0640
THE LAW AND ECONOMICS OF ANTHROPOLOGY

Robert Cooter
University of California at Berkeley

Abstract

I briefly review the classics of legal anthropology and discuss the economic analysis relevant to it.
JEL classification: K00
Keywords: Law, Economics, Anthropology, Property, Social Norms

'Just look along the road, and tell me if you can see either of [the messengers].'
'I see nobody on the road,' said Alice.
'I only wish *I* had such eyes,' the King remarked in a fretful tone. 'To be able to see Nobody! And at that distance too! Why, it's as much as *I* can do to see real people, by this light!' (Lewis Carroll's *Through the Looking-Glass*, Chapter 7)

As a rule of thumb, an academic subject exists when someone teaches it regularly at a major university. By this standard, the subject of law, economics and anthropology does not exist. A review essay requires eyes that the King attributed to Alice. In contrast, legal anthropology exists and so does the economic analysis of law. I will offer some remarks on how these two subjects relate to each other.

1. Legal Anthropology

Legal anthropology is a small subject that is taught in a few universities, especially in America (Kuppe and Potz, 1994). I recently asked teachers of law and anthropology at major American universities to send me the reading lists for their classes. The readings were 'all over the map' both literally and figuratively. The struggle in anthropology over the subject's identity has infected law and anthropology. Some strands in modern anthropology, such as symbolic anthropology (Geertz, 1983), have no apparent relationship to the economic analysis of law. Others, such as economic anthropology (Dalton, 1967; Plattner, 1989) and anthropological materialism (Harris, 1968), have a modest relationship to the economic analysis of law. In general, the analytical techniques used in the economic analysis of law are not understood or appreciated by anthropologists.

Reviewing the different strands of anthropological thought is a difficult task (Ortner, 1984) and relating them to the economic analysis of law in a brief article is impossible. I will attempt something more limited and modest. My main aim is to describe for law and economics scholars their subject's frontier with anthropology. Legal anthropology has a small, classical literature, which I will describe briefly. Then I will review in more detail the aspects of the economic analysis of law that relate to classical concerns of anthropology.

Legal anthropology developed its classical literature (Conley and O'Barr, 1993) in the twentieth century when anthropology books and monographs devoted to law first appeared. Malinowski (1926), who first conducted systematic field research on tribal law, debunked the myth that tribal law consists of strict prohibitions and harsh punishments resembling criminal law. Instead, he observed an elaborate system of compensation in Polynesia for harm done to others, resembling the modern law of property and torts, but without anything similar to formal courts. He commented on the usefulness of such a system and tried to explain how it worked .

Llewellyn and Hoebel (1941) interviewed Cheyenne Indians in the 1920s and reconstructed their legal order as it existed in the 1860s before conquest and subjugation. This study applied the 'case method' of the common law to tribal law, thus minimizing the distinctiveness of techniques required in legal anthropology. The 'cases' consist of memories, stories and myths about law and government. As practiced by Llewellyn and Hoebel, the 'case method' explores the purposes and uses of political practice and law, which makes legal realism resemble functionalism.

Bohannan (1957) observed disputes in the customary courts ('moots') of the Tiv in colonial Nigeria. Like Llewellyn and Hoebel, he analyzed cases, but in greater detail and subtlety, revealing the cultural obstacles to understanding exotic legal systems. Bohannan's concern over objectivity and neutrality in comparing cultures anticipates recent methodological discussion in anthropology. Gluckman (1965) provided the same kind of in-depth study of the legal culture of another African group, the Barotse. Pospisil (1958) extended this tradition by attempting something resembling a codification of the customary law of a group in New Guinea who lived in the 1950s under limited Dutch legal control.

