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Chapter 8 / Local Knowledge: Fact and Law in Comparative Perspective

I

Like sailing, gardening, politics, and poetry, law and ethnography are crafts of place: they work by the light of local knowledge. The instant case, Palsgraf or the Charles River Bridge, provides for law not only the ground from which reflection departs but also the object toward which it tends; and for ethnography, the settled practice, potlatch or couvade, does the same. Whatever else anthropology and jurisprudence may have in common—vagrant erudition and a fantastical air—they are alike absorbed with the artisan task of seeing broad principles in parochial facts. "Wisdom," as an African proverb has it, "comes out of an ant heap."

Given this similarity in cast of mind, a to-know-a-city-is-to-know-its-streets approach to things, one would imagine lawyers and anthropologists were made for each other and that the movement of ideas and arguments between them would proceed with exceptional ease. But a feel for immediacies divides as much as it connects, and though the yachtsman,

and the wine-grower may admire one another's sense of life it is not so clear what they have to say to one another. The lawyer and the anthropologist, the both of them connoisseurs of cases in point, cognoscenti of matters at hand, are in the same position. It is their elective affinity that keeps them apart.

A number of the curiosities that mark what lawyers tend to call legal anthropology and anthropologists the anthropology of law stem from this so near and yet so far relationship between those whose job, to quote Holmes, is to equip us with "what we want in order to appear before judges or . . . to keep . . . out of court" and those occupied, to quote Hoebel quoting Kluckhohn, with constructing a great mirror in which we can "look at [ourselves] in [our] infinite variety."[1] And of these curiosities, surely the most curious is the endless discussion as to whether law consists in institutions or in rules, in procedures or in concepts, in decisions or in codes, in processes or in forms, and whether it is therefore a category like work, which exists just about anywhere one finds human society, or one like counterpoint, which does not.

Long after this issue—the problematic relationship between rubrics emerging from one culture and practices met in another—has been recognized as neither avoidable nor fatal in connection with "religion," "family," "government," "art," or even "science," it remains oddly obstructive in the case of "law." Not only has a wedge been driven between the logical aspects of law and the practical, thus defeating the purposes of the whole enterprise (one more quotation of "the life of the law . . . has been experience" will do it in altogether), but the forensic approach to juridical analysis and the ethnographic have been unusefully set against one another, so that the stream of books and articles with such titles as law without lawyers, law without sanctions, law without courts, or law without precedent would seem to be appropriately concluded only by one called law without law.

The interaction of two practice-minded professions so closely bound to special worlds and so heavily dependent on special skills has yielded, thus, rather less in the way of accommodation and synthesis than of ambivalence and hesitation. And instead of the penetration of a juridical sensibility into anthropology or of an ethnographic one into law, we have had a fixed set of becalmed debates as to whether Western jurisprudential ideas have useful

[1]O. W. Holmes, Jr., "The Path of Law," reprinted in *Landmarks of Law*, ed. R. D. Henson (Boston, 1960), pp. 40–41. E. A. Hoebel, *The Law of Primitive Man: A Study in Comparative Legal Dynamics* (Cambridge, Mass., 1954), p. 10.

application in non-Western contexts, whether the comparative study of law has to do with how justice is conceived among Africans or Eskimos or with how disputes get dealt with in Turkey or Mexico, or whether jural rules constrain behavior or merely serve as masking rationalizations for what some judge, lawyer, litigant, or other machinator wants anyway to do.

I make these rather querulous comments not to dismiss what has been done in the name of legal anthropology—*Crime and Custom, The Cheyenne Way, The Judicial Process Among the Barotse,* and *Justice and Judgment Among the Tiv* remain the classic analyses of social control in tribal societies that they are—nor to draw a bead on what is now being done, some intriguing exceptions apart (Sally Falk Moore on strict liability, Lawrence Rosen on judicial discretion), about the same sort of thing in the same sort of terms, but to take my distance from it.[2] In my view, by conceiving of the product of the encounter of ethnography and law to be the development of a specialized, semi-autonomous subdiscipline within their own field, like social psychology, exobiology, or the history of science, anthropologists (to confine myself for the moment to them; I will have at the lawyers later) have attempted to solve the local knowledge problem in precisely the wrong way. The evolution of new branches of established fields may make sense when the problem is the emergence of genuinely interstitial phenomena neither the one thing nor the other, as with biochemistry, or where it is a question of deploying standard notions in unstandard domains, as with astrophysics. But with law and anthropology, where each side merely wonders, now wistfully, now skeptically, whether the other might have something somewhere that could be of some use to it in coping with some of its own classic problems, the situation is not like that. What these would-be colloquists need is not a centaur discipline—nautical wine-growing or *vigneron* sailing—but a heightened, more exact awareness of what the other is all about.

This, in turn, seems to me to imply a somewhat more disaggregative approach to things than has been common; not an attempt to join Law, *simpliciter,* to Anthropology, *sans phrase,* but a searching out of specific analyti-

[2]B. Malinowski, *Crime and Custom in Savage Society* (London, 1926); K. Llewellyn and E. A. Hoebel, *The Cheyenne Way* (Norman, Oklahoma, 1941); M. Gluckman, *The Judicial Process Among the Barotse of Northern Rhodesia* (Manchester, 1955, rev. ed. 1967); P. Bohannan, *Justice and Judgment Among the Tiv of Nigeria* (London, 1957).

S. F. Moore, "Legal Liability and Evolutionary Interpretation," in *Law as Process* (London, 1978), pp. 83–134; L. Rosen, "Equity and Discretion in a Modern Islamic Legal System," *Law and Society Review* 15 (1980–81): 217–45.

cal issues that, in however different a guise and however differently addressed, lie in the path of both disciplines. It also implies, I think, a less internalist, we raid you, you raid us, and let gain lie where it falls, approach; not an effort to infuse legal meanings into social customs or to correct juridical reasonings with anthropological findings, but an hermeneutic tacking between two fields, looking first one way, then the other, in order to formulate moral, political, and intellectual issues that inform them both.

The issue I want to address in this way is, stated in its most general terms—so general, indeed, as to lack much outline—the relationship between fact and law. As the is/ought, *sein/sollen* problem, this issue and all the little issues it breeds has, of course, been a staple of Western philosophy since Hume and Kant at least; and in jurisprudence any debate about natural law, policy science, or positive legitimation tends to make of it the crux of cruxes. But it appears as well in the form of quite specific concerns quite concretely expressed in the practical discourse of both law and anthropology: in the first case, in connection with the relation between the evidentiary dimensions of adjudication and the nomistic, what happened and was it lawful; in the second, in connection with the relation between actual patterns of observed behavior and the social conventions that supposedly govern them, what happened and was it grammatical. Between the skeletonization of fact so as to narrow moral issues to the point where determinate rules can be employed to decide them (to my mind, the defining feature of legal process) and the schematization of social action so that its meaning can be construed in cultural terms (the defining feature, also to my mind, of ethnographic analysis) there is a more than passing family resemblance.[1] At the anthill level, our two sorts of workaday cleverness may find something substantial to converse about.

The place of fact in a world of judgment, to tack now for awhile in the jural direction (as well as to abuse a famous title), has been something of a vexed

[1]On the skeletonization of fact, see J. T. Noonan, Jr., *Persons and Masks of the Law: Cardozo, Holmes, Jefferson, and Whythe as Makers of the Masks* (New York, 1976). On narrowing moral issues for adjudication, see L. A. Fallers, *Law Without Precedent* (Chicago, 1969); cf. H. L. A. Hart, *The Concept of Law* (Oxford, 1961). On the "interpretive" view of ethnographic analysis, see C. Geertz, "Thick Description: Toward an Interpretive Theory of Culture," in *The Interpretation of Cultures* (New York, 1973), pp. 3–30.

question since the Greeks raised it with their grand opposure of nature and convention; but in modern times, when *physis* and *nomos* no longer seem such unmixed realities and there seems somehow so much more to know, it has become a chronic focus of legal anxiety. Explosion of fact, fear of fact, and, in response to these, sterilization of fact confound increasingly both the practice of law and reflection upon it.

The explosion of fact can be seen on all sides. There are the discovery procedures that produce paper warriors dispatching documents to each other in wheelbarrows and taking depositions from anyone capable of talking into a tape recorder. There is the enormous intricacy of commercial cases through which not even the treasurer of IBM much less a poor judge or juror could find his way. There is the vast increase in the use of expert witnesses; not just the icy pathologist and bubbling psychiatrist of long acquaintance but people who are supposed to know all about Indian burial grounds, Bayesian probability, the literary quality of erotic novels, the settlement history of Cape Cod, Filipino speech styles, or the conceptual mysteries—"What is a chicken? Anything that is not a duck, a turkey, or a goose"—of the poultry trade. There is the growth of public law litigation—class action, institutional advocacy, *amicus* pleading, special masters, and so on—which has gotten judges involved in knowing more about mental hospitals in Alabama, real estate in Chicago, police in Philadelphia, or anthropology departments in Providence than they might care to know. There is the technological restlessness, a sort of rage to invent, of contemporary life which brings such uncertain sciences as electronic bugging, voice printing, public opinion polling, intelligence testing, lie detecting and, in a famous instance, doll play under juridical scrutiny alongside the more settled ones of ballistics and fingerprinting. But most of all there is the general revolution of rising expectations as to the possibilities of fact determination and its power to settle intractable issues that the general culture of scientism has induced in us all; the sort of thing that perhaps led Mr. Justice Blackmun into the labyrinths of embryology (and now following him with less dispassionate intent, various congressmen) in search of an answer to the question of abortion.

The fear of fact that all this has stimulated in the law and its guardians is no less apparent. As a general wariness about how information is assessed in court, this fear is, of course, a long-standing judicial emotion, particularly in common law systems where such assessment has tended to be given to

amateurs to accomplish. It is a handbook commonplace that the rules of evidence, and the Manichaean dispersion of Being into Questions of Law and Questions of Fact they represent, are motivated less by a concern for relevancy than by a distrust of juries as "rational triers of fact," whatever that may mean. The judge's job in admissibility questions is to decide, as one such recent handbook finely puts it, when "the trial [will be] better off without the evidence."[1] The general decline of jury trials in civil cases, the growth of empirical studies of jury operation, the stream of proposals for jury reform, for the importation of inquisitorial procedures from civilian systems, or for *de novo* review, as well as the spread of moral misgivings of the A. P. Herbert sort as to whether "shutting . . . ten good men and true and two women in a cold room with nothing to eat" is really a sensible way of deciding "questions that baffle the wisest brains of Bench and Bar," all bespeak the same anxiety: the world of occurrence and circumstance is getting out of juridical hand.[2]

Nor is depreciation of the jury (an institution Judge Frank once compared to the useless man-size fish-hooks coveted by prestige-mad Pacific islanders) the only expression of a growing desire to keep fact at bay in legal proceedings.[3] The increasing popularity of strict liability conceptions in tort law, which reduce the "what happened?" side of things to levels a mere behaviorist can deal with, or of no-fault ones, which reduce it to virtually nothing at all; the expansion of plea-bargaining in criminal cases, which avoids undue exertion in organizing evidence for all concerned and brings the factual side of things to court largely stipulated; and the rise of "economic" theories of jurisprudence, which displace empirical interest from the ragged history of issues to the calculable consequences of their resolution, from sorting material claims to assigning social costs, all point in the same direction. Uncluttered justice has never seemed more attractive.

Of course, the trial cannot go on wholly without the evidence or the simulacrum of such, and some intelligence, real or purported, from the world in which promises are made, injuries suffered, and villanies committed must seep through, however attenuated, even to appeal courts. The skeletonization of fact, the reduction of it to the genre capacities of the law note, is in itself, as I have already said, an unavoidable and necessary process. But

[1] P. Rothstein, *Evidence in a Nutshell* (St. Paul, 1970), p. 5.
[2] A. P. Herbert, *Uncommon Law* (London, 1970), p. 350; I have reordered the quote.
[3] J. Frank, *Courts on Trial* (Princeton, 1949).

it grows increasingly tenuous as empirical complexity (or, a critical distinction, the sense of empirical complexity) and the fear of such complexity grows, a phenomenon that has rather seriously disquieted a number of prominent legal thinkers from, again, Judge Frank to Lon Fuller and John Noonan, as well as, and I daresay even more seriously, a far larger number of plaintiffs and defendants made suddenly aware that whatever it is that the law is after it is not the whole story.[4] The realization that legal facts are made not born, are socially constructed, as an anthropologist would put it, by everything from evidence rules, courtroom etiquette, and law reporting traditions, to advocacy techniques, the rhetoric of judges, and the scholasticisms of law school education raises serious questions for a theory of administration of justice that views it as consisting, to quote a representative example, "of a series of matchings of fact-configurations and norms" in which either a "fact-situation can be matched with one of several norms" or "a particular norm can be . . . invoked by a choice of competing versions of what happened."[5] If the "fact-configurations" are not merely things found lying about in the world and carried bodily into court, show-and-tell style, but close-edited diagrams of reality the matching process itself produces, the whole thing looks a bit like sleight-of-hand.

It is, of course, not sleight-of-hand, or anyway not usually, but a rather more fundamental phenomenon, the one in fact upon which all culture rests: namely, that of representation. The rendering of fact so that lawyers can plead it, judges can hear it, and juries can settle it is just that, a rendering: as any other trade, science, cult, or art, law, which is a bit of all of these, propounds the world in which its descriptions make sense. I will come back to the paradoxes this way of putting things seems to generate; the point here is that the "law" side of things is not a bounded set of norms, rules, principles, values, or whatever from which jural responses to distilled events can be drawn, but part of a distinctive manner of imagining the real. At base, it is not what happened, but what happens, that law sees; and if law differs, from this place to that, this time to that, this people to that, what it sees does as well.

Rather than conceiving of a legal system, our own or any other, as di-

[4] J. Frank, *Law and the Modern Mind* (New York, 1930); L. Fuller, "American Legal Realism," *University of Pennsylvania Law Review* 82 (1933–34):429–62; Noonan, *Persons and Masks of the Law*.
[5] M. Barkun, *Law Without Sanctions* (New Haven, 1968), p. 143.

vided between trouble over what is right and trouble over what is so (to use Llewellyn's piquant formulation, if only because it has been so influential among anthropologists) and of "juristic technique," our own or any other, as a matter of squaring ethical decisions responding to the what is right sort with empirical determinations responding to the what is so sort, it would seem better—more "realistic," if I may say so—to see such systems as describing the world and what goes on in it in explicitly judgmatical terms and such "technique" as an organized effort to make the description correct.[9] The legal representation of fact is normative from the start; and the problem it raises for anyone, lawyer or anthropologist, concerned to examine it in reflective tranquillity is not one of correlating two realms of being, two faculties of mind, two kinds of justice, or even two sorts of procedure. The problem it raises is how that representation is itself to be represented.

The answer to this question is far from clear and awaits, perhaps, developments in the theory of culture that jurisprudence itself is unlikely to produce. But surely better than the matching image of fitting an established norm to a found fact, jural mimesis as it were, is a discourse-centered formulation that, to borrow from a young Swiss anthropologist, Franz von Benda-Beckmann, sees adjudication as the back and forth movement between the "if-then" idiom of general precept, however expressed, and the "as-therefore" one of the concrete case, however argued.[10] This remains a rather too Western way of putting things to make an ethnographer, whose subjects are not always given to explicitly conditional reasoning and even less to contrasting general thought to particular, altogether happy, nor doubtless is it without methodological problems of its own. Yet it does, at least, focus attention on the right place: on how the institutions of law translate between a language of imagination and one of decision and form thereby a determinate sense of justice.

Put this way, the question of law and fact changes its form from one having to do with how to get them together to one having to do with how to tell them apart, and the Western view of the matter, that there are rules that sort right from wrong, a phenomenon called judgment, and there are methods that sort real from unreal, a phenomenon called proof, appears

[9] K. Llwellyn and E. A. Hoebel, *The Cheyenne Way*, p. 304. *Cf.* on "justice of fact" vs. "justice of law" L. Pospisil, *Anthropology of Law: A Comparative Perspective*, pp. 234 ff.; M. Gluckman, *The Judicial Process* p. 336.

[10] F. von Benda-Beckmann, *Property in Social Continuity*, Verhandelingen van het Instituut voor Taal-, Land- en Volkenkunde, 86, (The Hague, 1979), pp. 28 ff.

as only one mode of accomplishing this. If adjudication, in New Haven or New Hebrides, involves representing concrete situations in a language of specific consequence that is at the same time a language of general coherence, then making a case comes to rather more than marshaling evidence to support a point. It comes to describing a particular course of events and an overall conception of life in such a way that the credibility of each reinforces the credibility of the other. Any legal system that hopes to be viable must contrive to connect the if-then structure of existence, as locally imagined, and the as-therefore course of experience, as locally perceived, so that they seem but depth and surface versions of the same thing. Law may not be a brooding omnipresence in the sky, as Holmes insisted rather too vehemently, but it is not, as the down-home rhetoric of legal realism would have it, a collection of ingenious devices to avoid disputes, advance interests, and adjust trouble-cases either. An *Anschauung* in the marketplace would be more like it.

And: other marketplaces, other *Anschauungen*. That determinate sense of justice I spoke of—what I will be calling, as I leave familiar landscapes for more exotic locales, a legal sensibility—is, thus, the first object of notice for anyone concerned to speak comparatively about the cultural foundations of law. Such sensibilities differ not only in the degree to which they are determinate; in the power they exercise, vis-à-vis other modes of thought and feeling, over the processes of social life (when faced with pollution controls, the story goes, Toyota hired a thousand engineers, Ford a thousand lawyers); or in their particular style and content. They differ, and markedly, in the means they use—the symbols they deploy, the stories they tell, the distinctions they draw, the visions they project—to represent events in judiciable form. Facts and law we have perhaps everywhere; their polarization we perhaps have not.

So much for dictum, the hallmark figure of legal rhetoric. To change the voice to a more anthropological register for a while, let me, mimicking the famous wind-in-the-palm-trees style of Malinowski, invite you to come with me now to a peasant village perched amid shining terraces on the green-clad volcanic slopes of a small sun-drenched South Pacific island where the operations of something that looks very much like law have driven a native mad. The island is Bali, the village we can leave nameless,

and the native (who, as all this happened in 1958, may well be dead) we may call Regreg.

Regreg's problem began when either his wife ran off with a man from another village, a man from another village ran off with her, or they ran off together: the marriage by mock-capture pattern of Bali makes these events more or less indistinguishable, or anyway not worth distinguishing, to local eyes. Properly incensed, Regreg demanded that the village council, a body of some hundred and thirty or so men which assembles once every thirty-five days to make decisions concerning village matters, take action to bring about her return. Though virtually everyone in the council sympathized with his predicament, they pointed out to him that, as of course he already very well knew, marriage, adultery, divorce, and that sort of thing were not a village concern. They were matters for kin-groups, which in Bali tend to be well defined and jealous of their prerogatives, to deal with. The issue was outside their jurisdiction, and he was pleading in the wrong forum. (Balinese villages have explicit rules, inscribed and reinscribed, generation after generation, onto palm leaves, defining in essentially religious, but nonetheless quite specific, terms the rights and obligations of the various bodies—councils, kin-groups, irrigation societies, temple congregations, voluntary associations—which, in a rather federative way, make them up.)[11] The council members would sincerely have liked to have done something for him, for they agreed that he had been badly used, but constitutionally, if I may put it that way, they could not. And as Regreg's kin-group, even more sympathetic, for his wife, being his patri-cousin, belonged to it too, was a small, weak, and rather low-status one, there was not much it could do either except try to comfort him with banalities of the that's life, bygones-are-bygones, and there are other pebbles, other cousins even, on the beach variety.

