

# ANTHROPOLOGY, LAW, AND THE PROBLEM OF INCOMMENSURABILITY

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### INTRODUCTION

More than a decade ago, I sat in the audience of one of the smaller lecture halls at Yale Law School, listening to a young faculty member explain the relative value of different Ph.D. degrees on the law teaching market. Economics and political science doctorates, it seemed, were the most valuable currencies, with history trailing just slightly behind, followed by philosophy, sociology, and, finally, literature. Barely rating a mention as a kind of stand-in for the residual category “other” was anthropology.

I shouldn’t have been surprised. At the time, very few of the so-called elite law schools had a single faculty member who could be called an anthropologist proper.<sup>1</sup> And while I had come to the talk as a partially cooked anthropologist myself, I was also seeking some dispassionate, practical advice. And that’s what I received: a picture of the state of the elite legal academy as it then seemed to exist—an academy overwhelmingly dedicated to the positivism of a narrowly defined empiricism equated largely with the quantitative methodologies of economics.<sup>2</sup> In the years since, I’ve been reminded by good-natured colleagues of the joke that in the karmic order of the academy, truly excellent economists are reborn as physicists and mediocre ones as anthropologists. It would seem, however, that in the legal realm, aspirations were a bit more measured: there, economists and their methodological fellow travelers could sit upon the throne.

This half-remembered moment is obviously a caricature of sorts. The presenter that day had humanistic sympathies after all, and the legal academy isn’t monolithic. What the portrait does capture though is an atmosphere, a “structure of feeling,”<sup>3</sup> that is likely recognizable to anyone who has had

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1. The top fourteen law schools, as determined by the rankings of *US News and World Report*, serve as a barometer of disciplinary interests given that graduates of these top-ranked schools have an outsized presence on legal faculties throughout the country. See Daniel Martin Katz et al., *Reproduction of Hierarchy? A Social Network Analysis of the American Law Professoriate*, 61 J. LEGAL EDUC. 1, 96 n.49 (2011).

2. See, e.g., Mark C. Suchman & Elizabeth Mertz, *Toward a New Legal Empiricism: Empirical Legal Studies and New Legal Realism*, 6 ANN. REV. L. & SOC. SCI. 555, 557 (2010) (describing the narrow, quantitative emphasis of “empirical legal studies”). My use of “positivism” here refers not to “positive,” as opposed to “natural” law, but to social science aspirations for natural science-like objectivity.

3. RAYMOND WILLIAMS, *MARXISM AND LITERATURE* 132 (Oxford 1977).

experience with the scholarship coming out of U.S. law schools over the past several decades. It's an atmosphere in which certain forms of knowledge have become more valuable than others in ways that are directly relevant to the task I, and my colleagues, have been charged with in this symposium: that is, to opine on the relevance of contemporary legal anthropology to the study of formal law—what I'm choosing to take as statute, regulation, and judge-enunciated doctrine and which includes what Annelise Riles has called law's "technical dimensions."<sup>4</sup> If this seems like a strange debate to unfold in the pages of a law review, perhaps it is, especially given how little time legal academics seem to dedicate to legal anthropology these days. "Who's even asking?" might be any busy reader's first reaction to this question of anthropology's potentially relevant contributions. Along similar lines, my own initial inclination was not to respond with a declaration of relevance—"of course anthropology has something to say about formal rules!"—but to ask a different, more structural question: why is it that the legal academy seems ill-positioned to listen and to hear when anthropologists give their answer? What I offer here, then, is an account of why a question as to legal anthropology's relevance even has to be asked in the first place and why its obvious answer might, but should not, fall on deaf ears.

#### I. OF RAIDING AND STRANGER KINGS

A year or two after graduating from law school and in the midst of writing my dissertation, I found myself in a conversation with a former professor concerning the creation of a Ph.D. program in law at Yale. At the time, no such program existed at Yale, although it is now in full swing.<sup>5</sup> What I took away from the back-and-forth that ensued was that there were some at Yale who saw the value-added of Ph.D.-credentialed faculty members as consisting primarily in the gifts they brought from outside the law, gifts that might add to academic legal inquiry or even partially transform it. Why formalize a Ph.D. of sustained tutelage *within* the legal academy when a turning inward of this kind was antithetical to the goal of seeking out doctorate-holders in the first place?

What the law needed, from the perspective of this member of the elite legal professoriate, were what anthropologists, to borrow a Hawai'ian idiom of

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4. Annelise Riles, *A New Agenda for the Cultural Study of Law: Taking on the Technicalities*, 53 *BUFF. L. REV.* 973, 974 (2005).

5. See *Ph.D. in Law: The Latest in Legal Education Offered by Yale*, 59 *YALE L. REP.* 1, 1 (2012). The J.S.D. has existed at Yale for some time. The Ph.D., however, is meant to be distinct. *Id.* A Doctor of Civil Law program did exist previously at Yale but came to naught. See John H. Langbein, *Law School in a University: Yale's Distinctive Path in the Later Nineteenth Century*, in *HISTORY OF THE YALE LAW SCHOOL: THE TRICENTENNIAL LECTURES* 65 (Anthony T. Kronman ed., 2004). Neither the comments made by the unnamed Yale professor I am about to describe nor the discussion that follows should be taken to indicate a negative assessment of the Ph.D. program that was, eventually, created and that has produced a number of fine legal scholars.

sacred kingship, would recognize as an analog to “shark[s] that travel[] on land”—that is, “stranger-kings” who come from an “elsewhere” (in the Polynesian case, the sea), achieving a position of legitimate authority not in spite of this outsider status but rather because of it.<sup>6</sup> Putting this in a cosmological key may seem a bit much, although it does a nice job of signaling anthropological bona fides (a theme I’ll return to below). More importantly, it conveys the sense that there is something that appears deeply structural about the desire for “foreign” knowledge and not just among academic lawyers muddling along in the wake of formalism’s demise.<sup>7</sup> One finds it in the fetishization of highland magic (from the perspective of the city) in Colombia’s Sibundoy Valley,<sup>8</sup> in the contradictory longing for the foreign in Biak (Irian Jaya),<sup>9</sup> in the racist acknowledgment of “lesser” immigrants’ revitalizing “barbarian virtues” by Theodore Roosevelt in the United States,<sup>10</sup> and in countless other examples. While the law may have difficulty with its “legal Lohengrins,”<sup>11</sup> well-credentialed outsiders bearing gifts from other disciplines cause less of a stir.

