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STATES OF THE ART:
A History of Legal Anthropology and the Next Generation of Research
at the Intersection of Language, Ideology, and Power

INTRODUCTION

1. *Purposes and Scope of the Paper*

The anthropology of law is perhaps as old as anthropology itself, tracing its origins back to Malinowski's fieldwork in the Trobriands and, earlier, the evolutionary speculation of Sir Henry Maine. For much of its existence, legal anthropology has remained a subject without a stable center, attracting an "enormous diversity in the range of issues investigated, the theoretical orientations advocated, [and] the research methods used."[1] In this essay, I review the overall development of the anthropology of law, its leading works, and prevailing theoretical orientations through different eras. I also examine the various dominant approaches in legal anthropology today, and attempt to explain their recent convergence on an interest in the role of language in legal contexts. I will conclude by suggesting an important and promising direction for the next generation of research in legal anthropology.

IN THE BEGINNING

In the latter half of the nineteenth century, as public interest in human evolution was beginning to take hold, a diverse assortment of professional academics and amateur

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[1] Danet (1990:538), "Language and the Law: An Overview of 15 Years of Research," in *Handbook of Language and Social Psychology*, Giles & Robinson, eds., (London: Wiley); *See also* Twining 1964:34–35, ("…the enormous diversity of purpose, method[,] and emphasis of different writers.") *See also* Moore (1970:270) cited in Comaroff & Roberts (1981) at 3.

scholars began to converge around such issues as the defining characteristics of civilization and the nature and origins of human society.[2]

Many of the first recognizable works of anthropology were written by lawyers.[3] In 1861, Sir Henry Maine, a Scots-born jurist and Cambridge lecturer, published Ancient Law, a treatise in which he aimed, according to the preface, "to indicate some of the earliest ideas of mankind, as they are reflected in ancient law, and to point out the relation of those ideas to modern thought." Modern scholars most frequently comment on the strong influence that evolutionary thinking (characteristic of the era's intellectual climate) had on Maine's work, which "set forth a grand theory to account for the development of law and governance from the origins of human society to his own Victorian England."[4]

The lasting contribution for which Maine is most often cited is his identification of a fundamental distinction between societies in which legal rights and responsibilities depend on social status, and those in which they result from "contractual" relationships among individuals. However, it should also be noted that Maine's work was originally intended as a repudiation of a concept that, for nearly two hundred years, had stood as a cornerstone of legal thought: the social contract. Maine principally objected to the concept "because of its artificial nature and its use in what he regarded as legal fictions."[5] Fortunately, Maine had recourse to his specialized knowledge of Roman law, which (assuming it was the "ultimate source [of] civilisation") he used to argue that society originates in the family and in kinship groups built upon the family, rather than in a social contract. Although initially uncontested, Maine's thesis gave way to vehement debates

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[2] Conley & O'Barr (1993:41), "Legal Anthropology Comes Home: A Brief History of the Ethnographic Study of Law," 27 Loyola Law Rev.
[3] As one historian of the discipline, Alan Barnard (2000:33), writes, "Anthropology as we know it began with law." See Alan Barnard (2000), History and Theory in Anthropology, (Cambridge Univ. Press).
[4] Ibid, 43.
[5] Barnard (2000:30).

about "the prehistory of the family and descent systems, and the relation of those systems to 'primitive promiscuity', the idea of 'private property', totemism, and the incest taboo." While Maine's evolutionary speculation would eventually be discredited, <u>Ancient Law</u> stirred debates which led directly to the development of kinship theory, a central focus of anthropological inquiry ever since.[6]

The fact that most of the key protagonists in early anthropology had professional training and experience as lawyers is significant for several reasons. Firstly, the pioneering debates among Maine's contemporaries — for example, between Lewis Henry Morgan, an American railroad entrepreneur, and his "arch-enemy," John Ferguson McLennan, a parliamentary draftsman for Scotland — over prehistoric social organization and descent structures reflected similar attention to nuance, logic, and style as two attorneys engaged in legal argument.[7] Secondly, the earliest recognizable works of anthropology frequently sought to discern the 'legal forces' that operated in "primitive" societies — even those which had no immediately apparent legal system, canonical rules, police force, or courts. The early literature's preoccupation with the heritage of "civilized legal society" seems so strong and distinct that some reviewers have observed that, "virtually every classic ethnography has 'Law' as a chapter heading."[8] This initial line of inquiry established law as a core cultural element that anthropologists should seek and study — a development in

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[6] Barnard, 30; *see also* Kuper, 1982 (describing Maine's influence on other evolutionary theorists); Kuper, 1988 (Maine's influence on kinship theory); Starr (1989:345), "The 'Invention' of Early Legal Ideas: Sir Henry Maine and the Perpetual Tutelage of Women" (correcting Maine's interpretation of Roman law as applied to women); Newman 1983: 6-12 (summarizing Maine's theory of the evolution of law).

[7] Barnard, 33. A number of articles explore parallels between the practice of anthropology and the practice of law (for example, movement in thought from "the particular" to "the general"; applying theoretical paradigms, etc.) *See generally*, Geertz, *Local Knowledge*; *also* Susan Bibler Coutin (2002), "Reconceptualizing Research: Ethnographic Fieldwork and Immigration Politics in Southern California" in *Practicing Ethnography in Law*; *see also* Stephan Fuchs and Steven Ward (1994), "What is Deconstruction, and Where and When Does it Take Place?: Making Facts in Science, Building Cases in Law," *American Sociological Review*, Vol. 59(4) pp. 481-500.

[8] Conley and O'Barr, (1993:44).

anthropological theory significant, if for nothing else, because it stood as a counterpoint to prevailing perceptions of indigenous peoples at the time (which may not have suggested 'law' as the most likely field of inquiry).[9]   Maine, Morgan, and other nineteenth century scholars' association with the branch of inquiry that would later become anthropology helped positioned law "at the forefront of substantive topics" for future research, and legitimized legal training as relevant to the work of an anthropologist.[10]

Beginnings of Modern Anthropology

Modern anthropology of law began with the publication of Bronislaw Malinowski's 1926 monograph <u>Crime and Custom in Savage Society</u>, the product of fieldwork conducted over two years in the Trobriand Islands.   Malinowski adopted a functionalist approach that came to define his work; more importantly, his approach, assumptions, and research questions established a contrast between the anthropology of law and socio-legal inquiry in other disciplines (setting aside, for example, the traditional preoccupation of legal studies with defining 'law' and characterizing its various forms):

> In looking for "law" and legal forces, we shall try merely to discover and analyze all the rules conceived and acted upon as binding obligations, to find out the nature of the binding forces, and to classify the rules according to the manner in which they are made valid. We shall see that by an inductive examination of facts, carried out without any preconceived idea or ready-made definition, we shall be enabled to arrive at a satisfactory classification of the norms and rules of a primitive community, at a clear distinction of primitive law from other forms of custom, and at a new, dynamic conception of the social organization of savages.[11]

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[9] On the other hand, at least two relevant factors suggest that, at the time, law would have been the most predictable area from which to begin any sustained study of "primitive societies": 1) the shared interests within social networks of leading intellectuals (law, politics, *Culture*), and 2) the colonial enterprises in which the early anthropologists' home countries were engaged.

[10] Barnard, ibid.

[11] Malinowski (1926:15-16). This, the last paragraph of the introduction to <u>Crime and Custom</u>, is the only explicit theoretical statement of its kind in the book.

Malinowski argued that Maine's evolutionary scheme rested on a "fundamental misunderstanding of the nature of governance and social control" in 'primitive' societies.[12] His ethnographic observations revolved around three main points: (1) Trobriand society was generally orderly; (2) this order was maintained not by "codes, courts, and constables,"[13] but rather through "a body of binding [reciprocal] obligations" whose enforcement was undergirded by economic reality: a "keen self-interest and watchful reckoning" and "rational appreciation of cause and effect"[14]; and (3) individuals frequently tested their social order through self-interested acts of deviance and resistance, demonstrating that Trobrianders were not "slaves to custom," as earlier theorists had characterized 'primitive' societies.[15]

Malinowski regarded law, essentially, as anything that produced and maintained social order; Crime and Custom's central project was to discern "what behavioral patterns control antisocial deviance."[16] In an effort to discern the socio-legal principles that governed Trobriand disputes, much of the book focuses on two "cases"; Llewellyn and

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[12] Conley and O'Barr (2002:46); Malinowski (1926:56). Specifically, Malinowski objected to the notion that "the individual is completely dominated by the group... that he obeys the commands of his community, its traditions, its public opinion, its decrees, with a slavish, fascinated, passive obedience" (pp. 3-4).

[13] Malinowski (1942:1248), "A New Instrument For The Interpretation of Law – Especially Primitive," *Yale Law Rev.* 51.

[14] Conley and O'Barr (1985:857); Malinowski (1926:27, 58). (See discussion of *wasi* – ritualized exchange of yams and fish in *Coral Gardens*).

[15] Strategic, creative acts of deviance and resistance included, for example, gossip and witchcraft — in Malinowski's view, "a conservative mechanism for discouraging promiscuity and excessive resource consumption." (Conley and O'Barr 2002:870)

[16] Malinowski drew criticism for employing vague and inconsistent definitions of the term 'law' throughout his career. Moore (1970:278) suggested that "'the conception of law that Malinowski propounded was so broad that it was virtually indistinguishable from the study of the obligatory aspect of all social relationships. It could almost be said that by its very breadth and blurriness of conception Malinowski's view made it difficult to separate out or define law as any special province of study. Law was not distinguished from social control in general."

Modern legal anthropologists, such as Conley and O'Barr, now tend to regard this less as a theoretical liability than as precedential wisdom: anthropology is best advised not to entangle itself in the 'bramble bush' question, "What is law?" (*See e.g.,* Karl N. Llewellyn, The Bramble Bush, [1930:3]. ["What these officials do about disputes is, to my mind, the law itself."]) *See also* Conley and O'Barr (2002), ("[Mal.] advanced the understanding of the definition of law by demonstrating that it was too complex to be worth arguing about. This is precisely what legal anthropology does today, constantly expanding the scope of its inquiries, but rarely pausing to worry about whether this phenomenon or that really counts as 'law.'")

Hoebel (1941) later adapted and refined this mode of analysis, "the case method," in their exploration of Cheyenne "law-ways."[17]

Karl Llewellyn, an American law professor and leader of the "Legal Realist" movement, and Adamson Hoebel, a young social anthropologist, elicited oral accounts of nineteenth-century disputes from Cheyenne elders. They hoped to develop substantive areas of Cheyenne law (or "law-ways") by closely analyzing "trouble-cases"[18] — "instances of hitch, dispute, grievance, [or] trouble" (p. 21) where individuals' deviant behavior strained the social fabric in such a way as to reveal (they expected) the Cheyenne's norms and procedures for handling disputes. The principal appeal of the case method for Llewellyn and Hoebel lay in its potential for facilitating a comparison between stated norms and actual behavior in Cheyenne society.[19]

In a chapter titled "Marriage and Sex," for example, the authors presented brief descriptions of several wife-absconding cases, from which they discerned six "principles" or "patterns of action" on the part of an aggrieved husband in response to "the violation of his marital rights":

> (1) "There is the basic and ideal norm according to which the husband made no move, but waited for the emissary, usually a tribal chief, to come from the aggressor bearing the pipe…"
> (2) The wronged husband may send a chief with a statement of his demands.
> (3-4) The aggrieved husband might steal or shoot a horse from the aggressor's herd.
> (5) "Rarely," the husband kills the absconded wife "without any attempt at legal settlement." However, "This must be regarded as illegal."
> (6) "The husband could demand the return of his wife."[20]

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[17] K. N. Llewellyn & E. Adamson Hoebel ([1941]1961), *The Cheyenne Way* (Norman: Univ. of Oklahoma Press).