Regreg would not, however, thus be comforted. When, seven or eight months later, his turn to take office as one of the, in this village, five council chiefs happened to come up, he balked and his troubles really began. One becomes chief, again in this village at least (no two do things exactly alike; if they find that they do, one of them changes something), in automatic rotation, the term being three years; and when your time comes round (quite rarely as a matter of fact; Regreg was not blessed with much luck in all

[11] C. Geertz, "Form and Variation in Balinese Village Structure," *American Anthropologist* 61 (1949): 991–1012; idem "Tihingan: A Balinese Village," *Bijdragen tot Taal-, Land- en Volkenkunde* 120 (1964): 1–33.

this), you simply must serve. This *is* a council matter, inscribed again on those palm leaves together with the god-produced disasters, exact and elaborate, attending its neglect; and refusal (so far as anyone could remember, this was the first example) is tantamount to resigning not just from the village but from the human race. You lose your house-land, for that is village-owned here, and become a vagrant. You lose your right to enter the village temples, and thus are cut off from contact with the gods. You lose, of course, your political rights—seat on the council, participation in public events, claims to public assistance, use of public property, all matters of great substance here; you lose your rank, your inherited place in the caste-like order of regard, a matter of even greater substance. And beyond that, you lose the whole social world, for no one in the village may speak to you on pain of fine. It is not precisely capital punishment. But for the Balinese, who have a proverb, "to leave the community of agreement [*adat*, a sovereign word whose ambiguities I shall be returning to at some length later on] is to lie down and die," it is the next best thing to it.

Why Regreg was so uncharacteristically resistant to public obligation for a Balinese, who obey their own rules to a degree an anthropologist, especially one who has come there from Java, not to speak of the United States, can greet only with personal astonishment and professional delight, is unclear. His co-citizens were, anyway, totally uninterested in the question of what his motivations might be and could hardly be brought to speculate on it. ("Who knows? He wants his wife back.") Rather, conscious of the disaster for which he was headed, they sought, in every way they could devise, to dissuade him from his course and induce him to take the damned office. The council assembled a half dozen times over the course of several months in special session simply to this end—to talk him into changing his mind. Friends sat up all night with him. His kin pleaded, cajoled, threatened. All to no avail. Finally, the council expelled him (unanimously; all its decisions are unanimous), and his kin-group, after one last desperate effort to bring him round, did so as well, for, given the precedence of the council's concerns over its own in *this* matter, if it had not done so, all of its members would have shared his fate. Even his immediate family—parents, siblings, children—had to abandon him in the end. Though, of course, their view, reasonably enough I suppose, was that it was he who had abandoned them.

He was, at any rate, abandoned. He wandered, homeless, about the streets and courtyards of the village like a ghost, or more exactly like a dog.

(Which the Balinese, though they have lots of them—mangy, emaciated, endlessly barking creatures, kicked about like offal in the road—despise with an almost pathological passion born of the notion that they represent the demonic end of a god-to-human-to-animal hierarchy.) For although people were forbidden to speak with him, they did now and then throw him scraps to eat, and he foraged in garbage heaps, when not driven off by stones, for the rest. After several months of this, growing more disheveled by the day, he became virtually incoherent, unable any longer to shout his case to deafened ears, perhaps unable any longer even to remember what it was.

At this point, however, a quite unexpected, and in its own way unprecedented, thing occurred. The highest ranking traditional king on Bali, who was also, under the arrangements in effect at the time, the regional head of the new Republican government, came to the village to plead Regreg's case for him. This man, who in the Indic state pattern of Southeast Asia as it was found in Bali (and to some, partly altered, partly reinforced extent, still is found), is situated along that gods-to-animals hierarchy I mentioned just at the point where its human ranges shade off into its divine; or, as the Balinese, who see rank progressing downward from the top, prefer to put it, the divine into the human.[12] He is, therefore, a half- or quasi-god (he is called *Dewa Agung*—"Great God"), the most sacred figure on the island, as well as, in 1958 anyway, the most elevated politically and socially. People still crawled in his presence, spoke to him in hyper-formal phrases, considered him shot through with cosmic power at once terrible and benign. In the old days, a local exile such as Regreg would most likely have ended up in his palace, or in that of one of his lords, as a powerless, protected, outcaste dependent—not precisely enslaved, but not precisely free either.

When this incarnation of Siva, Vishnu, and other empyrean persons came to the village—that is, to the council gathered in special session to receive him—he squatted on the floor of the council pavilion to symbolize that in *this* context he was but a visitor, however distinguished, and not a king, much less a god. The council members listened to him with enormous deference, a grand outpouring of traditional politesse, but what he had to say was far from traditional. This was, he told them, a new era. The country was independent. He understood how they felt, but they really ought not to exile people anymore, confiscate their house-land, refuse them political

[12] C. Geertz, *Negara: The Theatre State in Nineteenth-Century Bali* (Princeton, 1980).

and religious rights, and so on. It was not modern, up-to-date, democratic, the Sukarno-way. They should, in the spirit of the new Indonesia and to demonstrate to the world that the Balinese were not backward, take Regreg back and punish him, if they must, in some other way. When he finished (it was a long oration), they told him, slowly, obliquely, and even more deferentially, to go fly a kite. Village affairs, as he well knew, were their concern not his, and his powers, though unimaginably great and superbly exercised, lay elsewhere. Their action in the Regreg case was supported by the hamlet constitution, and if they were to ignore it, poxes would fall upon them, rats would devour their crops, the ground would tremble, the mountains explode. Everything he had said about the new era was right, true, noble, beautiful, and modern, and they were as committed to it as he was. (This was true: the village was an unusually "progressive" one; more than half the population were socialists.) But, well, no—Regreg could not be readmitted to human company. His traditional status reacknowledged, his modern duty done, or anyway attempted, the divine king-cum-civil servant said, may the village prosper, thanks for the tea, and left amid kowtows to his foot, and the issue never resurfaced. The last time I saw Regreg he had sunk into an engulfing psychosis, wandering now in a world largely hallucinatory, beyond pity, beyond remark.

There are clearly a great number of things to say about this terrible little episode, which may remind those who are fans of Storrs lectures of Grant Gilmore's description of Hell as a place where there is nothing but law and due process is meticulously observed; and I shall be referring back to it now and then as a sort of touchstone as I proceed to grander matters.[13] But what is of immediate relevance is that we have here events, rules, politics, customs, beliefs, sentiments, symbols, procedures, and metaphysics put together in so unfamiliar and ingenious a way as to make any mere contrast of "is" and "ought" seem—how shall I put it?—primitive. Nor can one, I think, deny the presence of a powerful legal sensibility here: one with form, personality, bite, and, even without the aid of law schools, jurisconsults, restatements, journals, or landmark decisions, a firm, developed, almost willful awareness of itself. Certainly Regreg (were he still capable of having a view) would not want to deny it.

Event and judgment flow along together here in, to adopt a phrase of Paul Hyams's about English ordeals, an effortless mix that encourages nei-

[13] G. Gilmore, *The Ages of American Law* (New Haven, 1977), p. 111.

ther extensive investigation into factual detail nor systematic analysis of legal principle.[14] Rather, what seems to run through the whole case, if it properly can be called a case, reaching as it does from cuckoldry and contumacy to kingship and madness, is a general view that the things of this world, and human beings among them, are arranged into categories, some hierarchic, some coordinate, but all clear-cut, in which matters *out-of-category disturb the entire structure and must be either corrected* or effaced. The question was not whether Regreg's wife had done this or that to him, or he had done this or that to her, or even whether in his present state of mind he was fit for the post of village chief. No one cared or made any effort to find out. Nor was it whether the rules under which he was judged were repellent. Everyone I talked to agreed that they were. The question was not even whether the council had acted admirably. Everyone I talked to thought, that, in his own terms, the king had a point, and they were indeed a rather backward lot. The question, to put it in a way no Balinese, of course, either would or could, was how do the constructional representations of if-then law and the directive ones of as-therefore translate one into the other. How, given what we believe, must we act; what, given how we act, must we believe.

Such an approach to things, one not of a legal anthropologist or an anthropologist of law, but of a cultural anthropologist turned away for a moment from myths and kin charts to look at some matters Western lawyers should find at least reminiscent of those they deal with, brings to the center of attention neither rules nor happenings, but what Nelson Goodman has called "world versions," and others "forms of life," *"epistemés,"* *"Sinnzusammenhange,"* or "noetic systems."[15] *Our gaze fastens on meaning*, on the ways in which the Balinese (or whoever) make sense of what they do—practically, morally, expressively . . . juridically—by setting it within larger frames of signification, and how they keep those larger frames in place, or try to, by organizing what they do in terms of them. The segregation of domains of authority—kin-group from council, council from king; the definition of fault as disruption not of political order (Regreg's obstinacy was not regarded as any threat to that) but of public etiquette; and the remedy employed, the radical effacement of social personality, all point to a powerful, particular, to our minds even peculiar,

[14] P. R. Hyams, "Trial by Ordeal, the Key to Proof in the Common Law," in press.
[15] N. Goodman, *Ways of Worldmaking* (Indianapolis and Cambridge, Mass., 1978).

conception of, to use another of Goodman's compendious tags, "the way the world is."[16]

The way the Balinese world is would take a monograph even to begin to describe: an extravagance of gods, groups, ranks, witches, dances, rites, kings, rice, kinship, ecstasis, and artisanry, set in a maze of politesse. The key to it, so far as it has one, is probably the politesse, for manners have a force here difficult for us even to credit, much less to appreciate. But however that may be, and I shall try later on to make all this seem a little less Martian, the cultural contextualization of incident is a critical aspect of legal analysis, there, here, or anywhere, as it is of political, aesthetic, historical, or sociological analysis. If there are any features general to it, it is in this that they must lie: in the ways in which such contextualization is accomplished when the aim is adjudication rather than, say, causal explanation, philosophical reflection, emotional expression, or moral judgment. The fact that we can—that is, that we think that we can—take so much of this context for granted in our own society obscures from us a large part of what legal process really is: seeing to it that our visions and our verdicts ratify one another, indeed that they are, to borrow an idiom less offhand, the pure and the practical faces of the same constitutive reason.

It is here, then, that anthropology, or at least the sort of anthropology I am interested in, a sort I am trying, with indifferent success, to get people to call "interpretive," enters the study of law, if it enters it at all. Confronting our own version of the council-man mind with other sorts of local knowledge should not only make that mind more aware of forms of legal sensibility other than its own but make it more aware also of the exact quality of its own. This is, of course, the sort of relativization for which anthropology is notorious: Africans marry the dead and in Australia they eat worms. But it is one that neither argues for nihilism, eclecticism, and anything goes, nor that contents itself with pointing out yet once again that across the Pyrenees truth is upside down. It is, rather, one that welds the processes of self-knowledge, self-perception, self-understanding to those of other-knowledge, other-perception, other-understanding; that identifies, or

[16] N. Goodman, "The Way the World Is," in *Problems and Projects* (Indianapolis and Cambridge, Mass., 1972), pp. 24–32.

very nearly, sorting out who we are and sorting out whom we are among. And as such, it can help both to free us from misleading representations of our own way of rendering matters judiciable (the radical dissociation of fact and law, for example) and to force into our reluctant consciousness disaccordant views of how this is to be done (those of the Balinese, for example) which, if no less dogmatical than ours, are no less logical either.

The turn of anthropology, in some quarters at least, toward a heightened concern with structures of meaning in terms of which individuals and groups of individuals live out their lives, and more particularly with the symbols and systems of symbols through whose agency such structures are formed, communicated, imposed, shared, altered, reproduced, offers as much promise for the comparative analysis of law as it does for myth, ritual, ideology, art, or classification systems, the more tested fields of its application.[17] "Man," as A. M. Hocart remarked, "was not created governed," and the realization that he has become so, severally and collectively, by enclosing himself in a set of meaningful forms, "webs of signification he himself has spun," to recycle a phrase of my own, leads us into an approach to adjudication that assimilates it not to a sort of social mechanics, a physics of judgment, but to a sort of cultural hermeneutics, a semantics of action.[18] What Frank O'Hara said of poetry, that it makes life's nebulous events tangible and restores their detail, may be true as well, and no less variously accomplished, of law.

As I suggested earlier, such a tack runs counter, or at least at some obtuse sort of angle, to what has been the mainstream of the analysis of law by anthropologists and their would-be fellow travelers in the other social sciences and in the legal profession. Michael Barkun's view, which he claims to draw from M. G. Smith, that what we comparativists of legal systems must do is "draw pure structure from its culture-specific accretions" seems to me a proposal for a perverse sort of alchemy to turn gold into lead.[19] P. H. Gulliver's self-styled "declaration of faith," formulated for him, he says, by my only anthropological predecessor to the Storrs platform, Max Gluckman, that he is concerned with "the social processes which largely determine the outcome of a dispute" not "the analysis of the processes of ratiocination by which negotiations proceed," seems to me, as befits such

[17] C. Geertz, *The Interpretation of Cultures*; P. Rabinow and W. M. Sullivan, eds., *Interpretive Social Science: A Reader* (Berkeley and Los Angeles, 1979).
[18] A. M. Hocart, *Kings and Councillors: An Essay in the Comparative Anatomy of Human Society* (Chicago, 1970), p. 128.
[19] Barkun, *Law Without Sanctions*, p. 33.

declarations, incoherent.[20] And Elizabeth Colson's notion, derived from god knows where, that those interested in symbolic systems are so interested because, shy of the dust and blood of social conflict and anxious to please the powerful, they retreat to realms assumed to be impersonal, above the battle, and to operate by their own logic, seems to me idle slander.[21] Again, I growl this way not to dismiss what others have done or are doing (though I am critical of a lot of it), nor to divide my profession into warring camps (that it does quite well by itself). I do it to lay a different course. I am going to revel in culture-specific accretions, pore over processes of ratiocination, and plunge headlong into symbolic systems. That does not make the world go away; it brings it into view.

Or rather, it brings worlds into view. I am going to try, in too brief a compass to be in any way persuasive and too extended a one wholly to avoid actually saying something, to outline three quite different varieties of legal sensibility—the Islamic, the Indic, and a so-called customary-law one found throughout the "Malayo" part of Malayo-Polynesia—and connect them to the general views of what reality really is embodied within them. And I am going to do this by unpacking three terms, that is, three concepts, central, so I think, to these views: *ḥaqq*, which means "truth," and very great deal more, for the Islamic; *dharma*, which means "duty," and a very great deal more, for the Indic; and *adat*, which means "practice," and a very great deal more, for the Malaysian.

It is the "very great deal more" that will absorb me. The intent is to evoke outlooks, not to anatomize codes, to sketch, at least, something of the if/thens within which the as/therefores are set in each of these particular cases (which will be even more particular because I shall be relying on my Moroccan and Indonesian work to construct them) and gain a sense thereby of what the fact-law issue comes to in them as against what it comes to for us.

That little job done over the course of my next forty pages or so, there remains only the minor question of how such distinct legal visions are going to relate, indeed are relating and have for some good time been relating, to one another as we all become more and more involved in each other's business; how local knowledge and cosmopolitan intent may comport, or fail to, in the emerging world disorder. Undeterred by either modesty or

[20] P. H. Gulliver, "Dispute Settlement Without Courts: The Ndenduli of Southern Tanzania," in *Law in Culture and Society*, ed. L. Nader (Chicago, 1969), p. 59.
[21] E. Colson, *Tradition and Contract: The Problem of Order* (Chicago, 1974), p. 82.

common sense, I will turn then finally to that in the third part of this essay, arguing, I suppose, that it is anyone's guess, but that anthropological guesses are at least worth juristic attention.

II

I said in the first part of this essay that "law," here, there, or anywhere, is part of a distinctive manner of imagining the real. I would like now to present some evidence that this is so—evidence only, schematic, peremptory, and, as I speak not from a bench but a podium, hardly conclusive, hardly even systematically marshaled, yet for all that I trust instructive. I want less to prove something, whatever "proof" could mean for so groping an enterprise, than to evoke something: namely, other forms of juristical life. And for that, and to risk sounding merely outrageous, what we need, or anyway can best expect to get, is not exact propositions, exactly established. What we need, or can best expect to get, is what Nelson Goodman, whose attitudes in these matters again closely resemble my own, sees even that modern paragon of naked truth, the scientific law, as being: "the nearest amenable and illuminating lie."[22]

If one looks at law this way, as a view of the way things are, like, say, science or religion or ideology or art—together, in this case, with a set of practical attitudes toward the management of controversy such a view seems to entail to those wedded to it—then the whole fact/law problem appears in an altered light. The dialectic that seemed to be between brute fact and considered judgment, between what is so and what is right, turns out to be between, as I put it earlier, a language, however vague and unintegral, of general coherence and one, however opportunistic and unmethodical, of specific consequence. It is about such "languages" (that is to say,

[22]N. Goodman, *Ways of Worldmaking*, p. 121: "But, of course, truth is no more a necessary than a sufficient consideration for choice of statement. Not only may the choice often be of a statement that is the more nearly right in other respects over one that is the more nearly true, but where truth is too finicky, too uneven, and does not fit comfortably with other principles, we may choose the nearest amenable and illuminating lie. Most scientific laws are of this sort: not assiduous reports of detailed data but sweeping Procrustean simplifications."

symbol systems) and such a dialectic that I want now to try to say something at once empirical enough to be credible and analytical enough to be interesting.

I want to do that, as I also said earlier, by the somewhat unorthodox route of unpacking three resonant terms, each from a different moral world and connecting to a different legal sensibility: the Islamic, the Indic, and what, for want of a better designation, I will call the Malaysian, meaning by that not just the country of Malaysia but the Austronesian-speaking civilizations of Southeast Asia. As the invocation of these generalized culture-images indicates, the route is not only unorthodox, it is full of pitfalls of the sort into which a certain kind of anthropology—the kind that finds Frenchmen Cartesian and Englishmen Lockean—particularly likes to fall. Proposing, besides, to communicate something of the character of these mega-entities through the examination of single concepts, however rich, would seem merely to make disaster sure. Perhaps it does. But if certain precautions are taken and certain restraints observed, the absolute worst, mere stereotype, may yet be avoided.

The first precaution is to confess that the three terms I shall use—*ḥaqq*, an Arabic word having something to do with what we, with hardly more precision, would call "reality," or perhaps "truth," or perhaps "validity"; *dharma*, a Sanskritic word, originally in any case, though one finds it now in everything from Urdu to Thai, which centers, in a linga-and-lotus sort of way, around notions of "duty," "obligation," "merit," and the like; and *adat*, also originally Arabic, but taken into Malaysian languages to mean something half-way between "social consensus" and "moral style"—are not only not the only three I might have used; they may not even be the best. *Šarī'a* ("path," "way") and *fiqh* ("knowledge," "comprehension") are cer-tainly more common starting points for reflections about the characteristic bent of Islamic law. *Āgama* ("precept," "doctrine") or *śāstra* ("treatise," "canon") might lead more directly into Indic conceptions of the legal. And either *patut* ("proper," "fitting") or *pantas* ("suitable," "apposite") would have the advantage for Southeast Asia of at least being an indigenous word rather than an obliquely borrowed and worked-over one. What one really needs, in each case, is a cycle of terms defining not point concepts but a structure of ideas—multiple meanings, multiply implicated at multiple levels. But this is clearly not possible here. We must do with partials.

We must also do with a radical simplification of both the historical and regional dimensions of these matters. "Islam," "The Indic World," and

sensu lato "Malaysia" are, as the bulk of my work in general has in fact been devoted to demonstrating, hardly homogeneous block entities, invariant over time, space, and populations.[23] Reifying them as such has been, indeed, the main device by means of which "The West," to add another nonentity to the collection, has been able to avoid understanding them or even seeing them very clearly. This may (or may not) have had its small uses in the past, when we were alternately self-absorbed and impassioned to shape others to our view of how life should be lived. It hardly has any now when, as I shall argue at some length in the concluding section of this essay, we are faced with defining ourselves neither by distancing others as counterpoles nor by drawing them close as facsimiles but by locating ourselves among them.

Yet, as my purpose is to put a comparative frame around certain of our ideas about what justice comes to, not to present "The East in a Nutshell," the necessity to gloss over internal variation and historical dynamics is perhaps less damaging than it might otherwise be; it may even serve to focus issues by blurring detail. And in any case, there is the further precaution one can take of remembering that, although I shall be drawing on material from all sorts of times and places, when I speak of "Islam," or "The Indic World," or "Malaysia," I usually have at the back of my mind one or another of the rather marginal cases quite recently observed on which I have happened as an anthropologist at an historical moment to work: Morocco, at the extreme western end of the Muslim world, far from the calls of Mecca; Bali, a small, detached, and extremely curious Hindu-Buddhist outlier in the eastern reaches of the Indonesian archipelago; and Java, a sort of anthology of the world's best imperialisms, where a "Malaysian" cultural base has been over-lain by just about every major civilization—South Asian, Middle Eastern, Sinitic, European—to thrust itself into the Asiatic trade over the past fifteen hundred years.

