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SWEET OLD-FASHIONED NOTIONS

Legal Engagement With Anthropological Scholarship

Deepa Das Acevedo

SWEET OLD-FASHIONED NOTIONS

Legal Engagement With Anthropological Scholarship

*Deepa Das Acevedo**

The study of law, we are told often and generally with approval, has become a potluck to which everyone is invited. Over there stand the historians bearing their retrospectively informed insights; across from them are the experimental psychologists hoisting their pleasingly social-scientific brew; in the corner lurk philosophers chatting calmly over some first principles. The center of the room is quite naturally taken up by the economists, laughing exuberantly over their spread of nifty models, intimidating formulae, and soothing predictions. In the midst of this lively affair, circulating among the invitees like a dutiful host, rejecting nothing, sampling everything, and exulting, not very slyly, in the dazzling array of theories and methodologies brought together for its delectation, is law. Law borrows from everyone in this delightful scene, it accommodates everyone, and if some of its esteemed guests seem more esteemed than others that is only because their offerings were seasoned to taste.

Why, then, is anthropology so conspicuously absent from the party?

The rest of this introductory Essay provides context for one half of an effort, now several years in the making, to think through the intersection of law and anthropology with others who, by inclination or by necessity, would like there to be one. It is *one-half* of that effort because it is addressed to law folk; its companion—appearing elsewhere—is addressed to anthropologists.¹ That these conversations have occurred at all is exciting. That they appear separately is telling.

* * *

Anthropology's virtual absence from contemporary legal academia is a puzzle with an abundance of solutions. "Too descriptive," says one scholar; "too exotic," says another. "We need plain vanilla rules for governance, not spicy cultural minutiae."

These are understandable demands coming from folks preoccupied by everything from the laws governing retirement accounts and the laws governing free speech to the laws governing lawyers. We are in the business of telling some

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1. Deepa Das Acevedo, *What's Law Got To Do With It?*, LAW & SOC. INQUIRY (forthcoming).

people how to tell other people how to live, work, play, and die. Whether or not anybody is listening, a point of chronic uncertainty among academic lawyers, it seems only reasonable to expect that we make it easy for them to do so. And this, we have largely decided, is a goal that is best met using the domestic (yet acultural), carefully designed (yet value-neutral), and generalized (yet nontheoretical) approach most strongly associated with law and economics.

It is tiresome to revisit the legal academy's obsession with law and economics, and it feels like dirty pool, too. So very many people have done it already.² Besides, what else should one expect of a scholarly universe whose gatekeepers are twenty-something trainees struggling heroically to vet, twice a year, a few thousand pieces of written work that would be considered healthily proportioned books elsewhere on campus? As many of my colleagues in this venture have observed, and as a few of them explicitly discuss later on in this very issue, numbers are imposing, models and the predictions they facilitate are reassuring, and it is infinitely preferable to hear that one is predisposed to think as one should, which is to say economistically, than it is to endure homilies on the sins of parochialism and bubblegum theory. Law's apparent weakness for enticingly wrapped nuggets of regulation-shaped insight may, moreover, only be endemic to *American* lawyers—in fact, to American lawyers of a certain professional status and disposition: legal scholars working in less elite schools or subfields are, even here, markedly more accepting of un-economic analyses. Or, perhaps: anthropologists ought not to blame law folk for loving what God and the Koch brothers have so effectively brought together.³

Whichever explanation one chooses, the legal academy's notions about how scholarship works carry implications for how law works, and that, as the old saw goes, makes them far too important to be left to lawyers. Old-fashioned notions, even ones that are almost endearingly obsolete, can be dangerous if they circumscribe what one is able to recognize as knowledge.

Nothing, for instance, will shake the belief among law folk that what anthropologists do is descriptive—which, according to the conventions of this particular universe, is an approximate synonym for canine leavings. At the same time, few pieces of advice have been given to me so consistently by legal scholars as the admonishment to not run out and rewrite a few sections of this statute or that model code because *that* kind of normativity is, I am told, not at

2. Besides several of the essays in this symposium and their siblings published in *LAW & SOCIAL INQUIRY*, see, e.g., Mary Anne Case, "Is there a *Lingua Franca* for the American Legal Academy?", in *THE NEW LEGAL REALISM: TRANSLATING LAW-AND-SOCIETY FOR TODAY'S LEGAL PRACTICE* 289 (Elizabeth Mertz, Stewart Macaulay & Thomas W. Mitchell eds., 2016); Lauren B. Edelman, *Rivers of Law Contested Terrain: A Law and Society Approach to Economic Rationality*, 38 *LAW & SOC'Y REV.* 181 (2004); LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 77–82 (1996).