The metaphor of the stranger king is not the only trope in the anthropological storehouse that conveys the allure of outside knowledge. There is also the raid. In the published version of his 1981 Yale Law School Storrs lectures, anthropologist Clifford Geertz bemoaned the “we raid you, you raid us, and let gain lie where it falls” attitude that he saw as governing the interactions of social scientists and academic lawyers.<sup>12</sup> At the time the lectures were delivered at Yale Law School, Geertz was at the height of his influence, his version of interpretive anthropology having had an enormous impact on the humanistic social sciences over the course of the prior decade.<sup>13</sup> For those in attendance who had done their homework, the raid as metaphor would also have brought to mind the interpretive focus of what was one of Geertz’s most famous essays on ethnographic “thick description”—the raw material being an

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6. MARSHALL SAHLINS, ISLANDS OF HISTORY 79 (1985).

7. See ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION *passim* (1993).

8. MICHAEL TAUSSIG, SHAMANISM, COLONIALISM, AND THE WILD MAN: A STUDY IN TERROR AND HEALING 152 (1987).

9. See DANILYN RUTHERFORD, RAIDING THE LAND OF THE FOREIGNERS: THE LIMITS OF THE NATION ON AN INDONESIAN FRONTIER *passim* (2002).

10. MATTHEW FRYE JACOBSON, BARBARIAN VIRTUES: THE UNITED STATES ENCOUNTERS FOREIGN PEOPLES AT HOME AND ABROAD 1876–1917 (2000).

11. The quotation is from Judge Henry Friendly’s description of the Alien Tort Statute, Lohengrin being a reference (without citation) to the swan knight of Richard Wagner’s opera of the same name who keeps his identity from the woman he is sent to rescue. *IIT v. Vencap Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975), *abrogated by* *Morrison v. Nat’l Australia Bank Ltd.*, 561 U.S. 247 (2010). Judge Friendly considered the origins of the ATS to be as mysterious as those of the swan knight, showing a taste for poetic allusion (albeit to a different sort of canon) that rivals that of many anthropologists. *Id.*

12. CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 170 (1983).

13. See DANIEL T. RODGERS, AGE OF FRACTURE 99–102 (2011).

iconic incident of sheep theft in the highlands of central Morocco.<sup>14</sup> Although Geertz bemoaned the raiding (in academia, not the highlands) and hoped for a more mutually edifying conversation, the dynamic of interdisciplinary theft continues to this day, albeit less between anthropology and law than was the case in decades past.<sup>15</sup>

What, we might ask, is it about the disciplines identified by the young faculty member mentioned above that make them worth raiding? The answer turns on the structural incentives of legal academia itself. As Paul Kahn—a noted admirer of Geertz I might add<sup>16</sup>—put it some years ago, “the central assumption of both the scholar and the lawyer-critic is that reform is the appropriate end of scholarship.”<sup>17</sup> Legal academics see themselves as oriented, in other words, toward practice and practical solutions above all else. They tend to write, Kahn explains, “in the same doctrinal form as the courts” and, more often than not, use the “judicial voice.”<sup>18</sup> The result is that each law review article they pen (and law review articles are still the coin of the realm within legal academia) “becomes a proposed draft of a judicial opinion or, if proposing too extreme a reform for a court, then an explanation to be inserted in a legislative committee report.”<sup>19</sup> The general thrust of this observation is, I think, correct and unsurprising, if a bit overstated.

Legal education is, indeed, meant to be a professional education. Its output is directed not merely to the “is” (an accounting of the state of things) but also to the “ought” (that which provides the basis for prescriptive recommendations).<sup>20</sup> Take Anthony Kronman’s 415-page lament over the loss of the lawyer–statesmen ideal as the guiding light of elite legal training; in it, the centrality of prescriptive models for how legal practice should be done is assumed; the only thing up for debate is whether the elite professoriate should be cultivating technocratic experts or virtuous and prudential leaders.<sup>21</sup> More generally, such concerns define the parameters for the utility of various disciplinary perspectives for law and reveal that the relationship of “law and” (law and economics, law and philosophy, etc.) is really a normative relation better rephrased with the preposition “for” (economics for law, philosophy for law, etc.).

14. See CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 9–10 (1973).

15. Geertz was not the first anthropologist to deliver the Storrs lectures. That honor appears to have fallen to Max Gluckman, though Geertz was the last. See GEERTZ, *supra* note 12, at 182.

16. See PAUL W. KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* 35 (1999).

17. *Id.* at 7.

18. *Id.* at 19.

19. *Id.*

20. See, e.g., Richard A. Posner, *The Present Situation in Legal Scholarship*, 90 *YALE L. J.* 1113 *passim* (1980); JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* *passim* (William Rehg trans., 1998); GEERTZ, *supra* note 12 *passim*.