The small, classical literature aimed at describing aspects of tribal law that the modern state had not changed or distorted. More recent studies in this tradition explicitly concern the way custom responds to state and market (Collier, 1973; Moore, 1986; (Nader, 1990; Sierra, 1995), including the attempts of subordinate peoples to secure themselves against exploitation (Nader, 1990; Comaroff and Roberts, 1981). Whereas the classical literature concerned tribes, modern studies in legal anthropology often concern formal, non-western legal systems, such as Islamic or Buddhist law (Fikentscher,

1995), thus effacing the distinction between legal anthropology and comparative law. Contemporary anthropologists have also developed an interest in the way contemporary customs interact with modern law in countries like the US (Greenhouse, 1986).

2. Economic Analysis

I now turn to the smattering of articles on anthropology that fit within the modern law and economics movement. In an earlier review Brenner (1983), stresses population growth as the destabilizing influence that causes innovation and economic development in tribes. Only a few papers in law and economics concern law among tribal people. Perhaps the most discussed is the paper by Demsetz (1967) which proposes a simple theory of the origins of property. Demsetz reasoned that private property emerges from a prior rule permitting open access to resources, and this event should occur at the point in history when the benefits of the change exceed the costs. He observed that when everyone has open access to a resource, over-exploitation produces a dead-weight loss, as with over-fishing on the high seas. In contrast, private ownership can eliminate this dead-weight loss, but, unlike open-access, private property requires costly definition and enforcement of ownership rights. So Demsetz predicts that privatization will occur when the dead-weight loss of open access exceeds the transaction costs of exclusion by private property rights.

For evidence in favor of this theory, Demsetz relies upon secondary sources, notably concerning the fur trade among North American Indian tribes. More careful examination proves that Demsetz got some important facts wrong. Tribal people live among kin with extensive, complicated obligations to each other, including obligations about using land. These obligations create a very different legal regime from open access. So the characteristic movement in tribal property law is not from open access to private ownership. Rather, new customary rights in property continually evolve from old customary rights in property (Cooter, 1991). Tradition persists by continually inventing new things.

Economists often contrast individual and group ownership, but these labels are too imprecise to fit customary law. Research on property rights has revealed variety and detail in the political arrangements by which small groups manage their assets (Eggertsson, 1992; Ellickson, 1993; McCloskey, 1975a, 1975b; Ostrom, 1990). Even without individual ownership, small groups of people living intimate lives seldom suffer the political paralysis that causes deadweight losses like the infamous tragedy of the commons.

Note that the Demsetz paper reveals a characteristic weakness of anthropological work among law and economics scholars: they lack intuition because they have never done field research. For an early exception in property law, see Trebilcock (1981).

In another paper with high ambition, Posner (1980) interprets the behavior of tribes as a response to missing insurance markets. The combination of the hazards of primitive life and the absence of insurance, according to this view, causes people to form long-run relationships and redistribute wealth. Like Demsetz, this paper contributes to anthropology by raising the level of generality in formulating familiar trade-offs.

Risk-reduction is important to cases where customary law allows relatively open access to a resource, such as summer grazing land in Mongolia. Variations in weather impose risks on people living off the land. A customary rule of open access enables people to relocate quickly from one micro-climate to another, thus reducing climatic risk (Cooter, 1995; McCloskey, 1976; Nugent and Sanchez, 1993). Open-access, however, discourages investments to improve the land. So the trade-off is between dead-weight loss and risk-spreading, not the trade-off between dead-weight loss and transaction costs of exclusion as proposed by Demsetz.

3. Social Norms

As explained, legal anthropology especially concerns customary law. Proponents of legal decentralization typically admire custom because it arises spontaneously, outside the state (Hayek, 1976; Leoni, 1991). The informality of social norms obscures their operation and causes observers to under-estimate their importance relative to formal law. Modern business is often conducted in rational ignorance of the law (Macaulay, 1963). Informal law plays an especially important role in basic markets where state enforcement of contracts fails, as in capital markets in developing countries (Winn, 1994). Over-zealous regulation forces informal law to operate in opposition to formal law, which impairs economics development (De Soto, 1989).