3. Readers will recognize that Charles and David Koch are hardly the sole institutional or financial forces behind the rise of law and economics; as Riaz Tejani describes in his contribution to this symposium, there have been plenty of other norm entrepreneurs involved. Riaz Tejani, *The Life Of Transplants: "Success" In Legal Anthropology And Law & Economics*, 73 *ALA. L. REV.* __, XX–XX (2022).

all necessary anymore. Lawyers are inherently normative, these well-wishers imply, because they are interested in critiquing and correcting the status quo. Economists are normative in this way too. Anthropologists are not.

Now, an aversion to normativity will seem like a strange charge to level against anthropology, at least to anyone who has read anthropology during the past thirty years. Judging by its flagship North American publication, the discipline is currently contemplating self-immolation over its failure to adequately denounce many of the same power structures that are on the receiving end of much contemporary legal ire. Its rising stars tend to make declarations to the effect that scholarship “aimed at material transformation is the only work that continues to be worth doing.”⁴ Some of its more senior practitioners are wondering, sincerely and publicly, whether the American Anthropological Association has “become an NGO” because of the ideological postures it assumes and that it assumes obtain among its membership—and, moreover, that it encourages as a condition of participation in associational life.⁵ We might (and I frequently do) fault anthropologists for many things, but a lack of opinions about how the world ought to be and an interest in using scholarship to achieve those ends is not among the discipline’s failings.

Admittedly, this normative bent is not always so eye-wateringly obvious. It regularly gets lost in the overabundant flow of interesting gerunds and artful syntax that marks the modern anthropological voice; even anthropologists themselves, as one member of our group diplomatically phrased it, often fail to realize that they are, at the very least, subtly moralistic. Anthropologists may not write code, for people or for machines, but they are no less interested in defining the contours of acceptable behavior. They critique notions about the past as well as notions about the present, notions about right here and over there, and very often, as in the instant case, they critique notions about notions. Setting aside the kind of sleeves-up legislative drafting that even legal scholars tell me I may avoid, the only way to seriously believe that contemporary anthropology resists recognizably normative judgment is to refrain from reading it.

Other perceptions about anthropology that circulate within the legal academy, to the extent that any such perceptions circulate at all, are just as

4. Ryan Cecil Jobson, *The Case for Letting Anthropology Burn: Sociocultural Anthropology in 2019*, 122 AM. ANTHROLOGIST 259 (2019); Leniqueca A. Welcome, *After the Ash and Rubble Are Cleared: Anthropological Work for a Future*, AM. ANTHROLOGIST (Sept. 22, 2020), <http://www.americananthropologist.org/welcome/>.

5. Email digest from Fadwa El Guindi, “Has the AAA Become And [sic] NGO?”, AM. ANTH. ASSOC. (Apr. 14, 2021) (on file with author) (“In order to classify our proposed panel on the AAA website a pulldown list of topics that constitute anthropology appeared. Looking at the list of topics I thought maybe I made a mistake and went to an NGO page and not to the science of humankind page - checked again. I read the list and said oh maybe this is a journalism page.”); Reply from Dwight Read, “Reply: Has the AAA Become And [sic] NGO?”, AM. ANTH. ASSOC. (Apr. 18, 2021) (on file with author) (“I was dumbfounded when I read through the list of themes that must be used to characterize an Oral Presentation Session and found no themes that are ‘focused on the science and data of the topics that are under discussion . . .’”).

difficult to sustain when presented in the charming and judicially approved typeface of your choice. Consider, for instance, the view that anthropological knowledge is merely anecdotal stretched thin. Or that anthropological insights are peculiarly and culturally specific. Or even that anthropological ways of knowing are inescapably subjective.

Really?

To a degree, I suppose, anthropology is all of these things. The field did emerge to provide information about the “savage slot” that, at one time, demarcated its disciplinary boundaries.⁶ Ethnographic data is indeed deep, not broad, such that anyone flashing (or confessing) their *n* as a prelude to unveiling anthropological analysis is walking around with borrowed identification and at risk of immediate shunning. And there is simply no way, even if there is also no need, to get away from the interweaving of scholar with finding that is an unmistakable aspect of every ethnographic encounter.

