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# Part I
# Law and Anthropology

# [1]

# LAW AND SOCIETIES

BY PETER FITZPATRICK*

*Professor Fitzpatrick offers an examination of bourgeois legality as the concrete embodiment of modern law. Citing examples from the prison system and the workplace, he finds that modern law exists in certain relations of opposition and support with other social forms. From these relations, certain modes of convergence and separation between law and other social forms are identified and explored. To test the utility of this analysis, Fitzpatrick provides an extended application to traditional scholarship about the nature of law and its relation to society. The central focus in this enquiry is the idea of integral plurality as a vehicle by which the abstracted, unitary and universalistic pretensions of the modern legal system may be exposed.*

. . .and even the sensitive animals tell that we're not very surely at home here in this encodified world. Perhaps we have still one special tree on the hillside we pass every day that we notice, we still possess yesterday's street and the devoted persistence of an old habit which decided it liked us and stayed with us.[1]

## I. INTRODUCTION

"Law and Societies" is a gentle play on the title of the lecture series, "Law and Society," held at Osgoode Hall Law School in 1981-82. In various ways, that series provided the origins for this paper.[2] The title encapsulates the central theme of the paper: that state law is integrally constituted in relation to a plurality of social forms.[3] This is called the theme of 'integral plurality.' In its development, the theme exposes the limits of viewing law as "typically public, unified and direct in its operation."[4] This idea of law creates a distortion; liberation from it opens up radical possibilities for the study and the politics of law.

In outline, the paper takes the familiar academic field of legal plu-

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* Senior Lecturer in Law and Interdisciplinary Studies at the University of Kent at Canterbury, England. In working on this piece, I deeply appreciated the intellectual companionship of Rue Bendall and Dave Reason. Noel Machin provided his incomparable translation of Rilke. The faculty and students at Osgoode Hall Law School provided a most stimulating and a most convivial setting for introducing the ideas elaborated in this paper.

[1] Rilke, *Duino Elegies* I, translated by Noel Machin.

[2] The paper is mostly a compendium of several presentations at Osgoode during a visit in January 1982 to deliver a lecture on "Law, Plurality and Historical Materialism" as part of this series.

[3] Here "form" is not used as something devoid of 'content,' but rather as content rendered determinate.

[4] Galanter, "Legality and Its Discontents: A Preliminary Assessment of Current Theories of Legalization and Delegalization," in Blankenburg, Klausa and Rottleuthner, eds., *Alternative Rechtsformen und Alternativen zum Recht, Jahrbuch fur Rechtssoziologie und Rechtstheorie, Band VI* (1980) 20.

ralism as a point of departure. In sustaining the idea of a persistent plurality of legal orders, legal pluralism has proved an enduring, if marginal affront to unitary, state-centred theories of law. Yet its own relation to the state, and to state law, has been distinctly ambivalent. Some of its adherents attribute no special pre-eminence to the state and even see it as subordinate to other social forms. In this view, there is left an unstructured and promiscuous plurality. Other adherents prematurely reduce or subordinate plurality to some putative totality, usually the state or state law. I want to argue that both these stands are 'right'; they are not opposed, but rather, reflect mutual elements of a wider process. State law does take identity by deriving support from other social forms. Thus, it would appear to be one social form among many, even as a subordinate form. But in the constitution and maintenance of its identity, state law stands in opposition to and in asserted domination over social forms that support it. There exists a contradictory process of mutual support and opposition. This process is tested and given more specific elaboration in instances of the relations between state law and other social forms, including the prison and the capitalist labour relation. Further, the academic utility of the analysis is found in the light it throws on certain perennial concerns: the gap between law and social reality; the link between law and consensus; and stages of legal development.

