are often dealing with forms of quite ordinary transaction. To see the terms as 'imposed' by a higher power is often misleading, nor can one separate legalism out from life as a discrete reality.[27] As E. P. Thompson (cited in Coss 2000) remarked of a

tion between penance and punishment that recurs in European history (Berman 1983: 68–73).

[25] Setting measures in law recurs from a very early date (Whitman 1996) and widely (e.g. Huxley 1997: 322). Wound-prices in 'Germanic' codes thus deserve more thought. The lists of reparation are grammatically as simple as could be (Wormald, P. 1999: 183), and some would omit them as 'tedious' (Whitelock ed. 1979: 362). Merely listing values, however, (perhaps in monetary units that no one encountered much in practice) asserts a distinction between might and right. You may be bigger and stronger than I, but our thumbs, little fingers, or ears are of equal value. For a modern example of settlement in these terms see Dresch 1989b.

[26] Talk of law as 'constituting' things and persons is usually much overstated (Murphy, W. T. 2004: 138). Nonetheless once legal phenomena are conceived as themselves 'things', so that one can transfer intangible rights, for instance, new possibilities arise. You might find yourself dispossessed by complete strangers, liable to people you have never heard of, or able to alienate newly-defined 'property'. For cautionary notes, Pollock and Maitland 1898: ii. 124–49.

[27] Part of Cheyette's argument (1970, 1978) is that 'legal' language spreads through such forms as notarial practice, which draw upon learned discourse but permeate the local (cf. Reynolds, S. 2003: 349–50, 353, 362). For an Islamic example where going to (learned) law threatened ruin yet where the terms of such law inform local life, see Mundy 1979. At least in European cases, notarial forms need not mean that writers understood the 'theory' behind legal phrases (Levy 1951), but the simplicity of such concepts as buyer and seller might remind us how basic the issues are in which law intervenes. The literature on notarial practice is large (for France alone see Dievoet 1986, Fontaine 1993,

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much later century and in some ways a more complex instance, law does not keep politely to a 'level' such as politics, philosophy, or the everyday, but permeates everything. Indeed much of our work might consist not only in tracing how (and to what extent) legal imagery and assumptions, as with *venditor* and *emptor*, are distributed through a social formation, but also in tracing the implications of persons and constituencies speaking at cross-purposes in a half-shared language that each may conceive as law, that is, as binding forms and values set apart from transient influence and claims. Vendors should do this, whoever they are, and purchasers should do that.

Several 'kinds' of law may be thought to coexist, of course. Pre-modern Malaya thus distinguished *adat perpateh* (customs of the commons or of community, roughly) from *adat temengong* (customs imposed by princes) and both from Islamic *sharīʿah* (Wilkinson 1922); in the Tibetan world *khrims* covers royal law, religious law, and other kinds of law besides (French 1995, Pirie 2010); in medieval Europe there is royal law, community law, Roman law, canon law, and much else in evidence (Berman 1983, Cohen, E. 1993, Wickham 2003).[28] Although usually not separable in the everyday, and sometimes not in expert practice, any one of these potentially allows a totalizing vision of life by the people involved. And often one such vision will somehow encompass others, as Islamic *sharīʿah* could treat local *ʿurf* or custom as a material source (as a source of mere fact, so to speak, not of law) and the common law in England could later presume, in quite similar terms (Ibbetson 2007: 167ff.), to judge the validity of forest law, law merchant, or variegated manorial law.[29] The localized or fragmented systems lacked means to return the compliment; the self-proclaimed dominant form might deny that they are law at all. Their visions of, let us say, buyer and seller are declared invalid.

Hilaire 2000, Poisson 1985). Reynolds (2003: 366), however, is surely right that the 'lower reaches' of legal practice deserve more thought. For promising directions, Teitler 1985, Rio 2009, Brown, Costembeys et al. 2012.

[28] The standard 'pluralist' approach (e.g. Benda-Beckman, K. 1981) is through 'forum shopping', whereby different legal venues comprise a resource to be exploited by litigants, and attempt in return to exploit them. A more compelling approach examines the dilemmas presented by invoking rules of differing provenance and authority. For a good ethnographic example, with much that might interest historians of Europe, see Bowen 2003.

[29] The specific histories of the common law and of Islamic law could not be more different. The former evolved at the court of King's Bench and at the Bench of Common Pleas, and would simply not exist without centralizing kingship (Brand 1992a, Hudson 1996, Milsom 1981); on the other hand, the common Western view that Islam does not distinguish between (religious) law and politics would apply, if at all, only to the earliest Islamic history (Lapidus 1975, Weiss 1998), after which power was localized but law and scholarship were broadly pan-Islamic. Yet the common law and *sharīʿah* each evolved means to subordinate or marginalize alternative visions of the world.

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Joseph Raz (1979: 116ff.) thus argued that the rules of private associations and of the modern state work in similar ways but the latter alone are 'law', being comprehensive and supreme.[30] As important as the arbitrary assertion of state supremacy here is the fact that associations' self-appointed rules provide few means but *ad hoc* committee-work to reflect on the rules' coherence; in what lawyers think of as 'complex' systems, by contrast, whether or not identified with states, the process of organized reflection may be endless. It is this that allows, besides the claim to be comprehensive, the reduction of rival views to mere 'fact' or to formal law's subject-matter. And the results thrown up by considered legalism may be counter-intuitive to the non-specialist: a thing (or a *res* or a *chose*) may not be a thing in the usual sense, nor a person a person, and one is rapidly lost in the 'labyrinth of law'.

Simpler systems ('simpler' in lawyers' terms) extrude the mismatch of category and fact, the inefficiencies of judgement, and much else besides into a non-legal realm of politics, dishonesty, or mere chance. They do not account formally for their place in the world. Nor do ordinary words acquire deeply esoteric meanings. But even here the terms at issue are general terms, if not vendor and purchaser then at least a generalizing image of, for instance, mother's brother and sister's son, or of kinsmen. In this respect law stands apart from the flux of events and personalities, suggesting an order of affairs that outlasts the moment.[31] Legalism means the world is addressed through categories and (explicit) rules that stand apart from practice.

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COMPLEXITY

In what lawyers think of as complex systems, disagreement can be addressed in unfamiliar ways. David Powers, for example, says of an

[30] Writers on modern law reproduce what they write on. But it cannot be generalized. One has only to think of Beaumanoir's thirteenth-century account of the Beauvaisis (Beaumanoir 1970), with its many forms of law, or at least *coutumes*, linked by a rudimentary account of conflict of laws. The king could make what arrangements he saw fit (*quod principi placuit*) for the safety of the realm, but his was not the only 'law' in a plural world. Esther Cohen (1993: 41) reports the *Constitucions de Chastelet* as unusual for the period in requiring that 'custom' be created by persons in authority, although see also Ibbetson 2007: 160.

[31] Again Bourdieu (1977) leaves us ill-equipped to grasp the issue. 'If all structures—including legal norms themselves—are created by processes of improvisation, then the temporal structures of actors are the elements that create both rules and processes, and the dialectic between them as well' (Wickham 2003: 307). This is true, perhaps, of the dialectic mentioned. 'Legal norms', however, have their immediate value precisely as claiming to be not improvised; and in the longer view they often outlast the actors, the strategies, and any likely use.

Islamic property dispute in Fès *c.* 1400 that '[a]s the case passed through the apparatus of justice, its underlying socioeconomic and emotional base was transformed into a question of textual analysis, that is, to the relationship between law and language' (Powers 2002: 165); the skills of hermeneutics would not be those of most land-owners.[32] More immediately (before 'interpretation' comes into play), the language of complex law is itself not ordinary: 'The layman would probably rather be found guilty of fraud, for he can then say the court was wrong, than be found guilty of "constructive fraud", for he does not know what that means and he may doubt whether the court does either' (Fuller, L. 1971b: 12). Yet the idea that this is simply a means for those Bentham (1827) called 'Judge and Co.' to exploit the rest of us, or for rulers to mystify power, is seldom adequate.

Person A, for instance, promises something to person B. Most societies, perhaps, will have forms of words or action that mark a promise out as serious; some will have forms that produce an obligation on which specifically one can base a claim (the Roman *stipulatio* is a famous case with its question and answer, 'Do you promise?' 'I promise', Nicholas 1962: 193). But if A fails to do what they said, does B then want means to force it done or means to make up for its omission? Very likely (but not necessarily in the Roman scheme) B promises something in return. If A let down B, is B's promise to A thus removed? The two may agree a form of words but later on disagree what was intended, and modern systems differ on whether a contract can thus be made void (ibid. 176–8). Again, if B relied on A's promise to enter into obligations with C, can B claim against A for the loss that results (Milsom 2003: 43), or can C do so, or is it B's fault for relying on A to start with? If B relied on A, and it seems reasonable to have done so, A might even be held liable although they never pronounced the formula or signed the document.[33] The ordinary person is as distressed

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[32] For a good account of legal reasoning in learned Islam see Weiss 1998; meanwhile, Powers's account of how Islamic practice articulates with learned theory would be hard to better. For the 'nuts and bolts' of Islamic law see Schacht 1964. An anthropologist would want to mention also Messick's nice ethnography (1993) of literacy and law in Yemen.

[33] For an argument that contract cannot now be derived from promise see Moor 1987, the references in which provide a useful start on modern concepts. For differences between French and English law, Moor 1986. English history, meanwhile, illustrates a recurrent problem: what now seem questions of contract were dealt with by writs of debt and of covenant, later often by writ of *assumpsit* (a form of trespass) whereby what now seem contractual claims 'sounded' in tort (Baker 2007: chs 18–20). But neither contract nor tort in its modern sense were explicit concepts. Maitland dealt with this partly in general or anachronistic terms (Pollock and Maitland 1898: ii. 184–239). Most historians and anthropologists would stick to the terms in their sources, but this does not remove the suspicion that the Roman division of debts or duties into those *ex delicto* and those *ex contractu* may work even where the terms are missing. For a detailed account of the English case, see Simpson A. W. B. 1975.

to find they were bound by contract without knowing it as to find what they thought were the terms of a contract are not binding. But dispensing with legal niceties does not restore an uncomplicated right and wrong. Complex legalism provides means (if sometimes unlikely means) to think how the parties are entangled.

The appearance of specialist reasoning along such lines coincides with the break in Western Europe between the early and later medieval worlds, *c.* 1100–1300, and thus often between two academic literatures. The discontinuity is surely real. It is also novel. Classical Rome may have defined legal concepts, but relating those concepts to each other in a jurisprudence of the kind we recognize was a distinctive feature of the Middle Ages (Berman 1983, Radding 1988, cf. Watson 1995, Stein, P. 1999),[34] and lawyers, so Strayer suggests, then 'set the tone' of the times they lived in: 'The thirteenth century was a legalistic century in which men sought exact definitions of all human relationships, in which men wanted to work out the logical implications of all general ideas and projects' (Strayer 1971: 258). Maitland had labelled the century before this 'a legal century' (indeed, 'the most legal', Pollock and Maitland 1898: i. 111). But in so far as one can characterize whole centuries (the limitations require no comment), lawyers are not always the prime movers and which applications of legalistic thought, even in learned circles, count as 'law' seems arbitrary.[35] The association of lawyers with administration seems contingent also. From about 1100 onwards

> governments produced and preserved more records and made more systematic demands on their subjects. Rulers needed experts to advise them and subjects needed experts to argue back. Economic and demographic growth meant more disputes that needed faster and more consistent

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[34] The emergence of Roman law in the West from about 1100 remains often mysterious. The sense made of Justinian's *corpus* was not that which a Roman would have made of it; it is not self-evidently 'written reason'; and were one concerned with applying law, not with dialectic, then Lombard and Visigothic ('sub-Roman') laws held more obvious promise. For a persuasive account of what allowed the emergence of jurisprudential thinking see Radding 1988. The current trend is to stress the continuity between early and late Empire, and between the Empire and medieval life (Humfress 2009, Maclean 2010), but it is hard to avoid the change in learned legalism.

[35] Thus Peter the Chanter and his circle in Paris at the close of the twelfth century were theologians, distrustful of Roman law and deeply distrustful of lawyers; but their style of argument on matters as disparate as horseplay at the Feast of Fools, clerics serving princes, knights indulging in tournaments, and wives entangled with interest on loans at their husbands' behest (Baldwin 1970: 142, 178–90, 225, 280) is surely legalistic in Strayer's sense. A student of the Islamic world would expect the theologians' concerns and methods alike to be grouped under *fiqh*, roughly 'jurisprudence'. Legal historians might assert incautiously that such matters simply fell under canon law, not civil, but that was not Peter's view.

> resolution. Forms of more or less specialist, expert law therefore developed (Reynolds, S. 2003: 351).

But similar pressures in worlds as different as the Chinese and the Islamic produced, in very different forms, outcomes each alien to Europe's pattern of professional advocates and chancery lawyers.[36] Reynolds's 'therefore' assumes too much.

