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PROPERTY AS LEGAL KNOWLEDGE: MEANS AND ENDS

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This article takes anthropologists' renewed interest in property theory as an opportunity to consider legal theory-making as an ethnographic subject in its own right. My focus is on one particular construct – the instrument, or relation of means to ends, that animates both legal and anthropological theories about property. An analysis of the workings of this construct leads to the conclusion that rather than critique the ends of legal knowledge, the anthropology of property should devote itself to articulating its own means.

Law is a means, a specific social means, not an end (Kelsen 1941: 80).

Many lawyers and law professors view law as an instrument for controlling society and directing social change, but most anthropologists are concerned with law as a reflection of a particular social order (Moore 1978: 244).

The recent revival of interest in property among anthropologists has generated new opportunities for anthropological dialogue with legal theory (Hann 1998; Pottage & Mundy 2004). Anthropologists now describe the effects of legal reforms such as privatization (Verdery 1996); they analyze legal doctrines such as copyright (Haraway 1997); they summarize jurisprudential debates (Mundy 2004) and they make suggestions concerning the ways in which legal doctrines should be interpreted or applied, as, for example, where indigenous people's property rights are concerned (Brown 2003; cf. Moore 2001). If property is a subject which causes anthropologists to look to law, American legal theorists of property increasingly look to anthropology in turn, as the innovation of much of the new property scholarship consists in the incorporation of insights from anthropology, socio-biology, and cultural studies (as well as economics, social psychology, political science, and other disciplines) (Ellickson 1991; Rose 1994).

While the result is that anthropologists and legal scholars now regularly find themselves sitting across from one another at academic conferences and citing one another in print, anthropologists encountering new legal theories of property might also be perplexed to discover the ways in which concepts from functionalist social science, symbolic anthropology, and even performativity theory are put to use in these writings. The problem is not simply that outmoded anthropological theories are now finding their way into the law; it is

rather that we now have two very different conceptions of the means and ends of knowledge.

Marilyn Strathern has noted that for anthropologists, property relations are both a kind of found object encountered in the field and an analytical category. Strathern describes her own interest in an American law case concerning rights of ownership of human embryos, for example, as follows:

The ... embryos were in dispute precisely as the product of a relationship between former conjugal partners. An abstract understanding of property as a set of relations is ... explored [in the anthropological account] through concrete instances where relations are presented twice over, as at once the (invisible) conceptual precondition of there being any claims or rights in the first place and as the (visible) social grounding of the particular dispute at issue (1999: 140).

Strathern describes the anthropologist's property construct here in terms that she has used to describe other anthropological artefacts – as taking the form of a homological relationship between analysis and description, theory and data (Strathern 1995). Property, as an anthropological artefact, exemplifies this form.

But property is unique among anthropological artefacts in one particular way: it is also always an implicit or explicit marker of a disciplinary relationship between anthropology and law. Anthropologists' usage of the language of ownership relations, as opposed to property relations, is at least in part a purposeful attempt to define an anthropological vocabulary distinct from the legal vocabulary, for example. And these relations of ownership usually emerge in anthropological accounts as targets of critique, as in the case of anthropologists who analyse property relations by exploring the political relations that are enabled and represented by property (Moore 2001). As Katherine Verdery puts it, 'The first question is: through what sorts of social struggles are actors striving to carve individual ownership rights ... and in whose interests (if anyone's) is it to clarify these, reducing ambiguities and rendering rights more exclusive?' (1998: 161).

In other words, anthropologists seek to achieve critical distance from property relations by pointing to their instrumental uses. By doing so, they also achieve critical distance from lawyers: what is taken as lawyers' narrow conception of ownership relations and unexamined commitment to neo-liberal property regimes serves as a kind of 'straw man' in anthropological accounts (cf. Strathern 1981), that is, a target of oppositional analysis, a foil for anthropologists' own broader, more contextual analyses. Property is a special anthropological artefact, in other words, because it serves as a stand-in for the relationship of law to anthropology as anthropologists wish to see it. Consider, for example, Malinowski's foundational distrust of legal knowledge:

There is nothing extraordinary in the professional lawyer's exclusive interest in cases of breach, retribution, codified rules and all that is legal only in the narrowest technical sense. A case may be righteous, just and deserving, yet no lawyer will touch it if it does not rest on sufficient evidence; or if it would arouse some well-known prejudice in a representative jury; or is technically unsound for any formal reason. No lawyer, however moral and upright, will refuse to take a case which, however sociologically unsound and ethically reprehensible, has really all the strength of law behind it. The practical lawyer's business is to take part in the practical administration of law (Malinowski 1972 [1934]: lxvii).

In this passage, Malinowski defines an ethically empowered disciplinary place for anthropology, as critic of the law. Others have followed this line of argument to delineate a disciplinary difference between anthropology and law in terms of a difference between two forms of knowledge – lawyers' narrow knowledge versus anthropologists' broader conception of property, or, in Sally Falk Moore's acute observation quoted as the second epigraph to this article, the difference between knowledge as an 'instrument' and knowledge as a 'reflection of a particular social order'.