## II. LEGAL PLURALISM

Using legal pluralism as a starting point, I will draw a distinction between two approaches to it: the diffusive and the centerist.[5] Ehrlich, the ancestor of the diffusive, remains an apt example. For him, the very basis of state law was a prior "social law" or "living law" which was the "inner order of associations."[6] Although the state is one of a plurality of associations, state law is subordinate to "living law." In the event of a conflict between the two, it would be ineffective. Attempts in this tradition to integrate state law and other legal orders have similarly been in denial of the originality of state law. An example is Bohannan's famed attempt at integration in which state law results from a "double institutionalization of norms" in which some "customs", operative within "social institutions" are "reinstitutionalized at another level" as state law.[7] There is nothing in such a reconciliation that would accord

[5] These approaches are treated in more detail in Fitzpatrick, *Marxism and Legal Pluralism* (1983), 1 Aust. J. L. & Soc'y 45.

[6] Ehrlich, *Fundamental Principles of the Sociology of Law* (1936) at 39-82.

[7] Bohannan, "The Differing Realms of Law," in Bohannan, ed., *Law and Warfare: Studies*

state law any distinctness and identity, much less accord it the original efficacy that, on occasion, it manifestly has. As well, that element of the tradition that would treat all legal orders equally fails to account for conflict between orders, a conflict that may point towards some overarching status for state law.

As for the centerist stand, a start should be made with Gierke. Like Ehrlich, Gierke saw associations as having a life of their own. The state was one such association. However, with Gierke's organic theory of society, the state is an association which embraces all other associations and has ultimate authority over them.[8] Whilst advancing theories of pluralism, legal scholars have been prone to make a pre-emptory ascription of ultimate domination to state law. This is well established in Griffith's acute and relentless analysis of legal pluralists which underlines the obduracy of "legal centralism" in this scholarship.[9] Both the diffusive and centerist strands encapsulate processes constituting state law in its relation to other social forms. Accordingly, it is necessary to move on to state law and its relation to a plurality of social forms. To this extent, the paper ceases to be exclusively about legal pluralism, but, insofar as social forms are integral to non-state law, the discussion remains one about legal pluralism, at least for those who wish to read it as such.

## III. INTEGRAL PLURALITY AND STATE LAW

Social forms are constituted in contradictory relations of support and opposition with a plurality of other social forms.[10] I tentatively suggest that the more social forms stand in a relation of integral support, the sharper is the opposition between them: "the more alike, the more dissimilar."[11] To establish the first proposition, I will take one idea of law, that of bourgeois legality or the rule of law, and show that

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*in the Anthropology of Conflict* (1967) 43 at 47-48.

[8] See Hallis, *Corporate Personality: A Study in Jurisprudence* (1930) at 140-65.

[9] Griffiths, *What is Legal Pluralism?*,(paper presented at the Annual Meeting of the Law and Society Association, Amherst, June 12-14, 1981). Griffiths' valuable account extends also to the diffusive strand in legal pluralism.

[10] This, and the method of analysis that follows, could be seen as a crude derivation from Hegel's ideas of contradiction and the dialectic but one which differs in several basic ways from Hegel: see Taylor, *Hegel* (1975) at 104-106, 227-31 and 238. Of course, the germ of these ideas is not exactly unusual: *cf.* McDonald. *The Legal Sociology of Georges Gurvitch* (1979), 6 Brit. J. L. & Soc'y 24 at 30-31.

[11] One of "a motley collection of maxims to disguise our epistemological nakedness" from Reason, *Generalization from the Single Case: Some Foundational Considerations*, (paper presented at the Conference on The Formal Analysis of Qualitative Data, University of Surrey, Guildford, Apr., 1983) at 32.

certain other social forms are conditions of its existence. The prison and the capitalist labour relation will be used as examples. The next step involves showing that the relations between bourgeois legality and these other social forms are contradictory. Bourgeois legality depends on social forms that tend to undermine it. The case of the dependency of other social forms on law is considered only incidentally. In the next section, the analysis becomes more concrete in its consideration of the operative modes taken by the contradictory relations of opposition and support. The present analysis is only a beginning, an open and preliminary enquiry the coverage and bounds of which are not comprehensive. It celebrates the particular, and pries open holistic, unitary conceptions of law. As such, this exercise is not at one with mainstream pluralism for it does not seek to deny overarching and integrating structures of domination.[12]