[18] Llewellyn and Hoebel, [1941]1961:26.

[19] It is not coincidental that their approach (and its attendant assumptions) closely resembled the "case method" practiced in American law schools; moreover, the primary interest driving their research—the comparison of stated norms to actual behavior—reflects Llewellyn's investment in the Legal Realist movement then gaining popularity in American legal scholarship. ("The concern that evidently animates [*The Cheyenne Way*] is much more with the jurisprudential question of the nature of law than the anthropological goal of extending the ethnographic record." Conley and O'Barr, 2004: 187.)

[20] Llewellyn and Hoebel (1941:201-202)

Today, Llewellyn and Hoebel's findings invite reanalysis from a number of different perspectives; for example, the preceding conclusions all clearly rest on the premise that the husband was the central actor in each event. Reexamining the *The Cheyenne Way* seventy years later, Conley and O'Barr were

> not convinced that the principles that Llewellyn and Hoebel deduced flow inevitably from the case materials… If one relies only on the case material itself, no compelling pattern emerges. To the extent there is a guiding principle, it seems to be no more specific than "anything goes." As for legal rules or processes, their existence seems to depend on unreported source material or axiomatic assumptions… Where they saw a set of rules that circumscribed the behavior of the aggrieved man, we find an almost infinitely fluid situation that invites autonomy on the part of the disappointed woman. (202)

Conley and O'Barr further observed that, especially in the case of *The Cheyenne Way*, "the genius of the [case] method is revealed in our ability to reevaluate [the ethnographers'] interpretations."[21] Although Llewellyn and Hoebel's pioneering application of the case method yielded, in the end, some famously muddled conclusions about Cheyenne "law-ways" and "law-stuff," their work provided a methodological model now considered the standard research method in legal anthropology.[22]

Classic Studies and Rule-Based Approaches

Nader and Todd have observed that, in particular, legal anthropologists of Llewellyn and Hoebel's generation "have used the case method in the search for systematic aspects of procedural and substantive law, for uncovering important jural postulates, [and] for abstracting values important to a society."[23] Among the most significant studies published prior to the discipline's theoretical reorientation in the late 1960's were those by Schapera (1938), Hoebel (1954), Gluckman (1955, 1965), Bohannan

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[21] Id.
[22] Snyder (1981:143).
[23] Nader and Todd (1978:6), *The Disputing Process—Law in Ten Societies* (Columbia Univ. Press).

(1957), Fallers (1969), Pospisil (1958), and Gulliver (1963).[24] This generation of research may generally be noted for two fundamental characteristics best addressed separately. All but a few studies from this era shared in common (1) a primary focus on identifying identify societies' legal rules and basic jural postulates by drawing inferences from actual cases; and (2) the assumption that law, in the cultures studied, constitutes a discrete, bounded, semi-autonomous domain analogous to what had typically been found in Western societies.[25]

Schapera's "influential classic," *A Handbook of Tswana Law and Custom* (1938), compiled by commission of the Bechuanaland colonial administration, provided "a clear, precise recording of 'customary' rules," drawing on both idealized reconstructions of informants and accounts of actual contemporary disputes.[26] Hoebel's *The Law of Primitive Man* (1954) attempted to devise a semievolutionary sequence of societies' legal behavior based on a posited relationship between population density and the need for social control of "deviant behavior."[27] In 1955, Max Gluckman published the first ethnography of law based on the observation of actual cases in a non–Western society; *The Judicial Process Among the Barotse* focused principally on the nature of judicial reasoning among the Lozi, a "very litigious," partially state-integrated social group in Northern Rhodesia (now Zambia). Paul Bohannan's *Justice and Judgment among the Tiv* (1957) convincingly argued

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[24] Schapera ([1938] 1955), *A Handbook of Tswana Law and Custom* 2nd ed. (Oxford Univ. Press); Adamson E. Hoebel (1954), *The Law of Primitive Man* (Harvard Univ. Press); Max Gluckman ([1955] 1967), *The Judicial Process Among the Barotse of Northern Rhodesia* 2nd ed. (Manchester Univ. Press); Max Gluckman (1965), *The Ideas in Barotse Jurisprudence* (New Haven: Yale); Paul Bohannan (1957), *Justice and Judgment Among the Tiv* (Oxford Univ. Press); Leopold Pospisil (1958), *Kapauku Papuans and Their Law* (New Haven: Yale); Lloyd Fallers (1969), *Law Without Precedent: Legal Ideas in Action in the Courts of Colonial Busoga* (Univ. Chicago Press). Hayden (1984) additionally cites two studies as falling under the "rule-based paradigm" which I have not been able to review personally: John A. Noon (1949), *Law and Government of the Grand River Iroquois* (New York: Viking Fund); and R. F. Barton (1969), *Ifugao Law* (Berkeley: Univ. of Ca. Press).
[25] Conley & O'Barr (2004: 208).
[26] Moore (1992: 24); Snyder (1981:143)
[27] Snyder, id.; Collier (1975:135); Starr & Collier, (1987:367).

that cross-cultural comparisons based on Western understandings of law is inappropriate, if not impossible; his analysis further underscored the need to attend to the details of language in ethnographic context. Fallers' (1969) fieldwork among the Basoga examined how parties in publicly adjudicated disputes negotiate the "fit" between alleged facts and legal categories.[28] Gulliver's (1963, 1969) detailed studies of the Ndendeuli of Tanzania compared various "forms of out-of-court dispute settlement," and departed from the field's prevailing rule-based approaches by instead "emphasizing the importance of viewing disputes as part of more general social processes."[29] Pospisil (1958, 1967, 1971), following Weber and Hoebel, elaborated existing theories of legal pluralism, arguing that every society comprised a number of legal systems, each corresponding to a political sub-group, and often hierarchically arranged "according to the degrees of inclusiveness of the groups involved."[30] Pospisil further argued that "every functioning subgroup of a society regulates the relations of its members by its own legal system," but that each is "always dependent on the number of functioning subgroups in the society."[31] Pospisil's concept of law, representative of his contemporaries and derived from Western jurisprudence, made law dependent on authoritative social control. It has since become strongly disfavored among anthropologists.[32]

However these classic studies varied in their purpose, focus, and methods of gathering data, they shared in common (with the exception only of Malinowski and

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[28] Brenda Danet (1980:510), "Language in the Legal Process," *Law & Society Review*, Vol. 11.
[29] Snyder, ibid.; Gulliver (1963:71-73, 297). (For example, Gulliver examined the importance of cross-cutting kinship ties in creating neutral third-party mediators whose intervention promotes reconciliation.)
[30] Moore, (1979:137); Snyder, (1981:143); L. Pospisil (1971:118, 98-99), *The Anthropology of Law: A Comparative Theory* (New York: Harper & Row).
[31] Collier (1975:128); Snyder, id.; Pospisil (1971:113).
[32] Collier (1975:128); *also* Comaroff & Roberts (1981:6-7). Cf. Pospisil (1971:40): "[T]he form of law should be seen as principles abstracted from decisions of a group's authority"; *cf. also* Hoebel (1954:28): "A social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force by an individual or group possessing the socially recognized privilege of so acting." *See also* Hayden (1984:470 at fn7).

Gulliver), the tendency to view law as rules used in the settlement of cases.[33] The "law-as-rules" paradigm that had defined legal anthropology until the late 1960s was soon displaced by a reorientation of the field, led by Nader and others, towards the study of dispute processes. We will return to this subject momentarily.

The second assumption which lay behind legal anthropology's first generation of "classic" literature relates to the tendency to view law as a bounded, autonomous cultural field. Comaroff and Roberts (1981:6-12) identify the "rule-centered paradigm" with two assumptions they see in these studies: (1) "that the legal phenomena covered by such basic terms as 'judicial system', 'law', and 'legal institutions' are clearly circumscribed and readily comparable across cultural boundaries"; and (2) that "linguistic, conceptual, institutional categories of Anglo-American law may be used to account for those found in other systems." Most reviews note, however, that Comaroff and Roberts' critique of rule-based approaches misleadingly conflates two separate, but related issues: (1) law's presumed autonomy, as a bounded conceptual system, from wider social processes, and (2) the practice employed by many anthropologists of analogizing Western jurisprudential concepts to interpret non-Western dispute processes.[34] (Just [1992] points out: "Methodologically, this approach was associated with the analogizing application of Western legal concepts to non-Western societies, although in fact doing so was not inherent in a rule-centered approach.")

By the late 1960s, a number of anthropologists were calling into question the appropriateness of using Anglo-American-derived legal concepts to understand non-Western cultures; this controversy reached its apogee with the Gluckman–Bohannan

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[33] Hayden (1984); Just (1992).

[34] *See*, *e.g.*, Just (1992:374); *also* Hayden (1984:470); *also* Maxwell Owusu (1983:386), untitled review of *Rules and Processes*, *American Ethnologist*, Vol. 10(2) ("…are criticized a bit unfairly…").

[34] Conley and O'Barr, 1993:47.

controversy, an exchange which began in the revised prefaces of their respective books (both of which have now attained canonical status) and eventually spilled onto the pages of Laura Nader's (1969) influential collection of essays *Law and Culture in Society*.[35]

In his studies of Barotse judicial reasoning and legal process, Gluckman's analyses relied substantially on Western jurisprudence as, variously, an analytical model (*e.g.* the case method, among other things),[36] a source of terms and concepts,[37] and as the target of expansive comparative generalizations. Most memorably, Gluckman reported that the "reasonable man" standard found in Anglo-American tort law was central to Barotse jurisprudence, as well — a conclusion for which Gluckman received a great deal of criticism and derision. By contrast, Bohannan's analysis of dispute cases among the Tiv, an acephalous group of northern Nigeria, made extensive use of Tiv terms, which he was reluctant to translate based on an insistence "that Tiv institutions be understood in their own terms."[38] As his goal, Bohannan sought to represent the totality of the Tiv legal system — the substantive issues involved, as well as the procedures for adjudicating them — as understood and described by the Tiv themselves. He wrote of Gluckman's comparative approach: "I was convinced in 1957, and I still am, that filling Tiv data into a model of Western jurisprudence is squeezing parakeets into pigeonholes and not a way to go about ethnography."[39] Gluckman regarded Bohannan's commitment to close emic description and refusal to translate Tiv words as "overly cautious and an impediment to

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[35] Nader's volume was based on a 1966 conference held at Burg Wartenstein, Austria in which Gluckman and Bohannan both participated. In addition to a significant portion of Nader's introduction dedicated to exposition of the debate, the book also contains a full chapter of analysis by Moore.

[36] "I also took certain analyses of the Western judicial process (particularly Cardozo's) as a model from which to approach the study of the African judicial process." Gluckman in Nader (1969:373).