Nor can law in later medieval Europe be reduced to state-like power and reactions to it. The professional culture of the Romanists, most obviously, providing them a set of common maxims (Stein, P. 1966) and sometimes perhaps of common principles, spread across most of Europe in the twelfth and thirteenth centuries (Hyams 2000). 'The civil law [i.e. "Roman" law] was a self-contained system,' says Stein (1999: 50), 'which had no need of supplementation from any other system. On the other hand, it was not applied exclusively in any court but only where the local law was lacking.' From a local perspective, to reverse the view, 'Roman argument was capable of structuring… disputes heard in any kind of venue' (Wickham 2003: 115), which brings into question localism. In twelfth-century Lucca, for instance, which thought its law mainly Lombard, court records suggest arguments turning more on fact than on technicality (ibid. 42); Pisa, which as a 'second Rome' claimed to apply distinctively Roman law, apparently records more complex argument (ibid. 120–5, 137). How different practice may have been in, say, transferring land or goods is hard to know,[37] but these cities defined themselves differently with respect to a common set of legal options, and law in either case (Lombard or Roman) was larger than polity. Let us label the difference between the cities 'political'.

Venice and Florence are of interest, too. The former was run by a set of councils ('the forty', 'the ten') which combined executive and legal power and were staffed by the nobility, who even troubled themselves to patrol the streets. The *ius commune* was excluded explicitly, the arbitrariness

[36] The role of legally expert (not just rhetorically expert) advocate perhaps appears in Burma (Huxley 2001a). But lawyers in the European sense were not a feature of early India (Rocher 1969); it is hard to find a parallel in much of Islamic history, and attempts to make 'litigation masters' fill the gap for pre-modern China (Macauley 1998) are not convincing. One of the oddest features of medieval Europe is the way that specialist advocates attain a monopoly of practice and, even in non-Roman England, monarchs accept this.

[37] Pisa presents a dense array of formal 'actions' in the Roman manner, such as actions of *uti possidetis* to secure possession of land (Wickham 2003: 124–5). But by the 1180s there seem to be often several actions at once (ibid. 128–9), which rather defeats the 'Roman' process. Given that Lucca too recognized the distinction between ownership and possession (ibid. 49–50), and that Pisa saw its law as Roman whatever its source (ibid. 116), it would be good to know what substantive law enabled one to do in one city that one could not do in the other.

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of judgement hardly disguised, and legalism confined to such matters as why direct proof was not needed to convict a pauper: 'a crime half proven was a fully proven half-crime' (Stern 2004: 229).[38] Florence, on the other hand, excluding the 'magnates' from high office from the late thirteenth century to the fifteenth, staffed its legal system with outsiders, and used formal law in other ways (ibid. 210, 213, 225). Again, 'political' realities in England might be evident in the composition of juries or in the role allotted them at different dates (Berman 1983: 451, 456, 2003: 285–7, 318, 478). By convention lawyers exclude such difference from comparison, preferring to compare instead modes of reasoning and the technical elegance of solutions to shared problems.

To 'bracket' legal argument, and thus allow a separate history of law, is made plausible by separating law from fact in legal practice. A classical (in both senses) case is the republican Roman scheme of the magistrate granting an action and 'formula', thus specifying the point of law at issue, and a judge or *iudex* deciding on the facts (Jolowicz and Nicholas 1972: 199ff.; for cautionary notes, Metzger 2004: 258). By contrast, in ancient Greece (in Athens, at least, in 'public' courts) there seems little separation (Todd 2000, 2005, Lanni 2005, 2006). Nor was there in much of early Europe: 'when we go back to the early twelfth century, this distinction [of fact and law], at least as far as litigation in the lay courts of Europe was concerned, did not exist' (Cheyette 1963: 369); much substantive law was only, in Maine's phrase, 'secreted in the interstices of procedure' (ibid. 375). Cheyette's concern here is to show that the 'custom' invoked by an older secondary literature was that of the emerging (royal) courts themselves, not of communities or of peoples at large, which is surely so (cf. Milsom 1981: 12, 48, 59, 83, Ibbetson 2007: 165). How legalistic other laws or customs were is difficult to tell.[39] But the writ-system in England and the *enquête* in France had the effect of separating

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[38] Venice had its statutes or decrees (*promissiones* of various dates), as well as its conventions among the nobility. But 'law' and legalistic reasoning hardly overlap. From one point of view, not dissimilar to that of modern 'law n'order' rhetoric, it worked very nicely: 'in Venice the conviction rate for theft between 1207 and 1403 was 99%' (Stern 2004: 230).

[39] The outsider coming to this subject is struck by how divided the secondary literature is. In the English case, pre-conquest and post-conquest matter remain largely separate, and writers on the emerging common law at Westminster have seldom much to say about other courts. For attempts to bridge the first of these gaps see Hyams 2003: chs 4 and 5, and Wormald 2001. Presumably to go further with the second problem would mean at least trawling the extant law-suits (Caenegem 1990–91). For plainly legalistic arguments elsewhere in Europe at an earlier period see Wormald 2001: 77, 80 (the point at issue is whether someone is or is not a Frank). For a thirteenth-century English example, from manorial records, see Ibbetson 2007: 168 (the point at issue is whether a woman's heirs have or have not rights to land where she has given seisin to the [reversionary] lord).

law, as Raz does for modern times, from local knowledge and decision, thus from common sense.[40]

Courts did this in part, on whatever geographic scale, by separating out a case from the rest of life, as they still do. The canonical inquisition, with its many *termini* and 'mathematical' scheme of proof (Seagle 1941: 97–8), is easy to mock. In classical Rome, however, the scope of a case might equally be limited in a formula by the magistrate granting the defendant's *exceptio*, to which could be added the plaintiff's *replicatio*, and so on through a *duplicatio* and *triplicatio* (Jolowicz and Nicholas 1972: 208). The English writ-system provoked something similar (Baker 2007: 76–95) and produced by degrees a notoriously obscure procedure of written pleading:

> The plaintiff's 'declaration' was, of course, followed by the defendant's 'plea,' but the plea might be followed by a 'replication,' the replication by a 'rejoinder,' the rejoinder by a 'rebutter,' and the rebutter by a 'surrebutter.' So sober an authority as the *Encyclopaedia Britannica* [1829] referred to common-law pleading as a 'mischievous mess which exists in defiance and mockery of reason' (Seagle 1941: 99).[41]

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But defining an issue is not the monopoly of 'Judge and Co.' Colloquial law in parts of Yemen, for instance, will produce a 'record of judgement' setting out the specific plaints and counter-plaints, the settlements proposed, and a structure of guaranty to support the judgement (Dresch 1987a); the separation of a 'case' from everyday life caught Fallers's attention in rural Uganda (Fallers 1969). Yet if neither the Yemeni nor the Ugandan example seems 'complex' law, it is not because of formal procedure.

[40] For the (very slow) production of substantive law in the English case, Milsom 1981. The French case is different. The process of *enquête* or enquiry by the king's *parlement* teased decisions on law away from those locally on fact (Strayer 1980, Carbonnières 2004), and did indeed evolve its own jurisprudence (cf. Cheyette 1963: 365). But the (substantive) law it administered remained uncentralized, which was not the case in England. The great *coutumiers*, or records of custom, of the late thirteenth century (Anjou, Orléanais, Touraine, Normandy, Venandois, and Beauvaisis) take shape in the context of enquiries from Paris, no doubt, and certainly of spreading formal knowledge of law; they attain a certain uniformity, and they are 'regional', displacing perhaps much small-scale law (Cohen, E. 1993: 29–33, Gauvard 2005: 50–1), although at least 300 smaller domains survived. But it is regional, not royal, law that the Paris *parlement* is asked to apply. Codifying such laws takes until the sixteenth century, *grandes ordonnances* appear in the late seventeenth, and a common law for France is still being debated on the eve of the Revolution (Olivier-Martin 1994).

[41] The *Britannia* article was authored by J. S. Mill. A legal system which infuriated such different characters as Bentham and Dickens must have been deeply at odds with any but lawyerly views of life. 'It is real question,' says Milsom (1981: 7), 'why nobody before Bentham was provoked, and a part of the answer is that nobody before Blackstone [1765–9] described the system as a whole.' But the history of the common law, no matter how one writes it, does suggest 'the spirit of Heath Robinson' (Milsom loc. cit.) or of Rube Goldberg. This seems much less the case with civil (Roman) law.

A simple system (one Hart would have called 'pre-legal' or 'primitive') may be complicated in its detail, with at least explicit rules about when other rules apply and extravagantly full compensation-tariffs. Practice, anyhow, in any form of life, is rarely simple. But a complex system in lawyer's terms is surely one with a jurisprudence, that is, a discourse that reflects on itself and justifies legal choices in legal terms (cf. Sealey 1994: 51–4 on the difference here between Greece and Rome). Systems differ in formal method. They may claim to deduce decisions from a code, for instance, as the convention now is in civil law (in France, let us say, or Germany); on the other hand, they may apply 'historicizing' arguments of which (English) common law is the type-case, the judges admitting in recent times that they make law in the process of finding it. This common-law style, most obviously, makes legal rules indeterminate (the professionals' famous 'rule in Rylands versus Fletcher', for instance [Honoré 1977: 100–101]). But so, less explicitly, do Islamic *fiqh* or Sanskritic *dharmaśāstra* literature, both of them forms of reflection and deduction that are largely independent of case law and purport to be ahistorical, as much as does 'Roman' law in its quite distinct forms of classical, medieval, and modern.[42] All these traditions, no matter their differences, can treat seeming exceptions to a rule as examples of other rules or as refinements of the rule first stated, such that there is no end to the process of rationalizing experience and its forms. In Donald Davis's resonant phrase (2010: 1), 'Law is the theology of everyday life.'[43]

[42] Sanskritic and Islamic law can be thought of as systems of jurisprudence existing independently of legal practice. The same might be said of the 'Roman' *ius commune*. Schacht (1964) discusses the parallel between Islamic law and classical Roman law as products primarily of jurists, and Lingat (1973) that between Roman law and *dharmaśāstra*. The prestige of the common law is such that some authors (e.g. Hallaq 2009) would like to see *sharīʿah* as developing from case law, but the evidence is thin (cf. Gleave 2010, Powers 2010).

English, continental European, Sanskritic, and Islamic terms (to mention just a few) do not map onto each other. *Sharīʿah* may thus be contrasted with 'Islamic law' where the latter means the circumscribed systems of modern states (Clarke 2012), or may itself be translated as 'Islamic law' with a broader notion of law in mind; *fiqh* may be translated as 'law', 'jurisprudence', or simply 'wisdom', recognizing that wisdom consists in deducing God's law for humanity; *uṣūl al-fiqh* (the 'roots' of *fiqh*) might be glossed as jurisprudence, as distinct from law. (For a crisp explanation of some key Islamic terms see Bowen 2003: 14–15). Little of this need obscure the modes of practice and thought at issue, although a careful self-awareness is needed in the use of terms, as Bourgon (2003) shows for China.

[43] English law has thus held in recent times that a crime requires both an *actus reus* (a criminal act) and also *mens rea*, which at first sight looks to be a state of mind. 'The individual human being…remains the paradigmatic subject of criminal law,' says Nicola Lacey (2000: 25), and debate about corporate liability 'is marked by a sustained use of metaphors, contrasts, images which depend upon analogies and disanalogies between "corporate" and "human" persons.' But *mens rea* is no less a metaphor in the latter case, it turns out, than in the former (Hart 1961, Kenny 1977, Ashworth 1987). What law is attempting, through such concepts as recklessness, negligence, and intent, is to

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This is scarcely the most pervasive aspect of complex legalism. Civil issues that come to court in our own world are notoriously unrepresentative of law in general (Priest and Klein 1984), and those that command careful reasoning in the higher courts of England or America are even more so (Schauer 2009: 23, 89, 139, 171).[44] Nonetheless the higher reaches of law guarantee, in their way, the lower reaches: jurisprudence and doctrine ensure that most objections to distinctively legal reasoning are long foreseen, and to tell a lawyer they are wrong is oddly difficult. The effect is evident in the 'forensic ritual' of public debate (Wickham 2003: 45). Some time around 1600 there seems to have been an 'inpouring of the people's disputes into the tribunals of the crown' in many areas of Europe, and '[q]uite how the image of the law, or the state or the crown, had managed to acquire a sanctity, a moral force of this order seems rather a problem' (Bossy 1983: 291, cf. Baker 2007: 43);[45] but the ritual of debate must surely have been part of law's attraction as much as was the promise of brute power. Whatever the seeming oddities of the particular judge, the appearance can emerge of judgement being rule-bound and of general validity (Touffait and Tunc 1974: 488, 502, cf. Seagle 1941: 342), a description that seems as appropriate to the medieval or renaissance court as to the modern. The complement is practitioners' attitudes. A modern author sums up the professionals' view, and perhaps that of reflective by-standers at many periods: 'Law's seemingly

formulate the relation between person and society. 'Complex' law can thus give serious thought to the paradoxical case of attempting an impossible crime, such as picking an empty pocket (Hart 1981). 'Simple' law, by contrast, extrudes these problems to other domains of social practice.