But the question is not whether anthropology *is* any one of these things—it is the belief, now baked into legal scholarship, that some other way of knowing *is not*. Law’s notions about anthropology, in other words, link directly to its notions about knowledge, and they make clear that the legal academy is standing at the door, eagerly awaiting a positivist, objective, value-neutral, yet normatively-inclined field of study that will never appear because, of course, it does not exist. All knowledge uses slices of the universe to talk about the universe at large, meaning that it makes assumptions that are at bottom unjustifiable regardless of whether they are of the can-opener-on-a-desert-island variety common to economics or the Jonesville-is-the-USA variety common to anthropology.⁷ All knowledge is culturally situated and situating, whether it takes up perspectives rooted in other and therefore (Tony Kennedy notwithstanding) analytically marginal countries, or leaves out perspectives from the marginalized inhabitants of this country.⁸ All knowledge, including the sort of knowledge that is expressed through numbers and graphs rather than words and stories, reflects personal commitments, subjective experiences, and decisions antecedent to analysis that determine what that analysis will find.

We knew this once. Before they began raiding one another for anecdotal flavor, anthropology and law gave to each other with a generosity and a

6. Michel-Rolph Trouillot, *Anthropology and the Savage Slot: The Poetics and Politics of Otherness*, in GLOBAL TRANSFORMATIONS: ANTHROPOLOGY AND THE MODERN WORLD 7 (2003).

7. A once-popular joke about economists has it that “a physicist, a chemist, and an economist were stranded on a desert island with no implements and a can of food. The physicist and the chemist each devised an ingenious mechanism for getting the can open; the economist merely said, ‘Assume we have a can opener!’” KENNETH E. BOULDING, *ECONOMICS AS A SCIENCE* 101 (1970). The Jonesville example is one of the two squibs (the other one being “Easter-Island-is-a-testing-case”) used by Clifford Geertz to critique anthropology’s pretensions to generalized insight. Clifford Geertz, *Thick Description: Toward an Interpretive Theory of Culture*, in THE INTERPRETATION OF CULTURES 3, 21 (1973).

8. See generally William N. Eskridge, Jr., *United States: Lawrence v. Texas and the Imperative of Comparative Constitutionalism*, 2 INT’L J. CONST. L. 555 (2004).

frequency that rendered benefactor more or less indistinguishable from recipient. The dead white men of anthropology's origins were, like Maine, Morgan, McLellan, and Bachofen, very often *lawyer*—men concerned with legal things.⁹ The second most famous book by the first most famous practitioner of ethnography was about “crime and custom.”¹⁰ Llewellyn taught Hoebel and then went on to write *The Cheyenne Way* with him; Yale invited Geertz to deliver the Storrs Lectures; the Gluckman-Bohannan debate lives on in the corners of international and comparative law theory some sixty years after it happened. Mutually beneficial seasoning, in other words, has not been a shortcoming of this relationship in the past.

But just as anthropologists of law are now apparently happy to maintain an arm's length distance from their object of study, lawyers too seem indifferent and occasionally dismissive with respect to anthropological ways of knowing. When I was admitted to law school at The University of Chicago, I was told by a faculty member there that my Ph.D.—from the same university—would not only be useless to me in my search for a law faculty position, but that precisely because it was in anthropology, it might very well *hurt* my chances. (Chicago, I should note, is to academic anthropology what Yale is to academic law.)¹¹ I've learned since then that this sort of reception is not unique to me, to the faculty member in question, or even to Chicago.

Ultimately, the problem is not that wrongheaded notions about what anthropology does or does not do for law are actively circulating within the legal academy today. It is that the intellectual assumptions these notions sketch in the negative—the idea that a smorgasbord of descriptively accurate, normatively universal, and easily applicable insights awaits lawyers on the other side of a disciplinary door—are themselves deeply problematic. What's more, these notions are so embedded in the fabric of law, in its *language*, as to determine the parameters of conversation. Asking what anthropology brings to the party is asking about anthropology in an economic key.