To ground the analysis, I will begin by looking briefly at bourgeois legality and the prison before taking the wage labour relation as my main example. There are several, more or less subtle ways in which bourgeois legality depends on the prison but, in the broad approach being used here, it is sufficient to point to the prison, in particular, as the ultimate enforcer of law. Moreover, it is an exemplar of a pervasive, disciplinary power that typifies modern society and that effects particularist coercions which leave bourgeois legality 'free' to assume its aspects of equality and universality.[13] The relation of bourgeois legality to the prison is a contradictory one. It is increasingly evident that prisons in 'liberal democracies' necessarily operate on the basis of arbitrary, authoritarian and Draconic power and that their operation would be impossible if the rule of law extended to relations within the prison.[14] Conversely, if bourgeois legality did so extend, it would lose identity as bourgeois legality. The prison is part of the necessary "dark side" of bourgeois legality.[15] Yet it is of the essence of bourgeois legality that the rule of law be universal. Consequently, bourgeois legality is asserted through the legal supervision by law of relations in the prison. This supervision is, however, always limited and marginal in its operation. It serves to set boundaries beyond which law will not proceed. When the judiciary reach these bounds, its inability to proceed further is justified on such evasive, but indicative grounds as the public interest

[12] *Cf* Fitzpatrick, "Law, Plurality and Underdevelopment," in Sugarman, ed., *Legality, Ideology and the State* (1983) 159.

[13] For a fuller treatment see Fitzpatrick, *supra* note 5.

[14] See, *e.g.*, Abbott, *In the Belly of the Beast: Letters from Prison* (1972) and Zdenkowski and Brown, *The Prison Struggle: Changing Australia's Penal System* (1982).

[15] Foucault, *Discipline and Punishment: The Birth of the Prison* (1979) at 222.

and the smooth running of the prison regime.[16]

To approach, in good company, the relation between bourgeois legality and the labour relation,

> Marx reveals that the the fundamental condition of existence of the legal form is rooted in the very economic organization of society. In other words, the existence of the legal form is contingent upon the integration of the different products of labour according to the principle of economic exchange. In so doing, he exposes the deep interconnection between the legal form and the commodity form.[17]

Bourgeois legality derives its constituent elements of freedom and equality from commodity exchange. Where labour power cannot be obtained 'freely' through its exchange as a commodity, direct compulsions in the field of production become necessary. However, this is incompatible with bourgeois legality. Commodity exchange can only be the realization of what is produced and production under capitalism is based on coercion and inequality. The freedom and equality imported by commodity exchange has to be kept separate from immediate relations of production. Bourgeois legality depends on the separation. The separation is achieved in an enthrallingly neat manner. Immediate relations of production, characterized by coercion and inequality, are necessarily entered into *via* the elements of freedom and equality imparted by commodity exchange. The element of compulsion, the necessity to labour for a wage, is general; it is not confined to or even specific to any particular employment relation.

Immediate relations of production come into being through the 'voluntary' and 'personal' commitment of the worker as an individual legal subject entering into a contract of employment. Bourgeois legality creates what is opposed to it, but it blunts the contradiction by investing its creation with its own aura. Life within the workplace becomes a matter of 'private' and 'economic' relations; outside is a matter of 'public' and 'political' relations. But immediate relations of production are also political relations which are ultimately based on compulsion. They are political relations of control over the worker and over production of hierarchic subordination and inequality.[18] They have to be kept apart from the contrary rationalities of bourgeois legality. If relations of equality and freedom pervaded the workplace or if there were a reverse process, there would be a very different type of law to that characterized by bourgeois legality. This is revealed in the necessary respect

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[16] See, *e.g.*, *Becker* v. *Home Office*, [1972] 2 Q.B. 407 and *Payne* v. *Lord Harris of Greenwich*, [1981] 2 All E.R. 842.

[17] Pashukanis, *Law and Marxism: A General Theory* (1978) at 63.