[37] "The very refinement of English jurisprudence makes it a better instrument for analysis…than are the languages of tribal law." Gluckman (1962:14) quoted in Gluckman (1969:352) (Nader volume).

[38] Bohannan (1989:xvi); Conley and O'Barr (2004:11).

[39] Bohannan (1989: vii); Conley and O'Barr, id.

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comparative analysis."[40]   A full recapitulation of the debate that unfolded is beyond the

scope of this essay, and it is significant that every reviewer, to date, has found the central

question regarding the validity of conceptual cross-cultural comparison to have been

sterile ground.[41]   If there is consensus today regarding this debate (described variously as

"notorious," "passionate," and "furious"),[42] it is that: (1) It was probably carried too far[43];

(2) it ended in a draw[44]; (3) emic representations are important; and (4) linguistic details

deserve careful attention.[45]   In subsequent decades, processualists would note that although

Gluckman and Bohannan disagreed as to the application of Western jurisprudential

concepts, both fundamentally accepted the Western view of law as rules used in the

settlement of cases, and tended to consider law as a system or conceptual framework,

rather than as a social process.[46]

The Process–Oriented Paradigm[47]

Several of Gluckman's students were critical of the approach used in his 1955 and

1965 work on the Barotse, arguing that it did not afford an opportunity to assess how, in

the cases he observed, the process of judicial reasoning — and in a different, substantive

sense, the rules mobilized therein — were informed by, and in turn, affected, the wider

social context of the Barotse legal system. Gluckman acknowledged this criticism (1973:

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[40] Max Gluckman, *Concepts in the Comparative Study of Tribal Law*, in <u>Law in Culture and Society</u> at 349. *See also* Conley and O'Barr (1993:50)

[41] Sterile, that is, relative to the particular issue they read into it. Starr and Collier (1989:20–21); Just (1992:386); Conley and O'Barr (1990:4-8); (1993:50-52); ([1998]2005: 98-104).

[42] F. von Benda-Beckmann (1979:14); Riles (2004:775), "Property as Legal Knowledge: Means and Ends," *JRAI*, Vol. 10(4); Hayden (1984:470).

[43] Roberts 1978: 4 (Counting it among "the most wasteful and debilitating quarrels within anthropology," and crediting it with the subdiscipline's decay for over a decade.)

[44] *Contra* Conley and O'Barr 2004:211 (Speaking for "most anthropologists today," they call it for Bohannan. The literature does not seem quite clear or unequivocal).

[45] Conley and O'Barr (1993:51).

[46] Hayden (1984:470); Snyder (1981:144).

[47] Just (374:fn1) notes that "'paradigm' is perhaps too strong a word for what might be better characterized as analytical and methodological styles or approaches." I agree. In this section, I identify important theoretical developments during legal anthropology's process-oriented era, illustrating along the way the diversity of approaches in this field.

372), and, late in his career, began but never finished (for lack of the necessary data) work on a project that examined the role of courts in Barotse life.[48] Had this projected book been completed, it likely would have been received well by the leading figures in post-1960s legal anthropology, who had successfully affected a theoretical reorientation of the field. 'Dispute processes', rather than rules, were now the focus of consideration, and anthropological inquiry became guided by such questions as: 'How are legal processes embedded within social relations?' and 'How are social relationships adjusted or transformed over the course of a dispute?'

The "process-oriented paradigm" attained preeminence following an influential review article by Nader (1965) that summarized previous studies and proposed directions for future research.[49] Nader emphasized the need to locate legal processes in their wider social context, and envisioned an anthropology of law that used 'disputes' as its operative concept, aiming "at both empirical and explanatory generalizations."[50]

Gulliver's (1969) widely accepted definition of 'dispute' as "the public assertion, usually through some standard procedures, of an initially dyadic disagreement"[51] inoculated the process-oriented paradigm against the theoretically burdensome issues that had begun to paralyze rule-based approaches, such as the role of Western jurisprudential

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[48] Gluckman (1973), *The Judicial Process*, 3rd ed.; Conley and O'Barr (2004:209); Hayden (1984:470)

[49] Nader (1965), "The Anthropological Study of Law," *American Anthropologist*, Vol. 67(6), Part 2: The Ethnography of Law, pp. 3-32.

[50] Nader (1965: 17-18). Specifically, with regard to social context, Nader wrote that "studies of law should be set in the general context of social control (although of course not equated with social control)," but adds in the same breath that, "we should consider the possibility that the range of functions of a legal system may vary cross-culturally."

[51] This definition is supplied by Gulliver, "Case Studies of Law in Non-Western Societies: Introduction" in Nader (1969: 14-15). Additionally, Gulliver offers the qualification that "usually" the assertion is made "through some standard procedures"; neither this nor the "public arena" requirement seem to prohibitively impair this definition's validity ....at least to Snyder (at fn 51).

concepts,[52] contested definitions of 'law', and the proper scope of study. Gulliver's definition also introduced

> a much broader view of what might constitute "legal" phenomena, treating conflict "as an endemic feature of social life," which [is] to be placed in a "total social context," thereby effecting "a shift *away* from judge- (and judgment-) oriented accounts…of dispute settlement." (Comaroff & Roberts 1981:13-14).[53]

The field's reorientation towards disputes, rather than the substantive study of rules and legal concepts, caused parallel shifts in focus "from social organization to processes" and "from groups to networks of individuals," consequentially reshaping the terms in which legal phenomena are understood:[54]

> [The 'dispute processes' approach] emphasizes the actions of parties in disputes just as much as those of negotiators or adjudicators, hence aims to map the perceptions of individual disputants and gives special attention to the cultural meanings and rationalisations of social action.[55]

The process-oriented paradigm encompasses two distinguishable (but not mutually exclusive) lines of inquiry.[56] The first, often referred to as 'dispute processing',[57] focused on the procedural forms by which disputes are handled. The second line of processualist inquiry was principally concerned with "social relationships in processes of conflict."[58]

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[52] It was thought that the "dispute paradigm" had an inherent "advantage" over rule-based approaches by virtue of the former's avoidance of factual distortion through the imposition of Western categories (Owusu 1983: 386). As scholars would later point out, however, the discipline probably reacted by shifting too far towards processualism; legal anthropology in the late 80s and 90s would validate the necessity of studying rules and norms as earlier anthropologists had insisted.

[53] Just (1992: 374), italics and citation in original.

[54] Snyder (1981:145)

[55] Id.

[56] In a general sense, one might say that the more expansive 'processes' approach developed out of the comparatively conservative 'processing' approach between roughly 1965 and 1975. More accurately, however, both lines of inquiry, rather than representing separate (but partially overlapping) phases or stages, can be read in the early studies of Nader, Abel, and Collier. The early emphasis on cross-comparable procedural forms foregrounded a concern with wider social processes & social structure. The two became separate lines of inquiry as researchers began to decouple procedural forms from social organization, and as studies of 'dispute processing' drifted away from anthropology, becoming a special topic of interest to sociolegal studies, ADR advocates, etc.

[57] This term was first used by Felstiner (1974: 63 at fn1) as a corrective to 'dispute settlement', the term previously preferred by Nader, et al., the connotations of which ran contrary to his "conviction that a significant amount of dispute processing is not intended to settle disputes." William Felstiner, "Influences of Social Organization on Dispute Processing," *Law & Society Review*, Vol. 9(1).

[58] Snyder (1981:146)

These studies viewed disputes as participating in or epiphenomenal of more general social processes which they sought to describe.[59] The 'dispute processes' perspective is distinguishable from 'dispute processing' in that anthropologists analyzing the latter (often using 'ideal types')[60] typically regarded procedural forms as social processes themselves; the mechanisms for handling a dispute were, it was assumed, intended to affect a certain outcome (*e.g.* order, harmony, etc.) through a standardized set of procedures ("[In this view,] the course of a dispute and the means by which an outcome is reached are often intimately connected.").[61]

All processualist studies were typically interested in such questions as the range of recognized disputes in a particular culture, how disputes are handled in and out of dispute-processing institutions, who brings what kinds of cases to which kinds of forums, and why.[62] As a basis for answering such questions, Nader proposed the following assumptions:

> (1) there is a limited range of dispute for any particular society…; (2) a limited number of formal procedures are used by human societies in the prevention of and/or settlement of grievances (e.g. courts, contests, ordeals…etc.); (3) there will be a choice in the number and modes of settlement (e.g. arbitration, mediation, compromise, adjudication…).[63]

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[59] 'Process' is a nebulous concept, and it is difficult to find an adequate definition that holds across different literatures within the anthropology of law. The following explanation is found in Vincent (1986: 101), "System and Process, 1974–1985," *Annual Review of Anthropology*, Vol. 15.:
> "Process" according to Moore, is used in at least three ways to describe 1. universal contexts of social contact (e.g. processes of competition and cooperation); 2. series of events that recur in certain institutional contexts (e.g. political, economic, educational processes); and 3. the kinds of circumstances that lead to certain results (e.g. the process of industrialization, urbanization, segmentation, stratification). All imply temporality, the movement of individuals, and change (72, p. 224).

[60] (e.g. Collier [2002:82], "Analyzing Witchcraft Beliefs" in Practicing Ethnography in Law, Starr & Goodale, eds.)

[61] Id.

[62] Hayden (1984:471).

[63] Nader (1965: 23).

Nader advocated for a coordinated effort at "wide-scale" "comparison of styles of dispute settlement" based on clusters of contrasting features.[64] It was hoped that this approach would "make systematic progress in data accumulation and theory building" and aid in developing classificatory typologies of dispute settlement.[65] The Berkeley Village Law Project, in which Nader and her students participated, published several studies towards this goal in the 1970s and early 80s.[66]

It is noteworthy, however, that by the end of the 1970s, 'processes' had replaced 'processing' as the leading subject of interest (except in Legal Studies); this reversal reflects, in Nader's view, a movement at the time among the social sciences away from positivism, which, it was thought, had "a sterilizing effect on meaningful understanding and discovery."[67] Another theoretical liability of the processing approach may have been its association with structural-functionalism and the purposivist assumption that dispute processes were necessarily designed for the maintenance of order notion of law.[68]

One of the most important developments among studies of dispute processes was the elevation of individual actions, strategies, choices, and perceptions related to disputing to analytic primacy. This trend relates to the contemporaneous suggestion (1966:2) by Roland Barth (put forth as a corrective to what was perceived as the major weakness of British structural-functionalism, *i.e.* "its inability to account for change except as social

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[64] Nader (1969: 90-91), "Styles of Court Procedure: To Make the Balance" in Nader (ed.); *also* Snyder (1981:148).

[65] Nader, id. at 90-91; *also* "Introduction," Nader (1969a:1); *also* Snyder (1981: 145). I should clarify that classificatory typologies, for Nader, were solely not ends in themselves (though a sort of circular logic does surface, now and then, in her argument for them), but one of "a variety of methods [that] ought to be explored" in the field's (then-) "early stage of development." Nader suggests that a coordinated effort such as she proposes may possibly improve "the quality of description" and help identify the "determinants or principles…that generate forms or styles of dispute settlement."

[66] *See generally,* Nader & Todd (1978), *The Disputing Process—Law in Ten Societies.*

[67] Laura Nader (1998:752), "Comments," *The American Journal of Comparative Law*, Vol. 46(4).