Finally, and then I shall be done with apologizing (it never does any good anyhow), I must stress that I am not engaged in a deductive enterprise in which a whole structure of thought and practice is seen to flow, according to some implicit logic or other, from a few general ideas, sometimes called postulates, but in an hermeneutic one—one in which such ideas are used

[23]For the disaggregation theme in my work, see especially my *Islam Observed* (New Haven, 1968), and *The Religion of Java* (Glencoe, Ill., 1960). Also, I should note that by "Islamic" I do *not* mean Middle Eastern; by "Indic" I do *not* mean Indian.

as a more or less handy way into understanding the social institutions and cultural formulations that surround them and give them meaning.[24] They are orienting notions, not foundational ones. Their usefulness does not rest on the presumption of a highly integrated system of behavior and belief. (There is none such, even on so tight a little island as Bali.) It rests on the fact that, ideas of some local depth, they can direct us toward some of the defining characteristics, however various and ill ordered, of what it is we want to grasp: a different sense of law.

Our three terms, to put all this in a somewhat different way, are more comparable to the Western notion of "right" *(Recht, droit)* than they are to that of "law" *(Gesetz, loi)*. They center, that is, less around some sort of conception of "rule," "regulation," "injunction," or "decree" than around one, cloudier yet, of an inner connection, primal and unbreakable, between the "proper," "fitting," "appropriate," or "suitable" and the "real," "true," "genuine," or "veritable": between the "correct" of "correct behavior" and that of "correct understanding." And of none of them is this more true than it is of *ḥaqq*.

There is an Arabic word and term of Islamic jurisprudence at least generally correspondent to the "rules and regulations" idea, namely *ḥukm*, from a root having to do with delivering a verdict, passing a sentence, inflicting a penalty, imposing a restraint, or issuing an order, and it is from that root that the commonest words for judge, court, legality, and trial derive. But *ḥaqq* is something else again: a conception that anchors a theory of duty as a set of sheer assertions, so many statements of brute fact, in a vision of reality as being in its essence imperative, a structure not of objects but of wills. The moral and ontological change places, at least from our point of view. It is the moral, where we see the "ought," which is a thing of descriptions, the ontological, for us the home of the "is," which is one of demands.

It is this representation of the really real as a thing of imperatives to be responded to, a world of wills meeting wills, and that of Allah meeting them

[24]For the postulational approach, see E. A. Hoebel, *The Law of Primitive Man*. Again, I do not wish to dismiss this approach or deny its achievements, merely to distinguish mine from it.

all, rather than a thing of, say, forms to be contemplated, matter to be perceived, or noumena to be postulated, that I want to use *ḥaqq* to light up; though, as this view is general to the legal sensibility we are after, any systematic consideration of juristical terms in the Islamic world would, I think, fairly promptly lead one to it.[25] The "real" here is a deeply moralized, active, demanding real, not a neutral, metaphysical "being," merely sitting there awaiting observation and reflection; a real of prophets not philosophers. Which brings us, as just about anything also eventually does in some devious way or other in this vehement part of the world, to religion.

Ḥaqq, as *al-Ḥaqq*, is in fact one of the names of God, as well as, along with such things as "speech," "power," "vitality," and "will," one of His eternal attributes. As such, it images, even for the unlearned Muslim, to whom these notions come wrapped in colloquial ethics, standard practices, quranic tags, mosque-school homilies, and proverbial wisdom, how things most generally are. As the Islamicist W. C. Smith has put it: "*Ḥaqq* refers to what is real in and of itself. It is a term par excellence of God. *Huwa al-Ḥaqq:* He is Reality as such. Yet every other thing that is genuine is also *ḥaqq*. It means reality first, and God only for those [that is to say, Muslims] who [go on to] equate Him with reality. [It] is truth in the sense of the real, with or without the capital R."[26] Arabic script does not, as a matter of fact, employ majuscules. But the relation of the upper-case sense of R (or, more precisely, *ḥā'*) and the lower-case one is the heart of the matter: the connecting, again, of an overarching sense of how things are put together, the if/then necessities of *Anschauung* coherence, and particular judgments of concrete occasions, the as/therefore determinations of practical life.

This connection is made (semantically anyway—I am not arguing causes, which are as vast as mideastern history and society) by the word itself. For at the same time as it means "reality," "truth," "actuality," "fact," "God," and so on, it, or this being Arabic, morphophonemic permutations of it, also means a "right" or "duty" or "claim" or "obligation," as well as "fair," "valid," "just," or "proper." "The *ḥaqq* is at you" *(ʿandek)* means (again,

[25]Some passages here and elsewhere in this discussion are taken from previous works of mine, most especially, *"Suq:* The Bazaar Economy in Morocco," in C. Geertz, H. Geertz, and L. Rosen, *Meaning and Order in Moroccan Society*, (Cambridge, England, and New York, 1979), pp. 123–313; C. Geertz, *Islam Observed*.

[26]W. C. Smith, "Orientalism and Truth" (T. Cuyler Young Lecture, Program in Near Eastern Studies, Princeton University, 1969); cf. W. C. Smith, "A Human View of Truth," *Studies in Religion* 1 (1971):6–24. I have, not to mar the page with dots, eliminated phrases and sentences without benefit of ellipses. On the question of attributes in Islamic theology, see H. A. Wolfson, *The Philosophy of the Kalam* (Cambridge, Mass., 1976), pp. 112–234.

I follow Moroccan usage) "you are right," "right is on your side." "The *ḥaqq* is in you" *(fīk)* means "you are wrong," "you are unfair, unjust," apparently in the sense that you know the truth but are not acknowledging it. "The *ḥaqq* is on you *(ʿalīk)* means "it is your duty, your responsibility," "you must," "you are obligated to." "The *haqq* is with you" *(minek)* means "you are entitled to it," "it is your due." And in various forms and phrases it denotes a beneficiary; a participant in a business deal; a legitimate "property right" share in something, such as a profit, a bundle of goods, a piece of real estate, an inheritance, or an office. It is used for a contractual duty or, derivatively, even for a contract document as such; for a general responsibility in some matter; for a fine, for an indemnity. And its definite plural, *al-ḥuqūq*, means law or jurisprudence. A *ḥuqūqī*, the attributive form, and thus most literally I suppose, "(someone) affixed to the real, fastened to it," is a lawyer or a jurisprudent.

The conception of an identity between the right and the real is thus constant through every level of the term's application: on the religious (where it is used not only for God, but also for the Quran in which his Will is stated, for the Day of Judgment, for Paradise, for Hell, for the state that comes with the attainment of mystic gnosis); on the metaphysical (where it signifies not just factuality as such, but essence, true nature, "the intelligible nucleus of an existing thing"); on the moral, in the phrases heard every day in the Morocco I know, that I have just been quoting; and on the jural, where it becomes an enforceable claim, a valid title, a secured right, and justice and the law themselves.[27] And this identity of the right and the real informs the Islamic legal sensibility not just abstractly as tone and mood, but concretely as deliberation and procedure. Muslim adjudication is not a matter of joining an empirical situation to a jural principle; they come already joined. To determine the one is to determine the other. Facts are normative: it is no more possible for them to diverge from the good than for God to lie.

Men, of course, can lie, and, especially in the presence of judges, often do; and that is where the problems arise. The as/therefore level of things

[27]For a fuller discussion of the various levels of meaning for *ḥaqq*, see the entry under "Ḥaḳḳ" in *The Encyclopedia of Islam*, new ed. (Leiden and London, 1971), vol. 3, pp. 81–82, where it is argued, rather speculatively, that the legal meaning was the original (pre-Islamic) one, out of which the ethical and religious meanings developed. "To sum up, the meanings of the root [*ḥ-q-q*] started from that of carved [that is, in wood, stone, or metal] permanently valid laws, expanded to cover the ethical ideals of right and real, just and true, and developed further to include Divine, spiritual reality." For other dimensions of this extraordinarily productive root, see also the entries at "Ḥaḳīḳa" (ibid, pp. 75–76) and "ḥuḳuḳ" (ibid, p. 551).

is as difficult of determination as the if/then level is (in theory, anyway) clear and inescapable. The Quran as the eternally existing words of God—the Inlibration of Divinity, as H. A. Wolfson has brilliantly called it in polemic contrast to the Incarnation conceptions of Christology—is considered crystalline and complete in its assertion of what it is that Allah would have those for whom he is in fact *al-Ḥaqq* do and not do.[28] There has been, of course, much commentary and dispute, formation of schools, secretarian dissent, and so on. But the notion of the certainty and comprehensiveness of the law as embooked (another of Wolfson's happy phrases) in the Quran powerfully reduces, if it does not wholly remove, any sense that questions of what is just and what unjust may be, in and of themselves, ambiguous, quixotic, or unanswerable. Jural analysis, though an intellectually complex and challenging activity, and often enough a politically risky one, is seen as a matter of stating public-square versions of divine-will truths—describing the Sacred House when it is out of sight, as Shafi'i, perhaps the greatest of the classical jurists, has it—not of balancing conflicting values. Where the value balancing comes in is in the recounting of incident and situation. And it is that which leads to what is to my mind the most striking characteristic of the Islamic administration of justice: the intense concern with what might be called "normative witnessing."

As is well known, at least by those whose business it is to know such things, all evidence that comes before a Muslim court—that is to say, one governed by the *šarī'a* and presided over by a *qāḍī*—is considered to be oral, even if it involves written documents or material exhibits. It is only spoken testimony—*šahāda,* "witnessing," from a root for "to see with one's own eyes"—that counts, and such written materials as come to be involved are regarded not as legal proof in themselves but merely as (normally rather suspect) inscriptions of what someone said to someone in the presence of morally reliable witnesses.[29] This denial of the legal validity of the written

[28]H. A. Wolfson, *Philosophy of the Kalam,* pp. 235–303.

[29]On documents and witnesses in classical Islamic law, see J. A. Wakin, *The Function of Documents in Islamic Law* (Albany, 1972). Cf. Rosen, "Equity and Discretion in a Modern Islamic Legal System"; A. Mez, *The Renaissance of Islam* (Beirut, 1973 [originally ca. 1917]), pp. 227–29; J. Schacht, *Islamic Law* (Oxford, 1964), pp. 192–94. The word for "martyr"—*šahīd*—developed from the same root, apparently in a "God's witness" sense. See the article, "*Shahid,*" H. A. R. Gibb and J. H. Kramers, *Shorter Encyclopaedia of Islam* (Leiden and London, 1961), pp. 515–18. *Šahāda,* "testimony," "witnessing," is also, of course, the term for the famous Muslim "Profession of Faith:" "[I witness that] there is no God but God and [I witness that] Muḥammad is the Messenger of God." The strict witnessing requirements (for example, that "the party who bore [the burden of proof] . . . was obliged to produce two

act as such dates from the very earliest periods of Islam, and in the formative phases of Islamic law written evidence was often rejected altogether, as was what we would call circumstantial or material evidence. "The personal word of an upright Muslim," as Jeanette Wakin has written, "was deemed worthier than an abstract piece of paper or a piece of information subject to doubt and falsification."[30] Today, when written evidence is accepted, however reluctantly, it still remains the case that its worth is largely derivative of the moral character of the individual or individuals who, personally involved in its creation, lend to it their authenticity. It is not, to paraphrase Lawrence Rosen on contemporary Moroccan practice, the document that makes the man believable; it is the man (or, in certain contexts, the woman) who makes the document such.[31]

The development of the institutions of witnessing have thus been as elaborate as those of pleading have been rudimentary. The search has not been for knowledgeable individuals sufficiently detached to retail empirical particulars an umpire judge can weigh in legal scales but for perceptive individuals sufficiently principled to produce righteous judgments an exegete judge can cast into quranic rhetoric. And this search has taken a wide variety of directions and a wider variety of forms. The sort of attention our tradition gives to assuring and reassuring itself, with indifferent success, that its laws are fair, the Islamic, in no doubt on that score, gives to assuring and reassuring itself, not much more successfully, that its facts are reputable.

In classical times, this obsession (the word is not too strong) with the moral reliability of oral testimony gave rise to the institution of accredited witnesses, men (or again in special cases or with special limitations, women) considered to be "upright," "straightforward," "honorable," "decent," "moral" *('ādil),* as well as, of course, of local prominence and presumed acquaintance with the ins-and-outs of local affairs. Chosen by the *qāḍī* once and for all through a settled procedure of evaluation and formal certification, they thenceforth testified, over and over again, in cases appearing be-

male, adult, Muslim witnesses, whose moral integrity and religious probity were unimpeachable, to testify orally to their direct knowledge of the truth of his claim") has sometimes been asserted to be the chief reason for the progressive constriction of *šarī'a* court jurisdiction in recent times (N. J. Coulson, "Islamic Law," in *An Introduction to Legal Systems,* ed. J. D. M. Derrett (New York and Washington, D.C., 1968), pp. 54–74, quotation at p. 70). There is truth in this but it neglects the degree to which such "strict" views of witnessing have influenced proceedure in the "secular" court successors of the *šarī'a* courts.

[30]Wakin, *Function of Documents in Islamic Law,* p. 6.

[31]Rosen, "Equity and Discretion in a Modern Islamic Legal System."

fore the court as individuals "whose testimony," as Wakin puts it, ". . . could not be doubted"—at least not legally.[32]

Not only could the number of such official, permanent witnesses grow very large (they reach eighteen hundred in tenth-century Baghdad), but the choosing and validation of them, one of the main duties of the *qāḍī* (each of which appointed his own, dismissing his predecessor's), could be extremely elaborate, extending to the point of the even odder practice, to our eyes anyway, of creating a similar body of secondary witnesses—*šahāda 'alā šahāda*, "witnesses as to witnesses."[33] These secondary, meta-witnesses affirmed the probity of the primary witnesses, two of them for one of the primary, particularly where the latter had died or moved since giving their original testimony or for some other reason were unable to appear personally in court, but also where the *qāḍī* still had reservations as to their moral perfection. (Perhaps, as Joseph Schacht notes, one had been seen playing backgammon or entering a public bath without a loin cloth. At least one medieval *qāḍī* is reported to have gone about in disguise through the streets at night to check on his witnesses' characters.)[34] The *qāḍī*'s anxiety in this regard was understandable, as well as unallayable: if he accepted the word of a false witness, his judgment based on it was legally valid, judicially irreversible, and morally on his head.[35] Where the normative and the actual are ontologically conjoined—*Ḥaqq* with a capital *Ḥa'*—and oral testimony (or the record of oral testimony) is virtually the sole way in which what transpires in the world—*ḥaqq* with a small one—is represented juridically, perjury has a peculiar fatality. Indeed, it is not even a crime, punishable by human sanction, in Islamic law. Like violating the fast, not praying, or giving partners to God, it is a sacrilege, punishable by damnation.[36]

This specific institution of a community of official truth-tellers is rare to nonexistent now, even in *šarī'a* courts; and, of course much of legal life in the Islamic world has long since been administered by civil tribunals pre-

[32]Wakin, *Function of Documents in Islamic Law*, p. 7.

[33]On Baghdad, see Mez, *Renaissance of Islam*, p. 229. This was an unusually high figure. A few years later the number was cut to a more practical 303, which was still felt by the jurists to be a bit too high. On secondary witnesses, Wakin, *Function of Documents in Islamic Law*, pp. 66 ff. Schacht, *Islamic Law*, p. 194, notes two witnesses must testify to validate each primary witness. *Šahada 'alā šahada* is singular and refers technically in law to the act of "witnessing" rather than to "witnesses," and so should perhaps more properly be translated as "witnessing as to witnessing." See footnote 29.

[34]Schacht, *Islamic Law*, p. 193. On the incognito *qāḍī*, Mez, *Renaissance of Islam*, p. 228.

[35]Schacht, *Islamic Law*, pp. 122, 189.

[36]Ibid, p. 187. As with a number of other points in the text, the matter is not entirely consensual among legal commentators, but nearly so.

sided over by more or less secular magistrates applying more or less positive law according to more or less "modern" procedures, leaving hardly more than family and inheritance issues to the care of the *qāḍī*.[37] But in the same way that the whole mass of what, in our ignorance, we used to do and now, in our enlightenment, do only somewhat differently—the near-vanished distinction between equity and common law, the transmogrified one between presentment and trial, or the culturally sublimated institutions of ordeal, battle, compurgation, and form-of-action pleading—haunts our sense of due process, so the notion of a certified virtuous witness speaking moral truth to a rulebook jurist haunts the legal conscience of the Muslim, however desanctified that conscience may become. More exactly, the increasing sensitivity to the problematics of evidence that for us led to juries has, for Muslims, led to notaries.

Such notaries, again called *šuhūd 'udūl*, "just" or "upright" witnesses, but now appointed as full-time professional officers of the court at least somewhat trained in at least the practical forms of the law, have become in more recent times as central to the functioning of the *qāḍī* court as the *qāḍī* himself.[38] Indeed, as they mediate the process by which social disputes are given judiciable representation, are brought to the point where settled rules can, rather mechanically in most cases, decide them, they are perhaps even more central. In no mere metaphorical sense, notaries make evidence, or anyway legal evidence, and thus, in line with what I have been saying about the normative status of fact, and so of witnessing, they make the better part of judgment as well. Reality as a structure of divine imperatives—God's will *Ḥaqq*—may be in the *qāḍī*'s hands. But reality as a flow of moral occurrence—in-you, on-you, and at-you *ḥaqq*—is to a significant extent in theirs.

But not only theirs. Notaries proper, those attached to *qāḍī* courts, are but the type case of an approach to judicial inquiry now expanded like a vast intelligence net to virtually all realms of legal concern. Like the

[37]On the contemporary functioning of *šarī'a* courts, see Coulson, "Islamic Law."

[38]The terms usually gets shortened to *šuhūd* (sg. *šahīd*; see footnote 29) in the central Islamic regions, to *'udūl* (sg. *'adl*) in the Western and Eastern margins; Wakin, *Function of Documents in Islamic Law*, p. 7. As he functions not just to record what people say but to add to what people say the aura of his own character, *'adl* should perhaps not be translated as "notary" (or even less, with its civil law overtones, "*notaire*"); but the rendering is standard and I have nothing better to offer save the literal, but in its own way not quite right in English "reliable witness." On Islamic notaries (and the "reliable witness" usage) in general, see E. Tyan, *Le Notariat et le Preuve par Ecrit dans le Pratique du Droit Musulman* (Beirut, 1945). Again, I am indebted to Lawrence Rosen for much of what I know about the role of the *'adl* in Morocco.

šarī'a itself, the jurisdiction of notaries is now largely confined to matters of marriage and inheritance in most parts of the Islamic world, their power to turn complaints into evidence mainly exercised with respect to marital contracts, divorce agreements, succession claims, and deeds." Beside them, there is now a host of similar official or quasi-official normative witnesses: people whose testimony, if not precisely incapable of being doubted—these are, after all, fallen times—carries, like that of the classical *šahīd* and unlike that of the ordinary litigant or defendant, the specific weight of their religious and moral stature.

Secular courts are quite literally surrounded by such certified truth-bringers—the general Arabic term for them usually being *'arīf*, from "to know," "be aware of," "recognize," "discover"; the usual English (and French) translation being "expert" *(expert)*. In Morocco, for example, there is the *amīn* (from the root for "faithful," "reliable," "trustworthy") in each craft or commercial trade, and in some professions as well, who is the fact-authority for disputes concerning it; there is the *jāri*, who is the same for irrigation matters; and there is the *muqqadem* for neighborhood quarrels. In each case, the disputants bring their problem to him first, and if they do not accept his mediation—the usual outcome—he serves as the main witness, most of the time the only one to whom the judge extends much credibility, in court. There is the *mezwār*, who acts in the same manner for particular religious status-groups; the *ṭāleb*, "student of religion," or the *šūrfa*, "descendant of the Prophet," who may be called upon in a wide range of moral matters; and there is the rural holy man, *sīyyid* or *murābit*, who serves in a similar capacity for country people. And, most important of all, there is a set of full-time investigator-reporters, called *ḫebīr* (from "to know by experience," "to be acquainted with"—the word for "news" in Arabic is *ḫbar*), some of them "expert" in agricultural matters, some in construction ones, some (women) in finding out who has made whom pregnant or who is sexually depriving or abusing whom, sent out in virtually every genuinely disputable case by the judges of the secular courts to visit the scene, interview those involved, and report back what the facts—never mind what the litigants say—"really are."