21. See KRONMAN, *supra* note 7 *passim*.

In accounting for the hierarchy of desirable targets of intellectual raiding, it makes sense to start with the economic study of law, given its ascendance within the legal academy since the 1960s.<sup>22</sup> Here is a disciplinary hybrid that, in one of its better-known manifestations, defines “efficiency as wealth maximization” and considers efficiency thus defined to be an “adequate concept of justice.”<sup>23</sup> Justice—again, justice as wealth maximization—becomes the governing metric to which lawyers, judges, and legislators may look as they engage in their practical work, guided, of course, by legal scholars with a sufficient knowledge of economic methods. In this way, law and economics is able to step into various debates with a set of tools for assessing the degree to which a policy recommendation, a judicial decision, or a piece of legislation is able to achieve a just outcome. In particular, many economist-lawyers hold out these quantitative tools as superior to others in the social sciences when it comes to assessing the various pathways to justice, ascribing a high degree of scientific certainty—in comparison with other methods—to their techniques, something I’ll return to shortly.<sup>24</sup>

What of normative philosophy? Any scholarly oriented law student is likely to encounter John Rawls and the “veil of ignorance” at some point in their studies, if not some other theory of justice and judgment ranging on the political spectrum from liberal, to libertarian, to radical.<sup>25</sup> At first glance, normative philosophy seems to bear little in common with economics—the two disciplines’ methodologies and the types of questions they ask are dramatically different. And yet philosophy, like economics, aspires to offer the legal scholar a set of arguments in support of a metric, or set of metrics, with which to answer a range of practically relevant questions: What rules actually require obedience?<sup>26</sup> What extralegal principles ought to be used in adjudicating difficult cases, the outcomes of which are not clearly determined by “black letter” law?<sup>27</sup> What ought a just society look like?<sup>28</sup> Whereas economics sees itself as methodologically superior, philosophy sees itself as conceptually foundational. Although less successful than economics within the legal academy, philosophy still rates as a discipline worth raiding. This is, in large

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22. See, e.g., RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* *passim* (1981); Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 *YALE L. J.* 499 *passim* (1961).

23. See POSNER, *supra* note 22, at 6.

24. The hubris of the economists is not always well-earned, to put it mildly. David Graeber conveys the Teflon exterior of the discipline well: “Mainstream economists nowadays might not be particularly good at predicting financial crashes, facilitating general prosperity, or coming up with models for preventing climate change, but when it comes to establishing themselves in positions of intellectual authority, unaffected by such failings, their success is unparalleled.” David Graeber, *Against Economics*, N.Y. REV., Dec. 2019.

25. JOHN RAWLS, *A THEORY OF JUSTICE* 136 (1971); see, e.g., RONALD DWORKIN, *LAW’S EMPIRE* (1986); ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974); ROBERTO MANGABEIRA UNGER, *WHAT SHOULD LEGAL ANALYSIS BECOME?* (1996).

26. See, e.g., H. L. A. HART, *THE CONCEPT OF LAW* 51 (1961).

27. See, e.g., DWORKIN, *supra* note 25, at 116–17.

28. See, e.g., RAWLS, *supra* note 25, at 28.

part, because it can be oriented to the practical questions of law reform, even if its discursive style is often not that of the judge or the practicing lawyer.<sup>29</sup>

History's place in the raiding game is a bit different than that of either economics or philosophy though it too remains influential. As a discipline long concerned with detailing the specificities of contingent processes, most good history declines to enunciate scientific laws of human behavior or declare normative foundations upon which legal decision-making can turn. What it can offer pragmatically oriented lawyers and scholars, however, are realist accounts of the past use and development of concepts and institutions relevant to legal practice.

Whatever folk theories of transparent textual meaning may be floating around these days, anyone with a modicum of understanding of language knows that meaning is always dependent on historical context and that no text reveals its secrets in isolation from the world that surrounds it.<sup>30</sup> The situation in which a conversation unfolds, including the expectations the parties to the exchange bring to the table, is one such context. The common sense pool of understanding that supports a "reasonable" assessment of the plain meaning of a legal provision is another. Some contexts are still more expansive in terms of their spatial and temporal scale and may include what the U.S. Supreme Court has referred to as the nation's "history and tradition"—a frame that can grow to be quite capacious indeed.<sup>31</sup>

U.S. constitutional law, and not just the nature of language itself, also explicitly requires that judges and lawyers (and thus the academics intent on influencing them) look into these scales of deep historical context as a prerequisite for making legal judgments. Substantive due process analysis is one such instance where the work of historians is indispensable. Take, for example, the Supreme Court's decision in *Lawrence v. Texas*, wherein the Court wrestled with whether the petitioners' convictions for "deviate sexual intercourse" violated their fundamental constitutional rights.<sup>32</sup> Fundamental rights analysis, as Justice Scalia noted strongly in his dissent, requires that courts look to historical context to determine if the right in question is "deeply rooted in" U.S. "history and tradition."<sup>33</sup> The opening for legal historians here is obvious, and they can step into it either as brief-writers, brief signatories, or through their

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29. Although the intersection of law and political science might appear too obvious to merit discussion here, it's worth noting that political science combines some of the advantages of both philosophy and economics when it comes to the discipline's fruitful pairing with law: political theorists are substantively specialized philosophers and quantitative political scientists are methodological experts who use techniques that resemble those of the economists.

30. See, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 37 (1997); Anya Bernstein, *Before Interpretation*, 84 U. CHI. L. REV. 567, 567 (2017).

31. *Lawrence v. Texas*, 539 U.S. 558, 593 (2003) (Scalia, J., dissenting).

32. *Id.* at 558.

33. *Id.*

broader body of scholarship, which itself can play a role in influencing disputes over the nature of fundamental rights. They have done so.<sup>34</sup>

Substantive due process is one area where the historians may have their say, but it's not the only one. Need to know the general understanding of the scope of the writ of habeas corpus at the time of the ratification of the U.S. Constitution? The historians have a position on that.<sup>35</sup> Eager to determine the meaning of the phrase, “the right of the people to keep and bear Arms, shall not be infringed”?<sup>36</sup> Historians have something to say about that as well.<sup>37</sup> One could go on, of course, listing various other constitutional provisions that demand further contextual explanation. It is no wonder then that historical scholarship and methods would be deemed worthy targets of raiding from the perspective of legal academia's law reform goals and that the discipline's Ph.D.s would be welcomed into the law school fold.