[44] Schauer's repetition deserves noting as he drives home his point that the US Supreme Court considers only about seventy cases of the 9,000 offered it each year. The French system recently has had the *Conseil d'Etat* review about 11,000 administrative cases *per annum* (West et al. 1998: 92); the *Cour de Cassation* for criminal and civil law hears more than twice that (ibid. 87). In the French system judgements are lengthy in the lower courts, succinct in the higher; in common-law practice the opposite is true (Touffait and Tunc 1974: 488–91). It is worth remembering, though, Seagle's caution (1941: 288) that 'the *Code Civil* could be put into a vest-pocket edition, but the expository works would fill trucks ... It is said that in the law schools the precedents may be weighed, but in the Court of Cassation they are counted.'

[45] Law is often envisaged as imposed 'top-down', and with reason: 'According to an old chronicler, when, in the thirteenth century [1223, in fact], an Eyre was proclaimed for Cornwall, all the inhabitants fled in terror to the woods' (Seagle 1941: 174). But the phenomenon of 'seeking' law, which Bossy points to, recurs widely at different periods. Philip the Fair's extension of control in France (r. 1285–1314) was achieved in large part by offering, rather than imposing, a system of appeal (Strayer 1980), for all that he may have bribed notables to use his courts. England's common law drew in plaintiffs from beyond the notability quite early (Hyams 2003: 264, Pollock and Maitland 1898: i. 358–60, ii. 48), and in the eighteenth century one finds a wide range of people using courts voluntarily (Beattie 1986). The same recurs from imperial Rome (Humfress 2012) to modern empires (Merry 2010).

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counterintuitive methods...are a function of law's inherent *generality*' (Schauer 2009: 8),[46] and of a taste among specialists for coherence. But plaintiffs, respondents, and defendants—if they lose their case—rarely see themselves as exemplifying general categories and rules. Their concerns may seem to them traduced by legalism.

What from one point of view seems theology appears from another as obscure 'doctrine' that one must dumbly honour for fear of the (ill-defined) consequence. The only outcome of legal theory might be to make us answerable to power:

> in the United States...state penal codes run to thousands of sections and regulate everything from the wearing of dangerously long hatpins to spitting on the sidewalk...No wonder it is a basic assumption of modern criminal law that everyone is presumed to know the law. *Ignorantia iuris neminem excusat* is the Latin maxim (Seagle 1941: 242).

The legislative business of government on both sides of the Atlantic since Seagle's day means that probably one is in breach of a statute for most of one's waking life, if not in sleep, and in Britain even appeal-court judges complain that one cannot find out what the law is meant to be.[47] The dispersion of law through all of life in a world of this kind (with the rise of judicial review, law and administration become inseparable, perhaps to the detriment of each) offers almost a limiting case. So too does law's linguistic form. Recent law thus offers little on the page but definitions and cross-references, leaving implicit and platitudinous what 'commands' there may be or what 'normative rules': 'Do not commit an offence', 'Abstain from torts', 'Perform contracts' (Honoré 1977: 118); in short, do

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[46] 'Rather than attempting to reach the best result for each controversy in a wholly particularistic and contextual way, law's goal is often to make sure that the outcome for all or most of the particulars of a given category is the right one' (Schauer loc. cit.). This echoes, surprisingly for its modern tone, St Germain's *Doctor and Student* (1528): 'the general grounds of the law of England heed more what is good for the many than what is good for one singular person only' (quoted Milsom 1981: 250, see also ibid. 94). But the fact of generality holds beyond the moral or political claims of particular states and courts.

[47] Bingham 2010: 40–41, referring to a speech by Menzies Campbell, who calculated that between 1997 and 2007 there were 328 acts passed and 3,000 criminal offences created. In 2006 alone 5,000 pages of primary legislation were enacted and 11,500 pages of subordinate legislation made by ministers (Bingham loc. cit.). The phenomenon is only relatively new. 'Thus in England from 1925 to 1928 the average number of Parliamentary Acts was 50.6, while in the same period the average number of Statutory Rules and Orders was 1408.6. A far vaster number of administrative orders, decrees, regulations and codes have been issued in recent years by the Federal administrative agencies in the United States' (Seagle 1941: 329). France recently has run at about 1,000 statutes and 100,000 'decrees' *per annum* (West et al. 1998: 42). It goes without saying that Europe's monarchs in earlier ages often promulgated just a handful of statutes each (Henry VIII of England is a worrying exception), and some of them promulgated none; regulations or decrees in the modern sense were vanishingly rare.

not break laws. Laws themselves, located primarily against other laws, appear not to mention people.

Forms of law elsewhere, and early European laws, can seem to approximate or foreshadow this modern North Atlantic form: 'Law and the state were from the very first an instrument to combat what we might call "habit" or "custom", an abstract, impersonal, literate structure of coercive force' (Cheyette 1978: 170, cf. Diamond 1971). The theology of the state is surely entangled in Europe with that of law itself.[48] But Cheyette perhaps tempts us to reach too far. Although literacy and law as abstraction are opposed in this account to orality and custom as concrete experience, the supposedly oral style colours early written law (Cheyette 1978: 161, quoting Hloþhere and Eadric, *c.* AD 680); the conditional (and concrete) form is as conspicuous in seventeenth-century Massachusetts (Watson 1993: 67) as in Gundobad's Burgundian laws of AD 500 (Drew 1972); and even the (English) 1861 'Offences against the person' act, part of the great Victorian effort to rationalize law, seems closer to life than does present drafting. To date 'abstraction' is difficult.[49] Just as pressing, meanwhile, is evidence of legalism beyond the reach of state functionaries and largely beyond that of notaries or churchmen, or of the latter's vague equivalent elsewhere, so that saga Iceland (Miller 1990) and tribal Yemen (Dresch 1989a, 2006), for instance, seem both to have law in Cheyette's sense as do the Carolingian monarchy or Gregorian church. Causation can be considered later (and coercion too). For the moment let us simply note what our cases of legalism have in common. All of them map and organize the world in terms that do not reduce to encounters among specific persons. The categories and rules invoked are supposedly applicable instead to every instance of the same type, which suggests a view of life, even locally, rather different from simply knowing one's relatives and neighbours.

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[48] Cheyette explores not the origin of the state or of law in general but the origin in Europe of means to think in such terms. This began perhaps with such undramatic changes as the spread of Carolingian miniscule, and the later spread of generalizing argument is associated with the 'papal revolution' of Gregory VII (pope from 1073 to 1085). Much has been done since Cheyette published. On literacy see e.g. Clanchy [1979] 1993, McKitterick (ed.) 1990; on ideas of 'office' and state administration, Bisson, T. 2009. Berman (1983) is not a favourite of specialists on law, but his claim that the Gregorian papacy formed a model for newly state-like ideas of kingship adds persuasively to Cheyette's account. (For the more concrete relation of law and theology see Gauvard 1991: i. 11, 60–118.)

[49] What Boureau (2002) calls *abstraction judiciaire* is a small part of the issue, a feature specifically of jurisprudential or complex legalism. Non-learned law, such as early Lombard law (Drew 1973), must also be taken into account, and 'abstraction' here is probably a misleading term: 'generalization' seems nearer the mark.

Legalism sets what Lyons (1984), with the language of rights in mind, calls argumentative or justificatory 'thresholds'.[50] If I have a right to park my car outside my house and you stop me doing so, then you owe me an apology or compensation; my right may be overridden by the municipality's right—and the claimed communal need, of course—to clear snow or extinguish fires. But none of us can come and go without the potential (usually unexpressed) of justification being sought or offered. This is much what we find in non-expert law where no formal vocabulary of rights is evident. I am wronged by you grazing my land because I 'own' it or 'possess' it, as others own or possess their land; you may claim against me because I abandoned you on the road, and to refute the claim I would need to show I was not your 'escort'; and as 'guarantor' I have rights and duties distinct from those of someone of whatever height, weight, and age or temper. Again, 'the basic characteristic of law lies in its *generality*. Law lays down *general* rules' (Fuller, L. 1971a: 200). Precisely the feature that accounts for dissatisfaction with law in court (my circumstances are unique, they are not caught by rules) is also the attraction and compulsion of legalism, whether or not institutions like courts are present (my claim, or the wrong done me, is of general relevance).

LAWS AND 'THE LAW', STATE, AND COMMUNITY

Within a 'legal community' that is centred on something like a state (it may be a 'commune,' in medievalists' terms; it may be a 'principality') one can certainly have one-off laws. The British parliament used to produce these in abundance to establish councils and boroughs, to recognize specific rights of way, or even to dissolve individual marriages. But most laws, within states or beyond, 'possess a certain generality and one can either say that such laws are all rules or that rules are a species of general laws' (Honoré 1977: 108): mother's brothers do this, sisters' sons do that; an agreement is not binding unless made under seal or for consideration; if anyone slays a man in the act of thieving, no *wergild* shall be paid for him. Lloyd Fallers thus draws from Edward Levi the notion of 'categorizing concepts'.[51] Legalism deals not just with whether this woman was

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[50] The concept of rights as 'possessions' is historically specific, and the division of rights and duties as a complementary pair is perhaps more so, as Finnis points out, citing Gluckman (Finnis 1980: 209–10). For all that the dating of rights as centred on the individual may be endlessly contested (ibid. 205–7, Tierney 1997, Hyams 2000, Garnsey 2007), we can agree that this sense of *ius* is contingent. Nonetheless, the philosophers' reflections are useful.

[51] Levi (1948, cited also Cheyette 1963: 369) traces how professional legalism shifts the boundaries of categories as it encounters specific cases. He does so partly with

right to leave her husband, but with whether they were married and perhaps with what a 'marriage' is (Fallers 1969: 102, 109, 199), that is, with which category is at issue and thus which rules. Fallers here suggests a scale of greater or lesser legalism among societies according to how much a 'case' is distinguished from the rest of life and how clearly rules are spelt out (ibid. 13, 326ff.). This is not the same as asserting (e.g. Moore 1978: 215) that societies 'all have law'.[52]

A distinction is drawn in most European languages between laws (*lois*, *Gesetze*, *legge*, terms used also of 'descriptive' rules) and law (*droit*, *Recht*, *diritto*); and if law is often in part the totality of specific laws, one could nonetheless idealize 'right' or 'justice' (*droit*, let us say) without legalism. Again Gluckman is of interest. Throughout *The Ideas in Barotse Jurisprudence* (Gluckman 1965) he pursues 'laws' (or *lois*) and, despite his great determination, fails really to find much. But he certainly finds an interest in 'law' in the sense of *droit*— and, as with many African ethnographies, one is put more in mind of Dworkin's 'principles' (Dworkin 1977, 1986) than of Hart's world of legal 'rules' (Fallers speaks of 'moral holism').[53] Something of the kind is true elsewhere. For example, the reader aware that the Dutch in what is now Indonesia rewrote custom (*adat*) as customary law (*adatrecht*) might reach beyond the Dutch imperium in the hope of finding indigenous laws, and what they find is often a set of homilies expressing in context an idea of *droit* but showing few signs of *lois*.[54] Village Thailand sounds not dissimilar (Engel 2009).

reference to the 1910 Mann Act prohibiting the trafficking of women across state lines for immoral purposes, surely one of the more peculiar products of the US Congress. Passed in the wake of a scare about imagined 'white slaving', it meant that if a man in New York bought his mistress a ticket to Albany for a wicked weekend he had only his wife to face; if the ticket was for Hoboken, he faced the federal government and ten years' imprisonment (cf. Seagle 1941: 9, 322). The agency of the women was of no account.

Seagle is another of Fallers's 'finds'. One would be rash to take seriously certain historical claims in *The Quest for Law*, and the evolutionary claims seem quaint now. It is a period piece. Nonetheless there is a great deal of stimulation to be had, along with the fruits of some curiously wide reading. The current equivalent of Levi's excellent short book is Schauer 2009. No equivalent of Seagle comes to mind.

[52] 'Law' is simply too large, or too general, a term to be helpful here. But in societies with a strong ideology of law it is easy to imagine, as anthropology has often done, that other societies must surely all have some equivalent to one's own provisions. For an interesting, if loosely argued, account of Muslim authors imagining the Mongols in their own (Islamic) terms of law see Aigle 2004.

[53] There is irony in the fact that much legal anthropology concerns Africa, a region where law in one sense (*droit*) was so prevalent and in another sense (*lois*) so rare. A more immediate problem is that anthropologists often take Moore's account (1986) of how the British formalized 'African customary law' near Kilimanjaro to demonstrate a universal truth such that '[c]ustomary law is now perceived as a refraction of legal centralism or state law' (Vincent 1996: 331). Many forms of law beyond Africa are thus pronounced unthinkable.