In recent years, economic theories have corrected the tradition of underestimating informal norms. The analysis of social norms has become central to the law and economics agenda, especially after Ellickson's research on liability for straying cattle framed legal decentralization in terms of the Coase Theorem (Ellickson, 1991). Two bodies of theory are joined in the economic analysis of social norms. First, game theory has been adapted to the specific circumstances in which social norms direct behavior (Ullmann-Margalit, 1977; Taylor, 1987). Second, competition among social norms resembles competition in evolutionary biology, so the application of game theory to evolutionary biology provides models for understanding social norms (Hirshleifer, 1987; Frank, 1988; Gruter, 1991; Gruter and Masters, 1992).

The economic analysis of social norms, such as the customary law of property or customary obligations of redistribution, draw upon a fundamental

result in game theory: one-shot games with inefficient solutions, such as prisoner's dilemma, often have efficient solutions when repeated between the same players (Fudenberg and Maskin, 1986). This generalization grounds the utilitarianism of small groups, by which I mean the tendency to create efficient rules for cooperation within small groups. Kinship provides a framework for repeated interaction among the same people. Consequently, game theory predicts that kin groups such as tribes can solve problems of internal cooperation without relying upon state law. Landa has used this result to study groups of Chinese traders (Landa, 1981).

Kinship, however, is not the only basis for dense social networks in intimate societies. Much like kinship, trade organizations can provide a framework for repeated interaction (Cooter and Landa, 1984). Historical institutions such as the medieval law merchant can be understand in this light (Milgrom, North and Weingast, 1990; Greif, 1993). Bernstein has demonstrated this fact in careful, detailed studies of modern diamond exchanges (Bernstein, 1992) and commodity trading associations (Bernstein, 1996). Social groups, in which people have repeated transactions with each other, must be distinguished from social categories by which people are classified. Unlike social groups, people who fall in the same social category might not have ties to each other, so they may have inefficient interactions (Posner, 1995).

I have reviewed various economic studies of social norms. The economic analysis of social norms requires a comprehensive vision, but none has emerged as yet. According to one approach, law should ideally correct failures in the 'market for social norms', rather like regulations should ideally correct failures in the market for commodities (Cooter, 1994). This approach requires an analysis of the incentive structures in society that cause the evolution of efficient social norms, and, conversely, the incentive structures that cause social norms to fail. The application of game theory to customary forms of discrimination suggests an important kind of failure (Akerlof, 1980, 1985; McAdams, 1995; Posner, 1996). A thorough development of a theory of the evolution of social norms would provide the foundation for a theory of adjudication, especially in the area of common law.

4. Conclusion

I organized my description of the law and economics of anthropology in terms of these underlying ideas: property, long-run relationships and social norms. Now I need to mention some loose ends that do not fit my categories. First, some law and economics scholars have examined issues concerning American Indians (McChesney, 1990; Cornell and Kalt, 1993; Anderson and McChesney, 1994). Second, some studies in comparative law and economics have an

anthropological flavor (Kuran, 1995). Finally, a few brave scholars have attempted to cross the deep divide between meaning and behavior in social science by using the tools of law and economics to interpret stories and parables from the Bible (Levmore, 1995; Miller, 1994, 1995, 1996a), or by trying to adapt the rigorous individualism of economics to encompass a theory of culture (Audain, 1995). These papers parallel the strong turn towards interpretivism in anthropology in general (Geertz, 1983) and in legal anthropology in particular, which stresses the distortion of the *meaning* of law as a consequence of political domination (Comaroff, 1992; Williams, 1994).

Finally, I want to conclude by remarking on the interaction between anthropology and economics. In anthropology as in politics, the confidence of colonialism dissipated into the self-doubt of post-colonialism. Economics, in contrast, retains its brash self-confidence. Given these facts, some anthropologists associate economics imperialism with the mentality of political colonialism. Abandoning such ideological conceptions would create a better atmosphere for anthropology and economics to learn from each other. The economic analysis of legal anthropology remains more aspiration than reality. Economists believe correctly that they can bring more systematic analysis to a range of topics in anthropology. Adapting economic theory to new institutions and cultures, however, requires careful field research. Without a commitment to field research, economic theory remains too remote from its object of study to convince anthropologists immersed in other cultures.