[68] *See* Collier 2002:79; Comaroff and Roberts 1981:248; *but see* Nader (1989) in Starr & Collier on the value of structural functionalism in understanding the Zapotec's "harmony ideology" of law as a response towards outside state/colonialist influences.

breakdown") that anthropologists focus on individual choices, and the constraints and incentives operating on them, as a way of understanding stability and change within societies.[69] Influenced by Barth's ideas as well as Nader's injunction "to focus [ ] on how litigants sought remedies for their problems,"[70] Collier's influential study of 'Zinacanteco law,'[71] was concerned with "defining the range of options open to litigants and…analyzing the constraints and incentives that channel the choices they make."[72] With this as her starting point, Collier's ethnography explored a broad range of disputing-related phenomena, along the way touching upon almost every major direction that research in legal anthropology would pursue during the 1970s. In addition to the (then) standard "Litigant Choice" analysis, Collier concentrated on "the conceptual and practical tools available to the Zinacantecos for fighting with one another," examining, for example, the words Zinacantecos used to talk about the disputing process, their witchcraft beliefs, and the types of actions interpreted as indicating aggression (*e.g.* slicing candles into pieces, shouting insults outside someone's home at night, or chasing them with a gun or machete).[73] Collier also looked into sources of conflict,[74] closely linking "the issues that Zinacantecos could fight about" with "the types of relationships involved."[75]

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[69] Collier (2002:78-79), citation in original.

[70] Id.

[71] A native group of west central Chiapas, Mexico.

[72] Jane F. Collier (1973:244), Law and Social Change in Zinacantan; also quoted in Snyder (1981:145 at n55).

[73] Collier 2002:79

[74] Interestingly, Snyder notes that Collier was among the very few anthropologists who were examining sources of conflict at the time. *See also* Levine (1961); *also* Beals and Siege (1966) cited in Snyder (1981:171, fn63). Collier would later expand the scope of this inquiry in *History & Power*, discussed below, in which she and others propose reenvisioning local disputes as both embedded in and created by larger conflicts involving "transnational processes," "historical circumstances," and the clashing interests of different groups along class, gender, etc., lines (inevitable, they agree, by the very existence of a legal system). (p. 6, 24)

[75] "I followed my Zincacanteco informants in assuming that if kinsmen fought, it must be over inheritance, if spouses fought, it must be that someone had not fulfilled their marital obligations; or if neighbors fought, it must be because their proximity brought them into conflict over such things as wandering animals, broken fences, or drunken insults." Collier, id.; *see also* Snyder 1981:fn63

Several other processualist studies brought attention to attitudes and patterns of action related to legal institutions and/or disputing by shifting the focus outside of formal settings. Spradley's ethnography of marginalized urban nomads in Seattle, for example, sought to analyze his subjects' perceptions of and experiences with the courts. Spradley argued that laws against public drunkenness create a "vicious cycle" of intoxication, conviction, relocation, and socialization with other "tramps" whose company and shared attitudes and behaviors (strategies for coping with arrest, sentencing, and incarceration) increase the likelihood of subsequent contact with the law.[76] In another study, June Starr found that a significant number of disputes in rural Turkey are handled through unmediated two- or three-party negotiation rather than through public confrontation.[77] Based on correlations between social rank and forms of settlement, Starr suggested that strategies for maintaining honor and competing over scarce resources were guided, among other principles, by the belief that "public confrontation…is the true forum of the powerless."[78]

Collier, Spradley, and Starr's work exemplified a new branch of inquiry that focused specifically on individuals involved in dispute processes and the social realities they inhabit.[79] This development is significant for several reasons. First, as a methodological matter, it greatly expanded the relevant scope of inquiry. Second, much of the field began to shift away from general ethnography (content in its general theoretical orientation), instead focusing on specific research questions drawn from "macro-sociological theory,"

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[76] Collier (1975:129-130); *also* James P. Spradley (1970), *You Owe Yourself a Drunk: An Ethnography of Urban Nomads*, Boston: Little Brown.
[77] Snyder (1981:147).
[78] Id.; June Starr ([1981]1997:129) "A Pre-law Stage in Rural Turkish Disputes Negotiations" in *Cross-Examinations,* Gulliver (ed.) by P. H. Gulliver
[79] *See also* Nader & Todd (1978), (examining law's role in social life, power relations in local context).

primarily Marxism.[80]   Third, and most importantly, this development prompted the

anthropology of law to begin considering issues of ideology, meaning production, and

elements of what would later be called 'legal consciousness'.   According to Hirsch and

Lazarus-Black (1994:4-5) the field's new "attention to the meaning and activity of

disputing illuminated cross-cultural variation in the micropolitics of legal processes and,

more generally, offered numerous examples of law's role in shaping social life and power

relations in local contexts."

Rules and Processes

It is significant that many of the 'process-oriented' studies acknowledged operating

under a conceptual framework in which law is viewed as a "normatively loaded, symbolic

language" "for conducting and resolving conflicts."[81]   This idea was first articulated by

Barkun:

> 'Law,' Barkun proposed, 'is that system of manipulable symbols that
> functions as a representation, as a model of social structure (Barkun
> 1968:92)   As a symbol system, law is a means of conceptualizing and
> managing the social environment.[82]

Comaroff and Roberts's breakthrough study of Tswana dispute processes

represents the definitive development of this idea.[83]   Taking as their premise the emerging

consensus among anthropologists that the distinction between "law process and social

process is nonexistent" (Nader and Yngvesson 1973:890), the authors integrated the study

of rules *and* processes in an effort to understand "the Tswana dispute process" within the

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[80] Snyder (1981:153). Legal anthropology was largely insulated from many of the major trends that took
hold in other areas of anthropology. No credible version of neo-evolutionism ever really caught on (the
exception, perhaps, is Collier, who flirted with the idea briefly [1975:133, 135], but disowned doing so in
[1987:367]). Similarly, Starr and Collier (1989:5) note that "the study of structuralism and symbolism" so
influential in anthropology of the 1960s and 70s "had little or no impact on the anthropology of law."
[81] Hayden (1984:469); Collier (2002:79)
[82] Collier, id., citation in original.
[83] Comaroff & Roberts (1981), *Rules & Processes: The Cultural Logic of Dispute in an African Context*, (Univ.
Chicago Press).

context of "the *total* fabric of the sociocultural system."[84] Comaroff and Roberts describe

the 'social field' at the center of their analysis as conditioned by a set of normative rules

which are simultaneously seen as governing behavior *and* as highly negotiable.[85] In order

to account for this apparent contradiction, they argue that "it is not enough to analyze the

form and content of Tswana disputes."[86] Instead, Comaroff and Roberts consider how

the Tswana use these rules in the negotiation of their social reality:

> It becomes necessary to account for the nature of Tswana ideology itself;
> for it is the latter that imparts meaning to the manner in which Tswana
> experience, and seek to contrive, their lived-in social universe and, a
> fortiori, the dispute process… [Others have recently demonstrated a
> broadly similar point that] political interaction consists primarily in the
> construction and management of meaning and value with reference to
> culturally inscribed categories… Value and meaning are negotiated, and
> this negotiation is predicated on shared symbolic categories and ideological
> assumptions…The latter [however] become analytically comprehensible
> only by virtue of their relationship to the constitution of the sociocultural
> order at large. If it is to be adequately explained, therefore, the dispute
> process requires finally to be located within the logic of this encompassing
> order.[87]

By now, the astute reader will probably have sensed that Comaroff and Roberts,

leaning heavily into explanations grounded in a deeper, "constitutive order," are building

towards an argument for dismantling legal anthropology as a separate, discrete field of

study. The authors argue that, unlike the internally consistent, hierarchically-organized

systems of rules thought to exist in Western legal orders, the body of rules found in

Tswana society is "an undifferentiated repertoire, ranging from standards of polite

behavior to rules whose breach is taken very seriously"; the norms relevant to dispute-

settlement processes "are never distinguished or segregated," as thought to be the case

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[84] Comaroff & Roberts (1981:216), emphasis in original; Nader and Yngvesson (1973:890), "On Studying
the Ethnography of Law and Its Consequences," in J. Honigmann *Handbook of Social and Cultural
Anthropology* (Chicago: Rand McNally), quoted in Comaroff & Roberts at 5.
[85] Comaroff & Roberts (1981): 'social field' at 31, 64; "regularity…" at 19;
[86] Id. at 20.
[87] Comaroff & Roberts (1981:20).

elsewhere. [88]   Moreover, their analysis found a dialectical relationship between Tswana norms and social processes, leading the authors to conclude that "law as a determinative set of rules may not be found in any culture."[89]

To illustrate how this "undifferentiated repertoire" operates in social context, Comaroff and Roberts examine types of cases that revolve around disputants' rival and contradictory invocation of marriage and status norms. The Tswana "express a preference for, and practice, all forms of cousin union"; "the conflation and confusion of relationships that flows" from such arrangements often positions a given person such that she may be able to reasonably advance a rule-based claim as "one of several different categories of kin."[90]   The Tswana tend to view a relationship as 'marriage' "when it is recognized as such";[91] no definitive, deductively-applicable formulation exists of the requisite elements or events in the 'marriage process' (*e.g.* uxorilocal residence, *bogadi* [bridewealth] payments, etc.).[92]   Although normative rules may guide social action, the "specific value of most norms is meaningfully derived only in terms of the situation in which they are invoked."[93]   Tswana disputants and judges accomplish this each through their efforts to construct what Comaroff and Roberts call a 'paradigm of argument' — in

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[88] Id., 9-10.

[89] Comaroff and Roberts 1981:28

[90] Comaroff & Roberts 30; 259; Hayden 473.

[91] 150; See also pp. 140: "The cultural logic that underpins conjugal formation…seems to stress the perpetuation of ambiguity rather than its elimination. This ambiguity is expressed in the tendency to *avoid* imposing public definition of ongoing relationships, a tendency that is sustained by relevant (everyday) terminological usage." (emphasis in original) It is this 'cultural logic' that Comaroff and Roberts see revealed, in a rare instance, through the dispute process.

[92] Id. at 140. Comaroff & Roberts regard the individual elements as *behavior* that is rule-based, but which cannot together be taken to embody a substantive norm applicable in other cases.

[93] Comaroff & Roberts (1981:79) They further add that the value of most norms "can be derived only in relation to either contingent or opposing norms."

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other words, "a coherent picture" of the "relevant events and actions" in a dispute's history, formulated "*in terms of one or more implicit or explicit normative referents.*"[94]

This previous point, I believe, represents a significant departure from the previous ways that legal anthropology had understood and analyzed essentially identical phenomena. Comaroff and Roberts' approach was, at the time, unique "in the prominence it assign[ed] to meaning construction and interpretation in analysis of disputes."[95] More specifically, their reformulation of rule- and process-based approaches called attention to the ways in which disputants creatively deployed "resources of meaning" in the construction of case narratives. The authors found that participants' "express invocation of norms…[was] associated with efforts to assert control over the paradigm of argument." Disputants—and later, the judge—would deliver their 'construction' of the relevant evidence; each account was oriented towards a different set of norms, thereby attempting to convey a different impression of the facts. In such cases, disputants' speech became a critical part of the event and its outcome:

> [T]he significance of rhetorical factors is very great. It is contingent on the Tswana concept of veracity, which derives from the assumption that social reality exists primarily in the manner in which it is constructed. There is no concrete set of social facts "out there" against which the truth value of words or propositions can be readily measured; veracity exists rather in the extent to which events and interactions are persuasively construed and coherently interpreted.[96]

This is what Comaroff and Roberts mean when they remark briefly—and with little further elaboration—that disputants' norm-oriented constructions were "elements of a rhetorical order rather than clauses in a legal code."[97] The language of Tswana disputing

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[94] Comaroff & Roberts (1981:84), emphasis in original.