[54] The literature is vast, but see particularly Vollenhoven [1918, 1931] 1981, Josselin de Jong 1948, Burns 2004. Geertz (1983: 176–9) reminds us that holism of this kind sounds

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Where legalism is conspicuous, by contrast, rules as numerable laws imply exceptions (cf. Hart 1994: 110) and thus potentially other rules.[55] But authority, communal or princely, is presented with several options, not least what MacCormack (1996: 45) calls 'the phenomenon of the non-enforceable'. This embraces laws that few think to enforce, such as the Chinese prescription that persons of the same surname not marry or that only junior relatives in the same clan could be adopted as heirs, and MacCormack groups with them laws that are enforced selectively.[56] On the latter score the rigours of Chinese punishment made a point about an ideal order centred on the state, but were alleviated by imperial beneficence or mercy (ibid. 81, 83, 203, 204). Being sentenced to strangulation was one thing; 'strangulation after the assizes' was another, for at the annual assizes the sentence might be changed to, say, 'exile to 3,000 *li*'.[57] Lon Fuller reports an aspect of recent American legalism that is less explicit:

> The ordinary citizen, thumbing his way through the statute book, may be startled to come upon some minor infraction burdened with a fine running into thousands of dollars and threatening the offender with economic

well until one is found to be a misfit and expelled. Similarly, Ruth Benedict's depiction of peacefully communal Pueblo Indians is nonsense: not taking part wholeheartedly can have one hung by the thumbs, whipped, or quietly murdered (Hoebel 1969).

[55] Edmund of England's prescriptions on feud (*c*. AD 940) are a good example (Whitelock (ed.) 1979: 428). So is early Lombard law (Drew 1973: 57–9). In the absence of jurisprudence, however, there is little of the lawyerly complexity that so frustrated Justinian and Napoleon. (For an amusing parallel between the latter two see Kelley 2002).

[56] The law on adoption of heirs was thus applied in late China to the military elite but not the peasantry (Junjian 1994: 51–2). What one seems to see in Chinese history is a stress on formal law in major cases, such as rape and murder, and intermittently in dealing with people who matter socially; otherwise, administration comes first and law is applied not obsessively but when useful administratively. (The Roman Empire often sounds similar.) Chinese imperial law, meanwhile, copies and supplements codes, but rarely discards much, from the seventh century through the nineteenth (ibid. 82), while ethical commentary ebbs and flows to its own rhythm. Bohannan's attempt (1965) to see law as simply 'lagging' behind culture, or what these days would be called practice, gets one nowhere with cases of this kind.

[57] MacCormack mentions the imperial assizes at many points and describes the implications, but does not focus on them as integrally part of law. Bodde and Morris (1967: 115–6, 138), although they wrongly assume a lottery in the decisions made, put more stress on the distinction between judgements to be reviewed and judgements to be executed summarily. This was not just a system of 'appeal'. Of particular interest are those cases where the throne decided from the start on a capital sentence to be commuted later, thus squaring the demands of law and of justice.

A less formal parallel is found in eighteenth-century English forms of 'pardon', including George III's grim instruction that a particular offender be taken to the gallows 'and that he be informed, then, and not before then, of the reprieve' (Hay 1975: 52). For further literature on the disjunction at this period between penalties prescribed and penalties executed see Berman 2003: 317ff. Perhaps less than half of capital sentences resulted in execution. The relations among fear, common sense, and patronage are nonetheless fairly clear.

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> ruin; . . . the threatened penalties are not really intended to be applied at all, but rather to be used by the prosecutor as a club with which to obtain a confession from the accused and perhaps his collaboration in the pursuit of other offenders (Fuller L. 1971b: 38–9).

Nor is the threat of ruin merely economic (the accused may be utterly destroyed). But the victim of a trial is nonetheless a 'wrongdoer' just as law is in some way synonymous with right. As in classical Athens, perhaps, condemnation says something about how society should be (cf. Cohen, D. 2005: 219, 221–2, Yunis 2005: 201, 207 and *passim*, Seagle 1941: 228, 250), and this is never a mere report of fact. The breach even of 'technical' rules acquires dramatic force. We should ask how that is possible.

Distinct though Chinese imperial law is from rites and cosmology, it is part of an intellectual tradition which declines 'a distinction that Western philosophy has [in recent centuries] largely accepted as fundamental, that between the descriptive and the prescriptive or the "is" and the "ought"' (MacCormack 1996: 70). The same is true for the quite different case of Sanskritic thought, less centred on a state-ideal, as for instance in the law-text *Manu*, which dates perhaps to *c.* 200 BC (perhaps to a good deal later) and remains ever after a source of reference: 'As a text on *dharma* it is by definition caught in the universal paradox between "what should be" and "what is"; . . . *dharma* may sometimes be rendered as "law" either in the sense of the law of gravity (*dharma* as nature) or in the sense of the law against slander (*dharma* as culture)' (Doniger 1991: vi–vii, xxxix).[58] Though a far simpler world in this respect than the Sanskritic, classical Greece appears part of the same set. *Nomos* (often translated as law in English) is distinguished not only from *phusis* (nature) but from *ethos* (habit, of a kind that animals have as much we do), and in a polity *nomos* both 'should be' and 'is'.[59] This elision, or lack of separation, remains of course in modern European law (*droit*) but not perhaps in laws (*lois*).

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[58] See also Doniger and Derrett (eds.) 1978. (For another translation of *Manu*, Olivelle 2005). To take *dharma* as 'law' in the sense of codes or statutes is to repeat the errors of British imperialism; to force thought about law being more than the statute book, however, the translation is invaluable (see Davis 2010). In the Indian case, law as something like statute is the province of 'corporate' groups, such as local caste-groups, and of rulers (Davis 2005). As Lingat points out (1973: 145–7), much the same concerns as colour *dharmaśāstra* are pursued from the perspective of temporal practice in the literature on *arthaśāstra* (e.g. Dutt 1896), but a great deal of work remains to be done before we can judge how legalistic India was beyond learned circles. For comparative purposes perhaps the most interesting feature of Sanskritic thought is that *dharma* is equally 'character' (or 'nature') and 'duty'.

[59] For a useful summary of passages from Aristotle see Murphy, J. B. 2007. For the meanings of key terms from Hesiod to the Stoics, Long 2005. Rosalind Thomas (2005: 52), meanwhile, cites Euripides to the effect that a tyrant may 'own' the law for himself, presumably reducing *nomos* to a set of arbitrary commands.

The result is much argument over law's nature. But law itself without a specifying adjective such as 'natural' or 'divine' is also assumed now to be the custom, legislation, and professional reasoning that courts enforce (Murphy, J. B. 2005: 218),[60] such that duty-based understandings of law become marginalized, enforcement by the legal apparatus comes much to the fore, and 'the law' as an institution is commonly our crux of argument.[61] The focus of terms may perhaps have shifted already by the time of Aquinas (ibid. 63–4). But the separation of *lex* from *ius* (of law from right) is often attributed to Hobbes, *c.* 1650 (Finnis 1980: 208). From here to ideas of 'social control' is not a long step; nor is it far to an easy identity of law with states or polities, or at least community, echoing the Greek or Chinese logic of centralized coercion and less the Sanskritic logic.

Anthropologists and historians alike will soon think of cases where the identity of law and community either fails to hold or raises difficult questions about what is meant by community, or indeed by polity. For example, the format of law may be borrowed in detail among supposed relatives each of which claims its independence politically, as with German 'city' laws in the Middle Ages (Berman 1983: 371–80). Commercial law and laws of feud, we shall see below, pose even more pressing questions. The coincidence of law and bounded community is a special case, and the seeming naturalness of their elision always requires examining. A certain arbitrariness is evident,[62] which the history of governance in Europe obscures as if the state were identical with law instead of appropriating

[60] Murphy here speaks of positive law. Hart, often denounced as a positivist himself, noted early on that positivism denoted so many unrelated things that we were probably better off without the term (Hart [1961] 1994: 302); many fierce arguments since then have been at cross-purposes. The root meaning of 'law laid down' (*ius positivum*) retains some sense, but it is usually best to say, as Porter (2007: 87) does discussing Gratian, what one means in context.

Positivism aside, terms have shifted. In post-classical Roman law one finds a distinction among *lex perfecta*, *lex minus quam perfecta*, and *lex imperfecta* (Jolowicz and Nicholas 1972: 87). In later European literature a distinction is made between perfect and imperfect rights, only the former justifying coercion. In modern usage, however, we dismiss 'imperfect' rights as (mere) morality, while 'perfect' (legal) rights are now those, no matter how trivial, which the legal apparatus would enforce coercively if challenged.

[61] 'Our own age is the first which has felt able to relegate the relationship between law and morals to the classroom' (Milsom 1981: 25), and attempts to retrieve the question often invoke supposed benefits of 'the law' as whole. For a good example from someone who cannot be suspected of unthinking individualism or functionalism see Finnis 1985.

[62] In Arabia an identification of 'customary' law and bounded community is rare; in Berber North Africa it is very marked (Stewart 2000). For the latter case, with its florescence of 'village' laws, each rather like the next but said to be quite distinctive see Scheele 2008. Predictably, it is claimed that the French in North Africa 'invented' local custom (cf. Parkes 2010). What they may have encouraged was the production of law identified with larger tribes, but inventing communal legalism in the time available is not plausible (Bernard and Milliot 1933). In Morocco 'customary' laws drawn up by communities predate the Western presence by centuries (Montagne 1927).

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as its own an ideal that obviously is broader, and to escape this contingent outcome proves difficult. The 'narrative' of the state, if a cant term be allowed, is self-justifying and comprehensive.

In the modern juristic state, the work of legal professionals becomes aligned with claims to maintain communal order, an 'ideology of law' (Strathern 1985) that elides several meanings of 'complexity' and seems always, in the absence of historical and ethnographic perspective, to be the type-case of law against which others must be judged. John Finnis, plainly with Joseph Raz (1973, 1979) in mind, thus discerns three characteristics of 'legal systems' in general:

> (i) they claim authority to regulate all forms of human behaviour (a claim which in the hands of the lawyer becomes the artificial postulate that legal systems are gapless); (ii) they therefore claim to be the supreme authority for their respective community…; (iii) they characteristically purport to 'adopt' rules and normative arrangements (e.g. contracts) from other associations within and without the complete community, thereby 'giving them legal force' (Finnis 1980: 148).

Yet a community might itself be incomplete with respect to law.[63] Civil ('Roman') law in nineteenth-century Europe could thus be opposed to political fragmentation in Germany as it could to reactionary government in France, extending beyond both (Koskenniemei 2001: 31); the *ius commune* of Europe was real enough, although the 'community' was at least the whole of divided Christendom (Hyams 2000); nor is Islamic law the possession of a single polity, nor yet Sanskritic law. What Bohannan (1965: 38) called a 'legal culture' is seldom coincident with what he called a 'power system', as we saw with Florence and Pisa or with Lucca, and what is true of learned law is true of many other forms.

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LAW AND (CONCEPTUAL) ORDER

To an extent, law floats free of politics. Specialists borrow among jurisdictions and schools, for example, which accounts for much legal history (Watson 1993), and occasionally they borrow from alien traditions.

[63] The idea of community at issue in Finnis's work goes back to at least Aquinas (d. 1274) and the rediscovery of Aristotle. For how different the idea of a common good was in Scholastic thinking from that in our own see Kempshall 1999. But the 'community' in such thinking seems quite undefined, apparently being anything from a household to the following of a king, rather as Finnis (1980: 149–50, 186) suggests the nation-state is now an approximation. One thing the Scholastic version does not admit is the tidy utilitarian calculus of right and coercive power: indeed, how coercion is justified is often hard to grasp.

These traditions themselves can be vast, whether Roman, Islamic, Sanskritic, or even Chinese,[64] and adopting a 'great tradition' of law, no matter in how nominal or fragmentary a way, is often a claim to civilized status, while empires with a legal tradition to hand may claim to civilize their subjects by imposing law. In Tibet, for example, there were doubtless recognized modes of proceeding in disputes among nomadic tribes and an idea of just reparation (Ekvall 1964, Pirie 2009), but Manchu law in the eighteenth century co-opted the idea of rightful settlement and by 'spelling out the rules' attempted also to define, delimit, and co-opt the tribes as elements of control (Shi-Yü 1950). On the other hand, bounded law may be invoked within a field of wider powers, as it was in the many *fors* and *coutumes* of southern Europe, each claiming localized identity and rights.[65] In the Caucasus one finds codes of 'customary' law (*ʿādat*), written in Arabic, that set principalities apart from each other and from encroaching empires before the nineteenth century (Bobrovnikov 2002, Kemper 2004); by contrast, Mxitar's eleventh-century 'Book of Judgement' forms part of a tradition by which Armenians claimed a place in the world through law although Armenia was not an independent polity and Armenians were widely scattered (Thomson 2000, Mahé 2000, Mardirossian 2004).[66] Beyond this, despite the obvious association in Europe's history of law with hierarchical authority such as princes or

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[64] One says 'even' Chinese because Chinese law, unlike the others, was so closely bound to a specific polity. But law, like the ritual calendar, could be adopted as a mark of civilized status. The obvious example here is Vietnam (vassal to China until AD 938), with a markedly Confucian aspect to law from the eleventh century until the fifteenth, and a code adopted in 1811 that mimicked Q'ing law. See Philastre 1909, Huy and Van Tai (eds.) 1987. But Sanskritic modes of discussing law, less attached to polities, seem to spread more easily (Brown 1996), in this resembling medieval Europe's appropriation of 'Roman' law.