If anthropological analyses have traditionally sought to broaden the scope of recognized ownership forms beyond the lawyer's narrow understanding of property, however, the renewed significance of property as an ethnographic subject results from the fact that people in many regions of the world have come to identify the products of their creative work in precisely the neo-liberal, lawyerly language of property in a bid to endow these creations with visibility under the law (e.g. Kalinoe 1999; Leach 2003; Maurer 2003). This has come as something of a shock, not least because this property discourse has created new problems for, and focused new attention on, the means by which ethnographers attain their ends. Whether it is informants who are asserting ownership rights in anthropological knowledge, or universities and funding authorities demanding proof that informants have consented to the taking of 'their' knowledge, anthropologists' efforts to make means of others' ends often find themselves blocked by others' assertions of ownership. At the same time, some anthropologists have also found in this condition new opportunities, as native title disputes and disputes over intellectual property rights provide the premise for recasting ethnographic knowledge as a tool for expert intervention in legal contests and debates. What is missing from many of these projects, however, is a serious ethnographic engagement with lawyers' own knowledge practices. If the project of the anthropology of law has been to oppose legal knowledge, and most recently has become also to participate in it, anthropologists have on the whole been slow to make legal knowledge itself an object of ethnographic study.¹

One goal of this article is to persuade anthropologists with an interest in law to give ethnographic attention to the character and work of legal theory, as produced in acts of teaching and writing, much as ethnographers of economics and science have done for those fields (Biagioli 2004; Pickering 1997; cf. Crook, n.d.). Michel Callon, for example, has challenged economic sociologists, whose project has long been to debunk the primacy of economic theory by showing that markets are 'embedded in social relations', to see that economic theory is itself an 'actant', and a powerful one, such that markets can be understood as 'embedded in economics' (Callon 1998: 23) From this point of view, economic theory must become its own sociological object, not simply a target of oppositional analysis. I want to suggest in a parallel way that the character of legal knowledge, and the problem of description and analysis that legal knowledge practices pose for anthropological knowledge, should be a central concern for the anthropology of law. The premise of my ethnographic description is that property is a legal theory, and hence must be understood in terms of lawyers' particular practices of theory-making. The ethnographic subjects of this article are legal theorists and their artefacts, that is, what they term 'legal doctrine'.²

I hope to show that an ethnographic study of legal knowledge about property brings into view a particular form: for legal knowledge experts, property has long been a device or tool – a means to an end – and one which can be honed by importing other analytical tools from other disciplines.³ And yet what kind of tool property should be, and what ends it should serve, remains a matter of far more contention than anthropologists might assume. Whereas, since the early twentieth century, American lawyers have understood property primarily as a tool of state regulation in the interest of social welfare, the new legal theorists of property seek to redefine property as a conservative bulwark against state regulation, an anti-regulatory tool. My aim will be not so much to address theoretical misunderstandings between anthropologists and lawyers on this point as to treat these misunderstandings as facts demanding of ethnographic description and analysis. Rather than turn ethnography into a tool for intervention in legal debates, therefore, I want to pursue ethnography as its own form of engagement with legal theory. My objective is to take the unarticulated differences between disciplinary understandings of property as the starting premise for an ethnography of legal theory. More specifically, I want to hold on to the difference between a found object and a theoretical tool long enough to provide an ethnographic account of lawyers' theoretical enterprise itself.

To produce such an ethnographic account will require a different way of conceptualizing the relationship between law and anthropology as disciplines. More specifically, I will have to work at defining a difference between anthropology and law as domains of knowledge that is more ethnographically defensible and analytically productive than the simple oppositions that pervade the anthropology of property such as state-sanctioned versus informal ownership practices, or elite versus non-elite perspectives on ownership, legal experts' versus disputants' perspectives, or singular versus pluralistic conceptions of law. Hence one of the puzzles of this ethnography, ironically, will be to define and describe the difference between anthropological and legal analyses of property in a way that makes the latter accessible as an ethnographic object in its own right. And it is on these more general problems of ethnographic conceptualization and description that the anthropology of law now stands to contribute most fundamentally to current anthropological practice and theory, as it has so often done in the past.

From a failed lesson to a found object

Since 1996, I have been engaged in fieldwork in two principal sites of legal knowledge production – among elite law school faculties in the United States, on the one hand, and regulators of the global financial markets in Japan, on the other. In the United States, my fieldwork has involved participant observation in the course of holding a series of teaching posts at American law schools. Although I rarely publish for a legal audience, I have taught property law and other foundational subjects, known as 'doctrinal courses', participated actively in faculty governance, attended seminars, organized conferences, and made friends with colleagues.⁴

The material I present here was collected using one standard ethnographic technique for gathering data about knowledge practices – the experience of learning to perform those practices through disciplined repetition under the supervision and critique of one's informants (Battaglia 1990; Rosaldo 1980; Tsing 1993; Weiner 1991). The practices in this case are articulations and manipulations of property doctrine. For two years, I have taught property, a first-year mandatory course, under the guidance of senior colleagues, and in dialogue with other property scholars.

My first year of teaching this course entailed the familiar ethnographic experience of awkwardly performing an activity that my informants master with grace and ease. According to student course evaluations, many students found my course 'useless', 'pretentious', and 'too theoretical'. As one put it, 'There was nothing taught in this course that will help me pass the bar exam'. Another wrote, 'This is not a sociology course! I had to learn all the doctrine on my own using a commercial outline!'⁵ The students had spent many long and attentive hours in my class during which time they necessarily reflected on the similarities and differences between my approach to law and that presented in other classes. Hence the conversation between myself and the students and the commentary this conversation elicited from colleagues, together with dialogues with experts in property law and with property materials such as cases, academic legal articles, and textbooks, constitutes a uniquely explicit indigenous commentary on the proper ways of deploying legal knowledge about property and the differences between legal knowledge and anthropological ways of knowing property (Holmes and Marcus n.d.).⁶

I framed my initial interest in property in rather conventional anthropological terms. Legal disputes over ownership seemed to be one site within which questions of longstanding interest to anthropologists were being elaborated, such as the nature of personhood, the character of gifts and of exchange, the meaning of social relations and of culture, and the impact of the market and of technological innovation on these. Many anthropologists had begun to treat legal opinions as found objects of their own, to be taken as evidence of cultural currents. One standard case in the first-year property curriculum, *John Moore v. Regents of the University of California*,⁷ for example, had already attracted a considerable amount of anthropological attention. The plaintiff in this California Supreme Court case was a patient whose spleen had been removed in the course of consensual treatment. Unbeknownst to him, his cells had unique properties that made them highly valuable for research, and the doctors harvested those cells and turned them into a profitable patented cell line. Mr Moore went to court to argue that his extracted spleen cells were his property and hence, among other things, he was entitled to ownership rights in the resulting cell line.