This leads us, finally, to anthropology. While economics, philosophy, and history seem to be able to march along quite comfortably within legal academe, anthropology—or, rather, I should say certain narrowly defined strands of elite anthropology today<sup>38</sup>—has found less of a welcome reception. The reason, I argue in the following sections, is in part a result of a tension rooted in law schools' commitment to law reform and anthropology's turn away from the types of prescriptive claim-making that the legal academy demands of its initiates—and which economics, philosophy, and history have been more willing to oblige since the latter half of the twentieth century.<sup>39</sup> In addition to that, anthropology's “slot” in the division of labor of the academy has long involved a focus on the exotic—social and political forms deemed “other” to the “West”<sup>40</sup>—that is at once alluring to law with regard to certain limited concerns but also seen by many lawyers as largely irrelevant with regard to the core questions of legal scholarship. This, coupled with a contradictory ambivalence about the “softness” of ethnographic methods, raises further issues. During my first few weeks of law school, a more senior law and

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34. See, e.g., Brief of Professors of History George Chauncey et al. as Amici Curiae Supporting Petitioners, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 152350.

35. See Brief Amici Curiae of Legal Historians Listed Herein Supporting Petitioners, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334, 03-343), 2004 WL 96756.

36. See *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (quoting U.S. CONST. amend. II).

37. See Brief of Amici Curiae Jack N. Rakove et al. in Support of Petitioners, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290), 2008 WL 157183.

38. Much like in law, a small number of anthropology graduate programs have an outsized influence on the professoriate. See Nicholas C. Kawa et al., *The Social Network of US Academic Anthropology and Its Inequalities*, 121 AM. ANTHROPOLOGIST 14 (2018). The more policy-oriented, applied programs are less successful at placing their doctoral students in tenure-stream positions. *Id.*

39. For a description of the types of policy-oriented work anthropologists were willing to engage, see MARK ANDERSON, FROM BOAS TO BLACK POWER: RACISM, LIBERALISM, AND AMERICAN ANTHROPOLOGY *passim* (2019).

40. MICHEL-ROLPH TROUILLOT, GLOBAL TRANSFORMATIONS: ANTHROPOLOGY AND THE MODERN WORLD 3 (2003).



anthropology scholar (already armed with his degrees) shared a pithy distillation of these barriers, which pose serious issues of possible translation between anthropology and law. In an offhanded way, he said simply: “I assume you’re ready for the problem of incommensurability.”<sup>41</sup>

## II. THE SAVAGE SLOT AND THE INTERPRETIVE SWAMP

When it comes to justifying contributions to interdisciplinary exchanges, there is, unfortunately, a tendency to pronounce on something akin to the essential characteristics of one’s home discipline—expressed in an oversimplified “we do this!”—as if such an essence exists. At times, these declarations are made from a defensive crouch, provoked by the stereotypes that solidify the academy’s longstanding assignment of its various tasks. Anthropologist Michel-Rolph Trouillot, pushing back against this tendency, has noted simply that “[a]nthropology is what anthropologists do.”<sup>42</sup> If only it were so easy to sweep away the academy’s hard-fought battle lines. The fact remains that disciplines are marked with identities that are difficult to expunge from the minds of one’s colleagues and the public at large.

With anthropology, that identity has been linked since the nineteenth century with what Trouillot, parodying the racist typologizing of modernist social science discourse, calls the “Savage slot.”<sup>43</sup> The reference is to a presumed anthropological fixation on that which is other to “the West”—i.e., the exotic, the distant, the “elsewhere” of a particular “here and now,” a “here and now” that aspires to universality.<sup>44</sup> Sociology, it is often suggested, was given the task of studying the metropole and anthropology the colonies—or in the case of American cultural anthropology, the domestic-exotic, whether the supposedly dying lifeways of Native American groups or the subordinated populations of the African diaspora.<sup>45</sup> Despite having abandoned slanderous terms like “primitive,” with their insinuations of stages of cultural or civilizational evolution, anthropologists have indeed long sought out “elsewheres” with the goal of shedding light on, and relativizing, institutions at “home.” This esteemed mode of “anthropology as cultural critique” has been a mainstay of the discipline, and, in particular, of its more popular translators, Margaret

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41. I took this use of the term “incommensurability” to refer to the problem of translating the value attributed to certain types of questions across the boundaries of disciplinary interpretive communities—in this case, anthropology and law. For a broader discussion of how commensuration has and can be used as a concept, see Joseph Hankins and Rihan Yeh, *To Bind and to Bound: Commensuration Across Boundaries*, 89 ANTHROPOLOGICAL Q. 1 (2016).

42. See *id.* at 1.

43. *Id.* at 2.

44. *Id.*

45. See ANDERSON, *supra* note 39 *passim*.

Meade and Ruth Benedict being some of the most widely known.<sup>46</sup> And yet anthropology has undergone a significant shift in recent decades toward a wide range of topics not contained within the traditional contours of the Savage slot—e.g., financial trading,<sup>47</sup> PET scan laboratories,<sup>48</sup> marine bioprospecting,<sup>49</sup> wine connoisseurship,<sup>50</sup> and industrial pork processing.<sup>51</sup> Nonetheless, in the popular imagination, and the lawyerly imagination as well, anthropologists are, for the most part, still seen as peculiar interstitial figures heading out to do fieldwork among the “natives” in search of a “primitive” other through which to relativize the cherished norms of Western society. The formal law of the West’s liberal constitutional regimes would appear to be outside the anthropologists’ wheelhouse.

In some ways, the image of the anthropologist as collector of cultural exotica counts against the discipline in the value hierarchies of the legal academy’s raiding game. To paraphrase one of my law school professors, “You may find that we’re more interested in what’s going on down at the local five and dime than in rural Africa.” At the same time, anthropology’s specialized knowledge of the Savage slot can be attractive to the legal scholar precisely because it promises to shed light on contexts beyond the legal academy’s scope of expertise—contexts where formal state institutions, for instance, are presumed to be nonexistent, weak, or altogether irrelevant. These settings provide an opportunity for creative theorizing through analogy. By presenting thickly described case studies of the possibility of order without written, codified law, the *kgotla* of a Tswana chiefdom,<sup>52</sup> to give one example, can illuminate informal modes of dispute resolution in more familiar contexts (private arbitration tribunals) or other patterned interactions at even larger scales—for instance, the “operational codes” at play in the multilateral relations between nation-states.<sup>53</sup>

Less prevalent, but somewhat related, is the way “primitive law,” as Richard Posner calls it, offers another case, another sociocultural setting, for the legal scholar to test hypotheses. For Posner, the relevance of anthropological material has been its usefulness in further demonstrating the explanatory power

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46. GEORGE E. MARCUS & MICHAEL M. J. FISCHER, *ANTHROPOLOGY AS CULTURAL CRITIQUE: AN EXPERIMENTAL MOMENT IN THE HUMAN SCIENCES* 130 (1986).