* * *

In the Spring of 2018, just after scrambling onto a perch in the legal academy, I invited a handful of anthropologists to join me for a roundtable discussion at that year's meeting of the American Anthropological

9. Sir Henry James Sumner Maine (1822–1888); Lewis Henry Morgan (1818–1881); John F. McLellan (1827–1881); Johann Jacob Bachofen (1815–1887). MARK GOODALE, ANTHROPOLOGY AND LAW: A CRITICAL INTRODUCTION 9–11 (2017) (discussing these four scholars, all of whom attended law school and three of whom were lawyers or law professors, as “proto-anthropologists”).

10. BRONISLAW MALINOWSKI, CRIME AND CUSTOM IN SAVAGE SOCIETY (1926).

11. See Robert J. Speakman et al., *Market Share and Recent Hiring Trends in Anthropology Faculty Positions*, PLOS ONE (September 12, 2018), <https://doi.org/10.1371/journal.pone.0202528>.

Association.¹² That a variety-of-law job allowed me to continue engaging with anthropology deserves more than parenthetical observation. Tenure-stream appointments may be disappearing in both fields but they are doing so at vastly different rates and, even when acquired, they impose significantly different conditions of work on those who hold them. I knew that as a law professor—even one at a school outside the rarified “Top 14” where I’d been educated and professionalized—I would have the necessary reserves of time and money to reach across disciplinary divides in ways that did not self-evidently fall on the path to tenure. There is, in other words, more than one reason to think that a stable stable of anthropologists of law may in the United States be increasingly populated by anthropologist-lawyers.

I asked the invitees to consider whether law—*formal* law—was still useful to anything that might be considered legal anthropology. It was an unabashedly personal question. For three years of law school, one-and-a-half years in a legal fellowship, and a six-month hiring process, I had been swallowed by an escalating campaign to convince law school hiring committees that they would benefit from adding an anthropologically inflected voice to their faculty rosters. I wanted to know whether anthropologists needed as much convincing about law as lawyers did about anthropology. “Today,” I wrote in the roundtable abstract, “those of us interested in ‘things legal’ are much more likely to focus on what is *adjacent* to law—artifacts, institutions, performativity, learning processes, the paper materials of law, its literal forms.” But does that mean that “a contemporary anthropology of law” has no space left for “the content of rules”?

The San Jose meeting turned out to be an otherworldly experience thanks to the 2018 California wildfires. I passed the first part of my first evening in the kind of frantic hunt for N-95 masks that would become almost banal just eighteen months later, and the second part of my first evening in the sort of martini-enlivened commiseration with friends that now seems almost mythological. Understandably, if predictably, the conference stirred apocalyptic emotions and prophetic inclinations in many anthropologists.

But for those of us gathered in one of the temporary and ceiling-less cubicles to which roundtables are increasingly relegated, not solely at the AAAs, it became clear that this conversation about anthropology and law was fueled by neither the chaos outside nor the chaos brewing within, although it had the potential to contribute positively to both. It was, moreover, a conversation that would be far from over at the end of an hour and forty-five minutes. A surprisingly large group had assembled in the open-air cubicle, and the liveliness of our conversation set against the din and traffic of the cubicles around us gave our exchanges the feel of a family parliament being held in a public restroom.

12. Readers should note that much of this mini-history appears, almost verbatim, in the introductory Essay to this Symposium’s sibling publication. Das Acevedo, *supra* note 1.

A tenured professor asked if there was something uniquely technocratic about law that could help account for the challenges in engaging with it anthropologically. A graduate student worried that legislation was too political for anthropologists of law and too legal for anthropologists of politics. There was clearly more to be said and there were more people to draw into the conversation.

That 2018 roundtable brought together Lee Cabatingan (UC Irvine), Leo Coleman (Hunter), Véronique Fortin (Sherbrooke), Jeff Kahn (UC Davis), and Katherine Lemons (McGill). Meghan Morris, who was then a postdoctoral fellow at the American Bar Foundation and scheduled to join us, could not attend. Instead, Meghan (now at Cincinnati), along with Anya Bernstein (SUNY Buffalo), Matt Canfield (Leiden), Gwen Gordon (Wharton),¹³ and Anna Offit (SMU), took part in a second roundtable on the same theme and under similarly cavernous conditions that was held at the 2019 meeting of the Law and Society Association in Washington, D.C. Véronique, Leo, and I participated in both conversations.