Bibliography on the Law and Economics of Anthropology (0640)

Akerlof, George A. (1980), 'A Theory of Social Custom, of Which Unemployment may be one Consequence', **94** *Quarterly Journal of Economics*, 719-775.

Akerlof, George A. (1985), 'Discriminatory, Status-based Wages among Tradition Oriented, Stochastically Trading Coconut Producers', **93** *Journal of Political Economy*, 265-276.

Anderson, Terry L. and McChesney, Fred S. (1994), 'Raid or Trade? An Economic Model of India-White Relations', **37** *Law and Economics*, 39-74.

Audain, Linz (1995), 'Critical Cultural Law and Economics, the Culture of Deindividualization, the Paradox of Blackness', **70** *Indiana Law Review*, 709 ff.

Bernstein, Lisa (1992), 'Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry', **21** *Journal of Legal Studies*, 115-157.

Bernstein, Lisa (1996), 'Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms', **114** *University of Pennsylvania Law Review*, 1643-1696.

Bohannan, Paul (1957), *Justice and Judgement Among the Tiv*, London.

Brenner, Reuven (1983), 'Trust, Population, and Wealth; or, Why did Cain Kill Abel?', in *History - the Human Gamble*, Chicago, IL, University of Chicago Press, 62-104. Reprinted in Spanish edition: Fondo de Cultura Economics, Mexico - Spain, 1989.

Collier, Jane (1973), *Law and Social Change in Zinacantan*, Stanford, CA, Stanford University Press.
Comaroff, John L. (1992), *The Discourse of Rights in Colonial South Africa: Subjectivity, Sovereignty, Modernity*, Vol. I (with J. Comaroff), Chicago, IL, University of Chicago Press.
Comaroff, John L. and Roberts, Simon (1981), *Rules and Processes: The Cultural Logic of Dispute in an African Context*, Chicago, IL, University of Chicago Press.
Conley, John M. and O'Barr, William M. (1993), 'Legal Anthropology Comes Home: A Brief History of the Ethnographic Study of Law', **27** *Loyola Law Review*, 41-64.
Cooter, Robert D. (1991), 'Inventing Market Property: The Land Courts of Papua New Guinea', **25** *Law and Society Review*, 759-801.
Cooter, Robert D. (1994), 'Structural Adjudication and the New Law Merchant: A Model of Decentralized Law', **14** *International Review of Law and Economics*, 215-231.
Cooter, Robert D. (1995), 'Mongolia: Avoiding Tragedy in the World's Largest Commons', *Olin Working Paper in Law and Economics*, Boalt Hall School of Law, Berkeley.
Cooter, Robert D. and Landa, Janet T. (1984), 'Personal versus Impersonal Trade: The Size of Trading Groups and Contract Law', **4** *International Review of Law and Economics*, 15-22.
Cornell, Stephen and Kalt, Joseph P. (1993), 'Where does Economic Development Really Come From? Constitutional Rule Among the Modern Sioux and Apache', **93** *Faculty Research Working Papers*, John F. Kennedy School of Government, Harvard University, 30 ff.
Dalton, George (1967), *Tribal and Peasant Economies*, Austin, University of Texas Press.
De Soto, Hernando (1989), *The Other Path*, New York, Harper and Row.
Demsetz, Harold (1967), 'Toward a Theory of Property Rights', **62** *American Economic Review*, 347-359.
Eggertsson, Thrainn (1992), 'Analyzing Institutional Successes and Failures: A Millenium of Common Mountain Pastures in Iceland', **12** *International Review of Law and Economics*, 423-437.
Ellickson, Robert C. (1991), *Order Without Law: How Neighbors Settle Disputes*, Cambridge, MA, Harvard University Press.
Ellickson, Robert C. (1993), 'Property in Land', *Yale Law Journal.*
Fikentscher, Wolfgang (1995), *Modes of Thought: A Study in the Anthropology of Law and Religion*, Tubingen, J.C.B. Mohr (Paul Siebeck).
Frank, Robert H. (1988), *Passions Within Reason: The Strategic Role of the Emotions*.
Fudenberg, Drew and Maskin, Eric (1986), 'The Folk Theorem in Repeated Games with Discounting or with Incomplete Information', **54** *Econometrica*, 533-554.
Geertz, Clifford (1983), 'The Way We Think Now: Toward an Ethnography of Modern Thought', *Local Knowledge*.
Gluckman, Max (1965), *The Ideas in Barotse Juriprudence*, New Haven, Yale University Press.
Greenhouse, Carol J. (1986), *Praying for Justice: Faith, Order, and Community in an American Town*, NY, Cornell Univesity Press.
Greif, Avner (1993), 'Contract Enforceability and Economic Institutions in Early Trade: The Maghiribi Trader's Coation', **83** *American Economic Review*, 525-548.
Gruter, Magaret (1991), *Law and the Mind: Biological Origins of Human Behavior*, Newbury Park, California, Sage.