47. See, e.g., KAREN HO, *LIQUIDATED: AN ETHNOGRAPHY OF WALL STREET* (2009).

48. JOSEPH DUMIT, *PICTURING PERSONHOOD: BRAIN SCANS AND BIOMEDICAL IDENTITY* (2004).

49. STEFAN HELMREICH, *ALIEN OCEAN: ANTHROPOLOGICAL VOYAGES IN MICROBIAL SEAS* (2009).

50. Michael Silverstein, “*Cultural*” *Concepts and the Language-Culture Nexus*, 45 *CURRENT ANTHROPOLOGY* 621 (2004).

51. ALEX BLANCHETTE, *PORKOPOLIS: AMERICAN ANIMALITY, STANDARDIZED LIFE, & THE FACTORY FARM* (2020).

52. JOHN L. COMAROFF & SIMON ROBERTS, *RULES AND PROCESSES: THE CULTURAL LOGIC OF DISPUTE IN AN AFRICAN CONTEXT* 3 (1986).

53. See Michael Reisman, *Myth System and Operational Code*, 3 *YALE STUD. WORLD PUB. ORD.* 229, 229 (1977).

of his wealth maximization hypothesis—despite its problematic assumptions about irrationality, substantial information gaps, and institutional power vacuums.<sup>54</sup> Anthropological data, in such instances, becomes raw material to be mined and simplified for the purpose of economic model making, models the data always, and curiously, seem to confirm. This is a one-way street of course. The lawyer-economists can peek into these “primitive” worlds but at the same time manage to hold on to their own turf—the esoterica of “Western” legal doctrine. In either case—the use of ethnographic case studies to draw analogies with “western” juridico-political practices and to test presumptively universal economic laws—anthropologists are called forth to perform the role of surveyors of the Savage slot, a role to which they are no longer committed but which they cannot seem to shake.

Beyond this focus on subject matter, there is also the question of empirical method and styles of interpretation. Long-term, participant observation fieldwork—often described simply as ethnography, despite the misleading connotations of the term’s etymology<sup>55</sup>—for instance, became, by the mid-twentieth century, the price of anthropologists’ admission to the discipline and an emblem of its commitment to a certain type of methodological practice and mode of knowledge production. On the one hand, ethnography generated the kind of grounded, empirical studies that one might expect pragmatic lawyer-scholars would appreciate—detailed, descriptive, and processual accounts with the capacity to demonstrate how formal law plays out in practice.<sup>56</sup> And yet there is a deep anxiety that ethnographic research is not sufficiently rigorous. It is seen as too subjective, too humanistic, too soft, and, in its more recent incarnations, too committed to a postmodern abdication of realist truth-finding and predictive modeling. Even when it is sufficiently realist, it is still too “swampy,” in the sense of being overburdened by a specificity that makes predictive modeling challenging.<sup>57</sup>

One could argue that this concern with methodological reliability is a result of the consequentiality of the questions law seeks to answer as an applied, professional discipline. The law is about serious questions, after all, with wide-ranging “real world” effects, and so demands serious methodologies. Certainly, legal academics tend to keep both the practical orientation of their students—who are not, for the most part, seeking out employment in the academy—and the legislators and judges they hope to influence in mind when selecting plausible research techniques. A quick look to medicine, however, demonstrates that the utility of a methodology can turn just as much on what tools the raiding

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54. See POSNER, *supra* note 22, at 174.

55. See, e.g., Paul Kockelman, *Being Multiversed in the Multiverse*, 9 HAU: J. ETHNOGRAPHIC THEORY 200 (2019).

56. See, e.g., ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991) (expressing the value of ethnographic fieldwork for legal scholarship).

57. See *id.* at 147.

discipline already has on hand—and the legitimating power they convey—as on its overall pragmatic orientation and potential impact.

Forgive me for another brief anecdote to illustrate the point. Not that long ago, I received an unannounced visit during my office hours from an anthropologist-lawyer (Ph.D. and J.D. in hand) whom I had not previously met. We ended up discussing the academic job market, and the visitor asked, genuinely perplexed, “Why is there no Paul Farmer of law and anthropology?” For those readers unfamiliar with Farmer, he is an anthropologist-physician best known as the titular character of Tracy Kidder’s bestselling biography *Mountains Beyond Mountains: Dr. Paul Farmer, a Man Who Would Cure the World* (2004), an engaging work of nonfiction that propelled him to public renown during the mid-2000s.<sup>58</sup> In addition to co-founding the nonprofit Partners In Health, he has published widely in anthropology and medicine, influencing both disciplines with his arguments concerning the structural inequalities that shape health disparities and the possibility of delivering complicated medical services in resource-poor settings.<sup>59</sup> He’s not the only medical anthropologist to play this role either. Medicine and anthropology have arrived at a mutually beneficial relationship over the years.<sup>60</sup> The question my guest wanted answered, then, was why hadn’t someone like Farmer emerged to bridge the anthropology and law divide.

Part of the answer has to do with what medicine and anthropology do for one another. Their symbiosis is, I believe, in part a manifestation of medicine’s somewhat freeing confidence in its scientific objectivity. The apparent incommensurability of anthropology and law is, in turn, an outgrowth of law’s insecurity with its classical tools, which, when confronted with the methodologies of economics, came to be seen as not quite objective enough, not quite rigorous enough, to bear the weight of the claims being made. Armed with its highly technical diagnostic paraphernalia and its randomized control trials, medicine is able to dabble in the interpretive and humanistic empiricism of anthropology precisely because its methodological credibility is already so deeply rooted in the “hard” sciences.