[65] As grants from lords these local laws begin early: the For d'Oloron, for instance, given by the lord of Béarn and Bigorre and sworn to by two sets of men each 100 strong, must date to around 1080 (Dumonteil and Cheronnet 1980). It serves as a model for certain other grants as late as 1383. From about 1150 a Provençal abridgement of Justinian, *Lo Codi*, colours *fors* and *coutumes* across a very wide area (Watson 1993: 62–3, Stein, P. 1999: 55). The similarity of many local law-codes in southern Europe, like that of Berber codes in North Africa, puts one in mind of Lévi-Strauss likening Amazonia to a Europe with no Rome ([1964] 1969: 8): he speaks of 'an already established semantic environment, whose elements [were] used in all kinds of combinations—not so much, I suppose, in a spirit of imitation but rather to allow small but numerous communities to express their different originalities . . . within the framework of a common conception of the world.'

[66] A rather different case is provided by Visigothic law (King 2006). First promulgated in AD 654, it was translated into Castilian, reissued by Fernando III in 1241 in the *fuero juzgo*, and perhaps remained nominally in force in parts of Spain until displaced by a civil code late in the nineteenth century. Through at least the eleventh century passages are being accurately quoted and applied in practice (Collins, R. 1985, 1986). A law-code first promulgated by centralizing kings enjoys a vigorous afterlife when the kingdom has evaporated (Zimmerman 1973), making 'functional' or simply 'political' explanations of law empty.

kings, or with bounded community such as municipalities, there is genuinely decentred legalism.

Forms of maritime law seem often to enjoy more than local currency. So might mercantile law. The idea of a single *lex mercatoria* in medieval Europe is no doubt misguided, whatever its later attraction as an image (Basile et al. 1998); but that seems no reason to ignore the presence of many fragmentary 'laws merchant', each being taken up in one jurisdiction and another with the assumption that it operates beyond any one jurisdiction's bounds.[67] Commercial law not dependent on state enforcement is well illustrated by a nineteenth-century Taiwanese case.[68] Bringing disagreements to an imperial magistrate here might usually have produced a compromise more reminiscent of Cheyette's early Languedoc than of apportioning contractual dues, and the un-imperial law of Taiwanese merchants could therefore not rely on government. What it did, in strikingly legalistic terms, was to elaborate, in effect, self-executing contracts such that each stage in the process of moving goods between, say, Taiwan and a mainland port was clearly defined, and with it ownership, liability, and the share of investment at issue. Legalism allows, first of all (and very obviously in merchants' law),[69] conceptual order in what otherwise

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[67] See also Baker 1979, Donahue 2004. Basile et al., although surprisingly tolerant on maritime law (1998: 154), set the bar quite high for *lex mercatoria*: 'an international body of substantive legal doctrine' (ibid. 124), perhaps on the model of the *ius commune*. Certainly that did not exist. For a discussion of fragmentary 'customs', such as putting down a 'godspenny' to mark a deal, see Kadens 2004. Presumably the place to look for partial 'laws merchant' would not be in rulers' courts so much as in documents governing the movement of goods, by long-range agreement or by 'cabotage', and in bills of exchange.

[68] Brockman 1980. Unfortunately for those with academic interests, the author went on to practice law and, apparently, published just the one article. It deserves a wider audience. The Taiwanese material, assembled under Japanese occupation, was until recently one of the few rich sources on non-imperial Chinese law. The study of Chinese law is now evolving rapidly (on contract, see e.g. Hansen 1995, Zelin et al. 2004), but Sinologists are seldom helpful on what counted formally as 'law' for whom. Huang's demonstration (1996) that a third of the workload at provincial magistracies concerned 'civil' matters does not resolve the question of law's conceptual boundary (see Bourgon 2002).

[69] Although one can imagine even long-distance trade conducted by a formally homogeneous kin-like guild, in practice differentiation among parties to transactions, and thus accountancy, is common and with it a need for definition. For example, if A wants goods from B, transported by C, when is ownership transferred, at the time the deal is made or on delivery? Which of A or B must C answer to in what terms if he loses the goods *en route*? Brockman (1980) discusses several of the options. For the seemingly arbitrary choice of when ownership and risk are transferred and whether or not the two are transferred together see Watson 1993: 82–7, where the plausible guess is made that non-specialists under legal regimes (French, German, and Swiss) that differ in this respect probably all assume that ownership and risk are transferred together at delivery. Each of the 'legal' answers to the question will have its own coherence. Grounding any one of them in a supposed logic of commerce, as Nicholas does for classical Roman law (1962: 179–80), leaves the others unexplained.

would be indeterminate (cf. Finnis 1980: 268), and maintaining such order can take many different forms. Coercion, in the sense of brute force, is not essential. As soon as one makes generalizing concepts explicit, however, the possibility exists of excluding and including persons with respect to these, thus defining their position against their fellows, a logic that covers exchanges of blood (more broadly by far than in 'controlled self-help', Sealey 1994: 109–10) as much as of goods or money.

Medieval Iceland provides a rich case of the former, of rules about physical harm and reparation. Here was a kingless polity which identified its existence and welfare with law, and where an extraordinary florescence of legalism occurred without the correlates one expects from mainland Europe:

> this mass of rules was mercifully unaccompanied by any state enforcement mechanism. There was no bureaucracy to oversee their administration, no permanent presence, with the exception of the inscrutable Law Rock, that had a vested interest in their being honored (Miller 1990: 228).

The late compilation of laws known as *Grágás* (*c.* 1260, perhaps two centuries after the imagined setting of classic sagas) goes into enormous detail, some of which smacks of theoreticism, some of practical concerns (ibid. 224). The detail is striking, because law was not enforced by a common power but largely by those at odds,[70] and descriptive rules are thus unlikely to predict what happens. But definitional, prescriptive rules are conspicuous. As a limiting case, outlawry is of interest (cf. Sealey 1994: 118, 123, on Greek *atimia*). The lesser and full forms do not fall under one Icelandic term, but the options can be summarized as follows:

> Full outlawry left a man no call of any kind on others; if he escaped from Iceland, despite a ban on people giving passage to full outlaws, he could be killed with impunity abroad as he could among the barren places of home. Lesser outlawry was more like temporary banishment. Though the outlaw lost his property, his exile ... [was] for only three years, and he had three summers in which to arrange passage abroad, during which time, still in Iceland, he had three named homes. Within bow-shot of each, and once a month within bow-shot of the roads between them, he was safe much as

[70] Many types of law set out amends or penalties and have little to say about how these would be enforced. Early Rome is an obvious case, and in private law much of this pattern seems to run on later. One had first to get the other party to court, or have them agree to come (to give an 'extra-judicial *vadimonium*'); one had then, most often, to extract for oneself what the court awarded, although violent resistance by the other party would in theory be a capital offence against public authority (Kelly, J. M. 1966, Metzger 2000, 2004). A very self-conscious 'state' here ruled, in effect, on the rightness of 'self-help'. For a general account of coercion and law, which makes redundant much early anthropology of law, see Lamond 2001.

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other men, as he was beyond Iceland (Dresch 2006: 294, drawing on Dennis et al. 1980, 2000).

Such divisions of space and time are not unusual in non-state law (they colour much kingly law also, as with banishment and sanctuary).[71] They are typical of legalism generally. But suing for outlawry in Iceland meant asking others to remove one's opponent's immunity (*helgí*), the presumption that violence against him deserved reparation (Dennis et al. 1980: 183).

Not all languages offer a comparable term to *helgí*. Most forms of law surely offer a comparable assumption, however, that a person who is not another's chattel can be wronged and in the usual way of things should not be. Legalism then typically defines wrongs by circumstance. If I hit you, it may not be a wrong to hit me back; if I owe you money, it may not be a wrong to distrain my goods, as normally it would be; if I occupy your property, it may not be a wrong to evict me by force. One's 'immunity', in short, depends upon circumstances legally defined. Indeed, the brutality of execution, imprisonment, or corporal punishment is presented often as the outcome of legalistic argument. Law itself may or may not be coercive (state law often is, of course), but typically it says where coercion is or is not justified, and the coercion exercised through law is seldom straightforward, consisting often in the removal of powers and protections (D'Amato 1985, Lamond 2001). States now typically claim to enable and to monopolize the process.[72] But far more generally, what in modern terms we call 'rights' are suspended or restricted, such that what one can and cannot do next are addressed in terms of what one last did, and in the limiting instance one's right to respond may be

[71] A point to note here, as one might in many cases, is that banishment need not place one wholly outside the law (a lesser outlaw whom one could freely kill in Iceland could not be freely killed abroad). We might also consider how closely related Scandinavian laws may have been among themselves. For Norway see Larson 1935. Berman (1983: 515) cites the *Codex Holmiensis*, promulgated by a Danish king in 1241, and claims a strong influence specifically from canon law; but the laws begin with a line one recognizes from *Njál's Saga*.

[72] One of the odder implications of states claiming to monopolize such questions is the idea that the power to form private contracts is somehow delegated. 'This . . . encounters the embarrassment that in many countries it is quite impossible to point to any legislative enactment by which private citizens were ever granted the power to bind themselves contractually' (Fuller, L. 1971b: 102). In nineteenth-century mood, one might surely as well derive law in general from private or civil law as from public or criminal.

That states treat rights in effect as 'liberties' is no surprise in older, once monarchic polities. More interesting by far is the United States, a fresh beginning on the basis of 'self-evident' rights; but rights to freedom can be withdrawn by all states, and rights to life by most, while property rights exist under 'eminent domain'. The only fully inalienable right is to be subject to the law's process. The distinction between public and private, which applies so little elsewhere (Miller 1990: 305, 312), may be of primarily technical importance.

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removed entirely, as was the case with 'full outlawry' in Iceland and plainly is with capital punishment, where one's dying protestation is cut off by the axe, the rope, or some cruelly inefficient mix of chemicals.

If even Iceland seems too 'state-like', we might remember what some will think of as laws of feud.[73] Such law is binding on people who, by definition, may invoke opposed yet legitimate identities. Often enough, the range of such law (the number of potential 'groups' involved, the geographical distance covered) is indeterminate, and similar phrases and conventions, as well as basic principles, recur over large areas. What typically one finds, however, are not the 'cross-cutting ties' of Gluckman's model, but rules that combine vengeance and protection with avoidance, and thus with divisions of moral space such that out of sight, whether in exile or in another's tent or house, means often out of mind (Dresch 2006: 119). The space at issue may seem first of all geographical, turning on arguments about 'borders', or genealogical, turning on definitions of 'kin'.[74] In either case the logic of categorization through general terms is no different from that of our Taiwanese merchants. It is very different, however, from what one reads of Amazonia, where arguments seem usually to concern more simply whether action is human or non-human, or of Melanesia, or of parts of the Malay world. Most of Eurasia, through most of its history, seems open to the logic of general categories and rules, that is, to legalism. One might wonder why.

If leaving 'causation' to the end of an essay seems perverse, we should remember Cheyette's caution (1978) that in Europe the language of law sets the terms in which we consider the pre-legal, as if law and the state were always waiting to be born. A broader perspective suggests we proceed carefully. Plainly literacy will play a part in sustaining legalism, but there are cases where formal laws are invoked in the absence of writing—the Sinai Bedouin (Stewart 1988) come to mind—and even in worlds well supplied with writing, literate forms may be marginalized or made subordinate, as Wickham remarks of England's 'Common Bench' *c.* 1300: 'Elaborate written law had less power in this instance than . . . oral but hegemonic professionalism' (Wickham 2000: 244). Nonetheless writing

[73] The standard case of 'law of the feud' is probably still Albania (Hasluck 1954). Decentred law that governs violence seems especially prominent in the less governed parts of the Islamic world, whether Kazakhstan (Martin 2001) or Yemen (Dresch 2006), but one suspects that rather similar ideas recur widely, not least in early Europe.

[74] Yet again, these are not 'descriptive' rules. Indeed, some provide almost no predictive power at all. In the North Arabian world, for example, one finds endless references to the *khamsah*, a kin group of 'five' degrees that shares liability for vengeance; but whether you should count up two and down three in the male genealogy, or up three and down two, or up five and down again seems open to debate. The 'rule' is clear, the application indefinite.