By the time we convened for that second iteration, I had started to entertain hopes of bringing back to Tuscaloosa as many of these folks as I could fit around an actual, if not actually round, table. Alabama Law had included funding for just such an event in its offer of employment to me—again a mundane but momentous factor in the pursuit of cross-disciplinary conversations—and our Dean allowed me to spend it on a two-day affair that would, I hoped, provide a slightly more familial environment for our parliamentary debates. I was even able to include two graduate students working at the intersection of law and anthropology: Neil Kaplan-Kelly (who had asked the question about legislation back in 2018) and Katherine Culver (a linguistic anthropologist–lawyer in the making).

We all know what happened to events in 2020.

Several months after we were to have assembled in Tuscaloosa, it became clear to me that there was still considerable interest in the conversations that had begun in 2018. Our revised plan, for a series of virtual workshops in early 2021, also featured a revised list of participants: Véronique, Leo, and the two graduate students were unable to continue on with us, while Katherine could join the sessions but could not contribute an essay to be workshopped during them. But the new format and schedule also allowed us to include three new participants: Vibhuti Ramachandran (UC Irvine), Riaz Tejani (Redlands), and Matthew Erie (Oxford). Over four sessions between February and March 2021, we devoted around an hour to discussing each of their essays.

13. Gwen Gordon's untimely passing while this special issue and its sibling publication in *Law & Social Inquiry* were in development is discussed in a preface and postscript accompanying her contribution to the other issue. This introduction was drafted before Gwen's death and, in the interests of capturing the spirit of conversations that she enthusiastically participated in, I have not significantly altered references to her here.

Finding homes for those essays has been a regrettably easy process. Both the student editors at *Alabama Law Review* and the editor in chief of *Law & Social Inquiry* welcomed a self-consciously metadiscursive project and worked to accommodate its peculiarities. At *ALR*, a series of three editors in chief and their faculty advisor, Jenny Carroll, have relocated the essays from one volume to the next and ensured that they appear as a cohesive unit within a single issue. At *LSI*, Chris Schmidt has offered generous guidance before the symposium was approved and exceptional kindness afterwards.

But I knew, more or less, that this would be the case. I suspected that, like many student-operated law reviews, *ALR* would do its best to accommodate a faculty request, and I guessed that the emerging division of labor between sociolegal journals meant that *LSI* would be receptive to a discussion about disciplinary confluences between law and anthropology.¹⁴ Indeed, around fifteen years ago, *LSI* had published one half of another, broader effort to bring law and social science into conversation with one another: the New Legal Realism project.¹⁵

Easy is not the antithesis of good, but like a guest who eats well and leaves punctually, it has a way of casting those around it into awkward relief. I felt these essays would have been a tough sell to the *Law & Society Review*, which, despite being the flagship journal of an organization that I and many of my colleagues in this venture consider our intellectual home, has traditionally tilted towards empirical (and often *quantitative* empirical) scholarship.¹⁶ I was even more confident that attempts by relatively junior scholars to engage with law, rather than with the more ethereal concepts plausibly associated with it, would have likely not suited any of the journals published by the American Anthropological Association, even the one expressly devoted to political and legal anthropology. And I was absolutely certain, given the popularity of substantive legal symposia—the Law of X, the Theories of Y—as well as the ever-increasing allure of economic analysis, that no law review save my own would have been willing to take us on.

Calling a process regrettable but its outcome otherwise is likely to please no one, and that, to put none too fine a point on it, *is* the point. We should *none of us* be particularly pleased at the way anthropology and law have pulled away from one another. A legal analysis built on comforting assumptions about

14. For a critique of this division of labor and the general disfavoring of theoretical works that it ascribes to the *Law and Society Review* see Sida Liu, *Preserving Theory as a Form of Sociolegal Writing*, 50 LAW & SOC. REV. 1022 (2016). In the interests of full disclosure, I have since joined the editorial advisory board of *Law & Social Inquiry* and have become an Associate Editor of the *Law & Society Review*; nevertheless, the proposal for this symposium was submitted and approved before I joined *LSI*'s advisory board.

15. Howard Erlanger et al., *Is It Time for a New Legal Realism?*, 2005 WISC. L. REV. 335; Mitu Gulati & Laura Beth Nielsen, *Introduction: A New Legal Realist Perspective on Employment Discrimination*, 31 LAW & SOC. INQUIRY 797 (2006).