It is not possible to go into the operation of these institutions here, nor

[9]The *šarī'a*, and with it presumably the notaries, has rather wider scope still in some of the more traditional Middle Eastern regimes, such as Saudi Arabia. Also, the recent so-called Islamic Revival seems to have led to at least a formal rewidening of its scope in Lybia, Iran, Pakistan, and so on.

into the problems this expansion of normative witnessing has brought with it—though, in my opinion, a just understanding of such matters is the key to a realistic comprehension of legal sensibilities in at least a great part of the contemporary Muslim world, where the "fact explosion" and the anxieties it induces that I spoke of earlier are hardly unknown. The essential point is that the energies that, in the Western tradition, have gone into distinguishing law from fact and into developing procedures to keep them from contaminating one another have, in the Islamic, gone into connecting them, and into developing procedures to deepen the connection. Normative witnessing is critical to the administration of justice in the Muslim world because it represents, so far as it can, the here-we-are-and-there-we-are of particular circumstance, *ḥaqq* with a small *ḥa'*, in the settled terms of general truth, *Ḥaqq* with a big one.

When we turn to Indic law and to its animating idea, *dharma*, the problems inherent in trying to sum a sensibility in a lexeme grow yet more awkward.[10] For all its adaptation to local circumstance, its unevenness of impact, and its internal differentiation into schools and traditions, classical Islamic law has been, on balance, a homogenizing force, creating a legal *oikumenē* such that, in the fourteenth century for example, Ibn Battuta, himself a judge, could travel, *qāḍī* to *qāḍī*, from Morocco to Malaya and back without ever feeling himself in genuinely alien surroundings. Climate differed, and race, and with them custom; but the *šarī'a* was the *šarī'a*, in Samarkand as in Timbuktu, at least in the homes of legists.

But Indic law did not spread that way. It singularized what it encountered in the very act of universalizing it. Its realm was granular, segmented into a horde of hyper-particular, hyper-concrete manifestations of a hyper-general, hyper-abstract form; a world of avatars. Not only was it split at its origins by the great Hinduism-Buddhism divide; but, a vast, dishevelled collection of obsessively specific rules, the eighteen this and the thir-

[10]I should reiterate that the use of the term "Indic" ("Indicised") rather than "Indian" (Indianized), "Hindu" (Hinduised"), and so on is an attempt to finesse the whole, highly vexed question of the degree, type, depth, or whatever of "Indian-ness," "Indian impact" in Southeast Asia. For more on this, see Geertz, *Negara*, p. 138. Cf. Derrett's "anything that is not a duck, a goose, or a turkey is a chicken" view of "Hinduism": "For the purposes of the application of the *codified* parts of personal law a Hindu [in India] is one who is not a Muslim, Parsi, Christian or Jew." J. D. M. Derrett, *Religion, Law and the State in India* (New York, 1968), p. 44 (italics original).

ty-four that, it was held together not by a single canonical scripture, copied direct from the explicit speech of God, but by a set of maddeningly global conceptions drawn from a Borgesian library of irregular texts of diverse purpose, differing provenance, and unequal authority."[1] In every locality, in almost every social group in every locality, it developed a distinct and definite variant, joined to its cognates by only the most cousinish of family resemblances. As with Divinity (or for that matter, Humanity, Beauty, Power, or Love), in the Indic world Law was one but its expressions many.

As it diffused, fitfully and unevenly, first across India, then to Ceylon, Burma, Siam, Cambodia, Sumatra, Java, and Bali, Indic high culture, and, as an unseparated part of it, Indic law, absorbed into itself a vast plurality of local practices, symbols, beliefs, and institutions. Hindu in some places, Buddhist in others, Hindu-Buddhist in yet others, it conquered not by anathema, ruling out, but by consecration, ruling in; by, as J. D. M. Derrett has put it, subordinating "an infinitely vast and cumbersome medley of rules . . . to a comprehensive pattern of life and thought."[2] On the decision-forming level of as/therefore, it was everywhere a scattered catalogue of particulate formulae, derived indifferently from text, custom, legend, and decree, adapted to place and changing with need. On the coherence-making if/then level, it was everywhere grounded in a highly distinctive, extraordinarily stable grand idea, derived ultimately from immediate revelation, Vedic or Bo-tree: a cosmic doctrine of duty in which each sort of being in the universe, human, transhuman, infrahuman alike, has, by virtue of its sort, an ethic to fulfill and a nature to express—the two being the same thing. "Snakes bite, demons deceive, gods give, sages control their senses . . . thieves steal . . . warriors kill . . . priests sacrifice . . . sons obey mothers," Wendy O'Flaherty has written. "It is their *dharma* to do so."[3]

[1]For discussions of classical Indian law texts (or, more exactly, texts from which juridical ideas are drawn) see, for Hinduism, R. Lingat, *The Classical Law of India*, trans. J. D. M. Derrett (Berkeley and Los Angeles, 1973), pp. 7–9, 18–122; for Buddhism, R. F. Gombrich, *Precept and Practice: Traditional Buddhism in the Rural Highlands of Ceylon* (Oxford, 1971), pp. 40–45; for the derivative works of Southeast Asia, M. C. Hoadley and M. B. Hooker, *An Introduction to Javanese Law: A Translation of and Commentary on the Agama* (Tucson, 1981), pp. 12–31, and M. B. Hooker, "Law Texts of Southeast Asia," *The Journal of Asian Studies* 37(1978):201–19.

[2]Derrett, *Religion, Law and the State*, p. 118.

[3]W. D. O'Flaherty, *The Origins of Evil in Hindu Mythology* (Berkeley and Los Angeles, 1976). The quotation is portmanteau from pp. 94, 95, 96, 98, 109. This is, of course, a Hindu formulation; Buddhist ones differ in important ways (for a discussion, see W. Rahula, *What the Buddha Taught*, rev. ed. [London, 1978]). In the text discussion I have sought, as best I can, to state matters in such a way as to at least generally apply at once to Hindu India, the Theravada countries of northern Southeast Asia, and the more mixed situation of the Indonesian archipelago, though a more deep going analysis could no more avoid probing the differences in legal view of the two major Indic traditions than a deep going one of Western tradition could ignore probing those between Catholic and Protestant Christianity. But, like the Western (and, for all its sectarian splits, the Islamic, where I have equally ignored Sunni/Shi'i differences), Indic civilization does possess a distinctive form and tonality that its law projects. "If you ask a Buddhist his religious beliefs he will assume you are talking of Dharma. But these beliefs operate in the context of other beliefs, of more basic assumptions. This is true both logically and historically: The Buddha grew up in a Hindu society and accepted many Hindu assumptions" (Gombrich, *Precept and Practice*, p. 68).

[4]J. Gonda, *Sanskrit in Indonesia*, 2nd ed. (New Delhi, 1973), pp. 537, 157; Gombrich, *Precept and Practice*, p. 60; Rahula, *What the Buddha Taught*, p. 58; Lingat, *Classical Law of India*, p. 3; S. Wojowasito, *A Kawi Lexicon*, ed. R. F. Mills (Ann Arbor, 1979), pp. 287–88. For an excellent brief discussion of the meaning of *dharma* and its relation to law in the Hindu tradition, see L. Rocher, "Hindu Conceptions of Law," *The Hastings Law Journal* 29 (1978): 1280–1305.

Rendering *dharma* (and its converse *adharma*) into English is an even more difficult enterprise than is rendering *haqq*. For the problem here is less a splintering of meaning, the partitioning of a semantic domain into a host of unexpected parts, than imprecision of meaning, the expansion of such a domain to near infinite dimensions. The Sanskritist J. Gonda calls *dharma* "untranslatable," remarking that it is glossed in bilingual dictionaries "by ten or twelve lines of English terms or phrases: 'law, usage, customary observance, duty, morality, religious merit, good works, etc.,' and many other equivalents must be added if we will do justice to all aspects of the concept and its unexhaustible wealth." From the Buddhist-Pali side, where the word is *dhamma*, Richard Gombrich says it "can be and has been translated in a thousand ways: 'righteousness,' 'truth,' 'the Way,' etc. It is best not translated at all." For Walpola Rahula, himself a Buddhist monk, "there is no term in Buddhist terminology wider than *dhamma* . . . there is nothing in the universe or outside, good or bad, conditioned or non-conditioned, relative or absolute, which is not included in this term." Robert Lingat begins his great treatise *The Classical Law of India*, at base an extended mediation on the term, with the comment that "Dharma is a concept difficult to define because it disowns—or transcends—distinctions that seem essential to us." And Soewojo Wojowasito's dictionary of Old Javanese defines it as "law, right, task, obligation, merit, service, pious deed, duty," and follows with a page and a half of distensive compounds from *dharmadeśanā* "[the] science of good conduct," and *dharmabuddhi*, "just, fair, impartial [of mind]," to *dhammayuddha*, "a . . . war [fought] according to [an established] code," and *dharmottama*, "[the] code of justice most appropriate to each class of society."[4]

So far as law is concerned, it is these last notions that are the most critical.

For what most distinguishes the Indic legal sensibility from others is that right and obligation are seen as relative to position in the social order, and position in the social order is transcendentally defined. What is just for the absolute goose is not for the absolute gander; for the priest for the warrior, the monk the layman, the householder the hermit, the once-born the twice, the inhabitant of fallen times the inhabitant of golden ones. Social category, whether ritually characterized as in caste Hinduism or ethically so as in merit Buddhism, represents a sorting of groups and individuals into natural classes according to the rules they naturally live by. Status is substance. If *haqq* negotiates "is" and "ought" by construing law as a species of fact, *dharma* does so by construing fact as a species of law, which is very much not the same thing.

The differencing of justice according to social location is, of course, hardly unique to the Indic world. Classical Chinese and tribal African law, for example, binding right to kinship relation, are at least as thoroughgoing in this regard, and something of it, whether in the form of juvenile courts or "mother knows best" presumptions in custody cases, remains in every legal system. It is the *dharma* idea—that the codes which govern the behavior of the various sorts of men and women (as well as gods, demons, spirits, animals, or, for that matter, things) define what they primordially are—that sets the Indic case apart. What Ronald Inden and Ralph Nicholas have said for Bengal is, suitably nuanced, true everywhere that Indian assumptions have penetrated, and to the degree that they have:

> All beings are organized into [kinds]. Each [kind] is defined by its particular [nature] and [behavioral] code which are thought to be inseparable from one another. As a consequence of this cultural premise . . . no distinction is made, as [it is] in American culture, between an order of "nature" and an order of "law." Similarly, no distinction is made between a "material" or "secular" order and a "spiritual" or "sacred" order. Thus there is a single order of beings, an order that is in Western terms both natural and moral, both material and spiritual.[45]

And both legal and factual. Or as O'Flaherty puts it, summarizing the Indic conception of evil:

> Dharma is the fact that there are rules that must be obeyed; it is the principle of order, regardless of what that order actually is. . . . [It] is both a normative and a descriptive term. . . . [Thus] the moral code *(dharma)* in India is nature, where in the West it usually consists of a conflict with nature. . . . The dharma of a [being] is both his characteristic as a type and his duty as an individual. . . . He may refuse his duty [and thus] deny his nature [the condition contemned as *adharma*], but Hindus regard this conflict as an unnatural one, one which must be resolved. . . .[46]

It must be resolved because, as the Code of Manu already says, somewhere just before or after the time of Christ, "destroyed *dharma* destroys, protected [it] protects."[47] The law is merely there, like the sun and cattle, both in its grand unbounded form as "what is firm and durable, what sustains and maintains, what hinders fainting and falling," and in its cabined, local form as particular duties embodied in particular rules incumbent on particular persons in particular situations according to their particular status.[48] What its guardians must do is guard it, so that it will guard them.

[45] R. B. Inden and R. W. Nicholas, *Kinship in Bengali Culture* (Chicago, 1977), p. xiv. I have omitted, without benefit of ellipses, Bengali vernacular terms and some passages that apply as such only to caste Hinduism. For similar formulations, see M. Davis, *Rank and Rivalry: The Politics of Inequality in Rural West Bengal* (Cambridge, England), and New York, forthcoming); M. Marriott and R. B. Inden, "Caste Systems," *Encyclopedia Brittanica*, 15th ed. 1974.

[46] O'Flaherty, *Origins of Evil*, pp. 94–95, again with emendations and interpollations to render the formulation more general. Both the Inden-Nicholas and O'Flaherty statements pertain, of course, to caste Hinduism, but once more, in this regard at least, the Buddhist view seems not all that different: "The [Buddhist] universe is full of living beings, in hierarchically ordered strata. Men are somewhere in the middle. . . . Above them are various classes of gods and spirits, below them are animals, ghosts, and demons. Above this world are heavens, below this world are hells. By and large, power, well-being and length of life increase as one goes up the scale. So do the power and inclination to do good. But at all levels there is death, the ineluctable reminder of the unsatisfactoriness of life. Death supplies the mobility between the different levels. Everywhere, constantly, are death and rebirth. One's station at birth is determined by *karma*. *Karma* is a Sanskrit word simply meaning "action," but it has acquired this technical sense. . . . All this is accepted by all kinds of Hindus and by Jains—by all the major Indian religious systems. However, Buddhism was the first system completely to ethicize the concept. For Buddhists *karma* consists solely of actions morally good or bad, not of other actions such as ritual." Gombrich, *Precept and Practice*, p. 68.

[47] *Manu*, VIII, 5, quoted in Lingat, *Classical Law of India*, p. 4, who dates the code ca. second century B.C. to second A.D. (ibid, p. 96).

[48] Ibid, p. 3, apparently from Manu. The unbounded sense of *dharma*—the word is etymologically related to Latin *firmus*, in the *terra firma* sense of "solid," "hard," "durable"—is as clearly expressed as it probably can be in the *Mahābhārata* (*Śāntip.* 109, 59; quoted in ibid, p. 3, n. 2): "Dharma is so called because it protects . . . everything; Dharma maintains everything that has been created. Dharma is thus that very principle which can maintain the universe." For the particular sense of the term *(svadharma)*, see Davis, *Rank and Rivalry*, "Afterword": "*Dharma* refers to the natural and moral behavior appropriate to an individual or group of individuals and to society as a whole. [It] is defined in part by the . . . physical-cum-social community in which one lives, for each [such community] has a customary way of life that is in some ways different from all other[s]. . . . The *dharma* of [an individual] is also defined in part by the . . . time in which one lives, for every [community] has a history which is unique and dissimilar, and even in the same [community] what is deemed right and proper behavior has not been unvarying through time. And *dharma* [is also] defined in part by one's own qualities and . . . life stage, for the behavior appropriate to individuals differs

And chief among such guardians is, or anyway was until colonial rule half replaced him, not the jurist, who was a scholiast only, but the king. It is, to put the basic principle of Indic legality in an Indic nutshell, the *dharma* of the king to defend the *dharma*.

The critical place of the king, large, small, or medium sized (and some, it must be kept firmly in mind, could be very small indeed), in Indic adjudication is as characteristic of it as normative witnessing is of Islamic, and as fateful. For it was he, counseled by the appropriate savants, monks, or brahmins, who connected the coherence-making if/then paradigms of general *dharma* to the consequence-producing as/therefore determinations of concrete rule. A society without a king, *arājaka*, is a society without law, *adharma*, subject to "The Rule of the Fish." The ability of an individual to follow his natural code in a world teeming with natural codes and with temptations to evade them, depends on the protection of the king. As the *Mahābhārata* explicitly says, all dharmas rest on the royal *dharma*—"all have the *rāja-dharma* at their head."[9]

Despite its imperatorial accents, however—accents real enough not just in legal theory but, as we shall see, in the practical administration of decisionary justice—this is not an Austinian conception. For the law here is not a spelling out of the sovereign's commands; the sovereign's commands, when they are proper commands, are, like the acts of any other variety of person when they are proper acts, a spelling out of the law. The behavior of just kings is an illustration of law, as Lingat puts it; an embodiment of it, as David Wyatt does; a symbol of it as M. B. Hooker does; or an enactment of it, as David Engel does.[10] The problem, of course, is that kings may

according to their own nature and physical-cum-moral maturity. Place, time, qualities and life stage . . . are the four . . . constant[s] against which the *dharma* of any individual or group of individuals is defined. The specific behaviors which constitute [their] *dharma* are not similarly constant, for they differ across time and place, they differ among individuals living at the same time and in the same place, and they differ during the course of an individual's own life." For a perceptive discussion of the complex relations between general and personal *dharma*, see O'Flaherty, *Origins of Evil*, pp. 94 ff.

[9]Lingat, *Classical Law of India*, p. 208. Cf. Hoadley and Hooker, *Introduction to Javanese Law*, p. 14: "Particular *rules* of dharma obtain stability only through the proper exercise of the King's will and in this sense the *Rāja-dharma* has precedence over all other stated duties in the [classical law] world" (emphasis original). Cf. Rocher, "Hindu Conceptions of Law," p. 1294: "Those aspects of *dharma* in which Western civilization's category of law play a more prominent role are joined together around the central figure of the king." For *arājaka* and "The Rule of the Fish," Lingat, *Classical Law of India*, p. 207, and Derrett, *Religion, Law and the State*, p. 560.

[10]R. Lingat, "Evolution of the Conception of Law in Burma and Siam," *Journal of the Siam Society* 38(1980):9–31, quoted in R. A. O'Connor, "Law as Indigenous Social Theory," *American Ethnologist* 8(1980):223–37, D. K. Wyatt, *The Politics of Reform in Thailand* (New Haven, 1969), p. 8, quoted in D. M. Engel, *Law and Kingship in Thailand During the Reign of King Chulalongkorn* (Ann Arbor, 1979), p. 3; M. B. Hooker, *A Concise Legal History of Southeast Asia* (Oxford, 1978), p. 31; Engel, *Law and Kingship*, p. 8.

The Wyatt passage indicates, again, the essential similarity in this regard of Buddhist and Hindu conceptions: "The Brahmanical concept of the *Devarāja*, the king as god, was modified to make the king the embodiment of the Law, while the reign of Buddhist moral principles ensured that he should be measured against the Law. The effect of this was to strengthen the checks which, in the Khmer [that is, Cambodian] empire, Brahmans had attempted to exercise against despotic excesses of absolute rule."

Remark should also be made of the other "differentiation" problem that arises here—that between India proper and the Indicised regions of Southeast Asia, between what the colonial Dutch, with useful ethnocentrism, referred to as *Voorindië* and *Achterindië*. The altered role of the king in Southeast Asia from what L. Dumont has called, for India, the "secularized type," (that is, one who "cannot be his own sacrificer [but] puts 'in front' of himself a priest . . . and *then* he loses the hierarchical preeminence in favor of the priests, retaining for himself power only" (*Homo Hierarchicus: An Essay on the Caste System*, trans. M. Swainsbury [Chicago, 1970], pp. 67–68; italics original), to the various sorts of "divine" or "semi-divine" or "exemplary" kingship types of Southeast Asia (see Engel, *Concise Legal History*; O'Connor, "Law as Indigenous Social Theory"; G. Coedès, *The Indianized States of Southeast Asia*, trans. S. B. Cowing, (Kuala Lumpur, 1958); and Geertz, *Negara*, pp. 121–36). In addition to the fact that this distinction may be a bit overdrawn in both directions, whatever its uses in inter-Indic comparisons, so far as comparisons between the Indic law world and others are concerned it fades to minor significance. The formulation of Coedès, "Indianization must be understood essentially as the expansion of an organized culture that was founded upon the Indian conception of royalty, was characterised by Hinduist or Buddhist cults, the mythology of the *Purāṇas*, and the observance of the *Dharmaśāstras*, and expressed itself in the Sanskrit language" (*Indianized States*, this note, pp. 15–16) seems overall the justest view of the matter, so long as the unevenness of the degree of "Indianization," thus defined, beyond India (and, indeed, within it as well) is kept firmly in mind.

[11]Geertz, *Negara*, pp. 37, 126, 240. There are similar images in classical Indian texts: the learned man is "he who conceives," the power-wielder "he who does"; the first is "intelli-

not in fact be just, and perhaps but sporadically are. The issue that in the Islamic world is framed in terms of the reliability of witnesses—the conformance of as/therefore verdicts to if/then visions—is framed in the Indic in terms of the righteousness of kings. What lying, the denial of truth, symbolized in the one, self-interest, the unmindfulness of it, symbolizes in the other.