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has its effect on law and often is recruited by law.[75] Causation here seems partial and indirect. So, surely, with states and empires, which seem often to spread law, although law is not always imposed *de haut en bas*. Law politically seems to cut both ways or neither here (domination may occur through law or may provoke claims to distinctive law locally), but one cannot ignore for long the disjunction of legalism and power. Through legalism people invoke a vision of the world whose historical conditions may be obscure to them but whose reach is indefinitely broad.

Within the ambit of scholarly law, localized disagreement can thus recruit opinions from a vast distance. Thomas Kuehn's account of an inheritance dispute in fifteenth-century Florence (Kuehn 2000, cf. idem 2008) and David Powers's of disputes around Fès at about the same time (Powers 2002: 141–66) are remarkably alike in this respect (the first, of course, draws in Roman law, the second draws in Islamic law). In both examples those at odds must win an argument, convincing kin and neighbours, and no doubt themselves, that their claims are just, to which end they seek expert opinions from as far off as need be.[76] Power (in any sense of imminent coercion) and law do not coincide. Nor do they in the complementary case of portable or mobile law. Blackstone's *Commentaries on the Law of England* (1765–69) were cited widely in colonial America, but the sheer number of American editions both before and after the revolutionary war is startling: twenty-one between 1771 and 1774, and at least ninety-four thereafter, often in a handy two-volume set one could fit in one's saddle-bags (Watson 1993: 94).[77] The image of taking the law with

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[75] Law must often be 'spoken'. Iceland, for all that later a hierarchy of authoritative texts is invoked (Dennis et al. 1980: 190–91), had a 'law-speaker'; in ancient Greece a key term for judgement or justice, *diké,* derives, says Benveniste, from the same root as Latin *dicere* ('to speak' or 'to say'). For a splendidly clear account of writing and law in the Greek case, which outlines several general issues, see Rosalind Thomas 2005. Cases where law's authority depends in part on the fact of a written text are easily multiplied. As interesting, perhaps, are cases where literate forms of local law are separate from those of learned law. Huw Pryce (2000) gives a good example from Wales, and provides a very useful overview of law and literacy in medieval Europe.

[76] Islamic *fatāwā* (pl. of *fatwā*) and the *consilia* of later medieval Europe sound very much alike. (For the former, Masud et al. 1996; for work on the latter, Dean 2007: ch 5.) Neither was a judgement of the case as such but an opinion on the law. One difference, if it does not reflect simply the priorities of researchers, is that the Islamic practice seems to reach throughout the social field, so that ordinary farmers in Yemen can ask an opinion of the local *muftī* (Messick 1993). The European material reflects more 'elite' concerns. The role of the *muftī* , however, underlines perfectly Hart's point that the 'bad man' view of law is inadequate: often law addresses equally the 'puzzled man' (Hart 1994: 40), or indeed the pious.

[77] For an account of law drifting westwards with later migrants, beyond the reach of settled government, or being elaborated independently in fresh settlements, see Reid 1980, 1992. Besides this we could cite law staying implausibly in place. Anglo-Americans occupying the Mississippi Valley thus found the Custom of Paris, first consolidated in 1510, still referred to formulaically in, for instance, marriage contracts around St Louis (Banner 1996).

you will be familiar to students of the Islamic world. Complex legalism of the kind in which experts trade is liable to be imported, perhaps initially in simple form, by people not constrained to do so.

Systems which lack a jurisprudence may appear of their nature to be more parochial, but legalism deals in general terms and, even in 'simple' systems, suggests always a disjunction between imaginative and practical scale. In this it is much like 'kinship' (Shryock, Smail et al. 2011: 32, 34, 43, and *passim*). 'Cross-cousins' of some degree might be found or imagined anywhere; the great 'Mosaic' genealogies of the Middle East and Europe make all of us agnatic kin as Adam's children; elsewhere in the world, 'clan' systems of indeterminate extent are common. Living in a tiny group, one can deny relatedness to immediate neighbours yet find relatives at the world's end. The simplest legal language has the same effect. If one has an idea of 'property', let us say, the right of ownership may be extended to others or withheld from them indefinitely far afield or close to home, as Locke's self-interested views of North America well illustrate. Although law can define people out as easily as define them in, legalism suggests of its nature a larger world than one's immediate relatives or neighbours. The question to which none of us has a general answer is why sometimes we treat our neighbours as 'vendors' or 'purchasers', and sometimes instead as the girl next door, or as ʿAli's son', or as the lady with the chickens.

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A Historian's Perspective on the Present Volume

HANNAH SKODA

The purpose of this volume is to generate insights, or more importantly, to provoke discussion, regarding the roles and representations of legalism in a variety of historically specific contexts. This short introductory section aims to draw out some of the issues raised by the volume's chapters and by the order in which we have set them.[78]

Putting different forms of law side by side is, of course, fraught with problems of comparability. One small sign of this is lexical. As Vinogradoff pointed out (cited Murphy, J. B. 2005: 61), when the Romans translated into Greek, they found that they needed three unrelated terms for *ius*. No doubt putting Greek *nomos* into Latin posed problems also. Yet Greeks and Romans seemed usually to have meant roughly the same thing, as Georgy Kantor shows here in Chapter One, chronologically the earliest case study in the volume. The extent of 'law' was not what some authors on the Roman world assert it was, nor were Greek and Roman law different in the ways one often finds proposed. But in a very rich analysis Kantor explains what 'law' was for whom. There are few signs in this material, beyond classical Athens, of a hierarchy to distinguish formal law from local regulation or from custom, nor to distinguish one type of law from another, despite which we find almost everywhere a clear idea of binding rules.

Where does this leave us with the notion of 'legalism'? By this, we mean rules that are distinct from practice (rules that are 'formulated', in other words) and rules characterized by the claim to be more than simply spontaneous improvisations, but in some sense often systematic. Rules we might describe as legal are general statements that often organize generalizing concepts (marriage, possession, debt, for instance), or relate such concepts to each other. These rules need not even be regulatory, and certainly need not be coercive. But they do seem to order a vision

[78] I would particularly like to thank Tom Lambert, Patrick Lantschner, and Malcolm Vale for helpful comments and suggestions.

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of the moral world and endow it with meaning. The ways in which they do this are extremely various, as too are the results and implications. If the term 'law' is polysemous and fluid, however, this volume of essays, ranging in subject from ancient Greece to medieval India and Saharan oases, tries to avoid the dangers of blindly conflating different notions of legalism, and instead invites readers, through comparison, to identify and explore the roles and attractions of legalistic discourse in a range of settings. For example, Kantor's essay indicates that terminological differences can reveal different sets of operative distinctions, but he also uses Hellenistic and Roman practice to demonstrate that a lack of terminology may not always mean conceptual absence (of individual rights, for example, where an explicit language to describe such rights is lacking). One of the issues off-stage in many chapters but ever-present, and raised explicitly in Chapter One, is that of comparison or translation; another is the relation of formal categories to unannounced ideas.

The reader is then led to medieval India, in Chapter Two, where 'medieval' designates the period *c*. 700–*c*. 1750, suggesting to a historian of medieval Europe an impressively stable state of affairs, but actually reflecting as much the nature of documentation on the subject as of the social order that produced those documents. Local arrangements were seldom committed to writing, and they seem to have been treated as ephemeral; the classical literature of law meanwhile presents itself as all but timeless, suggesting parallels with the apparent longevity of Roman law in much of Europe's history.[79] Donald Davis examines a form of legalism where the notion of duties rather than rights dominated, and where law was called upon to deal with doubts and dilemmas rather than primarily with conflicts. In this context, the notion of law carried with it a sense of responsibility, and this was partly articulated via the complex relationship between rules as such, and the discourse of religious and moral rightness inscribed in the *dharmaśāstra*.

The relationship between particular procedures and practices and the broader implementation of legalism is brought into focus also by Tom Lambert, who in Chapter Three examines English church sanctuary in the Middle Ages. Sanctuary, from some time late in the twelfth century, enabled felons to seek refuge in a church for up to forty days, at which point they were often able to abjure the realm. Law here presented

[79] The relationship between change and continuity provides another ongoing theme in the volume. Complex legalism seems to be characterized by a peculiar tension between the claim to contemporary relevance and the claim to authority because of some kind of unchanging historical longevity: the type of long-term stability described by Davis provides an intriguing contrast with the longevity but growing inappropriateness of the practice of sanctuary in Lambert's chapter.

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enforcers, communities, and culprits with choices and interpretive possibilities. But Lambert also demonstrates that in the later Middle Ages the formal institution of sanctuary did not match political needs or even the logic of legal practice more broadly, alerting us to the potential disjunctions between different aspects of legalism, and the ways in which some procedures become ossified whilst others continue to develop. He also makes concrete a discussion of jurisdiction. Kantor finds a 'hierarchy of authority', not of rules, on this score; Davis finds a hierarchy of rules and of institutions. Sanctuary offers a markedly unhierarchical set of 'sacred spaces' within which certain rules apply.

Lambert's analysis reveals a link between later sanctuary and earlier, Anglo-Saxon 'protection', which provides a cue for exploring the 'laws of protection' in Yemen (*c*. 1400 onwards), presented by Paul Dresch in Chapter Four. By examining a case where law can be shown to work 'sideways' rather than 'top down' (no one in Yemen imposed this type of law, as political authority or as founder), Dresch is able to demonstrate that legalism need not be dependent upon centralized coercion: but explicit rules nonetheless form binding obligations. A more familiar perspective comes into view in the case of English common law. Paul Brand, in Chapter Five, explains to us its early history from the late twelfth to the early fourteenth centuries. Law here became an increasingly prominent aspect of people's lives, both socially and politically, and Brand draws attention to aspects of its growing formalism, as well as demonstrating (against some prevailing historiography: e.g. Milsom 1981: 403) that this *was* a form of legalism shaped by generalizing rules and broader ideas (for example, distinctions between culpable and non-culpable homicide). By the end of his account the stage is set for the growth of the common law as an intellectually self-conscious system, centred on the state but not reducible to kingly power, managed by state-sanctioned specialists but appealed to by others.

As we move geographically with Judith Scheele to the Algerian Touat, in Chapter Six, legalism can be shown to be often a self-consciously bottom-up choice. Again, though dealing with Islamic law rather than with 'custom' of the kind that Dresch describes, Scheele shows, as did Davis, that enforcement was not the most salient aspect. Rather law, and specifically Islamic law (rhetorically quite distinct from custom, though seldom distinct in practice), played an 'aspirational' role. Its value was not dependent upon its coercive possibilities, but derived from what its generalizing concepts could achieve by inscribing local life within broader, even universal, frameworks of 'civilization' and rightful order. Very usefully at this point in the volume, Scheele reviews for us some of the obstacles that recent academic work has raised to taking law and legalism

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seriously in the sense discussed. In explaining very large pan-Saharan, and indeed pan-Islamic, themes she also brings us up against the detail of 'law in action', developing her general points from a wide range of local cases.

In Chapter Seven, Andrew Huxley considers Burmese law through a single sixteenth-century text (preserved in a nineteenth-century redaction) known as *Lord Kyaw Thu's Precedent*. The parts of mainland Southeast Asia attached to the ideal of classical Pali learning resemble in some ways the Islamic world described by Scheele, or indeed, as Huxley himself asserts invoking Francis Bacon, early modern Europe. A great tradition and many little traditions (the latter being state law in the European case) interact rhetorically. The role of institutions described by Brand is also thrown into relief by not only Huxley's detailed evocation of Burmese courts and legal practice but his concomitant demonstration that these institutions and formalities were explicitly not seen to trump ethical considerations of justice or right practice. Lastly, he highlights the logic of formal legal argument that in many of the chapters must remain off-stage.

Malcolm Vale, in Chapter Eight, reconsiders the work of the Baron de Montesquieu, the great eighteenth-century legal thinker (1689–1755), providing an opportunity to reassess our main questions about legalism and its different effects. Montesquieu's *chef d'oeuvre* was entitled *L'Esprit des lois*—the Spirit of the Laws: what do we mean by law? What is its place in different forms of society? How is law contingent upon geography, economic considerations, religious and moral outlooks, or political systems? In many ways, Montesquieu provides a challenge to modern historians, who have often taken for granted a series of elisions between legalism and what are presumed to be associated concepts.[80] Montesquieu did not assume such connections, and was not tempted by such slippages: we hope the present volume may encourage readers to share the sense of exploration that he still provokes. And Montesquieu, as Vale reminds us in discussing written law, dealt even-handedly with both the attraction and the repulsion of legalism.