For anthropologists, the conflicting arguments in the case's majority, concurring, and dissenting opinions seemed like accessible ethnographic objects – cultural texts to be interpreted discursively for their cultural meanings. Paul Rabinow wrote of his interest in the case, for example: 'I want to chart the forms of life-regulation and the production of value emergent today among those we have authorized to speak the truth about life' (1996: 131), and he said that he had discerned in the case 'broader cultural issues of the body and

the person, ethics, economics, and science' (1996: 130). It was an understandable approach to legal decisions from an anthropological point of view, but one for which my informants were very soon to take me seriously to task.

My first attempt at teaching the *Moore* case focused on unpacking wider political and cultural issues in precisely this way. I began with the interface between property and personhood, raised questions about the way each is defined in law in terms of the other, and then asked the students to describe the difference that the law makes between persons and things. The question struck the students as simplistic and naïve. Confused, I rephrased the problem and asked what legal difference it would make to determine that certain entities – human embryos, for example – were property. The students saw the point, but found it fairly self-evident. Frustrated, I focused on Mr Moore and the events that led to the case at hand, but once again the students found it difficult, and ultimately not terribly interesting, to think about the scientific details of spleens and cell lines. Sensing my control over the classroom slipping away, I turned to the arguments in the opinions and asked the students which they found most convincing. When they had almost no response, I lectured for the remainder of the class about the genealogy of the arguments in each of the opinions, cataloguing these as examples of differing traditions of jurisprudence associated with different periods in recent American legal history. Midway through the lecture, I noticed that the room had gone quiet. The students had put down their pens and stopped typing on their laptops on the assumption that what the professor was doing at that moment was merely indulging in reflection on some personal fetish of her own, rather than imparting important information which they should dutifully receive and transcribe.

What I was doing in that failed lesson was standard practice in regard to the anthropological handling of knowledge: I was treating the *Moore* case as a found object to be elucidated by drawing relations among orders of phenomena and concepts (persons, social relations, legal rules, theories of property, theories of personhood). I took it for granted that revealing connections across different domains (theories about property and American conceptions of personhood, for example), and demonstrating that seemingly self-evident categories like persons and property were in fact far more contested than they seemed, would render the case interesting for my students. The first ethnographic lesson of this research was that I was wrong about this.

The problem, I came to understand, was with what my analysis both concealed and revealed. Over lunch, a senior colleague and renowned property theorist sought to help me to improve. His advice was that the students would not accept a 'theoretical orientation':

'You have to slip the theory in: don't give them academic articles to read – stick to the cases. Don't make the history the explicit subject of conversation. Teach the material, and when one of them poses a problem, show them a solution. The solution could be squibbed⁸ from [Author X's] theory or could be a hypothetical from [Article Y] – but you don't need to tell them that.'

One of the most confusing critiques of my presentation was that it was 'abstract'. The lesson described above, for example, began with body parts, and with real persons, cast in familiar social roles – a doctor, a patient – all con-

crete phenomena, and hence standard found objects from an anthropological point of view. But the more concrete I thought I was making things, the more my commentary seemed abstract and 'theoretical' to the students. As I reflected on this mundane point of confusion, I came to identify a point of ethnographic entry into the difference between anthropologists' and lawyers' knowledge. My assumption that discussions of body parts and persons were 'concrete' ways of grounding one's analysis simply did not hold. These were not the appropriate found objects for a lawyer's investigation of property relations.

When my informants described my knowledge as abstract, they meant that it was too far removed from the particular object that they have in mind when they use the term 'legal doctrine'.⁹ Let me elucidate this idea of doctrine by describing my far more successful experience of teaching the same case, a year later. I began by asking a student to summarize the facts of the case. 'The plaintiff was a patient at the defendant's hospital and had his cells removed', she said. I interrupted to ask, 'What is the cause of action?' I teased out of her that there were two: a cause of action for conversion, and a cause of action for lack of informed consent and breach of fiduciary duty. 'What does conversion mean?' When she did not respond, I asked if anyone had looked up the definition in *Black's law dictionary* the night before. One student raised his hand: 'The wrongful interference with ownership rights of another over personal property', he said, over the sound of the clicking of keys as the others typed those words into their laptops. 'OK. Let's start with the property claim. What rule of law is the plaintiff arguing for', I asked the first student again. She struggled to state the plaintiff's argument in terms of a rule of law, and ultimately articulated a proposed rule: there should be a property interest in one's own body parts. With that rule in hand, we then turned to the lower court decisions and rephrased those as conclusions as to the validity of that rule.

We then turned to the majority, concurring, and dissenting opinions in the decision of the Supreme Court of California that were printed, in abridged form, in the students' casebook. 'What kinds of arguments does the majority deploy to reach the conclusion that there is no property right in one's body parts?' I asked the class. 'Well, the court said that there was no precedent for it', one student answered. 'What do they mean by that? Isn't there a property right in one's persona?'¹⁰ Isn't that precedent? What is the difference between persona and body parts such that the court can conclude that that doctrine does not serve as precedent here?' As the students identified successive arguments in the opinions, I asked them to contextualize those arguments in this way in relation to other rules of property law that they had already learned, or to think about the arguments' consequences or applicability in other possible 'fact patterns' by proposing a series of 'hypotheticals': 'Imagine that a couple decides to freeze embryos produced through *in-vitro* fertilization. Later on, the partners separate, and the former wife wishes to donate them to a childless couple while a husband wishes to have them destroyed and claims he has a property right in those embryos. Should the court recognize a property right?' Here the students recognized that I was 'squibbing' another case mentioned in their casebook, *Davis v. Davis*.¹¹ I had reframed an actual case as a hypothetical case, a tool for manipulating doctrine.