[18] See Wood, *The Separation of the Economic and the Political in Capitalism* (1981), 127 New Left Rev. 66.

which bourgeois legality shows for the integrity of the regime of the work-place in the severely limited effect of anti-discrimination law on the labour relation. Such legislation cannot displace the opposing practical rationalities of the immediate relations of production.[19]

## IV. MODES OF RELATION

To make the analysis more concrete and more complex, I will present a more historically specific aspect of the wage labour relation. There has been a remarkable increase in the formalization of "work-place discipline" in British factories in the last twenty years.[20] Stuart Henry charts "a dramatic change . . . in the form of disciplinary technology during the period in question towards the formalization of rules and procedures."[21] These are rules and procedures internal to the factory. During the same period, there was a large increase in external state regulation of the labour relation. A guiding code of practice was promulgated, legislation on "employment protection" was enacted (providing, for example, a remedy against "unfair dismissal") and "industrial tribunals" were established to deal with a range of employment disputes.

The main thrust of these developments is the link between internal and external changes. Henry finds that "the evidence . . . supports the view that formalization takes place as a result of government and legislative pressure."[22] The *how* of it is fascinating. The state's code of practice provides recommended rules and procedures only. However, internal disciplinary proceedings tend to follow the code since, as one manager put it, "going about these things in a different way might lead towards an Industrial Tribunal."[23] Such an outcome does not seem a matter of direct justiciability, but a breach of the code could be damaging evidence in a justiciable claim, such as in one for unfair dismissal. Yet the state's involvement does not seem to constrain management greatly. As the same manager put it: "[t]he Code does in fact reflect the practice of industry . . . there has been a pressure on us to mold things into the shape of the Code but only minor things. The general

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[19] *Cf.*, Mayhew, "Stability and Change in Legal Systems," in Barber and Inkeles, eds., *Stability and Social Change* (1971) 187.

[20] Henry, *Factory Law: The Changing Disciplinary Technology of Industrial Social Control* (1982), 10 Int'l. J. Soc. L. 365.

[21] *Id.* at 369.

[22] *Id.*

[23] *Id.* at 370.

philosophy is identical to the Code."[24] Indeed, Henry considers that formalization has operated to support management by giving it, in the face of counter-assertions of power by workers, a 'legitimate' means to dismiss.[25] To generate such legitimacy internally, it would be necessary for formalization to be of some, even if mixed, benefit for workers. This is the case. There are many measures supporting workers and, in a related development, there has been a growth in the participation of workers "in rule creation," "in establishing procedures" and "in administration."[26]

Henry emphasizes the limits of these changes. Thus, he found that "what is formalized is largely procedural," and "the due process-like model typically has representative participation only in its warning, procedural and appeals stages, and crucially important, not in its rule making or sanctioning stages." As well, "unions participate far more in creating procedures than in making rules, and far more in representing employees, than in deciding their fate."[27] There is a strong suggestion that these changes are, in total, a strategy for containing workers and unions. Not that this is a fixed resolution. Henry finds some "tension" between the involvement of workers and the potentiality of the situation to "undermine managements' ability to control."[28] "Automatic employee self-discipline" does, however, restrain the demands put on participation.[29] Overall, it seems there has been no significant change in the type of behaviour punished nor in the nature of the sanctions imposed.[30] There is continuity in the substantive law of the factory despite procedural changes. As for substantive law, it is indicative to find the law of the workplace dealing with such matters as "theft of company property . . . violence and assault, fraud . . . [and] damage to property."[31]

These and other instances can be used to map out modes of relation between law and other social forms. In fact, this mapping could be developed into a complex of contradictions. I will do little more than intimate that conclusion. The mapping is founded on the dichotomy of convergence and separation between law and other social forms. The dichotomy is further divided into positive and negative aspects. This

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[24] *Id.*

[25] *Id.*

[26] *Id.* at 371-73.

[27] *Id.* at 370-71, 377.

[28] *Id.* at 374.

[29] *Id.* at 371-73.

[30] See, *id.* at 375-77.