In turning to interpretation—and, in particular, interpretation through ethnography—Arthur Kleinman, one of Farmer’s mentors, and others, have sought to revitalize the subjective, yet still professionally conditioned, dimensions of medical practice—the physician’s embodied “feel for the game”—and restore them to their rightful place of distinction.<sup>61</sup> Despite

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58. Ellen Barry and Alex Traub, *Paul Farmer, Pioneer of Public Health, Dies at 62*, N. Y. TIMES (Feb. 21, 2022), <https://www.nytimes.com/2022/02/21/obituaries/paul-farmer-dead.html>.

59. See, e.g., PAUL FARMER, PARTNER TO THE POOR: A PAUL FARMER READER (Haun Saussy ed., 2010).

60. See PAUL FARMER ET AL., REIMAGINING GLOBAL HEALTH: AN INTRODUCTION (2013).

61. See ARTHUR KLEINMAN, WRITING AT THE MARGIN: DISCOURSE BETWEEN ANTHROPOLOGY AND MEDICINE 81 (1995).

concerns that both elite<sup>62</sup> and popular critiques<sup>63</sup> of scientific objectivity have chipped away at medicine's authority—a fear made all the more acute by the COVID-19 pandemic still raging as I write this—its foundation of biomedical positivism remains relatively strong. For precisely this reason, scholars like Kleinman need not shy away from ethnographic empiricism or hide the fact that ethnography is an “utterly human” but still “professionally disciplined” exercise in generating “positioned knowledge.”<sup>64</sup> It's that human element the physicians are after.<sup>65</sup>

Law, despite its scientific aspirations and declarations of universal rationality, has for much of its existence as an academic discipline muddled along with tools that, as Geertz noted in his Storrs Lectures, bear “more than [a] passing family resemblance” to those of the anthropologists.<sup>66</sup> The doctrinal legal scholar and the cultural anthropologist are both, Geertz explains with characteristic flare, “connoisseurs of cases in point” and “cognoscenti of matters at hand.”<sup>67</sup> One can see, Geertz tells us, an “elective affinity” revealed in the casuistry of common law reasoning and the schematization of ethnographic case studies in which each engage, respectively.<sup>68</sup> Ironically, the resemblances Geertz teases out are less an accurate description of shared methodological concerns and techniques than an awkward public declaration of kinship that some in the legal academy would be disinclined to embrace. It's true that scholars like Owen Fiss found in Geertz the potential for “objectivity” through “interpretation.”<sup>69</sup> Most, however, edged ever closer to what they saw as the even more “objective” policy science of economics. For them, a turn to Geertz, and anthropology more generally, would be tantamount to pulling the legal academy into a swamp of hyperspecificity, an interpretive morass of subjective-seeming hermeneutics,<sup>70</sup> or, worse yet, a game of postmodern slippages.<sup>71</sup> Law simply cannot weather such liaisons in the same way medicine can if it is to aspire to the scientific confidence of economics.

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62. See, e.g., Bruno Latour, *Why Has Critique Run Out of Steam? From Matters of Fact to Matters of Concern*, 30 *CRITICAL INQUIRY* 225, 227 (2004).

63. See, e.g., Ava Kofman, *Bruno Latour, the Post-Truth Philosopher, Mounts a Defense of Science*, *N.Y. TIMES MAG.* (Oct. 25, 2018), <https://www.nytimes.com/2018/10/25/magazine/bruno-latour-post-truth-philosopher-science.html>.

64. See KLEINMAN, *supra* note 61, at 81.

65. To be clear, the relationship is such that biomedical science largely proceeds as before. There is no proposal to replace gene sequencing with an interview.

66. See GEERTZ, *supra* note 12, at 170.

67. *Id.* at 168.

68. *Id.*

69. See Owen M. Fiss, *Objectivity and Interpretation*, 34 *STAN. L. REV.* 739, 745 (1982).

70. For a critique of Geertzian anthropology from a legal scholar committed to ethnographic approaches to the study of law, see ELLICKSON, *supra* note 56, at 155 n.78.

71. On legal scholarship and the antipathy toward postmodernist theory, see Robert Post, *Postmodern Temptations*, 4 *YALE J.L. & HUMAN.* 391 (1992).

At times, the stereotype of anthropology as the discipline of the Savage slot and the variable willingness of legal academics to attribute value to ethnography converge in a way that foregrounds how the territoriality—the turf-protecting tendencies—of academic politics selectively applies its disciplining moves. This is most apparent in the genres of what we might call the legal public service memoir, on the one hand, and the scholarly text bolstered by firsthand practice experience, on the other. A prime example of the former is Jack Goldsmith's *The Terror Presidency: Law and Judgment Inside the Bush Administration*.<sup>72</sup> In it, Goldsmith, head of the Office of Legal Counsel for a time during the first George W. Bush administration, gives readers a firsthand account of the inner workings of one of the more mysterious (and prestige-cloaked) divisions within the Department of Justice.<sup>73</sup> It is a personal account that draws heavily on narrative to feed its analysis and prescriptions, and while published with a trade press, it has been reviewed and cited widely in academic journals.<sup>74</sup> What it makes clear is that when legal academics turn their attention to the processes and experiences of legal practice—in this instance, the formal legal interpretations of a quasi-judicial body—there seems to be less concern regarding methodological objectivity. Goldsmith's account is, after all, a lay version of ethnographic participant observation.

While access to these sites of behind-closed-doors legal interpretation is closely guarded, one wonders if an anthropologist's ethnographic account of the OLC would face a different, less embracing reception. Similar questions arise with another version of this genre—the law review article that draws insights by providing blow-by-blow narratives of a noteworthy lawsuit or legal campaign.<sup>75</sup> And then there are the articles and essays that do not deal primarily with the author's firsthand accounts of work in the trenches but allude to them as a means of gilding arguments and conclusions.<sup>76</sup>

My suspicion is that legal scholars are less inclined to disparage ethnographic or ethnographic-like methods when they, themselves, casually employ them in recounting stories from the trenches or when anthropologists apply them to the conventionally imagined phenomena of the Savage slot. Ethnography-like empiricism is thus tolerated when used by a select group of disciplinary insiders or when used by disciplinary outsiders not looking at formal law. What renders such insider accounts and their style of expression

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72. JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 9–13 (2009).