[95] Carter Bentley (1984:642), "Hermeneutics and World Construction in Maranao Disputing," 11 *American Ethnologist*, quoted in Just (1992:375).

[96] Comaroff and Roberts (1981:238).

[97] Id. at 151. This comment is made in support of the point that the Tswana's "shared conception of conjugal formation," for example, is not one that can be "applied with deductive exactitude." Tswana unions are "not readily classified or easily defined," but characterizable generally by "the avoidance of

was closely linked to a "deeper cultural logic" which underlay the invocation, manipulation, and application of norms.[98]   Elizabeth Mertz most succinctly summarized the significance of this discovered "logic":

> The Tswana see all social facts as socially constructed products of ongoing human speech interaction.   Rule and process cannot be opposed in characterizing the Tswana system, for rule and process are inextricably interwoven in Tswana disputes.   Rather than emphasizing the prerequisite, static aspects of law, the Tswana put the most weight on creative, contextualized interaction.[99]

Broadly speaking, I see Comaroff and Roberts' most enduring influence on the anthropology of law in the field's current concern with how ideology and meaning operate in legal contexts.[100]   Snyder, writing the same year as *Rules and Processes* was published, interpreted their argument as advocating "greater attention to factors intrinsic to the process of argument[,] as distinct from extrinsic factors such as political organisation or institutional structure."[101]   This is an apt characterization of the sets of issues that have

definition and the perpetuation of ambiguity," (as evidenced by the absence of formalized bridewealth negotiations, ceremonies, etc.). Further, the terms the Tswana use to refer to such unions carry an "endemic ambiguity" that has "a specific semantic value; their capacity to obscure distinctions is closely liked to the fact that…the status of many of them is open to negotiation for much of their relationship." (134) The authors elaborate on the referent of this ambiguity in a later chapter: "the ambiguities surrounding a definition refer to the management of existing relations." (151)

In Tswana life, the dispute process is one of only two circumstances in which the status of a relationship requires specific definition (the other occurs quite rarely) (p.140). As described earlier, the Tswana's conceptions of the dispute process (as "rule-governed, yet negotiable, normatively constrained and yet pragmatically individualistic") are deeply involved with, and place a great deal of importance on, language. The Tswana's conception(s) of the interaction which takes place in "the dispute process," according to Comaroff and Roberts, "instantiates the ideological character encompassing the universe itself." (239-40)

On this basis, I would argue that the concept of 'language ideology' can account for an important part of what Comaroff & Roberts were observing, both in the immediate interaction of the *kgotla* and in Tswana life generally. To my knowledge, nobody has yet linked the two (although Mertz 1988:645-6 came close). Such an analysis would have nearly as great (perhaps more) explanatory power, while placing on the reader vastly smaller demands (both in comprehension and credibility) than Comaroff and Roberts. Regretfully, I do not have the time or space in this essay to fully explore the idea.

[98] Snyder 1981:154
[99] Mertz (1988:646)
[100] Geertz, too, brought an original 'meaning-centered' approach to the anthropology of law. Unlike Comaroff and Roberts, however, his work made no effort to examine how law actually operated in social context.
[101] Snyder also characterized it as a shift from studying the "transformation of social relations" and "the issues at stake as a dispute moved from a private context to the public arena" to instead bringing attention to "the role of language in these processes of situational transformation." Snyder 154; *See also* Comaroff and Roberts at 237, 261.

shifted in our gaze as legal anthropology turns away from 'dispute processing' and towards approaches concerned with language, power, and history.[102]

We should keep in mind that although Comaroff and Roberts did bring greater attention to "factors intrinsic to the process of argument," this was merely tangential to their concern with identifying the "cultural logic" of the Tswana dispute process; with locating the "systemic source" that "generated" the negotiated articulation of the Tswana's normative repertoire with social reality (but which had been obscured by the false dichotomy between rules and processes).[103]   I am not aware of any other legal anthropologists who have attempted in other areas to elucidate the 'total encompassing logic' of the 'sociocultural universe'; most research today flies considerably lower to the ground.

Although it would be a stretch to argue that recent work in legal anthropology directly relates to the sort of analysis Comaroff and Roberts practiced, it has benefited from several developments for which they may be credited. First, their work helped clear a number of theoretical impasses, most notably the troublesome dichotomy between rule and process paradigms.[104] Comaroff and Roberts' emphasis on the contextualization of disputing also had the effect of discouraging further analyses of litigant choice, as this approach offered little possibility of illuminating individuals' processes of meaning

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[102] I wonder, however, whether the contrast between "intrinsic" and "extrinsic" (originally drawn by Comaroff and Roberts, id.) could potentially be reifying false distinctions. Might political economy, for example, be as "intrinsic to the process of argument" as language or kinship ideologies?

[103] Comaroff and Roberts, (1981:247-248).

[104] I should note that prior to Comaroff and Roberts, work by Moore (1969, 1970, 1978) had actually made substantial progress towards integrating the rule and process paradigms. Indeed, both Hayden and Just intimate that the Comaroff and Roberts somewhat overstate the gaps and incompatibilities between the two "paradigms," and that greater consideration and acknowledgement of Moore's work was due than given. Moore studied the transformation of Chagga legal and political ideas and practices during colonial rule. Her analyses did not involve actual cases until (1986).

construction or the operant "total encompassing logic" of their cultural system.[105] Indeed, Comaroff and Roberts effectively argued that although processualist approaches had helped amass a great amount of data on local procedures for handling disputes, the dispute paradigm also prevented legal anthropology from joining the "theory-building 'part of' social anthropology."[106] To this end, they gestured instead towards the promising study of sociocultural structures of thought and action "embedded in the practical constitution of everyday life," such as they had discovered among the Tswana.[107]

In a footnote to the conclusion of *Rules and Processes*, Comaroff and Roberts declare that "the examination of rhetorical and speech forms is fundamental to the analysis of the dispute process." (274) Although the authors characterize this as "a central assumption of [their] account," Comaroff and Roberts do not devote any particular effort or attention to linguistic analysis (although several of their chapters include transcripts of dispute proceedings). Rather than a "central assumption," then, I read this as a conclusory pronouncement drawn from their insistence on a particular view of disputing: that in "the context of confrontation—when persons negotiate their social universe and enter discourse about it—the character of that system is revealed."[108]

This point was elaborated by Merry (1990), who introduced the concept of 'legal consciousness' in her ethnography of working-class litigants in Massachusetts courts. Merry describes 'consciousness' as "the way people conceive of the 'natural' and normal way of doing things, their habitual patterns of talk and action, and their commonsense

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[105] Comaroff and Roberts (1981:32); *also* Merry (1992:360); *also* Just (1992:375).

[106] Mertz (1991:178), review of *History & Power*, Starr & Collier eds., *American Ethnologist* Vol.18(1), quoting Starr & Collier at 6; *see also* Comaroff and Roberts (1981:15, 16) (referring to the state that the dispute paradigm had left legal anthropology in as "the theoretical desert.")

[107] Jean Comaroff (1985:5) quoted in Merry (1990:5).

[108] Comaroff and Roberts (1981:349). 'Conclusory' is defined as "expressing a factual inference without expressing the fundamental facts on which the inference is based. The word often describes evidence that is not specific enough to be competent to prove what it addresses." Robert Shuy quoted in Language Log, "Conclusive = good; Conclusory = bad," April 15, 2007.

understanding of the world"; 'consciousness' is expressed in both the way people speak "and in the content of what they say."[109]

Merry's approach combined traditional methods of dispute analysis (examining the transformation of conflicts and relationships over time, largely from litigants' perspectives) with analysis of the ideologies created, reproduced, and contested in the process. Merry viewed law itself

> as an ideology, as a set of symbols which are subject to various kinds of interpretation and manipulation. From this perspective, disputing is a process of meaning making or, more precisely, a contest over meanings in which the law provides one possible set of meanings… The focus on dispute processes is attentive to social interactions and to **the way the social world is revealed in moments of fight**. The focus on ideology foregrounds meaning and the power inherent in establishing systems of meaning. (pp. 6-7, emphasis added; *cf*: Comaroff and Roberts at 349.)

Ideology manifests itself in talk. Following Nader's (1965:24) injunction to attend to the "wrangling" in disputes ("the argumentative forms, stylistic devices, and other communicative resources upon which disputants and third parties rely in furthering their own interests or in attempting to resolve the conflict"), Merry's approach highlighted the various discourses (in Foucault's sense of the term) and attendant ideologies that operate in legal contexts. What this analysis sought to make visible was not a "deeper, constitutive order" of the sort posited by Comaroff and Roberts, but rather the discourse-level processes through which meanings are contested and imposed, consciousness is constituted, authority constructed, hegemonies reproduced. Although Greenhouse and others had previously developed analyses of ideology in law, these approaches left ideology as a hermeneutic abstraction—a composite, for example, of shared religious beliefs and

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[109] Merry 1990:5; Comaroff and Comaroff (1987) cited in Merry, id.

aggregate litigant choices (or in some cultures, avoidance of the legal system entirely).[110]

Merry's work focused on ideology as it was operationalized, bringing into focus "the

processes by which meanings are linked to actions."[111] As Just points out, this approach

neutralized objections raised by Comaroff and Roberts, et al., to the anthropology of law's

continued existence as a discrete field of study; reifying or "isolating the legal" was simply

no longer a relevant problem. Most importantly, however, Merry's approach was among

the first to link the study of disputing with a broader social vision of the role of language.

We will explore others in the following section.

LAW AND LANGUAGE

In the previous section, we examined legal anthropology's various theoretical

orientations through different eras and reviewed the leading works in the field prior its

'linguistic turn' in the early 1990s. I have devoted particular attention to the

development—and subsequent synthesis—of the rules and process paradigms in an effort

to explain the recent convergence on language as a central area of interest in legal

anthropology. To my knowledge, no published reviews have yet made a concerted effort

to trace the relationship between legal anthropology's methodological and theoretical

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[110] *See e.g.* Greenhouse (1988, 1992). Moore persuasively argues that law cannot be understood by its cultural or ideological basis alone; it must be considered within the system of action that gives it context:

> To abstract legal ideas from the operating community in which they are "used" generates the kind of categorical and semantic analysis recently produced by Geertz (1983:167). That kind of approach may tell us about ideological forms, but such "linguistic" or "literary" analyses of the conceptual elements in a legal order do not take one very far in understanding what people actually do on the ground or why they do it at particular times and places. I agree…that it is essential to know in what terms people think about basic moral and legal issues. Yet…presenting the "traditional" categories of legal discussion without the context of discourse offers statements without speakers, ideas without their occasions, concepts outside history. Moore, "History and the Redefinition of Custom on Kilimanjaro," in Starr & Collier (1989:279).