As we approached the end of the hour, the arguments presented in the majority decision in *Moore* now seemed legally contestable. At that point, I asked, 'What do you think is really motivating the court here?' There was a short pause, and then a student with a science background raised his hand and said that it would be a disaster for scientific progress if people like Moore could show up and claim ownership rights. He explained that cells taken from a patient often pass through multiple hands – from the hospital, to an intermediary, to a research lab, to another research lab – and hence if the court had found in Mr Moore's favour, in the future, someone down the line could suddenly be held financially responsible for an extraction of cells in which they played no part and this would have a 'chilling effect' on scientific research. Facts about the practice of science that, in my first teaching of the course, had seemed dull and unimportant now, emerging in this way from the gaps in the doctrine, struck the students as highly prescient. They concluded that the real basis of the decision was the court's pragmatic commitment to creating the legal conditions for scientific progress.

In this short example of how doctrine was made visible, manipulated, and ultimately backgrounded in property knowledge, we can see what was wrong with my initial anthropological reading of *Moore* from a legal point of view: I had the wrong found object. It was doctrine that needed to emerge from the cases, not relations of ownership and their meanings. Doctrine in this understanding is the artefact of the accumulation of individual cases. The *Moore* decision on its own is simply a judicial decision; but when set in analytical context by understanding the similarities and differences between the issues in *Moore* and the decision in *Davis* on property rights in human embryos, or the decisions involving property rights in one's persona, it becomes part of a 'doctrine' of property rights in one's person. Hence doctrine is the outcome of analysis performed at the bench, and also in the classroom, and in every law office. In her own ethnography of American legal pedagogy, the linguistic anthropologist Elizabeth Mertz argues that American legal education is a process of unlearning certain orientations to texts from the social sciences and humanities that students have learned in their first degree courses¹² and of learning a different, more pragmatic orientation 'focused upon the way in which legal texts index their contexts of production and use' (Mertz 1996: 233):

[E]ven were all the technical language to be transformed somehow into more accessible language, the 'meaning' for which lawyers read the text would remain elusive to those reading for referential content. A legal reading of case law focuses rather on the metapragmatic structure of the text, in which lies the key to its authority. This metapragmatic structure is (at least) twofold, indexing both the context of prior cases in the textual tradition now reanimated as precedent for this particular case, and the interactional context of this particular case in its prior transformations ... (Mertz 1996: 235-6).

Mertz's focus on the difference between referential and metapragmatic readings points to the problem that legal cases pose for anthropologists who might read them as cultural artefacts. For example, one crucial analytical device in this process of using the *Moore* case as a source of doctrine was the hypothetical. Hypotheticals allowed the class to knit cases into doctrine, but they also highlighted the social problems that were at stake in these decisions, such

as the effect of new reproductive technologies on the emergence of new kinds of property claims. The hypothetical encouraged students to begin to think of the decisions of judges as legal means to social ends. And yet the cartoon-like description of social phenomena that is the hallmark of the hypothetical is likely to offend anthropologists' descriptive sensibilities. The hypothetical in this exercise was a tool, a means of solving a doctrinal problem. But this means was also fashioned from other endpoints of doctrinal analysis, namely legal decisions. In much the same way, my colleague was advising me to treat what he termed 'theory' as a tool by squibbing it. The facts presented in the hypothetical were carefully tailored to present an analytical puzzle and hence were already prefigured by the doctrine itself (Parker 2003). We can see from these examples that doctrinal analysis aims not to describe the social world as ethnographic descriptions do, but rather to solve social problems.

Just because the social world is not described in legal knowledge does not mean that doctrine is removed from the social world in the lawyer's conception. The same social facts that provided the point of departure for anthropological interest in the *Moore* case, such as the impact of new scientific discoveries on concepts of ownership, were also of great interest to lawyers, so long as these facts were made to emerge as the artefacts of doctrinal analysis, as contextualized in doctrine. The emergence of facts about the economic and scientific consequences of legal decisions as interesting and relevant in turn reframed doctrinal analysis as important not as an end in itself, but as a means to other economic and social ends. The students were learning not simply to manipulate doctrine, but to see doctrine as a technology, and to ask how well this particular tool functions relative to the social, political, and economic ends it is formulated to serve. The focus of legal analysis of property begins with doctrinal categories but concludes with 'what works' (Ackerman 1977). The social world beyond the law is relevant, in other words, but in a specific way. It is the end, and the law is the means.

Doctrine turns out to be a complicated artefact, then – internally composed of many other artefacts and analytical relations so that the ends of analysis, such as a legal decision, could be recast as the means of another, such as a hypothetical, and indeed the entire project of doctrine could in the final analysis be recast as a means to some other social end. Put into practice as a way of performing legal knowledge, this legal means–ends relation consists of a nesting, cascading set of relations of means to ends. Acts of regulation are means to social ends; the decisions of judges in property cases about the scope of those acts, likewise, are means to particular ends; and scholarly thinking about judicial decision-making constitutes further means to ends. The law is simply the aggregation of each of these knowledge practices: in lawyers' conception, the law is a nested set of means and ends, and these are concretized in institutions that themselves are means to other ends. This understanding was put into practice pragmatically in the pedagogy of the classroom. The task of the student was to link individual decisions and hypotheticals into a coherent doctrine. The cases they encountered were squibbed in the textbook, turned into rules by commercial publishers, cited and recited by courts as, in each case, one set of ends became another's means. The lesson was that doctrine was nothing but a chain of cases and arguments about those cases in which the ends of one analytical practice become the means of the next. As

such, the practice of legal knowledge is linked to social reality, not of a different order from it in the way that anthropologists might understand their own description to be something of a different order from the phenomena it describes.