73. *Id.*

74. *See, e.g.*, Neal Kumar Katyal, *Stochastic Constraint*, 126 HARV. L. REV. 990, 992 (2013) (lauding *The Terror Presidency* as “the very best analysis of the national security issues surrounding President George W. Bush’s tenure.”).

75. *See, e.g.*, Harold Hongju Koh, *The “Haiti Paradigm” in United States Human Rights Policy*, 103 YALE L. J. 2391 *passim* (1994).

76. *See, e.g.*, Neal Kumar Katyal, *Trump v. Hawaii: How the Supreme Court Simultaneously Overturned and Revived Korematsu*, 128 YALE L.J.F. 641 *passim* (2019).

fully credible to legal audiences when trained on the formal sites of Western legal institutions is the extent of the intradisciplinary capital of those who use them. In other words, the credence given to legal academics with stories from the trenches hinges on the legitimacy afforded by initiation into the profession coupled with conventional markers of elite success. Admittedly, an ability to write well helps too.

In short, anthropologists and legal academics seem to be engaged in a ritualistic dance of incommensurability. More and more, anthropologists refuse to play the role of the curator of the “Savage slot” or to reduce their questions and methodologies to a search for prescriptive recommendations that can be neatly packaged as advice to sovereigns. The impasse is not a result of bad marketing on the part of anthropology—the discipline’s inability to hawk its wares—but rather of the structure of expectation doomed to spit out a set of conditions of exchange that will inevitably fail to satisfy either party.

### III. A RETURN TO MEANING, OR SOMETHING MORE?

What are we to do with this catalog of barriers to genuine interdisciplinary cross-pollination between anthropology and law? What would it take for the legal academy to listen when anthropology ventures into its most sacred territory—the domain of formal legal rules and judicial decisions? One response is that the study of law needs to open itself up to modes of inquiry that are not beholden to the project of scientific law reform. There are other worthy tasks, Paul Kahn reminds us, than providing advice to sovereigns and judges. For him, one answer is replacing presumptions about the natural foundations and ends of law with an agnosticism, a “suspension of belief”<sup>77</sup> that is also a suspension of disbelief—both classical anthropological moves. More than that, this agnosticism is meant to facilitate a shift away from ferreting out the “right” answers—the doctrinal statement that best captures the true, underlying principle within a chain of precedents or the perfect statutory framework to achieve some desired goal. Where might such a pivot lead? According to Kahn, it should lead toward “thick description,” toward exegeses of the “experience of meaning”<sup>78</sup> of the imaginative worlds law creates.

With that, we’ve essentially looped back to a version of Geertz’s Storrs lectures, and thus, returned to an interpretive anthropology of law pursued, this time around, from within the legal academy itself. Kahn’s tone, however, is not triumphant. He wonders whether an empiricism of this sort would “be welcome[d] in the nation’s law schools.”<sup>79</sup> His pessimism is warranted, at least insofar as U.S. law schools are concerned. Moreover, the way he hopes to go

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77. KAHN, *supra* note 16, at 3.

78. *Id.* at 2.

79. *Id.* at 3

about doing this—through a focus on meaning—leads to another question: whether interpretation is up to the task Kahn assigns it—that is, whether meaning is enough to serve as the organizing focus of the cultural study of law.

The rhetorical apotheosis of meaning minimizes, I think, even if unintentionally, what anthropology does and can do, particularly when directed at the realm of formal legalisms. To carve out a topic in this way is far too Cartesian, far too idealist. It fits too neatly into an idea of culture as a disembodied system of symbols—a patterned construction laminated onto the physical world. Such binaries, however, may have been what made anthropology—at least in its Geertzian strains—mildly attractive to legal scholars during the late 1970s and early 1980s, but it seems inadequate today.

“[O]ur medium is words,” Paul Carrington once noted, drawing a contrast between those professions that work with the objects of the physical world and those, like the law, that work with language.<sup>80</sup> The seemingly banal point was meant as a reminder of the fragility of law’s normative universe, which Carrington, then dean of Duke Law School, regarded as under attack from what he, and others, saw as the nihilism of the burgeoning Critical Legal Studies (CLS) movement.<sup>81</sup> The embattled moment in which the statement emerged is more than incidental. A focus on materiality in the early 1980s signaled either a reductive Marxism or CLS’s Gramscian take on law as ideological cover for something more substantial than mere words—that is, the exercise of power and a presumption that such power plays are about “real” concerns.<sup>82</sup> Geertz’s talk of interpretation and meaning lulled while any turn toward materiality seemed to evoke the vitriol of academic warfare then rending, to the delight of many, the faculties of Harvard and Stanford.

Setting aside the feuds between CLS and its detractors, let me conclude by offering an alternative to Kahn’s cultural study of law by starting with the obvious point that lawyers don’t just work with words and that anthropology’s insights have long extended beyond the realm of meaning and interpretation. One excellent example of the latter point can be found in Alex Blanchette’s recent study, *Porkopolis: American Animality, Standardized Life, and the Factory Farm*. Over many months, Blanchette immersed himself in the work of industrial pig farming and management, moving between hog barns, corporate offices, and industry conferences.<sup>83</sup> Materiality takes center stage in the account; some examples include the excruciating muscle and tendon pain that comes with the repetitive movements of precision knife work on the carcass disassembly line, the strains brought on by heaving vacuum-packed meat between conveyor belts, the exhaustion of laboring on the kill floor, and, perhaps most surprising,

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80. Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 226 (1984).

81. *Id.* at 227.

82. See, e.g., Duncan Kennedy, *Antonio Gramsci and the Legal System*, 6.1 ALSA FORUM 32 (1982).

83. BLANCHETTE, *supra* note 51, at 8.



the physical regimentation of family and social interactions outside of the workplace as a means of stemming the spread of pathogens across the industrial “herd” by human vectors.<sup>84</sup> The primacy of these forms of materiality should not be surprising. Anthropologists are concerned with how social and economic forms operate. They are interested in their processes and the effects of those processes—effects that include experience, meaning, and interpretations, yes, but also the production of material conditions that shape worlds and constrain possibilities.