Even the children of paupers in early Iceland acted out 'going to court' (Miller 1990: 227), as did children in Uganda recently (Fallers 1969): neither law nor legalism is restricted to formal settings. In our last chapter, I

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[80] More precise references will be given later, but one might glance at e.g. Gauvard 1991 for a discussion of the relationship between law and state-centred developments; Hay 1975, where the argument is put forward that legal developments sustain the hegemony of the ruling classes; and Karras et al. 2008, where the chapters seem predicated on the assumption that law and the ethical worlds of religion and theology necessarily overlapped.

examine how the image of law was taken up by 'popular culture' in medieval France. The process and imagery of formal law can provide a striking means to display or work out forms of right and wrong in non-legal settings, much as non-legal considerations of drama and story-telling now obtrude on the rituals of modern law courts (Dershowitz 1999). In medieval France, though, there seems to be a progression. I thus examine a transitional phase in French legal history (*c.* 1100–*c*. 1500) through the prism of literary reactions to legal change and legalism as a series of rules, increasingly state-centred, claiming to be fixed and to be aligned with moral and religious precepts. It is striking that so much literature of the period, appealing to a wide audience, took legalism as its key theme, and even more striking that in doing so, it focused upon many of the elisions which are problematized in this volume's chapters. If legalism has often been promoted as allowing clarity and justice, it also presents a spectacle and a moral quandary. Indeed, it is precisely the generalizing claims of legalism, reducing human life to forms and rules, that make fear of 'law in action' a common complement of desire for law in theory.

We have tried, then, to provide a trajectory, from what counts as law for whom, through what legalism is and does, to the problems it poses for those who live with it. Chapters respond to each other through a set of overlapping concerns. The effort as a whole is inter-disciplinary, drawing together specialists on very different times and places, and their particular concerns derive in part from specific material. However, it is worth highlighting from a specific viewpoint, that of a historian who works mainly on medieval France, ways in which these chapters challenge more generally assumed connections and elisions.

LAW, FACTS, AND INSTITUTIONS

It is always tempting to conflate the rules and categories which form the conceptual make-up of legalism, with the fact-finding upon which much application of law depends. Certainly this is a slippage which recent historiography's focus on dispute-resolution has encouraged.[81] This is the

[81] Much of the most important recent medieval historiography on legalism, as broadly conceived, has rather taken dispute-resolution as its subject. There are various reasons for what has been a fruitful line of enquiry: partly that this is a direction suggested by the nature of the surviving source material, partly that this is commonly assumed to be the stuff of law, rather than the rules and categories which constitute it; and partly because much recent historiography has been preoccupied by the notion of violence and feuding, with scholarship on law being an offshoot of this, rather than vice-versa (see notably Davies and Fouracre 1986, Karras et al. 2008, White 1986, Halsall 1998, Brown and Górecki 2003).

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first elision which many of the chapters in this volume help us to unpack, or at least to interrogate. Brand demonstrates that the English common law drew upon a 'fact-finding' jury, whose conclusions were then assessed by those with 'professional' legal skills, the latter being expected to apply legal thinking to the case at hand; here, then, a clear distinction was operative, reinforced by institutional formalism and a difference in personnel. In the case of Burma, though, Huxley shows that such distinctions could operate in rather different terms. He elucidates the role of maxims and rules *within* learned discourse, and goes on to discuss the supposed relations between maxims and facts, showing how facts could be combined with norms, and how these 'characterizations' were foregrounded as of interest in themselves.

Clearly, law as a set of more or less formalized rules, rather than improvised responses to circumstance, suggests a degree of 'institutionalization'. But the historian's usual conflation of legalism with certain institutions through which it can operate is heavily problematized in this volume, not least by challenging the historian's typically rather bland sense of what is meant by the term. There are two basic senses, which these chapters help us to unpick: on the one hand, institutions are concrete organizational forms (for example, courts or chanceries), often heavily bound up with state-centred administrative developments; on the other hand, we speak of concepts or established practices as institutions, as in 'the institution of marriage'.

Too straightforward assumptions about institutions in the former sense are challenged here principally through the variety of settings in which law was discussed and applied, from the tribal context of Dresch's Yemen to the increasingly elaborate law courts of Brand's England, to the local, even homely, settings of Scheele's Algerian Touat. The historiographical tendency to equate the development of institutions with the growing administrative centralization of states needs review.[82] It is perhaps in Davis's medieval India, however, that we encounter the greatest corrective to our frequent preoccupation with formal settings, a preoccupation often elaborated (at least by historians of medieval Europe) in

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[82] Much historiography has focused upon trying to identify the moment of, and reasons for, the emergence of such institutions, especially chanceries. Notable in this respect is the work of Berman (1983) positing the Gregorian papacy as a model for the development of a state-centred administrative approach to legalism; and, regarding the papacy's own legalistic institutionalization in the later Middle Ages, Ullmann 2003, Bombi 2009. In the case of later medieval France, much scholarship since the late nineteenth century has been primarily concerned to trace the emergence of 'institutions' of the law, such as the *parlement*: see e.g. Ducoudray 1902, Autrand 1981, Carbasse 2000, Carbonnières 2004. Institutions have been treated by French historians (e.g. Rigaudière 2003) as a sort of embodiment of power, usually tied up with a narrative of state-development.

terms of jurisdictions.[83] Davis redirects our attention from the institutions of the state to a far more pluralist model, wherein jurisdiction is reconceptualized not as a bounded area within which legal authority can be exercised, but rather as the capacity to 'speak the law', transforming our understanding of jurisdictional entities and institutions into a more subtle awareness of law as meaning, status, and even charisma. Here Lambert's examination of what is meant by sanctuary usefully refocuses our attention on law and the concepts which sustained it procedurally, rather than merely examining its growing formalism.[84] The 'institution of sanctuary', like that of marriage, does not reduce to a simply political or administrative form of order.

LAW AND LITERACY

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Given law's apparent claims to fixity, and given the academic tendency to assume a straightforward relationship with 'institutionalization' in the sense of formal organization, it is unsurprising that we are also often tempted to assume that a sophisticated level of legalism requires a high level of standardized literacy, perhaps that accepted by chanceries or by scholars. Indeed, literacy is a recurring theme throughout the volume. Huxley's analysis of *The Precedent* in Burma is predicated upon a sense that a written text is indicative of a wider legal context; Brand gives a detailed picture of the importance of growing literacy in the birth of the English common law; documents are as conspicuous in late medieval France, on which I write myself, as in Kantor's ancient Asia Minor. Yet in some contexts, whilst obviously academic analysis remains dependent upon those texts which survive, texts were only peripheral to legalism as such: in medieval India, according to Davis, it was not normal to write down legal matters.

In many cases, these chapters suggest that we need to be careful to identify precisely what we mean by literacy.[85] Sometimes it indicates

[83] The particularities of later medieval France, with multiple local jurisdictions with which royal jurisdiction increasingly overlapped, but which it remained unable to supersede, provides a useful comparison here: see particularly Gauvard 2005, Lewis 1968.

[84] Historiographical focus on procedural forms can also think of institutions in this way, e.g. Stern 1994. The recent work of Smail (2003) takes a novel approach, examining how legalistic institutions could be exploited by individuals in order to pursue personal enmities, and, in doing so, encourages historians to think more carefully about what is meant by 'institution' and the very blurred line between formal and informal procedures.

[85] The seminal work of Walter Ong (1982) is useful in this respect, as are the remarks of Westfall Thompson (1960: 196–7) and of Clanchy ([1979] 1993) on the medieval European context specifically.

the ability to comprehend, construe, and redact texts. But lesser degrees of literacy can also be operative, and it is clear that in many of the settings discussed here, full comprehension of a given text or document was not the point, so much as the role of that text or document as an object. Scheele shows the enormous importance attached to legal documents in the Algerian Touat, whilst noting that comprehension of their precise content was not deemed as significant as their careful preservation as artefacts which embodied status and, to some extent, membership of a common world. Even Huxley's *Precedent* seems to have functioned as much in symbolic terms, as the embodiment of the wisdom both of Kyu Thaw, the legal thinker, and the ruler, Bayinnaung, as it did in intellectual terms. In such cases, perhaps the operative concept is not literacy as such, but legibility—ensuring that a predetermined meaning can be extracted from the texts, though not always by every reader.

Scheele demonstrates that the appeal of legalism in the Touat lay not in its coercive power, nor even necessarily in the regulation it might impose: indeed, in many ways, she shows it to have been disadvantageous to those adopting it. However, the generalizing concepts and categories on which legalism is predicated offered the opportunity to assert that local concerns were aligned with the world-view of a wider Muslim community, and in this sense, legalism was all about enshrining meaning and significance of a sort which can be read by others, even if those layers of meaning indicate something different to different people. To some, documents made sense as objects; to some, they made sense because they reified certain terms; to others they could, in fact, be fully read. Uniqueness was all-important, and documents could become almost fetishized in ways which contrast with the multiple reproducible copies of our own print culture.[86] In the Touat, documentation was designed to ensure that local issues made sense not only (perhaps, not primarily) in local terms, and this concern for legibility elsewhere meant that documents were highly valued. This is worth remembering given the way in which the term 'legalism' is often used in a derogatory sense to refer to the opacity of law and its complexities which appear to exclude those locally who might otherwise have used it, a point made explicitly by Montesquieu in his analysis of the demise of the judicial duel, as discussed by Vale.

The accusation of opacity, implicit in derogatory uses of the term legalism, is connected to a sense that complex legalism can place too much power in the hands of legal experts, often equated with pettifoggers or

[86] Clanchy (1993: 21–8) draws attention to this point, and indicates that objects could, in a sense, therefore also function as texts, witness the sword provided by one witness as a warrant. The issue also meant that forgery provided matter for concern in very culturally specific terms (ibid. 318–27).

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even tricksters. Clearly, in many cases, highly developed legalism did favour the emergence of legal experts. Such a development characterizes, of course, medieval England: as the varieties of law became more complex in this period, there was a growing need for experts, both of the kind who could apply law knowledgeably and effectively in a particular case, and of the kind who could argue persuasively a particular interpretation (cf. Reynolds, S. 2003: 351).[87] Kantor's analysis of Roman and Hellenistic legalism opens with a description of one person expert in formal law (Pliny) administering a whole province, who yet needed to seek further advice in a tricky case. The focus here was upon practical administration, with specifically legal thinking subordinate to this: at the same time, however, we find private experts in law who travelled around among different cities. But even widespread and decentred legal expertise of this kind does not necessarily go hand-in-hand with the valuation of written records. The application of law in medieval India was, according to Davis, heavily reliant upon expertise, particularly on consultation undertaken by the Brahmins, and yet writing remained rare. Neither Dresch's Yemen nor Brand's England suggests a broadly literate population. Literacy colours Paris (in my chapter) and the Touat (in Scheele's) rather more. However, the problem of legibility perhaps captures in all these cases both the promise and the threat of general formulae.

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LAW AND THE STATE

In European history, the growing use of experts and the kinds of training which they might have required at least hints at the entanglement of legalism with the growth of states. Certainly this is an assumption made by the majority of historians.[88] If we are interested in the development of polities, we tend to be interested in questions of

[87] Recent research on medieval Europe has been particularly interested in the role played by university men in supporting growing states, and the studies of jurists are, of course, particularly relevant in this respect: see, e.g. Verger 1991, Vulliez 1984, Wetzstein 2010. Lying behind much recent thinking are the ideas of Alexander Murray (1978).

[88] The historiography of later medieval France is particularly instructive here: it is a line of scholarship dating back to the nineteenth century, but given renewed impetus by François Mitterand in 1989 with a state-sponsored research project entitled '*Genèse de l'état moderne*', a project which then spread to other European countries. There is also a transatlantic dimension to such work: the pioneering work of Joseph Strayer (1980) set the scene for scholarly focus upon the intertwining of developing legal forms and state centralization, and his supervisees (e.g. Bisson 2009, Jordan 1980) and their supervisees in turn (e.g. Firnhaber-Baker 2010), have nuanced what remains fundamentally the same paradigm, whilst exploring legal developments in an earlier period or exploring the limitations of royal-centred law. In Francophone scholarship, historiography has followed a similar path, although the concept of 'nationhood' as such is drawn into the analysis: e.g.

administrative centralization as embodied in legal developments, the growth of a legal system as such, and the homogenization of legal mechanisms centering its control in a hegemonic power. Such a model is not useless, and many legal developments form part of a narrative of political centralization. This much is clear from Brand's treatment of the early common law, where judgement was now to be exercised by royal officials, and forms of law were to apply evenly across the country. But even here, the often-assumed teleology both of state and of law is problematized, as Brand demonstrates that these new courts absorbed the existing pattern of local courts, and were obliged to engage with local concerns in a reciprocal, rather than exclusively 'top-down', manner. What is striking is that, *pace* the assumptions of many historians, and in spite of the high cost (in human and financial terms) of appealing to the common law and the possibilities of alternative forms of justice, it nevertheless was popular with laymen.[89] Indeed, Brand tells us, the barons in Magna Carta claimed that they wanted more law of this sort, not less. The connection with a growing state was seen as of a kind not to override local and individual prerogatives but rather to guarantee them and enshrine them within what was increasingly perceived as the law of the land.