To keep the ruler mindful so that he will act to fulfill his own *dharma*, protect the dharmas of others, and thus maintain the whole within the cosmic balance that is *dharma* as such, is in turn the *dharma* of those who devote themselves not to the enforcement of law but to the knowing of it. The relation between the wielder of power, the punisher, and the master of learning, the purifier, is perhaps the most delicate and elusive in the whole of traditional Indic civilization—like that, as the Balinese put it, of a younger brother to an older, a student to a teacher, a ship to its helmsman, a dagger to its hilt, the instruments of an orchestra to the sound that it makes.[11] In the realm of practical adjudication it was, at every level from

the state to the locality, altogether the heart of the matter. In the possibility of the clerics, in the Hindu case the Brahmin, in the Buddhist case the monk, in minor matters some lesser pundit, prevailing upon the king, prince, lord, or local official to rein his passions and selflessly follow the path of *dharma*, lay as well the possibility of attaining a settled justice of principle rather than an arbitrary one of will.[32]

There were many ways of trying, against the grain of sovereign arrogance, to accomplish this, to make, as Derrett puts it, "the *dharma* king over even kings": clerical praise in court poetry, clerical withdrawal from court ritual,

gence," the second "will"; the court priest is "the brain of the king," and so on (Lingat, *Classical Law of India*, pp. 216, 217. For general reviews of the learned man/ruler relationship in India, see Lingat, *Classical Law of India*, pp. 215–22; Dumont, *Homo Hierarchus*, pp. 71–79; L. Dumont, "The Conception of Kingship in Ancient India," in *Religion/Politics and History in India* (The Hague, 1970), pp. 62–81. For Southeast Asia, Geertz, *Negara*, pp. 36–37, 125–27.

The distinction between the application of punishment, *danda* (literally, "mace," "scepter"), considered as a part of the king's *dharma*, and the effectuation of purification through penance, *prāyascitta* (literally, "prime thought," "thought about finding"), considered as part of the man of learning's *dharma*, as well as the relation between the two ("The [Brahmins] prescribe the penance: [the king] must see that it is carried out and punish the recalcitrant" [Lingat, *Classical Law of India*, p. 66]; Buddhist formulations differ mainly in the conception of what penance and purification amount to), is central to an understanding of the legal dimensions of this relationship. "It would be vain to look in Indian tradition on the relations between the two powers for an analogy with the Christian theory of the Two Swords. True, the Brahmin is master when the question is one of ritual and . . . of penance. But his scope extends in reality over all the field of royal activity, as much on its political side as on its religious. There are not two powers here each functioning in its proper sphere, the sacred to one side, and the profane to the other. Secular power alone has the capacity to act, but it is a blind force which needs to be directed before its application can be effectual. If the king were to disdain the advice of his Brahmins he would not only fail in his duty, but even incur the risk of governing badly" (ibid, pp. 214–218; see also, pp. 50, 61–67, 232–37). For Java, see Headley and Hooker, *Introduction to Javanese Law*, pp. 227–28.

"The doctrine of self-interest (*artha*, not in itself an illegitimate sentiment, but only when its attractions obscure one's sense of duty), is, like that of sensuality (*kama*), nearly as developed in classical Indian thought as *dharma*, and there are entire treatises (*arthashastra*) devoted to its cultivation. See Dumont, *Homo Hierarchicus*, pp. 165–66, 196, 251–52; Derrett, *Legal Systems*, pp. 96–97; Lingat, *Classical Law in India*, pp. 5–6, 145–48, 156–57, and in relation to the adjudicative function of the king, 291–54. For a discussion of the role of self-interest—there, *pamrih*—in Javanese political theory, see B. R. O'G. Anderson, "The Idea of Power in Javanese Culture," in *Culture and Politics in Indonesia*, ed. C. Holt (Ithaca, 1972), pp. 1–69: ". . . the correct attitude of the official should be to refrain from personal motives, while working hard for the good of the state. . . . The pamrih [of the power wielder] is really a threat to his own ultimate interests, since indulgence of personal and therefore partial, passions or prejudices means interior imbalance and a diffusion of personal concentration and power." For Thailand, see O'Connor, "Law as Indigenous Social Theory," pp. 233–34: "The modern Thai . . . accept unbridled self-interest but see it as morally inferior to the cosmic and royal laws, customs, and lawlike discipline . . . that join a person to the larger order of society"; and Engel, *Law and Kingship*, pp. 7–8. Cf. L. Hanks, "Merit and Power in the Thai Social Order," *American Anthropologist* 64(1962):1246–61.

clerical shaming of court morality.[33] But so far as the administration of law is concerned, two devices were clearly the most important: the codification of royal *dharma* and the inclusion of learned advisors on royal tribunals.

Codification of the royal duty to maintain the behavioral order of society by punishing those who disturb it is found already in classical India, where Manu devotes three full chapters out of twelve to the subject. But it became even more explicitly developed in Southeast Asia, where perhaps the best example (or possibly only the best described) was the Thai *Thammasat*.[34] Setting forth the history of the world and man, the evolution of laws, and the origin of kings, the *Thammasat* "defined the relationship between the individual and the state and prescribed the norms by which the ruler should be governed in his actions."[35] In twenty-seven, or in some rescensions thirty-nine, titles, it covered everything from palace law, ordeal, fines, witnesses, and "the division of people [into ranks]" to debt, inheritance, theft, quarrels, and treason.[36] It was, as Engel has said, "the fundamental statement of royal law and legitimacy in traditional Thailand," and it was designed, like its Burmese, Cambodian, and Javanese counterparts, to justify the adjudicatory role of the king by describing the status ethic by which he was bound:

> According . . . to the *Thammasat* [a modern Thai scholar, himself a prince, has written], the ideal monarch abides steadfastly in the ten kingly virtues, constantly upholding the five common precepts. . . . He takes pain to study the *Thammasat* and keep the four principles of justice, namely: to assess the right or wrong of all service or disservice rendered unto him, to uphold the righteous and truthful, to acquire riches through none but just means, and to maintain the prosperity of his state through none but just means."

"Derrett, *Legal Systems*, p. 99.

"On Manu: Rocher, "Hindu Conceptions of Law," p. 1294; Lingat, *Classical Law in India*, pp. 222–32. On the *Thammasat* (the Thai rendering of Sanskrit *Dharmasastra*): Engel, *Law and Kingship*, pp. 1–8; Hooker, *Legal History*, pp. 25–35; Lingat, *Classical Law in India*, pp. 269–279; Lingat, "Evolution "Of the Conception of Law"; O'Connor, "Law as Indigenous Social Theory."

"Engel, *Law and Kingship*, p. 3.

"Hooker, *Legal History*, pp. 26–27.

"Engel, *Law and Kingship*, p. 5; Prince Dhani Nivat, "The old Siamese Conception of the Monarchy," *Journal of the Siam Society* 36(1947):91–106. As royal decrees were incorporated into the *Thammasat*, it may be said to contain elements of "positive law," but they were well contained within the general *dharma* conception of the whole and were considered but expressions of it. On this, and in partial correction of Lingat's ("Evolution of the Conception of Law") view that decree incorporation represented a genuine departure from "natural law" conceptions in Southeast Asia, see O'Connor, "Law as Indigenous Social Theory," especially

But, in the mysterious East as in the pellucid West, constitutions, however detailed, are no better than the institutions they are written into. It was in the composition of tribunals that whatever juristic check on executive will actually occurred—less than one would hope, more than one might imagine—was secured.

The sorts of tribunals found throughout the Indic world before colonial regimes attempted, with mixed success, to standardize them were as diverse and multitudinous as the rules they sought to apply, the groups they sought to apply them to, and the justifications they sought to give for them. But the principle that men of learning did the justifying and men of power did the applying seems to have been pervasive. In India, there was a vast hierarchy of caste and inter-caste councils, "dominant caste" mini-rajas of the so-called "little kingdoms," and grand maha-rajas of the great regional dynasties, served as needed by assorted pundits. In Thailand, there was a tangle of thirty sorts of ministerial courts, as jurisdictionally ill defined as the ministries themselves, advised by a consultative ministry of legal affairs manned, in this supposedly Buddhist country, by a dozen Brahmins. In Indonesia, there were hundreds of large and little palace-yard tribunals composed of legal experts of varying kind and competence under the immediate eye of the resident lord. Everywhere, the procedural *grundnorm*, again stated in Indian texts as early as the fourth century, "one [is] condemned by the judges [and] punished by the king according to [dharma]," was the animating ideal of adjudicative process.[38]

pp. 225–27, who rightly doubts the usefulness of the whole natural/positive distinction in this context.

[38]The *Nārada-Smṛti*, in *The Minor Law Books: Narada and Brihaspati*, trans. J. Jolly (Oxford, 1889), p. 35; quoted in M. C. Hoadley, "Continuity and Change in Javanese Legal Tradition: The Evidence of the Jayapattra," *Indonesia* 11:95–109, at p. 97.

For India, where "next to nothing is known about actual legal practice in [ancient] times," as Rocher ("Hindu Conceptions of Law," p. 1302) says, useful materials for more recent times can be found in B. S. Cohn, "Some Notes on Law and Change in North India," *Economic Development and Cultural Change* 8(1959):79–93 and especially in his "Anthropological Notes on Disputes and Law in India," *American Anthropologist* 67(1965):82–122, as well as from the fascinating eighteenth-century letter by a French Jesuit, Jean Venant Boucher, from "Pondicherry to a great man in France," ("Father Bouchet's Letter on the Administration of Hindu Law," trans. L. Rocher, in press). The fourth-century south Indian Sanskrit melodrama, *The Toy Cart*, attributed to one King Shudraka, but more likely composed by a (clerical?) poet at his court (trans. P. Lal, in *Traditional Asian Plays*, ed. J. R. Brandon, [New York, 1972], pp. 14–114) contains a trial scene in which the tension between royal power and legal learning is particularly well evoked. (See especially the speech, at p. 96, of the "judge"—that is, the presiding "assessor" or "counselor"—which opens the trial.) For some text-based remarks on traditional Indian procedure, see Lingat, *Classical Law in India*, pp. 69–70, 254–56. For Thailand, Engel, *Law and Kingship*, pp. 60–63. For Indonesia, Hoadley, "Continuity and Change"; Hoadley and Hooker, *Introduction to Javanese Law*, pp. 26–28; F. H. van Naerssen, "De Saptopatti: Naar Aanleiding van een Tekstverbettering in den Nāgarakṛtāgama," *Bijdragen tot Taal-, Land- en Volkenkunde* 90(1933):239–58; Th. G. Th. Pigeaud, "Decree Jaya Song, About 1350 A.D." in his *Java in the Fourteenth Century: A Cultural History*, 4 vols. (The Hague, 1960–63), 4:391–98 (original text at 1:104–7; translation at 3:151–55); Geertz, *Negara*, pp. 241–244. For Burma or Cambodia, even less is known, or anyway available, concerning procedure: for what there is, see Maung Htin Aung, *Burmese Law Tales* (London, 1962); and S. Sahai, *Les Institutions politiques et l'organisation administrative du Cambodge ancien VI–XIII siècles* (Paris, 1970).

Whatever the particular institutional shape of that process, whatever the cases considered appropriate for its regard (also a highly variable matter, as "Regreg vs. The Village Council" suggests), and whatever its general impact on social life (more variable yet; not all kings are mighty, and none are mighty everywhere), the central evidentiary questions to which it addressed itself pertained neither to the occasions of acts nor to their consequences, but to their type. That is, they were questions of *dharma* and *adharma* brought down to a judiciable level, a matter of determining where in the local version of the grand taxonomy of dutiful behaviors a particular behavior fell. Where the classical Islamic court, to put the point comparatively and doubtless overdraw it, sought to establish fact by sorting out moral character and was obsessed with testimony, the Indic one sought to establish it by sorting out moral kind and was obsessed with verdicts. "The essence of [traditional Indic] justice is not the fairness of its procedures in sifting through the evidence of particular wrongs," Engel has said (this for Thailand, but the matter is general), "but rather the aptness of final judgments as to the total value of an individual's existence."[39] The final judgments were the king's, depicted on the royal judicial seal as Yama, the god of death, astride a lion.[40] Whether they were apt depended on whether jurists could locate universal obligation in local rule and bring the king to heed it.

This distinctive mode of, if you will, skeletonizing cases so as to render them decidable, can be seen with particular clarity in traditional law tales of legendary judges, which, in the absence of records of actual trials, are about all we have to go on so far as the as/therefore style of classical adjudication is concerned. Two such tales from south India, related by the seventeenth-century Jesuit missionary, Jean Bouchet, and concerning an archetypal Brahman jurist called Mariyātai-rāman, are especially telling.[41]

[39]David Engel, *Code and Custom in a Thai Provincial Court* (Tucson, 1978), p. 5.

[40]Ibid, p. 4. "Yama has always been associated [in classical Hindu-Buddhist cosmology] with justice. Indeed, *dhamma* (*dharma*) is said to be another name for the god of death: he personifies the concept of justice itself."

[41]Bouchet, "Letter on the Administration." The stories also appear, in slightly different version in P. Ramachandra Rao, *Tales of Mariada Raman, 21 Amusing Stories* (London [?], 1902), pp. 5–10, 43–47; cited (by Rocher), in ibid.

The first tale, which Bouchet says "has something in common with Solomon's judgment," but is in actuality almost inversely conceived, concerns two wives of a rich, polygamous man. The first, an ugly woman, had a son by the husband; the second was barren, but because of her great beauty was esteemed by the husband while the first was disdained. Wild with jealousy, the first wife plotted revenge. She went about persuading everyone by her acts and speech how exceedingly fond she was of her son, how he meant everything to her, and how envious the barren wife, for all her beauty, was of her. She then strangled the child and put the corpse by the bed of her sleeping rival. Next morning, pretending to look for her son, she ran to the second wife's room, "discovered" his body, and ran crying to the multitude, "O this wretched woman! Look what she has done out of wrath because I have a son and she does not." The crowd, aroused, turned on the second wife: "It is just not possible a woman would kill her own son," and especially one she so obviously adored.

Mariyātai-rāmaṉ was called and listened, questionless, to the two women and decreed, "the one who is innocent . . . shall walk around this assembly hall in the condition I shall prescribe," the condition being a grossly indecent one. The guilty wife agreed—"I shall do it a hundred times if necessary"; the innocent one refused—"I shall never [do it], I shall rather die a hundred times than consent to doing things . . . unworthy of a woman." Mariyātai-rāmaṉ declared the second wife innocent, the first guilty, on the grounds that a woman so conscious of her *dharma* as to subject herself to certain death rather than contravene it obviously could not have committed so adharmic an act as to murder a child, whereas one so indifferent to *dharma* obviously could have, even her own.

The second story, more fabulous in content (at least from our point of view), brings the ontological aspects of *dharma*, its engrainment in the warp of reality, more vividly forward. A man, known for his great strength, abandoned his wife in a fit of rage. A god then took his form and moved in with the wife. In a few months the real husband, his anger cooled, returned, and the case presented to Mariyātai-rāmaṉ (whom the king called in when his own jurists found themselves stymied) was to decide who was who. Mindful of the real husband's great strength, he commanded each man to lift an enormous stone. The real husband heaved and hauled and lifted it but a few inches. The false one lifted it over his head as though it were a feather, and the crowd cried out, "There is no doubt, this one is the real husband." The judge, however, decided in favor of the first, saying that he had done

what was possible to humans, even those with extraordinary strength, while what the second had done only a god could do.

Again, however, not only deceiving gods and clerical judges but absolute kings—"all the golden grasshoppers and bees"—are, of course, gone, at least from the institutions of legal life if not entirely from its imagination. In India, one has first the odd amalgam of Western procedure and Hindu custom called Anglo-Indian law and then the somewhat desperate, half-reformist, half-restorative experimentation in codification of the Independence period. In Thailand, a throne-led reform movement (the seal was changed from a death-god king riding a lion to the Roman scales of justice enveloped in royal regalia) was completed by a parliamentary revolution. In Indonesia, the imposition by the Dutch of a racially pluralized state court system was followed by its unification under the culturalist ideology of Sukarno's Republic. All this has altered matters in fundamental ways, an issue I shall return to at some length in the concluding part of this essay.[42]

Yet, as Derrett remarks of India, but could as well of Southeast Asia, the legal system was in the hands of native jurists for two millennia and has been in those of European and Western-trained Indians for two centuries. So not everything is changed utterly, and most especially not the forms of legal sensibility.[43] Secular, or somewhat so, law may have become; even causidical. Placeless it has not.

The obstacles that lie in the way of an accurate understanding of what, to those who regard themselves as bound by it, *adat* means are rather different, if no less formidable, than those that hinder our comprehension of *ḥaqq* and *dharma;* for the difficulties here are largely Western-made: lawyers' dust thrown in lawyers' eyes. Whatever European and American students of comparative law may have thought of the governing ideas of Islamic or Indic jurisprudence—that they were immoral, archaic, or

[42]The literature on modern Indian and Southeast Asian law is, of course, extensive if uneven. For India, see, J. D. M. Derrett, *Introduction to Modern Hindu Law* (Bombay, 1963), as well as his *Religion, Law and the State;* for Thailand, Engel, *Code and Custom* and *Law and Kingship;* for Indonesia, D. S. Lev, "Judicial Institutions and Legal Culture in Indonesia," in Holt, *Culture and Politics,* pp. 246–318. Material on Burma and Cambodia is harder to find, but see Hooker, *Legal History,* pp. 150–52 (Burma) and 166–68 (Cambodia). For a general review, see M. B. Hooker, *Legal Pluralism: an Introduction to Colonial and Neo-Colonial Laws* (Oxford, 1975).

[43]Derrett, *Legal Systems,* p. 83.

magically profound—they have always realized that those ideas, emerging as they do from developed traditions of literate thought, are difficult to grasp in terms of either civilian or common-law conceptions of what adjudication is all about. But *adat,* discovered lying about amid the common routines of village life, they have found assuringly recognizable, comfortably familiar. A potpourri of vernacular rules, apparently artless and mostly unwritten, it was "custom."

The mischief done by the word "custom" in anthropology, where it reduced thought to habit, is perhaps only exceeded by that which it has done in legal history, where it reduced thought to practice. And when, as in the study of *adat,* the two mischiefs have been combined, the result has been to generate a view of the workings of popular justice perhaps best characterized as conventionalistic: usage is all. As *adat* was "custom," it was, for the legist-ethnographers who gave their attention to it, by definition at best quasi-legal, a set of traditional rules traditionally applied to traditional problems. The question was whether it ought to be set aside in favor of reasoned law imported from outside or to be made into reasoned law by rendering it capable of system and certainty. From about the middle of the last century until nearly the middle of this, the struggle between Westernizing Western jurists and anti-Westernizing Western jurists—the first pressing for the uniform imposition of English, Dutch, or American codes on one or another part of Malaysia, the second for the establishment of separate spheres of native law constructed out of one or another variety of native custom—dominated scholarly debate concerning, not so much the nature of *adat* (which was taken as, in a broad way, understood) as its future. Whatever the virtues of these positions (and there is much to be said for both, and more to be said against either), the outcome, most particularly in the heartland Indies, where the debate was the most intense and the anti-Westernizers the most articulate, was to turn *adat* from a term standing for a form of legal sensibility, a particular way of thinking about if/thens and as/therefores, into, as *adatrecht,* "customary law," one standing for a sort of homespun *corpus juris* (or rather a whole set of them) needing either to be imperially discarded and juridically ignored or to be officially researched, recorded, sorted, and, backed by the power of the colonial state, administered."