16. The current board and Editor in Chief, it should be noted, are admirably committed to making *LSR* as welcoming as possible to a broad range of methodological approaches and disciplinary conventions.

positivistic truths and where to find them is cutting analytic corners in ways that directly impact the subject, object, and purposes we ascribe to law. (Medical analysis that does this is, others have noted, similarly hamstrung.¹⁷) It is no wonder that the legal academy is increasingly under fire from within for its easy assumptions of intellectual neutrality: like lowercase liberals and English speakers worldwide, law folk have fallen into the trap of believing that any way of thinking—but specifically, theirs—could be value-neutral.¹⁸

It follows, therefore, that we should *none of us* feel absolved from contributing to anthropology's absence from law's festivities. Legal scholars have been entirely willing to ignore, or at best critique, insights that do not accommodate a preoccupation with falsifiability that borders on fetishization, and we have even been willing to declare that ethnographic methods in the field-site should be more like legal methods in the courtroom.¹⁹ What many of us are apparently unwilling to do, excepting in the few subfields and schools to which the American legal academy largely relegates anthropological analysis, is to engage in the hard and sometimes disconcertingly humbling work of engaging with disciplinary perspectives that are outside our own, which is a remarkably unfortunate thing to have to say about a field that prides itself on its defense of plural, often uncomfortable, perspectives.

The essays in this symposium, along with their companions elsewhere, work to correct these missteps. Riaz Tejani compares the rarity of “conceptual transplants” between anthropology and law with the plethora of transplants between law and economics, and arrives at a conclusion that inverts widely held views about both social science disciplines. It is not that anthropologists are descriptive, Tejani argues; it is that they are *overly prescriptive*: their focus on other places and ways of thinking implies a discontinuity between how law folks behave and how they might or should do so, whereas economics presents reasonable behavior as always already economic. Anna Offit interweaves ethnographic insight on discernment with legal rules on discrimination in jury selection, and suggests that both law and anthropology have much to gain from a conceptual vocabulary for discussing discrimination-in-action. Meghan Morris suggests that despite the multiple and often conflicting ways in which anthropological insight has been mobilized by property law scholars,

17. Molly Worthen, *Medical School Needs a Dose of the Humanities*, NY TIMES (Apr. 10, 2021), <https://www.nytimes.com/2021/04/10/opinion/sunday/covid-medical-school-humanities.html?action=click&module=Opinion&pgtype=Homepage> (arguing against the “false dichotomy” omnipresent in medicine between “the evidence-based hard sciences that produce perfectly objective knowledge versus the fuzzy humanities that gesture at feelings”).

18. In this regard, a perennial classroom favorite of mine is what I call the “pantyhorse moment,” when students reading the transcript of a rape trial discover how a little repetitive questioning can reveal the demographically and contextually specific nature of what is considered “objectively reasonable” regarding a universally despised article of women’s clothing. JOHN M. CONLEY & WILLIAM M. O’BARR, *JUST WORDS: LAW, LANGUAGE, AND POWER* 36–37 (2d ed. 2005).

19. *See generally* STEVEN LUBET, *INTERROGATING ETHNOGRAPHY: WHY EVIDENCE MATTERS* (2018).

anthropology's true contribution to property doctrine may be in the way it emphasizes and lays bare relations between human beings—which relations are, after all, what property consists of in the post-Blackstonian legal imagination. Jeff Kahn juxtaposes anthropology's minor influence on contemporary legal scholarship with both the greater influence of other disciplines on law *and* with the richer engagement between anthropology and medicine. He argues that the thinness of one relation and the thickness of the others can be considerably explained by “law’s insecurity with its classical tools,” an insecurity that prevents law from “weather[ing] such liaisons” with anthropology “if it is to aspire to the scientific confidence of economics.” And Matthew Erie dissects the perception that anthropology is descriptive and particular (rather than normative and universalizing), showing instead how the goals of anthropological description—reflexivity and comparison—are consonant with normatively oriented analysis.

The essays do not advance a unified agenda (that is far too stifling) and they do not follow a prescribed format (that is far too boring). Two of them (Tejani and Kahn) explicitly compare legal anthropology with the law and economics movement; two of them (Morris and Offit) explain the value of anthropological analysis for substantive areas of law; and two of them (Erie and Tejani) take up the issue of anthropological normativity to remarkably counterintuitive effect. All of them allude to Geertz, perhaps because he remains the anthropologist most likely to be recognizable among law folk. More than these superficial similarities, however, what they share with one another as well as with their sibling essays elsewhere is a commitment to bridging anthropology and law by paying close attention to how the logic of law manifests or is mobilized in particular contexts—at the very least, they upset longstanding and old-fashioned notions about what the anthropology of law is, does, and has to offer.