[31] *Id.* at 375.

creates a quadruple division: convergence/positive; convergence/negative; separation/positive; separation/negative.

Integral relations of mutual support between law and another social form tend towards their convergence. It is not such a matter of distinct influence operating from the outside. Elements of law *are* elements of other social forms and *vice versa*. So, with Bohannan's "double institutionalization of norms," some state law results by absorbing material by custom.[32] Custom supports law, but law transforms the elements of custom that it appropriates into its own image and likeness.[33] Law in turn supports other social forms, but becomes in the process part of the other forms. Henry's account of the strategic intervention of law in support of the regime of the workplace showed law subsuming itself to the alien rationalities of this other form. Non-state legal orders will often appropriate legal contents and techniques taken from the state. For instance, Santos provides a case study of how an urban community in Brazil constructed its own legality in drawing considerably on state law.[34] Supportive interactions are, however, much more complex, layered, and even dialectical. So, to use Henry's case study, the state "code" applying to the factory was derived largely from the practice of the factory, but it modified that practice. This becomes relevant to claims before the State's industrial tribunals and their treatment of such claims shapes the practice. And so it goes on.

To take another example, law, in support of the regime of the workplace, is supporting that which supports it. As we saw in Henry's account, the workplace deals with much crime on behalf of the state. More generally, I have considered the dependence of bourgeois legality on the wage labour relation. Along with the labour relation, I would suggest that a further example is the most significant for societies of advanced capitalism.[35] It is not infrequently said that law is increasingly dependent on and being displaced by 'science', that is, by the operation of the sciences of man and society in such forms as state administration and therapy.[36] Doubtless, law is integrally dependent on science, but science depends also on law and law's coercive power for its social operation. If science had to effect its own coercion, it would

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[32] Bohannan, *supra* note 7.

[33] See note 42, *infra*.

[34] Santos, *The Law of the Oppressed: The Construction and Reproduction of Legality in Pasargada* (1977), 12 Law & Soc. Rev. 5.

[35] Fitzpatrick, *supra* note 5.

[36] A formidable statement of the case can be found in Thomson, *Law and Social Sciences - The Demise of Legal Autonomy* (paper presented at the Conference on Critical Legal Scholarship, University of Kent at Canterbury, Mar.- Apr., 1981).

lose its essential concern for the neutrally or objectively factual. Its political constitution would be revealed, the basis of its legitimation in modern society would disappear and its own identity would change radically. With an audacity matching law's part in constituting the wage labour relation, that very coercion is also a social expression of freedom. For bourgeois legality has it that such coercive interactions in the lives of 'free' legal subjects must be justified in law. So the sphere outside of this legal coercion is one of 'freedom', but within that sphere come the myriads of 'normal', often more subtle, but still deeply coercive operations of science.

Accordingly, law and other social forms take identity from each other in positively supportive ways, but the resulting convergence has its negative aspect in its tendency towards dissolution. Hence, much of the lamentation over 'the death of the law' sees bourgeois legality being inexorably undermined by the intrusion of administration or science.[37] Such unidirectional scenarios do accurately perceive that law is open to penetration by corrosive social forms. However, they are at best preemptory. Law relates to opposing social forms in ways that constitute it positively. In this, law is separated from other social forms. It assumes some separate and autonomous identity in positive constitutive relations to other social forms. These are the relations of separation in their positive aspect. Law would not be what it is if related social forms were not what they are. This argument has just been illustrated in the instances of the prison, the wage labour relation and, summarily, that of science.

This leaves the last relational mode in our quadruple division, that of separation in its negative aspect. In this mode, identity is asserted or maintained in the rejection of other social forms. The most straightforward case is that of outright rejection. Law's coverage is confined by formal jurisdictional limits and in the range of issues recognized as legally significant. Some legal systems, such as that of Imperial China, drastically limit the range of state law and fundamentally discourage resort to law.[38] For legal systems with pretensions to popular access and broad coverage, especially those committed to a 'universal' rule of law, oblique rather than direct rejections are necessary if law is to exclude elements threatening its identity. Most obviously, this occurs in the vaunted problem of access to legal services and the exclusion of many people through the differential effect of the cost of litigation, lack

[37] *Cf.* the acute critique in Nelken, *Is there a Crisis in Law and Legal Ideology?* (1982), 9 J. L. & Soc. 177.