As Blanchette circulates through the various subcomponents of the factory farm and beyond it, he observes how widespread stories concerning capitalism’s triumphant domination of nature—in this instance, pigs—hide something worth knowing.<sup>85</sup> That is, they conceal the ways that industrial pork production is not about science and industry remaking pigs or isolating them from human worlds so much as it is about the remaking of humans—their movements, their bodies, their residential patterns, their sociality, their consumption—with the goal of extracting more and more value from industrialized hogs.<sup>86</sup> An interpretive anthropology does not get one to this conclusion. Nor would carefully crafted surveys or economic model building for that matter. Blanchette’s project, which I urge anyone interested in industrial food production to read, captures how important materiality is to anthropology.

Just as anthropology does not work exclusively on questions of interpretation, neither does law deal exclusively with words, despite Carrington’s insistence on the immateriality of legal labor—that is, the lack of anything “tangible” to “refresh” the lawyer’s sense that what he is doing (and it is a “he” for Carrington) “pertains to reality.”<sup>87</sup> Legal texts, whether judicial opinions, constitutional text, or regulatory provisions, seem to merely hover above the material world while remaining apart from it. This is a deeply unsatisfying perspective but one that lingers in the legal academy.

Now, when I look at, say, U.S. maritime migration policing efforts in the northern Caribbean, a topic of longstanding concern for me, I see something quite different than, I imagine, Carrington would have seen. What I see is an entanglement of ships and currents and seascapes and rocky shores and legal texts attached one to the other. While it is true that certain words are able to do things (like kick off the processes by which a Coast Guard vessel heads out into Haitian territorial waters to interdict a boat full of migrants) only when certain conditions of legitimate lawmaking are met, it is also true that lawmakers, regulators, and bureaucrats also tend to calibrate their pronouncements to what is more or less materially possible in the world. Presidential proclamations

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84. *Id.* at 183, 126.

85. *Id.* at 241.

86. *Id.* at xiv.

87. Carrington, *supra* note 80, at 226.

related to the interdiction of migrants at sea take into account, one assumes, the materiality of the ocean as a space apart from firm land, and laws concerning the provisioning of migrants with water in the deserts of Arizona do so as well for that arid landscape.<sup>88</sup> U.S. borders, one might say, are an entanglement of law and terrain that does more than just take note of materiality—rather, it weaponizes sea- and desert-scapes for deterrent ends.<sup>89</sup> Corpses among the mesquite and migrants crowded on a Coast Guard vessel’s flight deck seem tangible enough effects. Lawyers, to put it a bit differently, don’t just work with words. They work with deserts, and oceans, and ships, and people. That’s because words are not detached from some material ontological realm “out there.”

My aim, here, is not to entirely collapse the difference between, say, a legal framework and a material landscape, but it is to think the two together in a way that highlights the ways each constrains and facilitates (affords) possibilities without determining them outright.<sup>90</sup> I have found this particularly helpful in thinking about law not just as an expression of ideas, and values, and meanings (though it is that), but also as a mode of crafting infrastructures of which it, itself, is a part.<sup>91</sup>

Anthropology, as an empirical and theoretical discipline, has a good deal to say about the role of formal law in creating such infrastructures, as this all-too-brief example merely suggests. In fact, it has a lot to say about a good deal of other topics at the core of law’s territory. Although what anthropologists say may not be tailored to the objective of reform, that doesn’t make its findings irrelevant. Legal scholars may want to know how things like, say, industrial pork production, actually work, which is not the same as saying Blanchette’s ethnography should have ended with a set of policy prescriptions complete with cost-benefit analyses.

My point is that the burden of openness that may facilitate translation between anthropology and law cannot lie exclusively with the anthropologist whose endeavors may, indeed, challenge the underpinnings of specific reformers but not the project of reform itself. Anthropologists are not, after all, committed to an ascetic withdrawal from the world, and they will, on occasion, make overt normative claims, not just in their political lives but in their scholarship—though they often do it poorly (their tools are suited to different tasks). While some anthropologists are guilty of a self-imposed parochialism,

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88. See, e.g., All Things Considered, *Extending ‘Zero Tolerance’ to People Who Help Migrants Along the Border*, NAT’L PUB. RADIO (May 28, 2019), <https://www.npr.org/2019/05/28/725716169/extending-zero-tolerance-to-people-who-help-migrants-along-the-border>.

89. See JASON DE LEÓN, *THE LAND OF OPEN GRAVES: LIVING AND DYING ON THE MIGRANT TRAIL* *passim* (2015).

90. Cf. Webb Keane, *Perspectives on Affordances, or the Anthropologically Real*, 8 HAU: J. ETHNOGRAPHIC THEORY 27, 31 (2018).

91. See JEFFREY S. KAHN, *ISLANDS OF SOVEREIGNTY: HATTIAN MIGRATION AND THE BORDERS OF EMPIRE* 17 (2019).

this is often misattributed to a penchant for highly *technical* theorizing. If the issue is indeed about specialized vocabularies, then the law does not have much of a leg to stand on with its penchant for Latin *dicta*. After all, the terms we tend to use are not *bapax legomena*.<sup>92</sup> But when anthropologists arrive in good faith bearing gifts, the burden of hospitality lies with the gatekeepers of the legal academy as much, if not more, than with the anthropologists. Again, the costs of structured incommensurability cannot be borne by the anthropologists alone, and the benefits of hospitable collaboration should be obvious for anyone willing to take the time and make the effort to consider them.

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92. The use of Latin here is not meant to conjure up some obscure anthropological term of art. I came across the phrase for the first time in a Supreme Court opinion in which Associate Justice Antonin Scalia refers to the term “material” as not a *bapax legomenon*. *Kungys v. U.S.*, 485 U.S. 759, 769 (1987). For me, this was a fitting example of the lawyerly affection for esoteric jargon, something the discipline of law shares with anthropology.