"The major figures in the *adatrecht* movement, centered for the most part in the University of Leiden, were Cornelis van Vollenhoven, usually considered its founder, though the general view much preceded him (see especially his *Het Adatrecht van Nederlandsche Indië,* 3 vols. [Leiden, 1918, 1931, 1933]) and B. ter Haar (see his *Adat Law in Indonesia,* trans. E. A. Hoebel and A. A. Schiller [New York, 1948]). For a series of area-organized adat law handbooks,

The *adatrecht* movement and its counterparts elsewhere in the chopped-up quarter continent (roughly southern Thailand to southern Philippines) where the term *adat*—as mentioned, Arabic in origin—is to be found produced some of the best legal ethnography, in the simple, fact-gathering sense of category fixing and rule describing, we have yet had; marvelously detailed studies of inheritance principles here, marriage restrictions there, land rights in the other place.[65] But with its assumption that law, or anyway "folk law," was custom, custom was usage, and usage was king—a collapsed circle of ought and is—it represented, that is, misrepresented, an indigenous sense of what justice is, social consonance, in terms of an imported one of what order is, a *Rechtsstaat.*[66] Since Independence, the *adatrecht* persuasion, opposed now to headlong modernizers with very much the bit in their teeth, has continued with diminished vigor and waning influence, and there has been a turn toward less exterior views, but, nationalism being what nationalism is, accompanied by a certain idealization, the romantic apologetics of the culturally defensive.[67] Though coming more

of a generally civil law sort, produced by "The Commission for Adat Law," under the general stimulus, not to say domination, of the Leiden School, see *Adatrecht Bundels* (The Hague, 1910–55). The Westernizing opposition was more diffuse (and less academic) but I. A. Nederburgh, *Wet en Adat* (Batavia, 1896–98), provides a representative example. For a general review, see M. B. Hooker, *Adat Law in Modern Indonesia,* (Kuala Lumpur, 1978). For an anthropological critique, from within the Leiden ambiance, of the *adatrecht* idea, see J. P. B. de Josselin de Jong, "Customary Law, A Confusing Fiction," Koninklijke Vereeniging Indisch Instituut Mededeling, 80, Afd. Volkenkunde, no. 20, Amsterdam (1948).

"Among the more notable examples, G. D. Willinck, *Het Rechtsleven der Minangkabau Maleirs* (Leiden, 1909); J. C. Vergouwen, *The Social Organization and Customary Law of the Toba Batak of North Sumatra,* trans. Scott-Kemball (The Hague, 1964); R. Soepomo, *Het Adatprivaatrecht van West-Java* (Batavia, 1933); M. M. Djojodigoeno and R. Tirtawinata, *Het Adatprivaatrecht van Middel-Java* (Batavia, 1940); V. F. Korn, *Het Adatrecht van Bali,* 2nd ed. (The Hague, 1932).

Though *adat* is Arabic derived (*'ada*), and is indeed normally translated "wont," "custom," "usage," "practice," the root from which it derives, *'-w-d,* has the force of "return," "come back," "recur," "revert," "reiterate" (*'aud* means "again"), which actually catches the Indonesian sense more closely. The commonest word for custom in the central Islamic lands is, in any case, not *'ada* but *'urf,* from the root, *'-r-f,* meaning "to know," "to be aware of," "to recognize," "to be acquainted with."

"ter Haar, *Adat Law,* developed, in his notion of *beslissingsrecht* (roughly, "judge made" or "precedential" law) a slightly common-lawish version of adat law theory (he even hoped for law reports and case citations), as opposed to van Vollenhoven's more orthodox handbook approach, though the departure from civilian rule-and-sanction, "administrationalist" ideas was never very great. For the continuation of the *Rechtsstaat* conception, under the "Negara Hukum" rubric, in independent Indonesia, see Lev, "Judicial Institutions," p. 258.

"For the best, most reflective, and most sustained of the postwar discussions, only somewhat marred by a rather utopian view of village life, the nostalgia, perhaps, of the urban intellectual for an "organic" society that never was, see Moh. Koesnoe, *Introduction Into Indonesian Adat Law* (Nijmegen, 1971); idem, *Report Concerning a Research of Adat Law on the Islands of Bali and Lombok, 1971–73* (Nijmegen, 1977); idem, *Opstellen over Hedendaagse Adat, Adat-*

clearly into view, the realization that *adat* is not custom but outlook, *volksgedachte* not *volksgebruik*, is not quite here."

Adat, writes one of the best of the more recent commentators, Mohamed Koesnoe, with a diffuseness wholly appropriate to the subject, "is the form of life of the Indonesian people as founded in their sense of propriety"—and the key word is "propriety."[69] For the whole effort of *adat* adjudication (and, despite some claims to the contrary, it is adjudication) is to translate a definitional conception of justice as spiritual harmony, a sort of universal calm, into a decisionary one of it as consensual procedure, publicly exhibited social agreement. Judgment, here, as we saw with Regreg, is less a question of sorting claims than of normalizing conduct.

At the definitional level, the vision of a just order of things as being one in which a quiet hum of agreement prevails in the outer realms of life and a fixed tranquility of mind in the inner finds a whole range of behavioral, institutional, and imaginative expressions. A cloud of negligent near-synonyms—*patut* ("proper"), *pantas* ("suitable"), *layak* ("seemly"), *cocok* ("fitting"), *biasa* ("normal"), *laras* ("harmonious"), *tepat* ("apt"), *halus* ("smooth"), *luwes* ("supple"), *enak* ("pleasant"), each running off along semantic gradients of their own to provide the discriminant overtones (*laras* is a musical term; *enak* is a gustatory one)—envelops the discourse

recht, en Rechts Ontwikkeling van Indonesië (Nijmegen, 1977); idem, *Musjawarah, Een Wijze van Volksbesluitvorming Volgens Adatrecht* (Nijmegen, 1969). For other valuable discussions, also not without a certain tendency toward idealization of "the Eastern Way" and a certain amount of reactive ethnocentrism, see M. M. Djojodigoeno, *Wat is Recht? Over de Aard van het Recht als Sociaal Proces van Normeringen* (Nijmegen, 1969), where the sociological foundations of "normmaking" are clearly recognized; R. Soepomo, *Kedudukan Adat Dikumudian Hari* (Plakata, 1947), where the future of adat law in a would-be modern state is reflectively considered. The concentration of postwar adat law studies at Nijmegen (see also, M. A. Jaspan, *The Redjang Village Tribunal* [Nijmegen, 1968]; G. van den Steenhoven, *The Land of Karendo* [Nijmegan, 1969]; H. W. J. Sonius, *Over Mr. Cornelis van Vollenhoven en het Adatrecht van Nederlands-Indië* [Nijmegen, 1976]) has nothing to do with Christian evangelism (though it may with resistance to Islamic hegemony) but is the result of the move of interest there from Leiden, apparently under the stimulus of van den Steenhoven.

[68] Except, again, for von Benda-Beckmann, *Property in Social Continuity*: "*Adat* is the symbolic universe by which the people of the Indonesian archipelago have constructed their world . . . *adat* does not mean custom. . . ." pp. 113, 114. In his glossary the word is "defined" as "tradition, custom, law, morality, political system, legal system," which, except for the omission of "etiquette" and "ritual," is about the size of it. My dependence on this work (and on Koesnoe; see footnote 66) in the formulations that follow is great, though those formulations are, of course, my own. For a general view of "customary law" similar to mine, there applied to East Africa, see Fallers, *Law Without Precedent*.

[69] ". . . 'Adat' adalah tatanan hidup rakjat Indonesia jang bersumber pada rasa susilanja." Koesnoe, *Indonesian Adat Law*, p.A9. (I have altered the English translation—ibid, p. A8—because it seems to me a bit loose and introduces notions like "ethics" I think rather too academic to catch colloquial meanings.)

of everyday life in a softening moral haze.[70] An enormous inventory of highly specific and often quite intricate institutions for effecting cooperation in work, politics, and personal relationships alike, vaguely gathered under culturally charged and fairly well indefinable value-images—*rukun* ("mutual adjustment"), *gotong royong* ("joint bearing of burdens"), *tolong-menolong* ("reciprocal assistance")—governs social interaction with a force as sovereign as it is subdued.[71] And popular ritual life everywhere in the region is studded with prosy symbols of the deep interfusion of things: rice marriages, village cleansings, communal meals.[72] "Ought," here, the if/then vision of general coherence, is neither the universal execution of absolute command nor the punctilious performance of cosmic duty; it is the noiseless perfection of communal accord.

Such an ideal state of affairs is, of course, no more expected to obtain in fact than are others elsewhere; man is born to trouble, and to ill-use, as the sparks fly upward. The practical task of at least moving toward social harmony and individual composure rather than away from them toward dissonance and vertigo is what *adat* as judgment, the disposition of issues, is all about. It is the mechanisms of decisionmaking, procedure in the most procedural sense, that occupy the center of attention, rather than techniques for determining what actually happened or methods for containing magistral will. As Regreg's case, untypical only in the severity of its outcome (and not entirely even in that), shows, *adat* adjudication is a matter of what one can only call high etiquette, of patient, precise, and unexcited going through the elaborate forms of local consensus making. What matters finally is that unanimity of mind is demonstrated, not so much in the verdict itself, which is mere dénouement, the afterclap of accord, but in the public processes by which it has been generated. Propriety to be preserved must be seen being preserved.

The processes involved are mainly discussion processes, the propriety

[70] Such terms vary from place to place in "Malaysia." The above are rather Javanistic. For an interesting discussion of some of them, see Koesnoe, "Over de Operationele Beginselen voor het Oplossen van Adatrechtsgeschillen," in his *Opstellen*, pp. 39–80.

[71] The mistaking of such generalized normative ideas for specific institutions rather than moral covering notions for such institutions has sometimes led to rather scholastic efforts to distinguish among them in terms of some theory of "*adat* law principles," and thus to fix their meaning. For sociologically more realistic discussions, see R. R. Jay, *Javanese Villagers: Social Relations in Rural Modjokuto* (Cambridge, Mass. 1969); and R. M. Koentjaraningrat, "Some Social-Anthropological Observations on Gotong Rojong Practices in Two Villages of Central Java," (Ithaca, 1961).

[72] The literature on such matters is, of course, vast. For a particular example, see my *The Religion of Java* (Glencoe, Ill., 1960), part I., pp. 11–118.

mainly discoursive propriety. Unanimity, or at least the appearance of it, is to be gained by talking everything through, in hard cases over and over again and in a grand variety of contexts, in a set and settled manner. Law here is truly the sententious science—a flow of admonitory proverbs, moral slogans, stereotyped Polonious speeches, recitations from one or another sort of didactic literature, and fixed metaphors of vice and virtue, all delivered in a manner designed at once to soothe and persuade. A passage from a long, thirty-five-hundred line, West Sumatran (that is, Minangkabau) poem, in which a mother instructs her son on how to behave when he is admitted, after his forthcoming marriage, to the various local councils in which *adat* decisions are taken, gives, its particular cultural accents notwithstanding, a fair sample of the manner:

> . . . O my dear son
> if you are sent for by the council, you must answer;
> if invited you must come.
> If it happens you are sent for,
> invited to attend a council feast,
> eat sufficiently before going,
> and drink something too;
> for at a feast or banquet
> eating and drinking have a strict form,
> sitting and standing have their place.
> There you must use all your politeness,
> never forgetting where you are.
> Be polite in everything
> and remember all the rules,
> even in passing betel or cigarettes.
>
> Then when it comes to the speeches,
> always be careful what you say:
> sweet speech is a quality of goodness.
> Always speak truthfully
> observing all the forms of politeness,
> taking care to understand people's feelings.
> When you speak, speak humbly,
> always deprecating yourself.
> Be sure you behave correctly
> and control all your passions.
> A council member should live by his principles,
> his speech should be of the *adat*
> following the line of the right path
> —calm as a waveless sea,

> settled as a plain without wind,
> his knowledge firm in his heart,
> ever mindful of his elders' counsel."

The settings in which this sort of process takes place are multiple, ranging, as they did in Regreg's case, from household encounters to village conclaves, and the end toward which they reach, publically demonstrated unanimity of view, a right meeting of right minds, has as many names as there are settings.[74] Nor is it unconnected (as is also evident from Regreg's case) with images of natural and spiritual disaster if its requirements are neglected or its conclusions ignored. But the heart of the matter is a conception of truth finding—truth at once of circumstance and of principle—as a rhetorical enterprise, a bringing together of views through the suasive use of sanctioned words; the phrases, idioms, and tropes of . . . well, of *adat*. Or as another Minangkabau formula, a sort of proverb poem, succinctly puts it:

> Water circulates in bamboo pipes;
> Consensus circulates in accordant discussions.
> Water flows through bamboo;
> Truth flows through man."

[73] A. H. Johns, ed. and trans., *Rantjak Dilabueh: A Minangkabau Kaba, A Specimen of the Traditional Literature of Central Sumatra* (Ithaca, 1958), pp. 113–16. I have altered Johns's translation somewhat in order to avoid having to explain ethnographic details or to describe the place of the passage in the overall narrative. On the central role of proverbs, maxims, and other sorts of "set sayings," "formalized speeches," and so forth—that is, of rhetoric—in *adat* adjudication, see (again, for the Minangkabau, but the phenomenon is general) von Benda-Beckmann, *Property in Social Continuity*, pp. 114–15, 132–33.

[74] The most prominent in independent Indonesia is the Arabic borrowed *musjawarah*, "communal discussion," "collective deliberation," (see Koesnoe, *Musjawarah*), but it is rather abstract and ideologized, and words such as *mupakat* (also Arabic-borrowed, but more deeply assimilated), "agreement," "consensus"; *setuju*, "of one direction"; *setahu*, "of one mind"; *bulat*, "unanimous," "perfect"; *rukun*, "peaceful accommodation," and a large number of local vernacular terms (see, for example, ibid, pp. 9–15, on Sasak *begundum*, "thorough discussion"; von Benda-Beckmann, *Property in Social Continuity*, p. 193, on Minangkabau, *seitin*, "consent") are, in one place or another, more current.

[75] von Benda-Beckmann, *Property in Social Continuity*, p. 115; original quoted from M. Nasroen, *Dasar Filsafah Adat Minangkabau* (Jakarta, 1957), p. 56. Again, I have altered the translation, here in the interests of a (somewhat) more natural idiom in English. The poem depends on a pun on *bulek*, "round," which means "circulate," in the sense of "go around," "be distributed," when applied to water *(bulek aie)*, and "unanimous agreement," when applied to discourse *(bulek kato; kato*—"word[s]"). Von Benda-Beckmann's translation is: "The water gets around in the bamboo-pipe/The words (decision) get round through the *mupakat* (the unanimous decision)/The water is led through the bamboo/truth is revealed (bridged) by man." The original is: *Bulek aie dek pambuluah/ Bulek kato dek mupakat/Aie batitisan batuang/ Bana batitisan urang."* As *urang*, like Austronesian nouns generally, is unmarked for number or gender, it could as well be rendered "men" or "human being(s)."

Again, what the future of such a mode of skeletonizing cases by forming them within a ceremonialized vocabulary of collective discourse and resolving them by drowning them in unisonant voice will be in a world with a different sense of forensic style is a large question. Centered so firmly in the mechanics of procedure, the *adat* sort of legal sensibility is perhaps even more vulnerable to external disruption than either the *ḥaqq* or the *dharma*, where at least partial accommodations between local substance and foreign machinery are somewhat easier to effect. But for the meantime, anchored in local social organization, watched over by local guardians, adapted to local circumstances, and cast in local symbols, it maintains itself about as well as they. And like many other things supposed to go away—mullahs, caste, and the Emperor of Japan—now that modernity has at last arrived, it has, somehow, an odd tenacity.

So much, then, for distant ideas. Not that there isn't more to be said about them; there is virtually everything. But my intent has not been, as I mentioned earlier, to compress Islamic, Indic, and Malaysian notions about the interconnections of norms and happenings into some handbook for *ex patria* litigants but to demonstrate that they *are* notions. The main approaches to comparative law—that which sees its task as one of contrasting rule structures one to the next and that which sees it as one of contrasting different processes of dispute resolution in different societies—both seem to me rather to miss this point: the first through an overautonomous view of law as a separate and self-contained "legal system" struggling to defend its analytic integrity in the face of the conceptual and moral sloppiness of ordinary life; the second through an overpolitical view of it as an undifferentiated, pragmatically ordered collection of social devices for advancing interests and managing power conflicts.[16] Whether the adjudicative styles that gather around the *Anschauungen* projected by *ḥaqq*, *dharma*, and *adat* are properly to be called "law" or not (the rule buffs will find them too informal, the dispute buffs too abstract) is of minor importance; though I, myself,

[16]For an excellent critical discussion of these two, as they call them, paradigms, which ends however by adopting a too little modified version of the second, see J. L. Comoroff and S. Roberts, *Rules and Processes: The Cultural Logic of Dispute in an African Context* (Chicago, 1981), pp. 5–21. For an example of the "rule centered" paradigm, see L. Pospisil, *Kapauku Papuans and their Laws* (New Haven, 1958); for one of the "process centered," see Malinowski, *Crime and Custom in a Savage Society*.

would want to do so. What matters is that their imaginative power not be obscured. They do not just regulate behavior, they construe it.

It is this imaginative, or constructive, or interpretive power, a power rooted in the collective resources of culture rather than in the separate capacities of individuals (which I would think in such matters to be, intrinsically anyway, about the same everywhere; I rather doubt there is a legal gene), upon which the comparative study of law, or justice, or forensics, or adjudication should, in my view, train its attention. It is there—in the method and manner of conceiving decision situations so that settled rules can be applied to decide them (as well, of course, of conceiving the rules), in what I have been calling legal sensibility—that the informing contrasts lie. And it is there, too, that the passion of the anthropologist to set local views in local contexts and that of the jurist to set instant cases in determinate frames can meet and reinforce each other. I will try in my conclusion to this essay, in connection with the general question of legal imminglement (I can think of no exacter a word) in the modern world, not so much to demonstrate that this is so but to see what comes of assuming that it is.

III

Law, I have been saying, somewhat against the pretensions encoded in woolsack rhetoric, is local knowledge; local not just as to place, time, class, and variety of issue, but as to accent—vernacular characterizations of what happens connected to vernacular imaginings of what can. It is this complex of characterizations and imaginings, stories about events cast in imagery about principles, that I have been calling a legal sensibility. This is doubtless more than a little vague, but as Wittgenstein, the patron saint of what is going on here, remarked, a veridical picture of an indistinct object is not after all a clear one but an indistinct one. Better to paint the sea like Turner than attempt to make of it a Constable cow.

Elusive or not, such a view has a number of much less shadowy implications. One is that the comparative study of law cannot be a matter of reducing concrete differences to abstract commonalities. Another is that it cannot

be a matter of locating identical phenomena masquerading under different names. And a third is that whatever conclusions it comes to must relate to the management of difference not to the abolition of it. Whatever the ultimate future holds—the universal reign of *gulag* justice or the final triumph of the market-mind—the proximate will be one not of a rising curve of legal uniformity, either across traditions or (something I have, so far, had rather to neglect here) within them, but their further particularization. The legal universe is not collapsing to a ball but expanding to a manifold; and we are headed rather more toward the convulsions of alpha than the resolutions of omega.

This view that things look more like flying apart than they do like coming together (one I would apply to the direction of social change generally these days, not just to law), opposes, of course, some of the leading doctrines in contemporary social science: that the world is growing more drearily modern—McDonald's on the Champs Elysées, punk rock in China; that there is an intrinsic evolution from *Gemeinschaft* to *Gesellschaft*, traditionalism to rationalism, mechanical solidarity to organic solidarity, status to contract; that post capitalist infrastructure in the form of multinational corporations and computer technology will soon shape the minds of Tongans and Yemenis to a common pattern. But it opposes as well, or at least raises doubts about, a leading view concerning the social potency of law: namely that it depends upon normative consensus. Grant Gilmore, in his deliverance from the Storrs pulpit seven years ago, put the point with characteristic economy and force. "The function of law, in a society like our own," he said,

> . . . is to provide a mechanism for the settlement of disputes on whose soundness, it must be assumed, there is a general consensus among us. If the assumption is wrong, if there is no consensus, then we are headed for war, civil strife, and revolution, and the orderly administration of justice will become an irrelevant, nostalgic whimsy until the social fabric has been stitched together again and a new consensus has emerged. But, so long as the consensus exists, the mechanism which the law provides is designed to insure that our institutions adjust to change, which is inevitable, in a continuing process which will be orderly, gradual, and to the extent such a thing is possible in human affairs, rational."

My problem with this is not, of course, the hope for order, reason, steadiness and so on, nor the un-American skepticism as to how much can be accomplished through the working of law. No more than he do I get a lump

[10]Gilmore, *The Ages of American Law*, pp. 109–10.

in my throat at the mention of the Rule of Law, imagine that World Court adjudication of international disputes—"Arafat vs. The State of Israel"—is the wave of the future, or think that setting out to build a general theory of law is any more likely a venture than setting out to build a perpetual motion machine. The problem is that so drastic a contrast, cleaving the world into what, if he were a Muslim, he would be calling the House of Observance and the House of War, not only leaves law the most powerful where the least needed, a sprinkler system that turns off when the fire gets too hot, but more importantly, leaves it, given the way things are on the consensus front these days, wholly marginal to the main disturbances of modern life. If law needs, even "in a society like our own," a well-stitched social fabric in order to function, it is not just a nostalgic whimsy, it is through altogether.