[38] Needham and Ronan, 1 *The Shorter Science and Civilization in China: An Abridgement of Joseph Needham's Original Text* (1970) at 276-84, and van der Sprenkel, *Legal Institutions in Manchu China: A Sociological Analysis* (1962).

of cultural compatibility with law's processes and the allocation of inadequate resources to handle disputes.[39]

The Hunts' graphic account of the state court system in a region of Mexico illustrates this rejection.[40] More exactly, I will take one strand of the case study, the relation between the state court and the local Indian community. Their incompatibility may be dramatic, but it is not atypical. The state court operates along highly formalized and bureaucratic lines. It serves the dominant group in the region adequately. In the operation of the court, that group's local interests tend to override the state's interests. Yet the socially subordinate Indian community almost always dislikes taking cases to the court. This is partly a manifest matter of Indian custom. For example, customary marriages are not recognized in state law and cannot be dealt with in state courts. Also, the court usually imposes fines that Indians cannot afford or metes out inept punishments. Elopement, although deserving only passing admonition in the Indian view, is punished in state courts with prison sentences ranging from six months to six years and with heavy fines. There are other more covert and illuminating rejections. When the state court *does* recognize Indian claims, these will often be distorted in ways alien to the community. An action brought against a witch who failed to bring rain, when paid to do so, was treated as one of fraud. In the Indian view, the resulting fine was too light. An application to the court for protection from charges of witchcraft was treated inadequately as libel.[41]

Nor does the court modify its own demands to be more accommodating. If Indians tried to overcome the usual inability to pay a fine in cash by tendering corn, they would be mocked by officials and even imprisoned. More subtly, the very constitutive rationalities of the court serve to repel Indian involvement. For an Indian, coming to court as a witness is put aside if some significant agricultural task has to be carried out. It is not too speculative to say that something as basic as different and incompatible notions of time are involved. The same incompatibility underlies the complaint of a judge who claims not to have time to accommodate Indian modes of disputation. In peasant societies, time fits within social relations; in capitalist societies, social relations fit within time. Cumulatively, these rejections encourage Indians to settle

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[39] See generally, Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change* (1974), 9 Law & Soc. Rev. 95.

[40] Hunt and Hunt, "The Role of Courts in Rural Mexico," in Bock, ed., *Peasants in the Modern World* (1969) 109.

[41] These two examples are from another region. Indians from the region studied would not even bring such cases because of the courts' inability to deal aptly with them, *id.* at 131-32.

disputes within their own community. Judges believe that by rejecting Indian cases, they are eliminating Indian law. They are doing the opposite.

Outright rejection is not the only mode of effecting separation. There remains the paradoxical mode of rejection through acceptance. The Hunts' case study also illustrates this. The cases of witchcraft were accepted by the state court, but transformed in its own terms. Also, there are many studies showing that when custom is penetrated by state law, its nature changes fundamentally and it becomes part of state law.[42] The mere formal presentation of custom is incompatible with the persistence of custom.[43] This point has profound resonances in debates over the use of folk classifications in legal anthropology.[44] Nor is the inability of custom to survive in an encodified world only a matter of presentation. The issue of presentation is integral to a more comprehensive division between worlds. This is aptly encapsulated in the admonition of a magistrate of the Village Court in Papua New Guinea to a crowd outside the courthouse. The magistrate applies 'custom' through formal legal procedures characteristic of capitalist societies and this contrasts with the traditional mode of dispute settlement through popular participation. He said:

> [t]his is not the good old times when every person, whether he is a party to the dispute or not, could crowd around to hear and talk about the disputes. The village court is a completely different institution running under a new law. We must all respect the village court. It is only those people who are concerned that can come to the village court to settle their disputes. Everybody else must go home and involve themselves in coffee gardening, businesses and their families.[45]