In the remainder of this article, I will use the term ‘analytic’ to refer to the means–ends relation that organizes doctrine in this way – independent of its specific content (what means) or potential uses (what ends). I use this term as a place-holder that does not prefigure a conclusion about whether means–ends relations actually are theories, rules, ideologies, practices, or institutions. Means–ends thus emerge as the proper found object for an ethnography of property. It now remains to consider what form an anthropological analysis of this ethnographic object might take.

Disciplinary means and ends

The conventions of anthropological analysis usually demand that the ethnographic object be described in terms of a context of one kind or another. As it turns out, legal theorists specializing in property have much to say about the context of the means–ends analytic. An ethnographer’s question often provokes a deluge of enthusiastic, if somewhat didactic, discourse about history – and, specifically, about the birth of modernism in American law. This story, repeated with slight variations and amplifications in countless law review articles and monographs, can be briefly summarized as follows.

In the last decades of the nineteenth century and the first decades of the twentieth century, a new notion of property captured the imagination of American judges and legal theorists. This new understanding held that, rather than being an artefact of changing custom, property was a natural and pre-political fact and also the fundamental building block of a liberal political order (Alexander 1997). The corollary to this was that no legislature had the authority to interfere with citizens’ property rights, and judges had no choice but to strike down any laws which contravened such rights. As it was deployed by ‘formalist’ judges, as they came to be known, the concept of property was abstract and analytically expansive – it was capable of encompassing the ownership of land and other possessions, but also other kinds of powers and entitlements, such as the entitlements of employers to enter into agreements with their employees at a time when there were calls to place limits on the terms of such agreements through minimum wage and worker safety laws.

At almost the same time that it emerged in judicial opinions and scholarly writings, however, this formalist notion of property came under vigorous attack. The critics, who were known as Legal Realists because they claimed to focus on the ‘reality’ of ‘law in action’ rather than what they termed ‘law in books’ (Pound 1910), challenged what they viewed as the ‘unscientific’ claims of formalist scholars and judges about the autonomy and logical coherence of property and the duty of the judge simply to ‘apply’ the law regardless of the social consequences. In this critique, the Realists, borrowing from philosophical pragmatism (e.g. Dewey 1941: 31; cf. Parker 2003; West 1989: 5), viewed knowledge as a tool with practical uses and consequences, and reimagined property as an instrument of political interests (e.g. Cohen 1927;

Hale 1923; cf. Atiyah & Summers 1987: 252–5). For Karl Llewellyn, one of Realism's principal theorists and a great enthusiast for anthropology, Realism demanded a 'conception of law as means to social ends and not as an end in itself; so that any part needs constantly to be examined for its purpose, and for its effect, and to be judged in the light of both and their relation to each other' (1931: 1236).

Drawing on a familiar modernist trope, the Realists cast this tool as a technical machine, and the lawyer as technoscientist (Summers 1982: 194). The chaotic, continually changing nature of social ends could be accommodated and even embraced by a highly rationalized, technical means-ends framework that would calibrate the law according to changing social conditions. To its proponents, this problem-solving modality, and accompanying engineering mentality (Winner 1977: 11), conceptualized Realism as something that was more legitimate than political critique and more practical than philosophical contemplation. A century later, this is a theoretical battle that is largely over: in the United States, it is difficult to find a lawyer who is not an instrumentalist and a pragmatist in this technoscientific and sociologically informed sense.

This is the context my informants would wish me to highlight. I want to add that this sociological critique of formalism also created a demand for anthropological and sociological studies. The Realists embraced anthropology as a body of knowledge that was valuable for the purpose of understanding how law functioned in society – as an instrument for understanding legal instruments. Llewellyn's collaborative study of the Cheyenne with E. Adamson Hoebel, for example, aimed to understand the functions of legal processes through an empirical analysis of disputes (Llewellyn & Hoebel 1941: 230). The Realist judge and scholar Jerome Frank likewise drew extensively on Malinowski in his psychoanalytic critique of legal formalism (Frank 1930). And in fact, early and mid-twentieth-century anthropologists also regarded law as a tool to be used in resolving disputes (Malinowski 1984 [1926]), curbing violence (Bohannan 1967), or cleansing society of dysfunction (Radcliffe-Brown 1952: 214) – in other words, a tool of social control (Hoebel 1954: 275, citing Llewellyn). Borrowing from anthropology through a legal lens, it was possible for Realist scholars and judges to see all social realities as simply the aggregate of individual instrumental acts, as a chain, or cascading set of means-ends relations that included the law (cf. Riles 2004c). Well into the twentieth century, this shared understanding of law as instrument provided the premise for anthropologists' borrowings from legal theory and vice versa. Jack Goody's extensive discussion of the work of Wesley Hohfeld (1913; 1917), a canonical figure in modernist property theory, focuses on property as a means by which persons may do something relative to other persons (Goody 1962: 287). Simon Roberts summarizes this interdisciplinary conversation with the claim that Bronislaw Malinowski's insistence that 'law ought to be defined by function and not by form' is essentially 'the same approach' as the American Realist concern 'with what law *does* rather than what it *is*' (Roberts 1979: 28). In other words, the history that lawyers invoke as context is a history which they share with anthropologists.

Yet it is not simply a history that is shared. What defines modernist legal knowledge from the lawyer's point of view is its contextualized form of

analysis, and this analysis is contextualized using tools that anthropologists typically claim as their own. As with anthropologists of the same period, the Realists traded one set of abstractions and methods – legal categories – for another – social relations – in order to reframe debates about property around instrumental, functional concerns. The key analytical category of Realism was none other than the Social: in the Realist ideology, law was at its core a means to wider social ends. In this formulation, legal means and social ends were clearly distinguishable but also relationally defined. Hence the Realist understanding of law as a tool partook in an aesthetic of relationality that was central to twentieth-century anthropological knowledge (Strathern 1995) – an aesthetic that Goodwin and Duranti term ‘context’.¹³

There is increasing ethnographic evidence that this intermingling of legal and anthropological knowledge practices is not simply an historical context for contemporary legal anthropology, but is one of its pervasive methodological problems. John Borneman draws on the work of Sally Falk Moore to argue that ‘political and economic context is not external to the law but itself part of a cultural form to which law gives a certain expression’ (Borneman 1997: 18). Bill Maurer describes the process of assembling files of letters of reference as required under ‘due diligence’ laws that regulate who can conduct business in the British Virgin Islands as practices that ‘share a singular form’ with academic personnel reviews (2004: 3). Kim Fortun’s ethnography of the legal settlement of the Bhopal environmental disaster case and its aftermath begins with the fact that her ethnographic object ‘is not a unit of analysis’ (2001: 14). A recent collection of papers written by lawyers and anthropologists flags a number of shared artefacts of legal and anthropological knowledge such as potentiality, actuality, and creativity (Pottage & Mundy 2004).