Fortunately or unfortunately, however, the legal mind, in whatever sort of society, seems to feed as much on muddle as it does on order. It operates increasingly not just in relatively settled waters—criminal offense, marital discord, property transfer—but in highly roiled ones where (to remain for the moment in immediate contexts) plaintiffs are shapeless crowds, claims moral resentments, and verdicts social programs, or where the seizing and release of diplomats is countered by the seizing and release of bank accounts. That it operates less well in such waters is beyond much doubt. But it is beyond any doubt at all that it is in them that it is more and more going to operate, as both social grievances on the domestic side and political ones on the international get more and more cast in idioms of entitlement and equity, legitimacy and justice, or right and obligation. Like just about every other long-standing institution—religion, art, science, the state, the family—law is in the process of learning to survive without the certitudes that launched it.

The notion that the mechanisms of law have serious application only where prior consensus guarantees their social force comes, I think, from a view of law, which, as Professor Gilmore acknowledges, derives from that excited stoic, Justice Holmes, as passively reflective of the community in which it exists: "Law reflects [this from Gilmore] but in no sense determines the moral wisdom of a society. The values of a reasonably just society will reflect themselves in a reasonably just law. . . . The values of an unjust society will reflect themselves in an unjust law.""[11]

[11]Ibid, pp. 110–11. The Holmes quotation, "all of jurisprudence [reduced] to a single, frightening statement," that Gilmore says he is paraphrasing is at p. 49: "The first requirement of

There is doubtless more than a grain of truth in this rather lunar view of legal things, and it is certainly helpful to magistrate consciences. But it rather neglects the even more critical truth that law, rather than a mere technical add-on to a morally (or immorally) finished society, is, along of course with a whole range of other cultural realities from the symbolics of faith to the means of production, an active part of it. *Ḥaqq, dharma,* and *adat . . . ius, recht,* and *right, . . .* animate the communities in which they are found (that is, the sensibilities they represent do): make them—again along with a great many other things and to different degrees in different places—what juristically, if you will permit it, humanly, if you will not, they are.

Law, even so technocratized a variety as our own, is, in a word, constructive; in another, constitutive; in a third, formational. A notion, however derived, that adjudication consists in a willed disciplining of wills, a dutiful systematization of duties, or an harmonious harmonizing of behaviors—or that it consists in articulating public values tacitly resident in precedents, statutes, and constitutions—contributes to a definition of a style of social existence (a culture, shall we say?) in the same way that the idea that *virtūs* is the glory of man, that money makes the world go round, or that above the forest of parakeets a parakeet of parakeets prevails do. They are, such notions, part of what order means; visions of community, not echoes of it.

Taken together, these two propositions, that law is local knowledge not placeless principle and that it is constructive of social life not reflective, or anyway not just reflective, of it, lead on to a rather unorthodox view of what the comparative study of it should consist in: cultural translation. Rather than an exercise in institutional taxonomy, a celebration of tribal instruments of social control, or a search for *quod semper aequum et bonum est* (all of them defensible enough activities as such, though I do not have much hope for the last myself), a comparative approach to law becomes an attempt, as it has become here, to formulate the presuppositions, the preoccupations, and the frames of action characteristic of one sort of legal sensibility in terms of those characteristic of another. Or, slightly more practically,

a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong," and is taken from O. W. Holmes, Jr., *The Common Law,* ed. M. de W. Howe (Cambridge, Mass., 1963), p. 36. The degree to which this dictum assumes the prior, independent existence of "feelings and demands" to the "body of law" (and that "right and wrong" are some self-standing third things), so that "soundness" can be measured by the degree that the latter, as constructed, conforms to the former, as given, seems to go unnoticed by Gilmore and his illustrious predecessor alike.

to bring off this hermeneutic *grand jeté* with respect to some more focused problem, like the relation between the grounding of norms and the representation of fact (or: the representation of norms and the grounding of fact). This is, of course, like Englishing Dante or demathematizing quantum theory for general consumption, an imperfect enterprise, approximate and makeshift, as I trust I have proved. But, aside from resigning ourselves to the fixity of our own horizons or retreating into mindless wonder at fabulous objects, it is all there is, and it has its uses.

Among those uses is that, in such an approach, law is rejoined to the other great cultural formations of human life—morals, art, technology, science, religion, the division of labor, history (categories themselves no more unitary, or definite, or universal than law is)—without either disappearing into them or becoming a kind of servant adjunct of their constructive power. For it, as for them, the dispersions and discontinuities of modern life are the realities that, if it is to retain its force, it must somehow fathom. Whether or not it will so fathom them, in this place or that, with respect to this matter or that, employing these conceptions or those, is of course very much up in the air, and there is cause enough for even Holmesian pessimism, if not perhaps for such satisfaction in it. But the problem in any case is no different than for any other cultural institution: it will prosper if it can compass dissensus—"war, civil strife, and revolution"; not if it cannot. The sure fatality is to imagine variance not there or wait for it to go away.

As I say, it is not hard to find dissensus, legal or any other, these days; difference is too much with us late and soon. But one of the better places to look for it is surely in the international realm; particularly in that part of it that has come, a bit tendentiously in my opinion, to be called the Third World; more particularly yet in the interactions between the Third World and what is, in this headline taxonomy, I suppose still at least nominally the First: that is, the West. The lawyer attracted to hard cases and bad law and the anthropologist attracted to disturbed traditions and cultural incoherence can both find here more than enough to satisfy their deviant tastes.

So far as law is concerned, this inviting disorder derives from two main sources: the persistence of legal sensibilities formed in times not necessarily simpler but certainly more self-contained, and the confrontation of those

sensibilities by others not necessarily more admirable or more deeply conceived but certainly more world-successful. In every Third World country—even Volta, even Singapore—the tension between established notions of what justice . . . *ḥaqq* . . . *dharma* . . . *adat* . . . is and how it gets done and imported ones more reflective of the forms and pressures of modern life animates whatever there is of judicial process. Nor is this confusion of legal tongues but mere transition, a passing derangement soon to yield to historical correction. It is the hardening condition of things.

As it has hardened, throwing up all sorts of curiosities, it has come to be discussed under all sorts of rubrics—"legal pluralism," "legal transplants," "legal migrations," "legal syncretism," "external law (versus 'internal')," "lawyer's law (versus 'folk' or 'customary')"; the multiplicity being but testimony to the improvisitory quality of the discussions."[9] I will myself use "legal pluralism," mainly because it seems to commit one to less, hardly more than the mere fact of variance itself; and particularly not to the notion that the whole phenomenon is reducible to but another chapter in the history of oppression: who swindles whom, when, where, and how. Whatever the purposes driving the introduction of Western law-ways into non-Western contexts, and I have no quarrel with the view that they have not generally been philanthropic, what is happening to legal sensibilities in the Third World is not much elucidated by the opinionative categories of postcolonial polemic.

It is also not much elucidated by the more equable (or anyway, more

[9]See, inter alia, M. B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-colonial Laws* (Oxford, 1975); S. B. Burman and B. E. Harrel-Bond, eds., *The Imposition of Law* (New York, 1979); M. Galanter, "The Modernization of Law," in *Modernization*, ed. M. Weiner, (New York, 1966), pp. 153–65; idem, "The Displacement of Traditional Law in Modern India," *Journal of Social Issues* 24 (1968): 65–91; idem, "Hinduism, Secularism and the Indian Judiciary," *Philosophy East and West* 21 (1971): 467–87; B. Cohn, "Some Notes on Law and Change in North India," *Economic Development and Cultural Change* 8 (1959): 79–93; R. S. Khare, "Indigenous Culture and Lawyer's Law in India," *Comparative Studies in Society and History* 14 (1972): 71–96; A. St. J. Hannigan, "The Imposition of Western Law Forms on Primitive Societies," *Comparative Studies in Society and History* 4 (1961–2): 1–9; V. Rose, "The Migration of the Common Law: India," *Law Quarterly Review* 76 (1960): 59–63; J. N. D. Anderson, "Conflict of Laws in Northern Nigeria," *International and Comparative Law Quarterly* 8 (1959): 44–56; M. Rheinstein, "Problems of Law in the New Nations of Africa," in *Old Societies and New States*, ed. C. Geertz (New York, 1963), pp. 220–46; A. Watson, *Legal Transplants: An Approach to Comparative Law* (Edinburgh, 1974); J. H. Beckstrom, "Transplantation of Legal Systems: An Early Report on the Reception of Western Laws in Ethiopia," *American Journal of Comparative Law* 21 (1973): 557–83; M. A. Jaspan, "In Quest of New Law: The Perplexity of Legal Syncretism in Indonesia," *Comparative Studies in Society and History* 7 (1964–65): 252–66; S. Hatanaka, "Conflict of Laws in a New Guinea Highlands Society," *Man* 8 (1973): 59–73; A. A. Schiller, "Conflict of Laws in Indonesia," *Far Eastern Quarterly* 2 (1942–43): 31–47.

equable-sounding) ones of international law. Whatever the uses certain features of such law—rules of embassy, freedom of the seas doctrines, prisoner of war codes—may or may not sometimes have in ordering relations between states, they are, those features, neither lowest common denominators of the world's catalogue of legal outlooks nor universal premises underlying all of them, but projections of aspects of our own onto the world stage. This is as such no bad thing (better, by my local lights, Jeffersonian notions of human rights than Leninist ones), except perhaps as it leads us to imagine there is more commonality of mind in the world than there is or to mistake convergence of vocabularies for convergence of views. But the central issue posed by the florescence of legal pluralism in the modern world—namely, how ought we to understand the office of law now that its varieties have become so wildly immingled—largely escapes its rather classroom formulae.

"Florescence," in any case, is not too strong a word, though it is a somewhat ironic one. Not every Third World country is perhaps in the position of Ethiopia, which by the 1960s (before the military simplified things in some ways and complicated them in others) boasted not only a host of sharply contrasting tribal legal traditions, from pastoral Galla to agrarian Amhara, some of them operating in a Christian context, some in a Muslim, some in a pagan, but a Caesaro-Papist imperial code dating from the seventeenth century, Mālikī and Shāfi'ī versions of the *šarī'a* introduced about the tenth, a Swiss penal code, French civil, maritime, commercial, and criminal procedure codes, and an English civil procedure code, as well as parliamentary legislation administered by a civil High Court (staffed until 1957 by English judges) and royal decree administered by a Supreme Imperial Court (staffed, if that's the word, until 1974, by the Lion of Judah).[10] But in less extravagant form, legal eclecticism—something from abroad, something from home; something secular, something religious; something statutory, something traditional—is general in that world.

[10]Hooker, *Legal Pluralism*, pp. 393–94. What the situation is since the 1974 takeover is obscure, save that there are now a lot of military courts as well. The civil code, drafted by continental scholars, who apparently had a marvellous time, contained 3,367 articles, making it one of the largest in the contemporary world (ibid, p. 399). I, of course, have no wish to argue that "legal eclecticism" is confined to the Third World or that it does not have a long historical existence (cf. Watson, *Legal Transplants*); merely that it is right now especially prominent there and looks like it is becoming even more so. Nor do I wish to suggest that it is, as such, pathological; it is, in fact, part of the usual process of legal change. ("History of a system of law is largely a history of borrowing of legal materials from other legal systems . . . ," R. Pound, quoted in Watson, *Legal Transplants*, p. 22.)

The initial instinct of the Western-trained lawyer to this sort of situation is, I think, to deplore it as an affront to juristic decency, as the initial instinct of the Western-trained anthropologist is to explain it away as cultural posturing. The degree to which adjudication worthy of the name can proceed in such a nomistic din and the degree to which, so far as it does, its operations carry much social weight are, of course, empirical questions with different answers in different cases. But an affliction so prevalent, if affliction it is, would seem unlikely to be merely factitious or trivial. However difficult it may be to assimilate to received categories and standard ideals, it is not dismissable as the senseless product of spoiled societies.

It is, indeed, just this difficulty that, for me anyway, makes it interesting, for it suggests that the inability of the Western polarization of applicable law and pertinent fact—the never-the-twain confrontment of pictures of "what is right" and stories of "what is so"—to describe effectively how adjudication proceeds in other traditions is only increased when those traditions become embroiled with one another and with those of the West itself. To rely on that polarization is now not just to distort the law elsewhere, it is to be left without anything, save mockery and lamentation, to say about it at all. We need, to put the thing in a way that will seem excitingly avant-garde to some and to others merely fashionable ("trendy" is the trendy epithet), a novel system of discourse, a new way of talking if you will, not only to grasp what is going on, legal-wise, in the Ethiopias of the world, but, as this sort of thing is always reflexive, redescribing the describer as it redescribes the described, among ourselves.

Richard Rorty, in his recent *Philosophy and the Mirror of Nature*—a full-scale assault on the sort of neutral framework epistemology I am, under the local knowledge battle cry, sectorially harassing here for law—makes a distinction useful in this regard between what he calls, not altogether fortunately, normal and abnormal discourse.[11] "Normal" (or, as I would prefer, to avoid unwanted echoes, "standard") discourse is discourse that proceeds under a set of rules, assumptions, conventions, criteria, beliefs, which, in principle anyway, tell us how to go about settling issues and resolving disagreements "on every point where statements seem to conflict."[12] It is

[11] R. Rorty, *Philosophy and the Mirror of Nature* (Princeton, 1979). The normal/abnormal discussions are at, inter alia, pp. 11, 315–22, 332–33, 357–65. As Rorty acknowledges, the distinction is taken, and rotated a bit, from Thomas Kuhn's between normal and revolutionary science: see T. Kuhn, *The Structure of Scientific Revolutions*, 2nd ed. (Chicago, 1970); idem, *The Essential Tension*, (Chicago, 1977).

[12] Rorty, *Philosophy and the Mirror of Nature* p. 316. My preference for standard/nonstandard

the sort of discourse scientists usually imagine themselves to have (and over great ranges of inquiry actually do) and literary critics perennially think themselves tantalizingly near at long last more or less to achieving (and in certain moments and particular circumstances actually are). But it is the sort, also, that governs Professor Gilmore's "rational" settlement of disputes under "sound," that is, consensual, procedures—a condition that also indubitably obtains, except, as he notes, where it does not. Normal discourse, Rorty writes, is "any discourse (scientific, political, theological, or whatever) which embodies agreed-upon criteria for reaching agreement."[13] It projects a situation

> . . . in which all residual disagreements [are] seen to be "non-cognitive" or merely verbal, or else temporary—capable of being resolved by doing something further. What matters is that there should be agreement about what would have to be done if a resolution *were* to be achieved. In the meantime, the interlocutors can agree to differ—being satisfied of each other's rationality the while.[14]

"Abnormal" (or "nonstandard") discourse is, then, discourse in which "agreed-upon criteria for reaching agreement" are not the axis upon which communication turns and the evaluation of disparate views in terms of some accepted framework within which they can be objectively assessed and commensurated one with the other is not the organizing aim. Hope for agreement is not abandoned. People occasionally do change their minds or halve their differences as the result of intelligence concerning what individuals or groups of individuals whose minds run on other tracks believe. But "exciting and fruitful disagreement"—how do I know what I think until I see what you say—is recognized as a no less rational process.[15]

> Normal discourse [thus Rorty] is that which is conducted within an agreed-upon set of conventions as to what counts as a relevant contribution, what counts as answering a question, what counts as having a good argument for that answer or a good criticism of it. Abnormal discourse is what happens when someone joins in the discourse who is ignorant of these conventions or who sets them aside. . . . The product of normal discourse [is] the sort of statement which can be agreed to be true by all participants whom the other participants count as "rational." The

stems from a dislike of the pathology overtones of normal/abnormal (itself a revision of Kuhn's rather too political-sounding normal/revolutionary) and from a dislike of pure types, dichotomous dualisms, and absolute contrasts.

[13] Ibid, p. 11.

[14] Ibid, p. 316.

[15] Ibid, p. 318.

product of abnormal discourse can be anything from nonsense to intellectual revolution. . . ."[14]

It can also be, less dramatically, a practicable method for living in a situation where dissensus is chronic, probably worsening, and not soon to be removed. I do not want to pursue the philosophical issues here, themselves hardly settled into the world of the acclaimed and the obvious, any further. We can leave the vexed to vex the vexing. My concern is with what law is like when what most lawyers, and most anthropologists too, would probably regard as the *sine qua non* of its existence—"agreement about the things that are fundamental" (to quote this time the peroration of another Storrs lecturer than Professor Gilmore as foil, namely Justice Cardozo)—is rather spectacularly absent.[15]

So far as we, anthropologically-minded lawyers or law-minded anthropologists, are concerned, the issue that faces us is, as I say, how to describe such situations in a usefully informative way; informative both as to them and as to the implications they have for how we need to think about legal process as a general phenomenon in the world, now that the pieties of natural law, the simplicities of legal positivism, or the evasions of legal realism no longer seem of very much help. It is a matter of talking about irregular things in regular terms without destroying thereby the irregular quality that drew us to them in the first place; as noted before, a most irregular business.

It is this irregular business, "the study of abnormal discourse from the point of view of some normal discourse," as Rorty puts it, "the attempt to make some sense of what is going on at a stage where we are still too unsure about it to [know how, exactly, properly to] describe it and thereby to begin [a systematic] account of it," that has come to be called hermeneutics—a term whose Greek looks, theological past, and Herr Professor pretentiousness ought not to put us off because, under the homelier and less fussy name of interpretation, it is what many of us at least have been talking all the time.[16] Indeed, it is here that the ant-hill level conversation between

[14] Ibid, p. 320.

[15] B. N. Cardozo, *The Growth of Law* (New Haven, 1924), p. 145.

[16] Rorty, *Philosophy and the Mirror of Nature*, p. 320. Rorty's use of "hermeneutics" for normal discourse about abnormal discourse (and "epistemology" for normal discourse about normal discourse) is itself not altogether normal, and I am myself not completely ready to endorse it. Quite standard legal or anthropological (or literary, or theological . . .) commentary seems to me also properly to be termed hermeneutic, and epistemology, though I share Rorty's distaste for it in its traditional form, seems to me not its opposite but merely something else—namely, theory of knowledge. This, as I see it, terminological quirk is not however of any particular importance in the present connection. For my views of what interpretation in anthropology comes to, see my "Thick Description: Toward an Interpretive Theory of Culture," in *The Interpretation of Cultures*, pp. 3–30.

anthropologists, absorbed with the peculiarities of ethnographic cases, and lawyers, absorbed with those of legal ones, that I proposed in the first part of this essay as the most practical way for these dissimilar aficionados of the local to assist one another with, if not precisely common problems, anyway *cognate ones, is most urgently needed. Legal pluralism,* attracting the lawyer because it is legal and the anthropologist because it is plural, would seem to be just the sort of phenomenon neither could leave safely to the care of the other.

An hermeneutics of legal pluralism—an attempt to represent Ethiopic situations, whether in the Third World, the Second, or, now that challenges to one-state, one-law ideas are turning up closer to home, the First, in a reasonably intelligible fashion—does not imply, therefore, the construction of some miraculous Esperanto in which everything counter, original, spare, strange, can be blankly and neutrally said; the sort of thing Rebecca West once dispatched by remarking of a U.N. publication that, in deference to the dove of peace, it was written in pidgin English. (A leading anthropologist of law, Paul Bohannan, despairing, as well he might, of the long debate concerning whether African law ought to be analyzed in terms of African concepts or Western ones, once suggested, in apparent seriousness, that we all write about such things in FORTRAN.) What it implies, revolution enough for most academics, is an expansion of established modes of discourse, in the case at hand those of anthropology and comparative law, in such a way as to make possible cogent remarks about matters normally foreign to them, in the case at hand cultural heterogeneity and normative dissensus. The standards of cogency must needs be our own—Whose else could they be?—but they need not be such that everything that goes on in the world beyond the ordered talk of federal appeals courts or tribal ethnographies fails to meet them.