* * *

Asking lawyers to pay attention to anthropology seems foolish or vain, I expect. “Who has the time to go *talk* to people?” the law professor wonders, with one eye on the next submission season’s rumored opening date. A hankering for intellectual adventure may justify the occasional straw poll or carefully constructed first-person anecdote, but for the most part the legal academy chooses to spice up its scholarship by turning to journalism rather than to ethnography. True legal analysis remains that which describes and prescribes with unselfconscious ease accompanied by a formidable onslaught of citations.

There are good reasons for this, in addition to the bad ones I’ve focused on. A lawyer who studies people by talking to one or two handy specimens invites the same deserved criticisms as an anthropologist who reads laws without reading law. We resolve nothing by falling into the easy words-on-a-page and “walking tape recorders” assumptions about one another’s work that

make frequent appearances outside the academy and are virtually inescapable inside it.²⁰ Or, disciplines that are habitually devalued by others ought not to devalue each other.

But this does not mean that lawyers cannot be attentive to culture, society, or any other similarly contestable noun to describe the aggregate human condition. *Cultivating attentiveness* is, in fact, what many of us in this small venture recognize to be both the method and the purpose of anthropological analysis, far more than the ludicrously old-fashioned stranger-in-a-village paradigm of Malinowskian fieldwork.²¹ This kind of attentiveness is, in borrowed terms, what makes anthropology “surprising, insightful, novel, useful, meaningful.”²² It inheres in the extent to which an ethnographer “is capable of *attending* to things that her interlocutors might attend to differently (ignore, naturalize, fetishize, valorize, take for granted, etc.).”²³

To be sure, most anthropologists still learn to cultivate attentiveness through an early stint of immersive ethnography, which makes fieldwork inextricable from the analytic stance and renders that foundational experience something more than the antiquated hazing ritual it is often made out to be. There is a real sense in which much of the discipline believes that ethnography, however novel, is what makes one “think like an anthropologist,” just as many law folk, push comes to shove, believe that three years of legal education are what allows one to “think like a lawyer.”²⁴ They’re not wrong—and yet, as the words themselves suggest, attentiveness *can* be cultivated in other ways. There are different modes of attentiveness, different aptitudes for any one of them, and different demands according to the nature of the ethnographic encounter. Cultivating attentiveness outside the usual processes of anthropological professionalization takes time and it takes respect: two things that lawyers excel

20. Diana Forsythe’s image of “walking tape recorders” is one that I’ve found especially useful in my efforts to explain what anthropology is *not*. Diana E. Forsythe, “It’s Just a Matter of Common Sense”: *Ethnography as Invisible Work*, 8 COMP. SUPPORTED COOP. WORK 127, 140–41 (1999).

21. It also strongly resembles what others have recommended as the purpose and method of anthropology. See, e.g., the discussion of “imaginative sociologies” in JOHN & JEAN COMAROFF, *ETHNOGRAPHY AND THE HISTORICAL IMAGINATION* 184 (1992). On Bronislaw Malinowski’s significant but complicated role in the development of anthropology, see Clifford Geertz, *On the Nature of Anthropological Understanding*, 63 AM. SCIENTIST 1 (1975).

22. The quotations in this paragraph are from Kaushik Sunder Rajan, ANTH 42000: Anthropological Fieldwork Methods 1 (2015) (on file with author). Although I’ve found the idea of cultivated attentiveness useful for years and have occasionally made explicit reference to it, I did not consider it in depth and in relation to legal analysis until quite recently. Deepa Das Acevedo, *Unbundling Freedom in the Sharing Economy*, 91 S. CAL. L. REV. 793, 797 (2018) (referencing “cultivated attentiveness”); Deepa Das Acevedo, *(Im)mutable Race?*, 116 NW. U. L. REV. ONLINE 88–119 (2021) (providing further discussion).

23. Many of us in this exchange have been circling around similar phrases for some time; see Anya Bernstein, *LAW & SOC. INQUIRY* (forthcoming) (discussing “ethnographic sensibility”) and Gwendolyn Gordon, *LAW & SOC. INQUIRY* (forthcoming) (discussing “ethnographic attention”).