[111] Just (1992:407).

development prior to the mid-1980s and the field's sustained interest in language during the last two decades.[112]

I would argue that Comaroff and Roberts' novel focus on meaning construction in the immediate context of a dispute and its relationship to ways people understand and experience their social reality helped actively encourage future research in legal anthropology to adopt language as a central area of interest. The sea-change that has reshaped the anthropology of law over the last twenty years is, I believe, attributable to parallel developments in both legal and linguistic anthropology, rather than a movement *sui generis* within either field. Legal anthropologists today study language, rather than substantive rules or general social processes, because, as the convergence of these perspectives has led us to realize, linguistic interaction is *itself* "the process whereby cultural understandings are enacted, created, and transformed in interaction with social structure."[113]

In the conclusion to an influential 1994 review article, Elizabeth Mertz announced:

> There is an exciting convergence among a number of disciplines on the role of legal language as socially creative and constitutive in the struggle over power in and through law. Anthropological linguists have developed a framework that permits detailed consideration of the contextual structuring of language to be linked with analysis of wider social change and reproduction. Legal anthropologists and critical legal theorists have outlined the ways in which law serves as a site for struggle and imposition of hegemony. Legal theorists focusing sensitively on language from critical race theory, feminist, and deconstructionist perspectives add a dynamic, daring, and vivid understanding of the impact of legal language in those struggles. (447)

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[112] It strikes me as genuinely odd that within the growing (and arguably now dominant) body of scholarship on law and language, none of the authors have made an extended effort to ground their work in (or even position themselves with reference to) previous prevailing paradigms within legal anthropology. Stranger still, nobody, to my knowledge, has yet pointed out the absence of explicit connections drawn in the literature. (The extent to which Conley and O'Barr, for example, relate their work in discourse analysis to "classic" legal anthropology consists of a standard five-paragraph passage reproduced in (1990:4-5), (1993:49-50), and ([1998]2005: 99-100) that gives a brief exposition of the Gluckman-Bohannan controversy, then critiques the latter's method of reporting speech by way of contrast with their own, more nuanced analysis.)

[113] Mertz 1994:423

In a set of influential review essays, (1992, 1994) Mertz outlined a general theoretical framework (constructed largely around Silverstein's work in metapragmatics) by which to assess the diverse assortment of previous research on legal language,[114] as well as to guide the future application of linguistic anthropology to the study of law. Mertz's exposition of this framework remains authoritative and sound; subsequent efforts within the field to develop the concepts centrally involved seem only to have enhanced its value.[115] The following section, then, reflects—though not exclusively—distinctions drawn on the basis of her organizing framework for the literature.

Meta-Pragmatics and Language Ideologies

In recent years, Michael Silverstein and other anthropological linguists have developed a new approach to conceptualizing the structure and function of language. This perspective reverses traditional ideas which emphasize the semantic or "referential" aspects of language, proposing instead that "it is the social and expressive function of language that orders and grounds its ability to convey semantic information."[116] Silverstein's work has demonstrated, for example,

> the many ways that the social and expressive functions of language—the contexts of culture and social relations, or prior texts and immediately surrounding language, of specific speech situations and uses—are actually pervasive in linguistic structure. Grammatical structure is at every point responsive to the fact that it is a system created in use, for speaking, for carrying on social relationships and constituting cultures.[117]

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[114] This framework indexed the body of ideas then emerging from work in metalinguistics, and organized the relevant 'law and language' literature according each study's awareness/application of (or relevance/attention to) the role of linguistic creativity and contextualization.

[115] *See e.g.*, Susan U. Philips (1998b), "Language Ideologies in Institutions of Power: A Commentary," in *Language Ideologies: Practice and Theory*, Bambi B. Schieffelin, Paul V. Kroskrity, Kathryn Ann Woolard, eds., (Oxford: New York). If we are interested in looking for general indicators of the health of this field (as it seems legal anthropologists have always been—obsessively), it may be significant that Mertz has since 1992 consistently described the emerging body of scholarship on law and metalinguistics as "exciting" and offering great potential. (*See also* 1994, 2003, 2007)

[116] Mertz 1992: 420

[117] Mertz 2007: 18

In a similar manner as legal ideologies and systems of practice have been shown to be conditioned by social process,[118] recent developments in anthropological linguistics have demonstrated the ways in which language structure, meaning, and function are "always responsive to social forces," with issues of power "implicated at every level of contextual influence."[119]

A more detailed exposition of the mechanics behind metapragmatic analysis is beyond the scope of this essay (more appropriately discussed in Curran 2007, forthcoming). It should suffice, for the purposes of this discussion, to say that work in this field considers the ways in which ideologies (which may participate in wider social processes) play an active role in shaping the structure of language (Silverstein 1979:233); at the same time, such ideologies are conditioned by linguistic structure and practice (Woolard & Schieffelin 1994:70; Silverstein 1985, Mertz & Weissbourd 1985a,b).

Work on legal language is increasingly beginning to bring attention to the role of linguistic ideologies in shaping outcomes and understandings of dispute processes (Conley and O'Barr 2005: 249; Haviland 2003, Richland 2005); mediating legal ideologies (Mertz & Weissbourd 1985a, 1985b); affecting or inhibiting social change (Matoesian 2001), forming identities (Hirsch 1998), epistemologies (Mertz 1994: 436,446; Woolard & Schieffelin 1994:56), and interpretive perspectives (Mertz 1996); and even participating in the constitution of the legal system itself (Mertz 2007; Curran 2007; Philips 2000). What, then, are linguistic ideologies? Woolard and Schieffelin offer the following definitions:

> Linguistic/language ideologies have been defined as "sets of beliefs about language articulated by users as a rationalization or justification of

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[118] Weissbourd and Mertz 1985:656 (persuasively arguing "the need for added sensitivity to the fundamental creative role of social process, which forges the link between legal rules and events.")

[119] Mertz 1992:420, 423. ("Because it is in use that the system of language is created, the backbone of language structure is that part which is responsive to social contexts (see also Kurylowicz 1972)." [citation in original])

perceived language structure and use"…with a greater social emphasis as "self-evident ideas and objectives a group holds concerning roles of language in the social experiences of members as they contribute to the expression of the group"…and "the cultural system of ideas about social and linguistic relationships, together with their loading of moral and political interests"…and most broadly as "shared bodies of commonsense notions about the nature of language in the world."[120]

Language ideologies are often visible in explicit form when we look at metapragmatic discourse ("talk about talk"; language "pointing to itself as it is used").[121] They also operate in more subtle ways, as when, for example, "a set of meta-level linguistic features indicates what kind of speech is occurring (or what ought to occur)."[122] Linguistic forms, discourse conventions, and "global structures"[123] provide "contextualization cues" that signal different genre-specific ways of framing or interpreting linguistic interaction and the social realities created thereby.[124]

In the following section, I illustrate the explanatory value of the concept of 'language ideology'—and work in metapragmatics, generally—for language and law research. I begin by tracing its development from ideas found in early language and law studies by Conley and O'Barr (among others) to the concept's more recent applications by Hirsch, Matoesian, Mertz. These recent studies have employed the concept of language ideology to account for linguistic behavior in legal contexts, as well as for their relationship to broader social phenomena (for example, linking together "the details of pragmatic structure with the content of legal discourse and with broader socioeconomic considerations." Mertz 1994: 444) A subject that has received less attention, however, is

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[120] Woolard and Schieffelin (1994:57), "Language Ideology," *Annual Review of Anthropology*, Vol. 23 (citations omitted).
[121] Mertz 2007:20.
[122] Mertz 1998:151; S*ee also* Silverstein 1979, 1993.
[123] "*Global structure* refers to the idea that a genre of discourse involves an abstract schema or script entailing a predictable sequence of topics or smaller discourse units that, when adhered to, allow for recognition of speech as constituting a particular form of talk." Philips (1998a: 11).
[124] Gumpertz 1982:131. "How we conceive of the details of speaking is a central part of the [contextual –JC] structuring of everyday discourse." (Mertz 2007: 20-21).

how law, its habits of thought and action, legal doctrines and practice, are themselves shaped by and responsive to linguistic ideologies. I suggest that a promising avenue for future research is the role of language ideologies in mediating, shaping, or constituting legal ideologies and systems of practice.

Outline of Themes in Legal-Linguistic Anthropology

Mertz's 1994 review essay identified four questions that represented the various areas of inquiry then being addressed by studies of language and law. I quote them here to convey a general impression of the orienting themes in the literature, rather than as a prelude to an effort at systematically re-addressing them. At the time these questions were formulated by Mertz, they represented overlapping but partially separate fields of inquiry; I should note that any boundaries which existed at the time seem to have been all but erased by work in the thirteen years since:

1. How do systematic aspects of language structure and use impact and mediate the social conflicts with which (legal) institutions deal?
2. How are both imposition of hegemony and moments of resistance made possible in, through, and by (legal) language?
3. In a related vein, how do we understand the complex and nondeterminist embodiment of social epistemologies in (legal) language?
4. What is the role of ideology and meta-language in the (legal) institutional regimentation and sedimentation of language—and in the linguistic regimentation and sedimentation of (legal) institutions?[125]

Language Structure and Social Conflict:

The first question (how "language structure and use impact and mediate [ ] social conflicts" in legal institutions) is associated most closely with classic approaches to the study of dispute language. This question has been approached at two different "levels," the first addressing "the way in which language operates situationally within legal

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[125] Mertz (1994: 442).

contexts," and the second focused on "the broader social and cultural levels at which legal language works."[126]   These categories correspond closely with the distinction (elaborated by Brenneis [1988]) between the "'process–oriented' tradition" (a combination of ethnomethodology and conversation analysis that examines, for example, turn–taking or patterns of question and response in order to reveal the organization of talk—a critical part of an ongoing process, according to this perspective, in which participants negotiate and produce social structure)[127] and a second "perspective [that] draws primarily upon the ethnography of speaking" (in which "nonlinguistic variables [such] as the relative status or powerlessness of participants are seen as critically relevant in shaping talk"; and concerned particularly with "the resources and constraints associated with various contexts and genres").[128]

The first variety of studies, influenced by the ethno/CA tradition(s), examined specific details of language use in institutional settings, and concentrated, for example, on "rules for the organization of talk" and "the linguistic forms that differentiated bureaucrats' and clients' contributions."[129]   This perspective highlighted the ways in which the power to control the structure and form of talk—ascribed both to people in positions of power and to legal language itself—was associated or equated with "control over the definition of reality in the bureaucratic setting and with [the] imposition of a bureaucracy-specific interpretive perspective."[130]

Conley and O'Barr (1985) illustrated the problems that lay litigants in small claims courts frequently encounter when they attempt to use narrative conventions and strategies

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[126] Id. at 445.
[127] Brenneis 1988:228; s*ee also* Philips, Conley and O'Barr.
[128] Id.; Drew 1990 in Levi; Maynard 1988, also Maynard 1990 in Levi; Hayden 1987; "how participants in these interactions contest, manage, understand, and create social and legal realities in language."
[129] Philips 1998b:211–212.
[130] Philips 1998b:212; Mertz 1994:445.

common in everyday speech. They found that rules of evidence and procedure constrained or otherwise frustrated witnesses as they tried to construct, often for the first time, stories of their dispute; these interventions had the effect of changing the way litigants "conceptualize their problems," "how they define their objectives in coming to small claims court," and their overall satisfaction with the legal process.[131]

This perspective and methodology is reflected also in Matoesian's ethno/CA analyses (1995, 2001) of the William Kennedy Smith rape trial (discussed below): "My objective is to show how the social organization of talk—the procedures of talk in sequential context—mediates between legal statutes and trial practice."[132]

Power & Hegemony:

Merry's (1990) ethnography of working-class Americans attempted to map, in a similar manner as earlier studies, people's perceptions and understandings of the legal system through their patterns of court use; her account also identified a crucial link between lay people's 'legal consciousness' and the role of language in reproducing state hegemony. Central to her analysis was the concept of "discourse," conceived as "systematic, impersonal modes of talking which govern the production of culture" (101). Merry viewed 'discourse' as both "the medium through which disputants negotiate the meaning of problems" and as an instrument for maintaining power—coidentical, in a sense, with law itself.[133] This suggests a general affiliation with the process-oriented approach/ethnography-of-speaking tradition described earlier in the sense that her analysis

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[131] Conley and O'Barr (1985: 672, 698). In other work (1990:171), Conley and O'Barr seem to place such weight on the creativity involved in constructing these narratives that the authors, straining credibility, seem suggest litigants' stories cannot, in any way, be determined prior to the moment of their telling: "A 'story' does not exist fully developed on its own, but only emerges through a collaboration between the teller and a particular audience." S*ee also* Mertz 1992:433

[132] Greg Matoesian (1995:670), "Language, Law, and Society: Policy Implications of the Kennedy Smith Rape Trial," *Law & Society Review*, Vol. 29(4).