This effort, half-quixotic, half-Sisyphean (the implausible takes a little longer), to render anomalous things in not too anomalous words is especially illuminating in the case of legal pluralism because it is not just observers of Third World complexities who find themselves drawn inexorably into

it but the subjects of those complexities as well. They, too, oscillate unsteadily between trying to comprehend their legal world in terms far too integral—revivalist-traditional, radical-revolutionary, law-code Western—to represent it realistically and abandoning much hope of comprehending it, save opportunistically, at all. Things do not look that much clearer from within than they do from without. And what from the one side is an hermeneutic challenge, what can we say about so polyglot a discourse, is from the other a practical one, what can we say *in* it.

Take Indonesia, and most especially Java, which I know somewhat more about than I do Ethiopia. Settled by Austronesians coming, in God knows how many waves, by God knows how many routes, out of what is now south China and north Vietnam a millennium or two before Christ; scene of elaborate Indic state building, Borobudur and all that, from about the fifth century to about the fifteenth; progressively honeycombed with rather single-minded Chinese settler-traders from the Han on; subject to intense Islamic missionization, some orthodox, some less, from the twelfth century; colonized inchmeal, region by region, by the Dutch from 1598 to 1942 (with an English interlude, bringing eminent domain and leftside driving, around the time of the Napoleonic wars); occupied, and rather generally manhandled, by the Japanese Army from 1942 to 1945; and now variously intruded upon by American, East Asian, Australian, European, Soviet, and Middle Eastern political and economic interests—there is hardly a form of legal sensibility (African, perhaps, and Eskimo) to which it has not been exposed.

I have already alluded to the general nature of legal arrangements in the Netherlands East Indies in connection with my discussion of *adat* as against *adatrecht*. Basically, it was a to-each-his-own sort of system ("like over like is grace," the homily-slogan went), with the Netherlands government as the final arbiter as to who the each-es were and what was their own.[9] The fundamental distinction was straight-forward enough: it was between Europeans and non-Europeans. But there were too many sorts of non-Europeans, too much disagreement between resolute modernizers, resolute orientalizers, and resolute temporizers among the Europeans, and too

[9]For general descriptions of Netherland East Indies legal development, see J. S. Furnivall, *Netherlands India: A Study of Plural Economy* (Cambridge, England, 1944); Supomo, *Sistim Hukum di Indonesia Sebelu n Perang Dunia II* (Jakarta, 1957); M. B. Hooker, *A Concise Legal History of Southeast Asia* (Oxford, 1978), chap. 7; Hooker, *Legal Pluralism*, chap. 5; M. B. Hooker, *Adat Law in Modern Indonesia* (Kuala Lumpur, 1978), chap. 4; D. Lev, "Judicial Institutions and Legal Culture in Indonesia," in *Culture and Politics in Indonesia*, ed. C. Holt (Ithaca, 1972), pp. 246–318.

many ways in which individuals on opposite sides of the divide were caught up in one another's lives to make this straightforwardness more than the frame for grand indirection.

The history of this indirection is, of course, a long and changeful one, full of wistful codifications and policy turnarounds. But by the early part of this century it had more or less reached the form, or nonform, in which the Republic finally inherited it: three major legal classes—Europeans, Natives, and Foreign Orientals; two major court hierarchies—one *Rechtsstaat* administrative, full of jural bureaucrats, one colonial administrative, full of native affairs experts; and a horde of special cases, particular arrangements, and unassimilable practices blurring the classes and scrambling the hierarchies.[10]

On the classificatory side, the main complicating factors were the porous quality of the Foreign Orientals category, from which all sorts of socially interstitial types were always leaking into quasi-European status, the ambiguous position of "educated" Indonesians, who were sometimes Natives and sometimes not, and a vast set of elaborate rules for bending the rules when they got in the way of the business of imperialism. On the hierarchy side, they were a developed *śarī'a* court system only half controlled, and less than half understood, by the colonial administration, and a great host of *adatrecht* tribunals grouped by *adatrecht* jurists into nineteen *adatrecht* jurisdictions on diffusely, and sometimes rather notional, culture-area grounds. Details aside, however piquant (that the Japanese were honorary Europeans; that a Native who lived sufficiently like a Dutchman could apply to the Governor General to become legally treated as one; that intermarriage made Dutch women into Indonesian or Chinese, and vice versa; that you could be a European for purposes of a particular transaction, like bank borrowing, and a Native for everything else), whatever one has here it is certainly a great deal of law and not very much consensus.

In any case, after first, the rigors of the Japanese occupation, when for about three years law came out of the barrel of a gun, and second, the dislocations of the miscarried Dutch return, when for about five it came out of a desperate effort to restore at least the semblance of the prewar social order, the various components of this collage were rudely pried apart and, some

[10]For a brief systematic review of all this, see E. A. Hoebel and A. A. Schiller, "Introduction," in ter Haar, *Adat Law*. Cf. J. H. A. Logemann, *Het Staatsrecht van Indonesië, Het Formeel System* (The Hague and Bandung, 1955), pp. 17–30. The court system was actually rather more complicated than this, given the somewhat different arrangements in the "directly" and "indirectly" administered parts of the colony; see Hooker, *Legal Pluralism*, pp. 275–77.

discarded, some added, some reworked, about as rudely glued back together again.

As Daniel Lev, the foremost student of these matters, has repeatedly pointed out, what the coming of Indonesian independence (declared in 1945, achieved in 1950) meant for legal institutions there was their engulfment by a suddenly much more active political life, a phenomenon usually misperceived, inside the country and out, as that most feared of tropical diseases, the Decline of Law.[9] The tension between religious, regional, racial, economic, and cultural groupings that in the colonial period was prevented, save now and again and then in mainly outlaw fashion, from breaking into open political expression came, under Sukarno, who was nothing if not eclectic, not just to expression but to uproar. Everyone from soldiers and civil servants to schoolboys and sharecroppers splintered into contending factions, fixedly embittered; a fate from which judges, lawyers, law scholars, legislators, and policemen did not escape. Rather than disappearing with the disappearance of the Dutch, legal pluralism burst the high-wrought institutional structure that, however inequitably, previously contained it.

The irony, largely unperceived at the time, glaring now that its human price is known, was that this efflorescence of disagreement about everything and anything took place in the accents of a radically unitary nationalism that denied the legitimacy, indeed sometimes the very existence, of such disagreement in the name of pervasive, exceptionless social integration. So far as law was concerned, this took the form of trying to subordinate the established legal sensibilities—Muslim, *adat*, Indic, Western, or whatever—to a novel, visional one, called "revolutionary," whose animus was a great deal clearer than its content. The initial reaction to the simultaneous discrediting of colonial legal arrangements and the accentuation of the problem to which they were a response—incommensurable notions of what justice is—was to regard the arrangements as having caused the problem. Remove the one and you remove the other.

[9] Lev, "Judicial Institutions," (on "the decline of law," pp. 257 ff., 316 ff.); idem, *Islamic Courts in Indonesia* Berkeley, 1972; idem, "The Politics of Judicial Development in Indonesia," *Comparative Studies in Society and History* 8 (1964–65):173–99. Lev himself occasionally writes (for example, "Judicial Institutions," pp. 316–17; "Politics of Judicial Development," p. 189) as though the intensity of political conflict and the social weight of legal institutions were in inverse correlation, the advance of the one leading *pari passu* to the retreat of the other. But this is, I think, but the result of taking consensus theories of Western, and especially Anglo-American law, which he represents as "impersonal," "formal," and "unitary," rather more seriously than the facts of its legal life, now or in the past, warrant.

This did not turn out to be so. Rather than a grand coming together in the name of a recovered national identity, there was, in its name, a grand falling out. So far as law is concerned, this in part occurred (as, again, Daniel Lev has shown) in the form of a three-cornered struggle between judges, prosecutors, and police for dominance within the Western-without-Westerners, thus "national," legal apparatus that emerged with the disestablishment of racial categories and segregated courts. Judges, seeking to inherit the elevated status of their Dutch predecessors without the colonial odor associated with it, looked to Common Law models, and especially to the American one, to shore up their position (they even sought, unsuccessfully, to institute judicial review). Prosecutors, seeking to correct the lowly status of their "native justice officer" predecessors, who were hardly more than exalted law clerks, looked to continental Civilian models, the *juge d'instruction* sort of thing, to upgrade theirs. And the police, seeking independence not only from judges and prosecutors, but from ministers of justice and army chiefs of staff, and the end thereby of their running-dog image in the popular mind, looked to their vanguard role in the Revolution to refurbish theirs.[9] In part, the falling out occurred in the form of a reinvigoration of the *šarī'a* court system—organized pressure from the pious (and organized resistance from the secular) for its expansion, centralization, and "officialization"; for broadened jurisdiction, increased authority, and indeed, in extreme "Islamic State" notions, constitutional status.[9] And in part, it occurred in the form of a renewal, under local management, of the *adatrecht* movement, represented as an authentically Indonesian, "law of the people" bulwark against foreign impurities of whatever sort: Western "positivist," Middle Eastern "dogmatist," or Indic "feudalist" alike.[9]

Leaving aside the question of how all these struggles have come out (they have not come out; they have merely continued, and will probably do so, in some fashion or other, more or less indefinitely), the upheavals attendant upon invasion, reaction, and revolution in a single decade—and Putsch,

[9] Lev, "Politics of Judicial Development"; "Judicial Institutions."

[9] Lev, *Islamic Courts*.

[9] On *adatrecht* (or now, *hukum adat*) in the Republic, see Jaspan, "In Quest of New Law." The issues here are complicated by the fact that open attacks on "Islam" are more or less impossible in Indonesia, which is self-defined as a Muslim society, polity, and population, so that the strong anti-*šarī'a* sentiments of *adat* law theorists have to be somewhat indirectly expressed, by the fact that even the most headlong Westernizers (Capitalist or Communist) or Islamizers must give at least lip service to *adat* and "The Indonesian Spirit," and by the fact that, explicitly in Bali, implicitly in many parts of Java, much of what is taken to be *adat* is in fact Indic in character and origin. The politics of more-authentic-than-thou can get, in such a context, both extremely elaborate and extraordinarily delicate.

mass murder, and military rule in the following—hardly caused either thought about the law or the practice of it to become peripheral to the mainstream of social development. If anything, they pushed them even more toward the middle of it." The effort to connect if/then views of how life coheres and as/therefore formulae for rendering cases decidable does not lessen when the views proliferate and the formulae clash. It merely takes on a more determined tone.

What I called the constructional role of law is indeed especially clear here. For what is at issue is not, after all, whether property is to devolve according to *adat*, *šarī'a*, or Roman Dutch principles; whether secular marriage is going to be recognized or financial institutions may charge interest; nor even whether Balinese Hinduism or Javanese Indic mysticism should be admitted by the state to legal standing—all perduring controversies in independent Indonesia. What is at issue, and what these specific disputes in one way or another evoke and symbolize, is the sort of society, what counts and what does not, this ex-East Indies is now going to be. Law, with its power to place particular things that happen—this promise, that injury—in a general frame in such a way that rules for the principled management of them seem to arise naturally from the essentials of their character, is rather more than a reflection of received wisdom or a technology of dispute settlement. Small wonder that it draws toward it the same sorts of passions those other begetters of meanings and proposers of worlds—religion, art, ideology, science, history, ethics, and commonsense—draw toward them.

The passions are intense because what is at risk, or anyway is felt to be, is not just agreement as to how fact is to be found and law instituted. If that were all there was to the problem it could be well enough negotiated: a little moral witnessing here, a little status legislating there; some verdicts

"Even amidst the massacres of 1965, where probably somewhere between a quarter and three-quarter million Indonesians were killed by other Indonesians, a perverse kind of justice doing persisted. In the area of Java where, thirteen years earlier, I had worked, the army assembled village populations in the district capital square, asked each to indicate who the "Communists" among them were, and then assigned the condemned of one village to the condemners of another, and vice versa, to take home and execute. Under the Suharto regime, when the presumed subversives who had escaped fates of this sort, perhaps as many as a hundred thousand, were interned in prison camps, legal activity centered around human rights issues conceived in largely Western, due process terms and around the formation of a Western sort of client-centered advocacy profession, something Indonesia had barely had to that point, to pursue them. And finally, since the general resurgence of Islamic political activity, stimulated by the Iranian "legists to power" revolution, the role of *šarī'a* adjudication has become an even livelier focus of dispute than it had been previously.

designed to quiet village disharmonies, some fictions concocted to enable commercial banking. Hardly anyone, even a marriage closer or a probate judge, is ready to die for pure procedure. What is at risk, or felt to be, are the conceptions of fact and law themselves and of the relations they bear the one to the other—the sense, without which human beings can hardly live at all, much less adjudicate anything, that truth, vice, falsehood, and virtue are real, distinguishable, and appropriately aligned.

The struggle over how adjudication is to be conducted—the sort of thing that set the bureaucrat god-king of Bali and the citizens of my village at odds—is, in short, part of a much wider, deeper struggle, as it was there, to evolve a practible form of life, to patch together what, in reference to Anglo-Indian law, an even more jigsaw affair than Dutch-Indonesian, has been called a working misunderstanding. The prospective parties to such a misunderstanding have, of course, changed somewhat in recent years, and their relative power has changed even more. And there is, also, of course, at least the possibility that one of the parties will so triumph politically as to be able to fasten their views on the others, though I myself rather doubt it. It may even be that a genuine Hobbesean moment will appear where nothing matters save the economy of violence (something that, to a degree, has already occurred in October and November of 1965); but if it does, it will be followed (as has also occurred, under Suharto) by yet another attempt to force the pieces of the collage into some tolerable arrangement. But one thing is surely clear: an instrumental view of law as having to do only with means not with ends, a pure agency for realizing social values set some place else—in religion maybe, or philosophy, or by that famous man at the back of the Clapham bus—will simply not do." "Never place confidence in a man you see flying until you know whether he obeys the *šarī'a*," wrote the great Egyptian enemy of Muslim ecstaticism, Rashid Rida, who, whatever one may think of his legalism, at least saw law as casting its own shadow."

"Such a view is, of course, characteristic of legal positivism in general, but it seems particularly attractive to students of comparative law, where facing up to the life-defining character of law is especially nervous-making: "The trend of the foregoing [discussion of Indonesian legal pluralism] tends to the view that law may usefully be considered not as an ultimate value in itself but as a means of realizing other values, including a variety of social and political goals. The law may be regarded as a medium or instrument of social and political worth which need not necessarily have intrinsic value. It should be obvious that this view clearly distinguishes the instrumental value of law, on the one hand, from the value intrinsic goals that law is used to serve on the other." Hooker, *Adat Law*, p. 7.

"Quoted in A. Hourani, *The Emergence of the Modern Middle East*, (Berkeley and Los Angeles, 1981), p. 97.

What will do? That, of course, is hard to say. But it will surely involve a shift away from functionalist thinking about law—as a clever device to keep people from tearing one another limb from limb, advance the interests of the dominant classes, defend the rights of the weak against the predations of the strong, or render social life a bit more predictable at its fuzzy edges (all of which it quite clearly is, to varying extents at different times in different places); and a shift toward hermeneutic thinking about it—as a mode of giving particular sense to particular things in particular places (things that happen, things that fail to, things that might), such that these noble, sinister, or merely expedient appliances take particular form and have particular impact. Meaning, in short, not machinery.

Such, anyhow, is my view, and the governing themes of this discussion, coming into and out of sight as this or that matter has been breathlessly addressed, have all been designed with an intent to advance it. The local knowledge, *Anschauung* and instant case, view of the law; the disaggregation of "law" and "anthropology" as disciplines so as to connect them through specific intersections rather than hybrid fusions; the relativization of the law/fact opposition into a various play of coherence images and consequence formulae; the conception of the comparative study of law as an exercise in intercultural translation; the notion that legal thought is constructive of social realities rather than merely reflective of them; the stress on the historical tenacity of legal sensibilities; the rejection of a social consensus account of the practical force of law in favor of a sense-seeking one; the conviction that legal pluralism is not a passing aberration but a central feature of the modern scene; and the argument that self-understanding and other-understanding are as internally connected in law as they are in the other realms of culture—all these are products of a certain cast of thought, one rather entranced with the diversity of things. Taken together they do not so much cohere into a systematic position, "hermeneuticism" or something equally barbaric, as bounce off one another, insofar as themes may properly be said to do such a thing, and to do so with enough regularity to suggest that, although it is doubtless going rather too far to rework Shelley's *line and proclaim lawyers the unacknowledged poets of the world*, to conceive of law as a species of social imagination may have something to be said for it.

One thing to be said for it is that analytical resources from somewhere else than behavioralist psychology, neoclassical economics, utilitarian sociology, or functionalist anthropology—hard-edge social science—can be brought to bear in understanding it. The move of social theory toward seeing social action as configuring meaning and conveying it, a move that begins in earnest with Weber and Freud (or, in some readings, Durkheim, Saussure, and G. H. Mead) and that has now become massive, opens up a range of possibilities for explaining why we do the things we do in the way that we do them far wider than that offered by the pulls and pushes imagery of more standard views.

Although this "interpretive turn," as it has been called, the conceiving of human behavior and the products of human behavior as "saying something of something—" which something needs to be drawn out and explicated—has touched virtually every domain of cultural study, reaching even to such positivist strongholds as social psychology and the philosophy of science, it has not as yet had very much influence in legal studies. The strong "how-to" bias of practiced law—how to keep out of court if you can, how to prevail there if you cannot, to echo again Holmes's sardonic summary—has kept it at bay. But it is doubtful whether the history, sociology, and philosophy of a field are well advised to adopt as their own the sense of it held by its practitioners, caught up, as those practitioners are, in the immediate necessities of craft. We need, in the end, something rather more than local knowledge. We need a way of turning its varieties into commentaries one upon another, the one lighting what the other darkens.

There is no ready method for this, and for myself I rather doubt there ever will be. But there is by now some accumulated cunning. We are learning—more I think in anthropology than in law, and within anthropology more in connection with exchange, ritual, or political symbology than with law—something about bringing incommensurable perspectives on things, dissimilar ways of registering experiences and phrasing lives, into conceptual proximity such that, though our sense of their distinctiveness is not reduced (normally, it is deepened), they seem somehow less enigmatical than they do when they are looked at apart. Santayana's famous dictum that one compares only when one is unable to get to the heart of the matter seems to me, here at least, the precise reverse of the truth: it is through comparison, and of incomparables, that whatever heart we can actually get to is to be reached.

I apologize for this Zen koan ("What is the sound of two hands not meet-

ing?") way of putting the matter. But when it is considered that this, comparing incomparables—Milton and Shakespeare, Rembrandt and Reubens, Plato and Kant, Newton and Einstein—is what the disciplines devoted to the descriptive explication of imaginative forms spend a large proportion of their time doing, the sense of outrageous paradox evaporates. And it is for that reason, too, that those disciplines, literary criticism and art history, moral philosophy and the history of science, *inter* a great many *alia*, may have more to offer us in making our way through such perplexities as the shape-shifting nature of the fact/law distinction across cultural traditions and historical phases than supposedly more "scientific" enterprises, where everything that arises must converge. If there is any message in what I have been saying here, it is that the world is a various place, various between lawyers and anthropologists, various between Muslims and Hindus, various between little traditions and great, various between colonial thens and nationalist nows; and much is to be gained, scientifically and otherwise, by confronting that grand actuality rather than wishing it away in a haze of forceless generalities and false comforts.

Phrased thus, it of course all sounds very bracing. We like to think that the reality principle is good for us, except perhaps when it finally kills us. But a serious effort to define ourselves by locating ourselves among different others—others neither distanced as Martians, discredited as Primitives, nor disarmed as universal Everypersons, bent like us on sex and survival—involves quite genuine perils, not the least of which are intellectual entropy and moral paralysis. The double perception that ours is but one voice among many and that, as it is the only one we have, we must needs speak with it, is very difficult to maintain. What has been well called the long conversation of mankind may be growing so cacophonous that ordered thought of any sort, much less the turning of local forms of legal sensibility into reciprocal commentaries, mutually deepening, may become impossible. But however that may be, there is, so it seems to me, no choice. The primary question, for any cultural institution anywhere, now that nobody is leaving anybody else alone and isn't ever again going to, is not whether everything is going to come seamlessly together or whether, contrariwise, we are all going to persist sequestered in our separate prejudices. It is whether human beings are going to continue to be able, in Java or Connecticut, through law, anthropology, or anything else, to imagine principled lives they can practicably lead.