Recent appropriations of anthropological arguments by legal theorists of property present further evidence of this phenomenon. At first blush, what is jarring about some legal theorists’ current readings of anthropological evidence is that these bolster a claim that most anthropologists would steadfastly reject. These scholars reinterpret anthropological accounts of other peoples’ narratives of ownership and debt as cross-cultural evidence that neoliberal conceptions of property rights reflect a natural human orientation towards ownership because, functionally or culturally speaking, everyone has it (Bailey 1992). Or they deploy narrative and cultural theory to cast the Realist conception of socially defined and analytically divisible bundles of property rights as a pedantic technicality that is out of step with ordinary people’s much more absolute and objectified understandings of ownership (Rose 1994). In this way, these theorists suggest that individualized property rights are pre-political, and that it is rather collective ownership, and, by extension, the idea of redistributing private wealth through social justice legislation, that is both inefficient and unnatural, a product of well-intentioned but misguided social engineers.¹⁴

Anthropologists may be equally perplexed, however, by these theorists’ wilful ignorance of the political and theoretical divide that many anthropologists would posit between legal and anthropological conceptions of property. Legal theorists’ instrumentalization of anthropological theory and data is

premised on the assumption that anthropological analysis is not something outside of the technical legal object, as many anthropologists would like to imagine; rather, it assumes that anthropology has long been the very means of the technical.

The political end of these legal theorists' intervention in property debates is to replace the modernist legal conception of property as a contingent, manipulable, and hence always already politicized chain of relations of means and ends with a more absolute, immutable understanding of property rights. For them, the goal is precisely to turn property into a found object. What exactly is the appeal of anthropology for these theorists, then? Over the course of many conversations and seminars, I have come to understand that from the standpoint of a modernist conception of property as technical relations of means and ends, anthropological accounts seem to present straightforward descriptions of found objects – accounts of property relations in this or that (often exotic) locale. Hence the invocation of ethnographic accounts of others' property rights emerges as a means of foregrounding found objects and backgrounding political and analytical relations. For anthropologists, of course, the found object of the ethnographic account is always only an analytic, a vehicle for the kind of relational, politicized analysis these neo-liberal property theorists wish to disavow. Yet these theorists read description as the end of ethnography, and refashion it as a means of their own – an instrument for displacing Realist conceptions of property which they view as already too imbued with social and political analysis.

In the new property theory, therefore, the ends of anthropological knowledge have been turned into the means of a legal defence of neo-liberal property rights. One possible response to this appropriation of anthropological knowledge would be to seek to correct the ethnographic record. The uses of anthropological data in contemporary legal texts would seem to be so amateuristic¹⁵ (Demsetz 1967; Soto 2000) that at first glance what would seem to be called for is a straightforward primer in the anthropology of property. Indeed, turning our theories into discursive tools in this way is precisely what legal theorists would expect anthropologists to do. But it is now apparent that to correct the errors in property theorists' anthropological claims would be merely to add another link to the chain of means and ends and hence expand its reach. With the help of this ethnographic material, we can now restate with more ethnographic specificity the nature of the intermingling of knowledges observed by many anthropologists of law: property is best understood as a chain of relations of means and ends of anthropological and legal knowledge, each recycling the ends of the other's knowledge into means of its own.

This rethinking of the target of anthropological research from an object to be contextualized to a chain of means and ends draws upon a number of current projects that seek to displace the form of object-context relations with analytical and artefactual relations between the analyst and the object of analysis. For the actor-network theory of science and technology studies (Latour 1990), for example, the positivist distance between social scientific analysis and its objects is replaced with a chain of artefacts – the anthropologist's theories, texts, and instruments, the subject's theories, texts, and instruments, each

manipulable into ever further forms of one another (cf. Pottage 2004). The premise of contemporary linguistic anthropology, likewise, is a recognition that language practices can be studied only through other language practices, and hence that it is necessary to treat the anthropologist's linguistic and textual practices, and those of the informant, as temporally and socially situated in a singular, telescoped field (Silverstein & Urban 1996).

But to posit the target of anthropological research in these terms is to foreground the problems that legal knowledge poses for ethnographic study: an ethnographic object should have an aura of difference about it, that is, it should be demanding of, and be lacking in, analysis. This is what typically renders the ethnographic object anthropologically interesting (Riles 2004*b*). Yet legal knowledge about property presents itself as already self-analysed. For example, I mentioned at the outset that anthropologists have tended to read legal cases as if their meaning were transparently accessible, rather than as artefacts to be understood ethnographically. There is plenty of fodder for such a textualist analysis in the cases themselves. In his dissent in the *Moore* opinion, for example, Justice Mosk describes property in terms that can almost be imagined to lay a trap for the ethnographer in their very familiarity:

Being broad, the concept of property is also abstract: rather than referring directly to a material object such as a parcel of land or the tractor that cultivates it, the concept of property is often said to refer to a 'bundle of rights' that may be exercised with respect to that object – principally the rights to possess the property, to use the property, to exclude others from the property, and to dispose of the property by sale or by gift.¹⁶

To anthropologists with an interest in property relations, therefore, the ethnographic discovery that lawyers understand property as a means to an end may seem as unremarkable as it does to lawyers themselves because the means–ends relation is as much an anthropological analytic as a legal one. Anthropologists documenting the pervasiveness of contemporary invocations of property discourse have recently sought to show how property 'instrumentalizes' given cultural categories, for example, or how property serves as a tool of certain interests at the expense of others. The counterintuitive problem for the ethnography of law is that legal knowledge is simply too familiar to be 'heard' as an ethnographic subject (Riles 2004*a*).