[133] Hirsch (1992: 852); Merry (1990:192, 215)

(1) focuses on "semantic and discourse-level phenomena"; (2) views the language of disputing as socially constitutive; and (3) emphasizes the ways that authoritative discourse "creates and reinforces power relationships, validating only some stories, hearing only some voices."[134]

In the institutional settings she observed, Merry identified three distinct discourses (legal, moral, and therapeutic) which framed the discussion in non-institutionally (and non-ideologically) neutral ways. These discourses also participated in shaping the immediate dynamics of interaction; court personel would frequently "shift the discourse of disputes from legal to moral or therapeutic," and through this exercise of power "leave disputants puzzled and frustrated."[135] However, Merry observed that some individuals eventually learn to manipulate the discourses of law to their advantage; their legal consciousness begins to change in the process, and these litigants are more likely to turn to and depend on the courts to resolve future conflicts.

Conley and O'Barr (1990) give us a more detailed picture of linguistic interaction in courtroom settings; their approach to studying trial proceedings in American small claims courts is imprecisely situated, but influenced heavily by discourse analysis, which they use to (1) address an essentially similar issue as Merry ("the ways in which ordinary people relate to the American legal system"),[136] and (2) examine how power relationships are enacted, challenged, etc. in discourse practices.[137] Both Merry and Conley and O'Barr

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[134] Mertz (1992: 446).

[135] Hirsch, id., at 853.

[136] Conley and O'Barr 1990: ix; *Cf*: "…the ways people who bring personal problems to the courts think about and understand law and the ways people who work in the courts deal with their problems." Merry 1990: ix.

[137] In the only full-frontal attack on their work that I know of, Dingwall (2000) criticizes Conley and O'Barr for their vague and occasionally contradictory theoretical/methodological commitments. He further argues that Conley and O'Barr's findings lack persuasive force because they fail to justify their conclusions through rigorous analysis and argumentation of the data (an objection satisfied only by the orthodox CA approach he advocates). Mertz (2007: 218, 272 n43) makes room for a middle path between, one hand, CA approaches

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share in common an important finding: that people's knowledge of and ideas about discourse practices are a critical part of the way they relate to the legal system. The authors identify two contrasting "orientations" to the legal system (and to rights, responsibilities, conflict, and "the world," generally) that people exhibit in the way they talk:

> [R]elational litigants focus heavily on status and social relationships. They believe that the law is empowered to assign rewards and punishments according to broad notions of social need and entitlement… By contrast, rule-oriented litigants interpret disputes in terms of rules and principles that apply irrespective of social status. (p. 58)

Whereas "relational" accounts of disputes are primarily concerned with social relationships and the personal histories of the people involved ("oriented towards *social* rules"), rule-oriented litigants structure their accounts according to the deductive application of legal rules and categories; facts are used to address relevant legal issues, rather than for providing context.[138] Conley and O'Barr also identified five contrasting "approaches" to courtroom interaction among the judges they observed, "distinguished by different conceptions of the legal process." This subject, however, received relatively little elaboration.[139]

Conley and O'Barr's analysis focused primarily on litigants' ideologies of law (manifested in the differential use of rule- and relationally-oriented modes of talk), their socioeconomic distribution, and their function in the courtroom — with specific (perhaps exclusive) attention to the creation and maintenance of power relations / inequality.[140] The authors

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which analyze linguistic interaction as devoid of "any wider institutional contexts or power dimensions," and, on the other hand, "those that reduce all spoken exchanges to mere reflexes of wider power relations."

[138] Conley and O'Barr (1990:59), emphasis in original; Mertz (1992:429-30).

[139] Conley and O'Barr (1990: 82); Curran (2007a:3).

[140] Id. at 13, 2; Curran, id.

> posit a complex picture in which a discourse-level "orientation" and
> corresponding speech style can contribute to legal results that reinforce
> social inequities…The bulk of [this] analysis focuses on semantic themes
> in the language of litigants and judges, themes that emerge as framing
> orientations for the interacting parties. These themes (rules-relationships)
> are grounded in the social context of courtroom interaction….

How does Conley and O'Barr's analysis relate to more recent research's interest in language ideologies? Kuipers has written that "one important source of the concept's appeal lies in how language ideology systematically links [linguistic –JC] form with [social] function." (2003:637; s*ee also* 1999:153-4). In a very general sense, this is what Conley and O'Barr are aiming at (unconsciously, I think) when they attempt to correlate[141] litigants' rule or relational discourse "orientations" with specific linguistic features (*e.g.* hedging and intensifiers); in earlier studies (1978, 1982), they identified these features as being associated with relatively more "powerful" or "powerless" speech styles.

As the title of their work indicates, the distinction between "rule" and "relational" "orientations" is fundamental to how Conley and O'Barr view the (unexplicated) relationship between law and language. How, then, do they conceptualize these "orientations"? They are described as "ideas about": (1) the law; (2) conflict and social rights and responsibilities; (3) the world, generally; and (4) ideas about language. The social function of these "orientations" is slightly fuzzier. Conley and O'Barr emphasize their role in shaping how narratives are constructed in court.[142] Language itself is imbued

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[141] Mertz (1992:432-433). Conley, O'Barr, and Lind (1978); Conley and O'Barr (1982) found that "powerless" speech styles thought to be associated with women, poor people, and other structurally disadvantaged social groups impaired witness credibility. Conley and O'Barr (1990) raise the question of whether the "orientations" they identified in lay litigants' modes of talk correlate with any specific socioeconomic distribution. Although their data did not suggest any straightforward link with "any single social category such as gender" (79-8), Conley and O'Barr nevertheless indicated that they "suspect a greater tendency" among women towards a "relational orientation." Interestingly, Morrill, Harrison, & Johnson's (1998) study of "simulated everyday legal discourse" in law school found no empirical basis for these suspected gender differences. *But see* Mertz (2007:171-3), though she cautions against drawing "any broad conclusions from so small a sample."

[142] Mertz writes of this narrow emphasis (on courtroom narratives): "Given the important role of indexical structuring…it would seem that there is a great deal more that could be done to explore the ways language

a sort of agentive power that "operates in subtle and structured ways to constrain or translate litigants' and witnesses' speech."[143]   Indeed, Conley and O'Barr's account gives power relationships analytic priority over all other phenomena. It is interesting, then, to read the first (and only) explicit attempt to apply the "language ideology" concept to their work fifteen years later:

> For people like us who have done comparable research framed in terms of discourse, the concept of language ideology may provide greater analytical precision…We would have done better to characterize these orientations as language ideologies, for that is exactly what they are: shared ideas about language. Specifically, they are ideas about the linguistic practices that appropriate in legal contexts. Because different social groups have differential access to these divergent ideologies, and because only one is compatible with the dominant ideology of the law, the power implications are clear. (2005:159)

A better way of theorizing social function (*e.g.* "creating and reflecting power relations") in relation to linguistic form (*e.g.* speech styles) requires introducing an additional level of analysis: that of metalinguistics. This allows us to make visible in the language of law more than might be discovered from discourse-level analyses (where Merry or Conley and O'Barr, for example, see only the production of "discourses of the law" through which the hegemonic order reasserts itself[144]). "In talking about a partially independent metalinguistic level," Mertz writes, we "reach beyond analysis of power to talk about epistemology, which," as the studies in following section show, "intersects with questions of identity and personhood, of narrative and agency, of morality and context, and of a number of other dimensions that cannot be understood in terms of power dynamics alone."[145]

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structure contributes to the creative linguistic process Conley and O'Barr found in the courtroom." (1992: 433)

[143] Mertz 1994: 445.

[144] Mertz 1994: 444; Conley and O'Barr 1990: 1, 9, 12.

[145] 2007: 271 n37.

Language Ideologies and Legal Epistemologies

Moving beyond earlier discourse-level work, several lines of analysis have attempted to develop further understandings of how microlinguistic processes are linked with wider social phenomena. These studies have focused particularly on language's role in "maintaining existing power relations"; more recently, work in "metalinguistics" by Silverstein (1979, 1985, 1993, 1998), Bauman and Briggs (1990, 1992), Schieffelin (1998), Woolard (1994), and others, has enabled us to explore the relationship of ideology and language practices with identity, epistemology, and social change.[146]

Hirsch's ethnography of dispute language in Islamic divorce courts focuses on role of gender and linguistic ideologies in shaping the way that Swahili women construct cases about marital troubles in court. Whereas women are expected to make their case ("complaint," in this context, is a loaded term) in a highly stylized narrative form,[147] men engage the *khadi* (judge) as equals (in terms of their speech style, that is), responding to questions and refuting accusations with reference to Islamic law.[148] ("Men tell stories less frequently, and their stories include fewer features of storytelling performances." [140])[149]

Hirsch grounds her analysis of gender and language ideologies in a more general, yet also nuanced and complex, description of the salient cultural features of life in a Kenyan Islamic community. Women of "good moral character" are expected to persevere in difficult circumstances (17, 232); this, in addition to "a strong ideology of complaining as inappropriate, particularly when it exposes problems in the household"

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[146] Mertz (1994:446).

[147] Women's presentation of their cases is constrained by culturally significant conceptions of words and their proper use; they are also framed by gendered ideas about how stories should be told.

[148] Hirsch (1998: 157-8); Kuipers (1999: 153).