24. For exceptionally smart reflections on what each mode of thinking—and training—involves, see MATTHEW ENGELKE, *HOW TO THINK LIKE AN ANTHROPOLOGIST* (2018) and ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO “THINK LIKE A LAWYER”* (2007).

at according to their clients but could expend a little more on their colleagues down the hall.

What does cultivating attentiveness *afford* the legal scholar? As with the semiotic—or indeed, the moderately plain English—meaning of that term, it supplies, allows, and even invites possibilities without necessitating them. It opens up interpretive paths that need not be taken, unlike the proverbial mountain that must be climbed because it is there, but that also could not be taken absent a careful consideration of things—life—outside books and numbers.²⁵ And in doing so, it gives the legal scholar confidence that her analysis is reflexive and reflective rather than built on reflex.

A story is, by now, surely in order.²⁶

In recent years, interspersed between reports of world-altering trauma, there have been accounts, some more astounding than others, of individuals who engaged in “reverse [racial] passing.”²⁷ Most left their jobs and tried to leave the news cycle, but public fascination and consternation remained strong. As a line of critique emerged about how these white-non-white persons had consumed opportunities and resources that had been intended for others, I began to wonder how a court might resolve disputes over altered race-claiming if, or more correctly, *when* they arise, and I assumed that legal scholars had an answer.

What surprised me more than the absence of that answer was the consistency with which courts and scholars—legal *and* anthropological—had disregarded the possibility that racial identity could meaningfully change. This seemed odd, since the U.S. Supreme Court had just held that transformations within another protected and seemingly immutable trait, gender, were themselves protected, and the United States is not known for the avant-garde jurisprudence of its apex court.²⁸ I suggested that this recent opinion offered a way to think about the mutability of race and even to grapple with it in the context of litigation that, apparently, our conceptual vocabulary currently lacks.

I conducted no interviews and made no in-person observations; this would have been impossible under any circumstances given the already-occurred nature of the incident, but it was doubly impossible given the isolated, quarantined, and generally chaotic nature of the world. At the risk of

25. Note that I am not simply arguing that lawyers should become more like anthropologists. Representatives of law’s cognate disciplines have sometimes articulated a version of this argument, more recently and most notably, historians responding to originalist scholarship. *See, e.g.,* Saul Cornell, *Originalism as Thin Description: An Interdisciplinary Critique*, 84 *FORDHAM L. REV. RES GESTAE* 1 (2015). But as anthropologists have argued with respect to other potential collaborations—feminist studies, human rights—vibrant interdisciplinary engagement depends on disciplinary difference. Iris Jean-Klein & Annelise Riles, *Introducing Discipline: Anthropology and Human Rights Administrations*, 28 *POL. & LEGAL ANTH. REV.* 173, 189–190 (2005). What I’m arguing for is more engagement, not less difference.

26. The material that follows is taken from Das Acevedo, *(Im)mutable Race?*, *supra* note 22.

27. For an earlier discussion of reverse passing proceeding from a somewhat different perspective, see Khaled A. Beydoun & Erika K. Wilson, *Reverse Passing*, 64 *UCLA L. REV.* 282 (2017).

28. *Bostock v. Clayton Cnty.*, 140 S.Ct. 1731 (2020).

simultaneously alienating two disciplinary audiences, I will say that I do not believe this matters. What called for cultivated attentiveness in this case—for “*attending* to things” in ways that others might “ignore, naturalize, fetishize, valorize”—was not a social phenomenon requiring ethnography, but a scholarly one requiring anthropology. My interlocutors were scholars and courts, and what I saw, from the vantage point I occupied, was a specific way of thinking about race that was made invisible by its omnipresence. Making those assumptions visible and considering the implications they carry as well as the adjudicative possibilities they open up is exactly what anthropology brings to the party.

Cultivating attentiveness to the substance of law, as this story suggests, is neither for the purist nor the faint of heart, but its rewards are commensurate with its obstacles. It allows us to think with law, not around it, and to do so in a world populated by humans rather than numbers or models. It marks the closure of a historical circle that began, more or less, with legal scholars trying to discover whether ordinary persons did elsewhere what those scholars, rightly or wrongly, thought lawyers did at home. For today’s legal scholar, groomed to seek certainty and universality while overlooking the epistemological assumptions that make certainty and universality possible or even desirable, a cultivated attentiveness to law brings with it caution *and* confidence in the analytic process.

Smart, newfangled notions.