Marilyn Strathern has recently described ethnography in already familiar knowledge practices as a project of seeking out an epistemological counterpart to traditional anthropological practices of contextualization: 'Whether its content is bounded or dispersed, a context sets the epistemological boundaries ... That is where the "discipline" in such work lies' (2004: 37). What would set the epistemological boundaries for an ethnography of means–ends relations in this sense? I mentioned at the outset that one of the tasks of this ethnography would be to define and describe a meaningful difference between lawyers' manipulation of means and ends and those of anthropological analyses such that legal knowledge about property rights could come into view as an ethnographic subject of its own. Such a difference must be defined from within the epistemological boundaries of the analytic, means–ends relations.

Means-ends reversals

The character of relations of means to ends was in fact a longstanding twentieth-century philosophical problem. The premise of philosophical pragmatism was that knowledge should be viewed as a means to an end, and nothing more. What was effective was what was true (James 2000: 194). And yet how were the political or social ends to be defined in such an anti-foundationalist tradition? In a series of essays that deeply influenced the Realists, John Dewey reversed the analytical directionality of instrumentalism to argue that such ends should be defined through a process of thinking through the means, that is, by thinking about what was possible with the tools available (Dewey 1998*a*). One ‘starts in the middle’, he argued, and discovers the ends of knowledge by reasoning through the means (Dewey 1998*b*).

In a parallel way, I want to suggest that if anthropologists and legal theorists are working within a singular vocabulary of objects and analytical or political relations, the difference is that they are working the device in reverse. For anthropologists, property as a found object in the first instance is shown, through analysis, to be a tool of political and social interests. For neo-liberal legal theorists, in contrast, what is at first glimpse clearly a tool of political interests can be seen, with the help of ethnographic data, to be merely a found object in the world, ordinary people’s common-sense commitment to ‘their property’. Like partners on a see-saw, anthropologists and lawyers are operating the same device in countervailing, albeit mutually enabling, ways. At each stage, the appropriations of the ends of one disciplinary knowledge as the means of the other consist in practices of reversal. It is this means-ends reversal that constitutes the disciplinary difference and hence sets the epistemological boundaries for an ethnography of property.

What is significant about Dewey’s own reversal, from this perspective, is that it foregrounds the means of knowledge, not the ends, even as Dewey’s philosophical project is premised on a faithful adherence to the question of what knowledge is for. In his essay on technology, likewise, Martin Heidegger distances himself from the ‘instrumental’ definition of technology as merely a means to an end and claims instead that the essence of technology is the means, best understood as a ‘way of revealing’ (1977: 12). Heidegger’s description of the technical as a knowledge practice – revealing – which is not an end in itself, but which nevertheless foregrounds its own means, also finds contemporary echoes in the work of Giorgio Agamben, who defines politics not as a debate over ends, but as ‘the sphere of pure means’ (2000: 60). Commenting on Aristotle’s distinction between production (*poesis*) and action (*praxis*) in which the former has an end other than itself while the latter is an end in itself, he focuses on a third category, the gesture:

[I]f producing is a means in view of an end and *praxis* is an end without means, the gesture then breaks with the false alternative between ends and means that paralyzes morality and presents instead means that, as such, evade the orbit of mediality without becoming, for this reason, ends ... The gesture is the exhibition of a mediality: it is the process of making a means visible as such (Agamben 2000: 57–8, emphasis removed).

Dewey, Heidegger, and Agamben, each in their own fashion, recast debates about instrumental politics in ways that offer a more subtle understanding of

the character of the means itself. Each shares an appreciation of the fact that political analysis and critique must begin from within the epistemological boundaries of the instrument – that solutions must be found in the means of technology. Agamben's formulation of politics as gesture and Heidegger's view of technology as a 'way of revealing', as well as Dewey's reversal of the directionality of means-ends relations, highlight one important effect of means-ends reversal: what is foregrounded are the means.

This helps to capture a subtle but fundamental difference between the instrumentalism that anthropological studies of property impute to the object where they ask questions about whose interests property serves, or how the introduction of property relations changes social practices, and lawyers' own valuation of legal means. The ethnographic experience of training lawyers in the uses of their tools has taught me that lawyers value their knowledge in a particular way – not simply as a means to an end, or an end in itself, but as pure problem-solving means, as technical instruments. In the telescoped chains of means-ends reversals that constitute property doctrine, what is foregrounded are the means of its manipulation and use. What defines legal knowledge is precisely this commitment to the analytic, the means as means, despite the fact that this analytic is explained and defined by practitioners as a question of ends, that is to say, a question of what doctrines are for.

Of course, anthropologists of property may respond that their interest is not in describing lawyers' own conceptions of their instruments, but rather in exposing their instrumental effects. My ethnographic focus on the means, from this perspective, may seem to obscure property's ends. I only want to point out that this view exemplifies the character of property knowledge which I have sought to describe. Anthropologists who assert that property should be analysed only for its political ends are seeking to create a distance between anthropological and legal knowledge by reversing the directionality of legal means and ends and hence foregrounding their own anthropological means (lawyers may value the means, but anthropologists focus on the ends). These anthropologists are not describing property so much as turning legal means into means of their own. Anthropologists who assert that their interest is not in describing legal knowledge but in providing a critique of its effects are demonstrating, in other words, that means can only be turned into further means (cf. Miyazaki 2004).