[149] Hirsch (1998:140). The differential use of certain speech forms indexes gender, which, in this sense, is "performed" through disputing. (211-225)

(226), exerts a selective pressure on the number and type of divorce cases brought to court. Thus, language and gender ideologies — as manifested in metalinguistic talk — are responsible for shaping the way divorce cases are presented in court. (221-2)   Women must negotiate persistent tensions in their verbal performance between culturally significant yet simultaneously conflicting ideologies:[150]

> Swahili women who complain in court embody a contradiction. Through their participation in cases and mediations, they generally stand in gross violation of appropriate speech, and yet, in so many dialogues, they are also routinely depicted as compliant wives… (219)
> [B]ecause women's stories focus on entextualizing tales of conflict that index the link between narration and the gendered exposure of household problems, these metalinguistic deployments, which reflect underlying ideology, facilitate devaluing women as complainers. (226)

Hirsch argues that language practices in legal contexts perpetuate social dominance, while also opening up possibilities for resistance and social change: "There are always gaps to be exploited by those who seek a hearing for their experiences." (1998: 246)

By applying linguistic anthropology to the ethnography of law, Hirsch is able to render a subtle, complex account of the negotiated discursive construction of gender, linking together ideologies about gender and language,[151] their cultural grounding, and their operation in context.[152]

Matoesian is similarly "interested in how discursive form and linguistic ideologies interact with questions of identity and difference" (41), specifically the ways in which legal discourse reinforces patriarchal norms.[153]   Much of his work focuses on the William

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[150] Conley and O'Barr (2005:157).

[151] *E.g.* "Words never end"; "words expose"; "words harm"; *See* Hirsch (1998: 227-235).

[152] "[G]endered subjects are constituted by speech that operates within and against cultural ideas about speech and speakers. These ideas, in turn, set limits on how individuals engage, reproduce, and transform their gendered positions." Hirsch (1998: 17, 222); *see also* Hoffman (2000: 295).

[153] "…[H]ow linguistic ideologies interface in a reflexive moment with male hegemony and structures of language use to form an epistemological strategy… What counts as knowledge, as a fact, and how do we know?" 1997:59, 2001:41

Kennedy Smith rape trial, which he dissects with exacting detail using an ethno/CA approach. Matoesian shows how linguistic structure and linguistic ideologies in courtroom discourse embody what he terms "the patriarchal logic of sexuality rationality": "the situated practices of discursive interaction through which sexual identities are improvisationally assembled, transformed, and naturalized into a relevant object of legal knowledge to accomplish practical tasks in the rape trial context." Matoesian (2003: 40). Witnesses and victims whose "behavior through linguistic and conversational structures"[154] in a given context fails to align with "the cultural demands of male sexual logic" encounter a "gendered minefield" of oppositions or "double-binds." (40, 218) These oppositions arise when "there is an inconsistency between the victim's version of events and the *expectations of patriarchal ideology* governing victim identity." (40, italics in original)

Matoesian points to exchanges in which attorneys exploit particular "poetic procedures of language use—contrasts, parallelism, repetition, direct quotations" to generate inferences about a witness's sexual identity and credibility. (215) For example,

> by using a repetitive list that requires the witness to repeatedly acknowledge departures from normatively prescribed behavior, an attorney can invoke a sense that there are many incongruities ("more of form equals more of content"[155] linguistic ideology).[156]

If, however, a witness attempts to "respond to the pragmatic force of a sequence (e.g., "I was not afraid of him")" the cross-examining attorney can mobilize the dominant semantico-referential language ideology to recast the witness's resistance as evasiveness ("That's not my question…My question is did you meet this man who your friend says is the alleged rapist...in this dark hallway, is that right?" [p. 72]). This process of discursive

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[154] I understand this phrase to mean, essentially, "witnesses' behavior, considered with regard to both (1) the *immediate* context of courtroom interaction, and (2) their *prior* behavior, according to the account constructed through their testimony."

[155] Lakoff and Johnson 1980. [citation added –JC]

[156] Mertz 2003.

construction generates inferences used to assess credibility and determine fact. While such inferences are generated through a supposedly neutral legal epistemological method, in reality the process is responsive to gender and language ideologies at every moment.[157] Building on Matoesian, Mertz (2007) also writes about the constitution of legal epistemology through linguistic practice, a subject I will return to discuss briefly in the conclusion.

Philips (1998) observed systematic variations in the interactional strategies and stylistic features of language which trial court judges employed while hearing guilty pleas. She found that judges' linguistic behavior was informed by a "complex interpenetration" of legal, political, and "control" ideologies, and that differences among their ideological stances reflected (in a more complex way than traditional Marxist theories of ideology would suggest) wider social processes of ideological conflict and struggle.[158]

Philips' analysis presents a picture of ideological diversity within the law, linking specific discourse practices (such as the elaboration or abbreviation of procedural speech segments, the ratio of yes/no to WH-questions, etc.) with shared clusters of ideological traits, and with broader considerations of power, political economy, and institutional structure.[159] Although the judges she observed did not profess to see a political ideological dimension in their (linguistic/judicial) behavior, two distinct and ideologically opposed groups emerged from the data: "procedure-oriented" judges, who enacted "a liberal view

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[157] Matoesian 2001: 72, 40; Mertz 2003: 633.

[158] Phillips was unable to find any dualistically organized relations of domination and subordination among ideologies. (1998b:xiv; 7; 122).

[159] This helped move scholarship on the ideologization of language in legal contexts beyond a narrow concern with processes of categorization (*see e.g.* Yngvesson and Nader 1978; also Mather and Yngvesson's [1981] study of dispute processes in an Atlantic fishing village; labeling and categorization were central to their analysis), to instead bring attention to the ideological structuring of "language in use." S*ee also* Mertz 2007: 270 n24.

of the state" through their discourse practices, and "record-oriented" judges, who embodied "a more conservative view of the state." (xvi)

Most interesting, perhaps, was the finding that "conflict and opposition between the two groups," while "not directly acknowledged for legal or political ideologies," became "very overt when ideologies of courtroom control [were] discussed." (xvii) Among the three types of ideologies identified in this analysis, ideas about courtroom language use and interaction were the exclusive domain of "control ideologies." In fact, ideas about language were at the very core of "control ideologies"; "political" and "legal" ideologies seem only to have been made visible through their enactment in linguistic behavior (by extension, judicial behavior). In Philips' view, however, "everyday control ideologies" were not fundamentally *about* language, but instead about the issues of power, consciousness, and political economy implicated in the details of linguistic interaction:

> The courtroom control ideology seems most like those analyzed in the emerging anthropological literature on language ideologies (e.g. Kroskrity, Schieffelin, & Woolard 1992)… It entails both practice and talk about practice (metapragmatics) and has both implicit and explicit dimensions. Still, language is subordinated the ideas of both control and informality, which is why I have called this a CONTROL IDEOLOGY rather than a language ideology. (1998a:196n3, citation and caps in original)

Although Philips' analysis of ideology in courtroom language does not appear, at first, to bear on our still-developing understanding of language ideologies, I would argue that, in fact, this account underscores the dependence that legal, political, social, and other ideologies have *on language ideologies* for their enactment in legal discourse. Research that explores this hypothesis is currently underway.[160]

While approaches that conceptualize law as ideology are hardly considered new (a point illustrated, I hope, in previous sections of this paper), Philips persuasively

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[160] Curran 2007a, and forthcoming.

demonstrates the range of interesting and important phenomena brought into focus by an ethnographer's sensitivity to variation and diversity within 'the law'. Future research in this area will benefit from efforts to represent law and legal practice as ideologically plural, rather than uniform and monolithic.[161]

WHERE WE GO FROM HERE: CONCLUSION

The studies by Hirsch, Matoesian, and Philips reviewed in the previous section represent promising directions for future research. By attending specifically to the communicative processes through which ideology is produced/reinforced/enacted in context,[162] these analyses suggest a number of ways that linguistic ideologies may be linked with wider social phenomena (*e.g.* the discursive construction of gender, hegemony, contestation of colonialist discourses,[163] etc.). More exciting, perhaps, is the ability of these studies to highlight the central mediating role of language and linguistic ideology in the ongoing constitution of legal epistemologies and systems of practice.[164]

In earlier sections of this paper, I traced a history of the anthropology of law — examining its various approaches, research questions, and attendant assumptions — in an

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[161] Philips' work is also exemplary in the way it provides the ideologies it analyzes a clear and thorough grounding in specific institutions; particular effort is made at connecting observed legal and political ideologies with a detailed account of Arizona's judicial nominating process, party politics, and professional bar organization. "Without such grounding," Philips explains, "it is not possible to take the next interesting step of talking about how language ideologies are socially ordered across institutions and groups within a nation and transnationally…It is very difficult to talk about fluidity, about the flow or transmission of language ideologies from one institution or group to another, or how language ideologies are transformed as they move from one setting to another." Philips (1998b: 222)

[162] Matoesian 1997: 67; *also* 2001: 47–48:

> The structuring framework of the patriarchal logic of sexual rationality represents a linguistic template for shaping the interpretation of talk, for assessing the sociolegal meaning of the rape incident, and for gauging the victim's credibility and moral character. It represents an epistemological totality governing the application of substantive evidence in any given case... Together, both law and patriarchal culture contingently interact through the verbal proceedings of the court to constitute and enforce this logic. This study is not a preoccupation with victim/defendant subjectivity or experience but a respecification of analysis toward the linguistically detailed production of ideology-in-action: the symbolic mechanisms through which meaning-in-context is mobilized to create and recreate cultural hegemony.

[163] *See* Mertz 1988 (South Africa & U.S.); *also* Philips 2004 (Tonga); *also* Richland 2005 (Hopi).

[164] A growing body of work has begun to argue that legal ideologies are necessarily "skewed by" linguistic ideologies (through the "drive for reference"). Silverstein 1985; Mertz 1985.

effort to account for the field's recent convergence on language as a critical area of interest. Research in this area has increasingly begun to focus on the role of language ideologies, a concept which holds particular value for several reasons.

I earlier described in some detail the developments which led legal anthropology to move beyond a relatively narrow concern with rules and processes, and instead concentrate on meaning construction, specifically through linguistic interaction. The concept of 'ideology' offered an ideal (and mostly uncontested)[165] way of explaining how people relate to and understand their legal system. At roughly the same time, another field of anthropology was beginning to use 'language ideology' to link linguistic form with social function. This focus on ideology creates "a promising bridge between linguistic and social theory"[166]; when applied to legal contexts, the possibilities are especially exciting. As Elizabeth Mertz has observed, "because legal language crystallizes the interplay of pragmatics, poetics, and social power with such clarity, it affords a crucial crucible for the formulation of social-linguistic theory." (1994: 448)

Furthermore, as a methodological matter, this approach satisfies the "best practices" expectation held by most scholars in the field today (developed as a corrective to interpretive approaches popular in the 1980s) that legal phenomena be analyzed through observed events and interactions, rather than as a hermeneutic abstraction. In this way, linguistic anthropological approaches tend generally to reaffirm legal anthropology's long-standing methodological commitment to the case method.

Future research in legal and linguistic anthropology would benefit from developing further understandings of how language ideologies mediate, shape, or otherwise participate in the ongoing creation of legal epistemology, systems of practice,

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[165] Just (1992: 407).
[166] Schieffelin and Woolard (1994: 72); *also* Schieffelin, Woolard, and Kroskrity (1996: 27)

and substantive areas of law. More work must be done to show how the actual of practice of law — whether in institutional contexts or in everyday life — is shaped by and responsive to processes of "semiotic mediation" and linguistic ideologies.[167]

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[167] (Mertz 1994:447). A growing body of work has begun to advance the argument that legal ideologies are necessarily "skewed by" linguistic ideologies (through the "drive for reference"). Silverstein 1985; Mertz 1985.

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