Many of the cases discussed in this volume problematize the connection between law and statehood still further by discussing what is explicitly non-state law. Sometimes, as in the Algerian Touat, we find people at local level deliberately importing law from a greater political or moral field, but, as Scheele shows, this was not with the aim of political integration, but rather arose from a desire to create shared meaning or even to question existing power structures. The case of Yemen provides an opportunity to take this argument further by examining a tribal context which, by its very nature, undermines a prevalent 'Kantian' framework

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Beaune 1993. The historiography of later medieval England has been interested in similar questions. See particularly Reynolds, S. 1997.

Some historians have turned this approach on its head, notably Radding (1988) who discusses the rise of legalism in the Lombard context necessitated primarily by the *breakdown* of the state, entailing the dispersal of legal experts and the need for more explanation at local level. In German historiography, historians have been interested in state growth as set against the perceived 'lawlessness' of autonomous noblemen who prevented its development: the work of Otto Brunner (1939) is an important starting point, relating control of feuding to state-development. In medieval Italy, state-development is clearly more complex in an era of fragmented polities, but much historiography (e.g. Costa 1969, Sbriccoli 1969) has still focused upon the relationship between political structures and legalism, particularly in the area of jurisdiction.

[89] See, for example, Wormald, P. 1999: 68, citing Pollock and Maitland 1898: i. 587–94.

and its assumptions that a common power is the prerequisite of effective legalism. Law is shown here to work 'sideways', and the importance of protection is central. Resonating with the focus on duties and responsibilities, rather than just on rights, of Davis's India, Dresch discusses how assumptions of hegemonic power and community in modern state-centred discourse obscure talk of obligation to others, since all persons subject to the law are, nominally, the same: a non-state form of legalism, by contrast, creates a series of relationships, often asymmetrical but reversible, which are characterized by obligations as much as rights. Protection strikingly provides the common ground between Dresch's Yemen and Lambert's medieval England where the connection between state and law would seem at first glance to be more straightforward: yet Lambert's analysis indicates that sanctuary in medieval English law was in some part at odds with state development, even if its particular shape was moulded by political change. It only really makes sense, even in its later form, as a result of the far more 'horizontal' applications of legalism in early medieval England.

The duties-based model evoked by Davis in his analysis of law in India is one where the role of 'the state' (perhaps 'kingship' is the term, we need) is complex and subtle. Indeed, Davis's challenge to the elision of state and law is articulated via consideration of forms of legalism which operated pluralistically. He posits not one centre of law, but several (as of course did Beaumanoir for France, and after him Montesquieu), discussing their overlapping and complex relationships.[90] Legal pluralism means, so Davis argues, a context in which different groups and persons exercise authority by virtue of their own moral value, not merely through delegated authority. Even when we challenge the elision of state and legal development, though, pluralism itself is shown to pose problems. Kantor's exposition of legalism in the Roman and Hellenistic worlds reveals multiple centres and sorts of law, but the lack of any systematized notion of what Hart labels 'rules of recognition', which would have enabled contemporaries to resolve formally the priority of different sources of law in given cases. No theory of 'conflict of laws' to validate competing official forms at the expense of colloquial is evident either. The claim of the modern state to single out and monopolize 'law' at the expense of unofficial custom (e.g. Raz 1973) is, as Beaumanoir (1970) showed for medieval France, merely one among the many claims possible.

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[90] The more sophisticated historiography on medieval law assumes a similar approach and examines the relationship between multiple different jurisdictions and approaches to law, e.g. Wickham 2003.

LAW AND POWER, LAW AND COMMUNITY

Even when law and state are conceptually untied, many of us remain wedded to the connection between law and power. Much historical analysis of legal developments is based on an underlying assumption that legalism's *raison d'être* must, in some sense, be power, even if not straightforwardly identified with state power. And some of the case-studies presented here support that assumption. Huxley's Burmese text, for example, was produced at the centre of a vast empire, at the moment when King Bayinnaung and his Toungoo dynasty had just conquered the whole area. This is no coincidence, and the text worked, to some extent, to consolidate the reach of his authority. Connecting law with 'rulership' is perhaps more useful here than nebulous ideas of (state or non-state) power, since Huxley demonstrates that Bayinnaung was keen to use the ethical dimension of law wisely interpreted and applied in order to stress his ideal governance.

Huxley's comparison between sixteenth-century Burma, and the work of Francis Bacon at a similar date in England and Scotland helps undermine the straightforwardness of the usual picture. According to Huxley, Bacon's understanding of the relationships among law, kingship, and the state was that the three were mutually dependent, but that chronologically, kings preceded law, revealing a perception that legalism is something which shores up power. Since Bayinnaung lacked the distinction between national and natural law or ethics which Bacon assumed (and it was only the former which apparently post-dated kingship), such an order of precedence could not be assumed. Although in the Burmese context, Bayinnaung was using law to promote a particular kind of rule, he was doing so with a different justification of legalism in mind, one which was not political so much as ethical and which demonstrated his attachment to *dharma* and his wise adherence to its principles.[91] The ancient imperial context considered by Kantor, meanwhile, is clearly one in which a hierarchy of authority was established, and in which the application of Roman law in the Eastern provinces may well have been a

[91] To historians of medieval Europe, much of this sounds familiar: the notion of the wise ruler, going back to Solomon, shaped the representation of figures from Charlemagne (Ullmann 1969) to Frederick Barbarossa (Berman 1983: ii. 488) and Louis IX of France (Le Goff 2009). On the connection between law and rulership, see the important work of Patrick Wormald (1999), although he describes a context in which rulers *give* law rather than exemplify it. As so often, it is moments of crisis and disjunction which can prove the most illuminating, and much work on the recurrent crises of rulership in fourteenth- and fifteenth-century England has viewed events through the prism of the application of law, and disparaging contemporary comments about the inability of kings to abide by or enforce the law. See e.g. Harriss, G. L. (ed.) 1985.

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message of power. However, Kantor points out that, counter-intuitively, there does not appear to have been a hierarchical system of legislation in the Hellenistic or the Roman late republican and early imperial period. Ideal rule did not of its nature express existing law, in the Buddhist or Hindu fashion, or even define its decrees as the only law valid, in the style of later European states.

The examples of non-state law in the present volume underline that the appeal of legalism lay in something more complex than simply a desire for top-down control: indeed, often the embracing of legal forms seems, from a purely pragmatic point of view, actively to have disempowered its users, witness the cost of the common law as noted by Brand, and the detrimental effects of attention to the letter of the law on water rights in Scheele's exploration of Touati documents. But these chapters also suggest more useful ways of thinking about the relationship between legalism and the imposition of rule. Government cannot be studied merely from the perspective of rulership, but requires us to consider how that power could be implemented by appearing to confirm or at least protect the interests of those it claimed to order.[92] In other words, kings and rulers depended upon those using law seeing it as a guarantee of sorts in their everyday lives: the motivations behind the use of law in the cases studied by Scheele make this point firmly and provide a useful corrective to historians' common assumption that law is something imposed against the wishes of those it directs.

This being the case, our attention is redirected to the relationship between the law and communities. Again, though, it is complex: what do we mean by communities? Susan Reynolds's book title 'Kingdoms and Communities' begs this question, and the preface to her second edition acknowledges the impossibility of providing a straightforward answer beyond equating community with the study of everyday life (Reynolds, S. 1997).[93] In one sense, not isolated by Reynolds, community can refer to a self-contained moral unit (let us call it 'bounded' community), in whose

[92] In this respect, the work of Walter Ullmann (1978) on ascending and descending concepts of power, as sustained through legalism and as related to monarchical authority, is paradigmatic for many historians. French historiography, partly following an interest evoked by the *Annales* school, has been much concerned with the development of power, and the role of law in sustaining this: e.g. Krynen and Rigaudière 1992. The recent book of Joseph Canning, on the relationship between power and legitimate authority in the long fourteenth century, helpfully sets the concrete exercise of power in the context of the theories of sovereignty and legitimacy being discussed at the period in increasingly complex terms (Canning 2011).

[93] Medieval historians have also been particularly interested in the role of communities in the framework of medieval discussions of the common good, as a justification for legal regulations: interestingly, many of these discussions (e.g. Kempshall 1999, Lecuppre-Desjardin and Van Bruaene 2010), whilst carefully wrought, fail to address the question of why a *particular* community should be set apart.

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definition law can play an important role.[94] The emphasis of legalism on shared meanings certainly renders law and community in this sense a tempting, and analytically useful, pairing, one with which medieval historians should be familiar through Dante's framework (1961, 2005) of the multiplicity of communities in a postlapsarian world, whose differences are enshrined in their different languages (post-Babel) and their different legal customs, to be progressively unified through the imposition of Roman law (e.g. *Purgatorio* VI: lines 88–9); in his *De vulgari eloquentia*, we are told that communities are embodied in their peculiar legal customs. But communities on a whole variety of levels have been involved in the law and legalism: the community of the realm in Brand's description of medieval England, the corporate bodies of medieval India in Davis's account, the regions and cities that interested Montesquieu as loci of power and law. And this is often not so much about communities *per se*, as about their relationships with other communities, as with the oases of the Algerian Touat and their aspirational assertion of a place in a wider moral framework.

In some of the cases described, we simply do not find bounded communities (Dresch is quite explicit about this in his Yemeni case), but something vaguer and broader indicating much more fluid ways in which societies made and remade themselves. It was the great contribution of Montesquieu, perhaps, to demonstrate how law interacted, in often contradictory ways, with the social and moral frameworks of which it formed only part, whether a line was drawn around community or not. The pairing of law and social order more generally turns out to be a useful way of thinking through the appeal of legalism in a variety of different societies, revealing particular social preoccupations, and helping to define social relationships. Even in the ancient world, Kantor is able to demonstrate that 'Roman' law could be used by just about anyone in any 'structural' setting for any purpose. The convergences, but more strikingly the disjunctions, between legalism and social assumptions and structure are always of pressing interest.[95]

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[94] An especially fruitful line of inquiry has focused on private actions and the ways in which they might be manipulated by litigants in order to pursue personal enmities or to concretize a specific sense of community: see e.g. Carpenter 1983.

[95] Hughes (1983) provides an apposite example here, showing how legalistic sumptuary proscriptions were unable to control the extravagant dress of various Italian ladies, whose (largely tacit) understanding of social expectations meant they were able to circumvent and flout legal rules. As ladies, not merely women, they could hardly be disciplined directly, as perhaps their menfolk could have been. As members of households they competed for precedence in ways that rules could not reliably prevent.

LAW AND MORALITY, LAW AND RELIGION

If legalism's interrelationships with social patternings can be explored in a variety of cases,[96] its connections with morality, whether secular or religious, is perhaps more problematic, despite comforting clichés (even lexical equations, in most European languages) about law and what is right. The majority of the cases discussed in the present volume demonstrate that societies concerned with legalism also tend to be concerned about the relationship between law and morality, but that this relationship is never given. The question is perhaps most explicitly foregrounded in the notion of *dharma* as discussed by both Huxley and Davis. The focus on *dharma* within these legal traditions suggests ethics to have been particularly prominent, whether in Brahminical consultations or in law-giving as a kind of virtue. But law was not the same as morality, and Indian medieval stories on the subject of 'law in action', cited by Davis, indicate that the disjunction between morality and legality was a source of concern.

It is this problematic relationship between law and morality which forms the thrust of the chapter on medieval France that we have placed at the volume's end. The frequent discursive slippages assumed by academics between law and rules, law and literacy or legibility, law and its institutions and experts, law and statehood, law and community, and, perhaps most seriously, law and morality, were all already being highlighted by medieval commentators, who appealed to the common concerns of their audiences. We try to do likewise, and it is hoped that readers may be challenged to reassess these commonly assumed analytical pairings. Where, then, to end, or to begin?

Susan Reynolds (2003: 352) makes the important suggestion that, for medieval specialists in legal discourse, law 'must have been fun'. No one who has tinkered for a living with texts and arguments can have missed her point, although few admit it. From the florescence of distinction by rank that colours early Irish law, through the thirteenth-century authors of *Grágás* working out divisions of *wergild* to more degrees of kinship than could possibly have been found in Iceland, to Muslim scholars posing each other brain-teasing puzzles of rightful inheritance, the mad compulsions of analysing law recur. When one turns to 'law and society', sobriety is preferable but hard to maintain. We ourselves have had a lot

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[96] Some of the most interesting recent historiography in this direction has been the work of Thomas Kuehn on Italy: see his collected essays (1991). Social understandings of the law in England, and the relationship between law and society have been much worked on: e.g. Musson and Ormrod 1999, Musson and Powell 2009. A wider perspective is provided in the essays edited by Bossy (1983) and by Coss (2000).

of fun so far, attempting to situate 'legalism'. We make no great claims for what we have achieved. But we do hope to have started, in a hesitant manner, to set out some ways in which disciplinary boundaries cease to be an obstacle and instead stimulate fresh perspectives and discussion.

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