From this perspective, there is perhaps a reason why the anthropology of law has long been the site of important and passionate debates about ethnographic method (Bohannan 1967; Gluckman 1965; Moore 1969; Nader 1972). In taking means-ends reversals as the epistemological boundaries for the anthropology of property, I am proposing that anthropologists once again take up the means of ethnography as the central project of the anthropology of law.

NOTES

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¹There is a considerable body of ethnographic work on legal language, however (e.g. Conley & O'Barr 1998; Hirsch 1998; Philips 1998), as well as on the perspectives of ordinary 'litigants' on legal practices (e.g. Greenhouse 1986; Merry 1990; Yngvesson 1993), and anthropologists have also made important contributions in introducing Euro-American audiences to debates in Islamic jurisprudence largely ignored by comparative lawyers (e.g. Mundy 2004; Rosen 1989). Legal knowledge itself has recently been studied ethnographically by a number of science studies scholars (e.g. Latour 2004; Valverde 2003).

²Fieldwork has focused my attention on the way lawyers regularly treat documents, theories, persons, and institutions as actants of a singular order (Latour 1990; Lynch 1993). I will represent them as such here.

³Unless otherwise noted, my discussion is limited to American legal theory and practice. All references to 'legal knowledge experts', 'legal theorists' or 'legal practitioners' therefore should be interpreted as references to American legal theorists and practitioners.

⁴This article is limited to the United States portion of my fieldwork. For discussions of the Japanese portion, see Riles 2004a and Riles n.d.

⁵The student refers here to 'outlines' produced by commercial publishers as study aids for law students. These outlines summarize the 'doctrine' and tutor the student in how to apply it on a so-called 'issue-spotter' examination – an examination in which students are presented with a hypothetical fact pattern and are expected to spot the relevant legal issues and analyze them in terms of the doctrine. For an example, see Dukeminier (2002).

⁶Douglas Holmes and George Marcus (forthcoming) have recently suggested that the challenge of contemporary ethnography 'involves the delineation of the phenomenon to be studied', a challenge best met through attention to 'shared frameworks of analysis' between anthropologists and their subjects-collaborators:

[C]ontemporary critical ethnography orients itself through the imaginaries of expert others – through what we call para-ethnography ... This is distinctly not about an ethnography of elite cultures, but rather an access to a construction of an imaginary for fieldwork that can only be shaped by alliances with makers of visionary knowledge who are already in the scene or within the bounds of the field (references omitted).

In my second year of teaching Property Law, I structured the course so as to generate data on this question. I hired one of the students who excelled in the course in the first year as a 'teaching assistant' with the responsibility to attend class each day, meet individually with students, and provide me with weekly feedback on my presentation of the material and students' reactions as well as his own. Two questions on the final examination, including in particular an essay question asking the students to discuss several cases in light of the quotation from Kelsen that serves as the first epigraph to this article, provided insight into individual reactions. I also consulted extensively with other property scholars and other law teachers about the themes in this article (and I particularly thank Professor Kunal Parker of Cleveland Marshall College of Law).

⁷51 Cal. 3d 120 (1990).

⁸'Squibbing' is the standard practice of excerpting, summarizing, or restating the facts of a case or the point of an academic article so as to render these relevant to another analytical problem. In law school textbooks, numerous actual cases are 'squibbed' – summarized in a paragraph or more, often as hypothetical facts or patterns that pose questions for the students to answer and without attribution or citation.

⁹*Black's law dictionary* defines doctrine simply as 'a rule, principle, theory, or tenet of the law; as, e.g. Abstention doctrine; Clean hands doctrine, etc.' (Black 1990: 481).

¹⁰The pages preceding the *Moore* case in the students' textbook had focused on 'property in one's persona', or the 'right of publicity', a property law doctrine that gives celebrities a

property interest in their image, likeness, or identity and hence a cause of action against persons who imitate them without their permission (Dukeminier & Krier 2002: 77-9).

¹¹ 842 S.W. 2d 588 (Tenn. 1992).

¹² In the United States, legal education can be pursued only as a second degree. Hence all students hold a first degree in another discipline.

¹³ A relationship between two orders of phenomena that mutually inform each other to comprise a larger whole is absolutely central to the notion of context' (Goodwin & Duranti 1992: 4). If, in Goodwin and Duranti's terms, an ethnographic object and its context exist in a kind of relationship of figure to ground (1992: 9), here, the figure already contains within itself its own relationship of figure to ground. I use the term 'aesthetic' in Marilyn Strathern's sense of 'the persuasiveness of form, the elicitation of a sense of appropriateness' (1991: 10), rather than in the Kantian sense of notions of beauty prevalent in the anthropology of art. I have discussed this category at greater length in Riles (2000).

¹⁴ Although this line of argument represents the majority position in the legal academy, other property scholars borrow from anthropological arguments to very different purposes. Some diverse examples include the work of Bruce Ackerman (1977), Rosemary Coombe (1998), and Paul Kahn (1999).

¹⁵ I mean this as an ethnographic description and not as a critique of legal knowledge. I have elaborated on the efficacy of the aesthetics of amateurism in legal knowledge in another context (Riles 2001).

¹⁶ 51 Cal. 3d 120, 105-06 (1990) (Mosk, dissenting).

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De la propriété comme connaissance juridique : moyens et fins

Résumé

Dans le cadre du regain d'intérêt que connaît la théorie de la propriété en anthropologie, l'auteur s'intéresse à l'élaboration des théories juridiques en tant qu'objet à part entière de l'ethnographie. Elle aborde notamment une construction spécifique, l'instrument, ou le rapport entre les moyens et les fins, qui est le moteur des théories juridiques et anthropologiques sur la propriété. L'analyse du fonctionnement de cette construction amène à la conclusion qu'au lieu de disséquer les fins du savoir juridique, l'anthropologie de la propriété devrait se consacrer à l'élaboration de ses propres moyens.

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