Legal procedures characteristic of capitalist societies are incompatible with the communal expression of interest and, hence, with the

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[42] See generally, Diamond, "The Rule of Law Versus the Order of Custom," in Black and Mileski, eds., *The Social Organization of Law* (1973) 318 and specifically Burman, *Chiefdom Politics and Alien Law: Basutoland under Cape Rule, 1871-1884* (1981); Chanock, *Neotraditionalism and Customary Law in Malawi* (1978), 16 Afr. L. Stud. 80; Le Roy, *Local Law in Black Africa: Contemporary Experiences of Folk Law Facing State Law and Capital in Senegal and Some Other Countries* (paper presented at the meeting of the Commission on Folk Law and Legal Pluralism, Villa Servelloni, Bellagio, Sept., 1981); and Snyder, "Colonialism and Legal Form: The Creation of 'Customary Law' in Senegal," in Sumner, ed., *Crime, Justice and Underdevelopment* (1982) 90.

[43] See Galanter, *The Displacement of Traditional Law in Modern India* (1968), 24 J. Soc. Issues 65, and Twining, *The Place of Customary Law in the National Legal Systems of East Africa* (1964).

[44] See Bohannan, "Ethnography and Comparison in Legal Anthropology," in Nader, ed., *Law in Culture and Society* (1969) 401.

[45] See Paliwala, "Law and Order in the Village: Papua New Guinea's Village Courts" in Sumner, *supra* note 42, 192 at 213 for the general point and also, in the same volume, Fitzpatrick, "The Political Economy of Dispute Settlement in Papua New Guinea" at 228.

adequate expression of communal interests. More broadly, these are simply instances of reification in and through law. Law transforms social issues into its own terms of communication or substantive content.[46] In this way, law protects its own identity against contrary demands made on it. Also, there are other ways in which such demands can be absorbed and their danger contained. One admits the demand initially, but then allows it only an anaemic existence at the level of enforcement, as in the failures of enforcement in racial discrimination actions.[47] Another mode of shaping what is allowed into the sanctum of law and of rejecting what is not apt involves the use of broad discretionary standards, such as reasonableness and good faith. Such obfuscating forms of dispute settlement as conciliation and the judicial review of administrative action also allow a broadly similar discretion.[48] The implied term in contract law is another example which serves to instance the most oblique type of rejection through acceptance. The mechanism of the implied term imports the immediate relations of production into the contract of employment;[49] workers thereby 'agree' to their own subjection in those relations.

In such instances, law sets and maintains an autonomy for opposing social forms, keeping them apart from itself and purporting to exercise an overall control. Yet this control is merely occasional and marginal. In such instances, the balance between autonomy and control is most often struck by law's intervention being comprehensive in terms but limited in operation. Administrative law provides numerous examples. Again the analysis of Henry's case study showed that law's intervention in factory 'discipline' was limited operatively to procedural elements, leaving substantive elements unchanged. The balance can be more intricate. In the same case study, the law's immediate intervention in factory 'discipline' took the form of a non-obligatory code which was nevertheless enforced obliquely through its relevance to cases before industrial tribunals; in this way state law came to the aid of capital without being compromised in too intimate and too revealing an involvement in the regime of the workplace and without manifestly undermining the integrity of that regime. In the limited nature of its involvement with other social forms, law accepts the integrity of that

[46] See, *e.g.*, Gabel, "Reification in Legal Reasoning," in Spitzer, ed., 3 *Research in Law and Sociology: A Research Annual*, (1980) 25.

[47] See, *e.g.*, Marshall *et al.*, *Employment Discrimination: Impact of Legal and Administrative Remedies* (1978).

[48] See Arthurs, *Rethinking Administrative Law: A Slightly Dicey Business* (1979), 17 Osgoode Hall L.J. 1, and, *e.g.*, Mullard, *Black Britain* (1973) at 75-87.

[49] See Napier, *Discipline* (1980).