Gruter, Magaret and Masters, Roger (1992), *The Sense of Justice: Biological Foundations of Law*, Newbury Park, California, Sage.
Harris, M. (1968), *The Rise of Anthropological Theory*, New York.
Hayek, Friedrich A. von (1976), *Planning and the Rule of Law*, Chicago, University of Chicago Press.
Hirshleifer, Jack (1987), 'Evolutionary Models in Economics and Law: Cooperation versus Conflict Stategies', **9** *Economic Behavior in Adversity*.
Kuppe, Rene and Potz, Richard (1994), *Law and Anthropology: International Yearbook for Legal Anthropology*, Dordrecht/Boston/London, Martinus Nijhoff Publishers.
Kuran, Timur (1995), 'Islamic Economics and the Islamic Subeconomy', **9** *Journal of Economic Perspectives*, 155-173.
Landa, Janet T. (1981), 'A Theory of the Ethnically Homogeneous Middleman Group: An Institutional Alternative to Contract Law', **10** *Journal of Legal Studies*, 349-362.
Leoni, Bruno (1991), *Freedom and the Law*, Indianapolis, Liberty Fund.
Levmore, Saul (1995), 'Rethinking Group Responsibility and Strategic Threats in Biblical Text and Modern Law', **71** *Chicago-Kent Law Review*, 85 ff.
Llewellyn, Karl N. and Hoebel, Adamson E. (1941), *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence*, University of Oklahoma Press.
Macaulay, Stewart (1963), 'Non-Contractual Relations in Business: A Preliminary Study', **25** *American Sociological Review*, 55-70. Reprinted in Goldberg, Victor P. (ed.), *Readings in the Economics of Contract Law*, Cambridge, Cambridge University Press, 1989, 4-15.
Malinowski, Bonislaw (1926), *Crime and Custom in Savage Society*, New York.
McAdams, Richard H. (1995), 'Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination', *Harvard Law Review*.
McChesney, Fred S. (1990), 'Government as Definer of Property Rights: Indian Land Ownership, Ethnic Externalities, and Bureaucratic Budgets', **19** *Journal of Legal Studies*, 297-335.
McCloskey, D.N. (1975a), 'The Economics of Enclosure', in Parker, W.N. and Jones, E.L. (eds), *European Peasants and Their Markets*, ASIN.
McCloskey, D.N. (1975b), 'The Persistence of English Common Fields', in Parker, W.N. and Jones, E.L. (eds), *European Peasants and Their Markets*, ASIN.
McCloskey, Donald N. (1976), 'English Open Fields as Behavior Towards Risk', in Unselding, Paul (ed.), *Research in Economic History 1*, Greenwich, CT, JAI Press.
Milgrom, Paul R., North, D. and Weingast, B. (1990), 'The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs', **2** *Economic and Politics*, 1-23.
Miller, Geoffrey P. (1992), 'The Culture of Capital: Comments on Conley and O'Barr', **71** *North Carolina Law Review*, 201 ff.
Miller, Geoffrey P. (1993a), 'Ritual and Regulation: A Legal Economic Interpretation of Selected Biblical Texts', **22** *Journal of Legal Studies*, 477-501.
Miller, Geoffrey P. (1993b), 'Contracts of Genesis', **22** *Journal of Legal Studies*, 15-45.
Miller, Geoffrey P. (1994), 'The Legal-Economic Analysis of Comparative Civil Procedure, the Legal-Economic Approach to Biblical Interpretation', **150** *American Journal of Comparative Law Journal of Institutional and Theoretical Economics*, 755 ff.
Miller, Geoffrey P. (1995), 'Verbal Feud in the Hebrew Bible: Judges 3:12-30 and 19-21', *Journal of Near Eastern Studies*.

Miller, Geoffrey P. (1996a), 'Ancient Law: the New Learning (tentative title) (1996) Constitutionalist: A Legal-Economic Interpretation of Exodus 17:8-16 and Related Texts', **70** *Chicago-Kent Law Review*, 1829 ff. To be republished in Lindgren, James, Miller, Geoffrey et al. (eds).
Miller, Geoffrey P. (1996b), 'The Song of Deborah: A Legal-Economic Analysis', **144** *University of Pennsylvania Law Review*, 2293 ff.
Moore, Sally Falk (1986), *Social Facts and Fabrications: Customary Law in Kilimanjaro 1880-1980*, New York, Cambridge University Press.
Nader, Laura (1990), *Harmony Ideology*: *Justice and Control in a Zapotec Mountain Village*, Stanford, CA, Stanford University Press.
Nugent, Jeffrey B. and Nical Sanchez (1993), 'Tribes, Chiefs, and Transhumance: A Comparative Institutional Analysis', **87** *Economic Development and Cultural Change*, 113 ff.
Ortner, Sherry (1984), 'Theory in Anthropology Since the Sixities', **26** *Comparative Studies in Society and History*, 125-166.
Ostrom, Elinor (1990), *Governing the Commons: Evolution of Institutions for Collective Action*, Cambridge, Cambridge University Press.
Plattner, Stuart (1989), *Economic Anthropology*, Stanford, Hoover Institute Press, Stanford University.
Posner, Eric A. (1995), 'The Regulation of Groups: The Influence of Legal and Nonlegal Santions on Collective Action', **63** *University of Chicago Law Review*, 113-197.
Posner, Eric A. (1996), 'Law, Economics and Inefficient Norms', **145** *University of Pennsylvania Law Review*, 1697-1744.
Posner, Richard A. (1980), 'A Theory of Primitive Society, with Special Reference to Law', **23** *Journal of Law and Economics*, 1-25.
Pospisil (1958), *Kapauku Papuans and Their Law*, New Haven, Published for the Dept. of Anthropology, Yale University.
Sierra, Maria Teresa (1995), 'Indian Rights and Customary Law in Mexico: A Study of the Nahuas in the Sierra de Puebla', **29** *Law and Society Review*, 227-254.
Taylor, Michael (1987), *The Possibility of Cooperation*, Cambridge, Cambridge University Press.
Trebilcock, Michael J. (1981), 'Communal Property Rights: The Papua New Guinea Experience', *University of Toronto Law Journal.*
Ullman-Margalit, Edna (1977), *The Emergence of Norms*, Oxford, Clarendon Press.
Williams, Robert, A., Jr (1994), 'Linking Arms Together: Multicultural Constitutionalism in a North American Indigenous Vision of Law and Peace', **82** *California Law Review*, 981-1049.
Winn, Jane Kaufman (1994), 'Informal Financial Practices of Small Business in Taiwan', **28** *Law and Society Review*, 193-241.