A Life in the Law: Laura Nader and the Future of Legal Anthropology

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The publication of Laura Nader's latest book, *The Life of the Law: Anthropological Projects* (2002), is also a time for stock-taking. At the most recent Law & Society Association meetings (Chicago, 2004), a multigenerational panel was convened in order to consider the many contributions of Nader's work. Although panelists discussed particular books and articles in their own terms, there were at points suggestions about how Nader's work stands in relation to the history of legal anthropology more generally. Participants were probably rightly hesitant about going on to consider the future of legal anthropology, particularly since Nader herself, in her own comments, moved very quickly from intellectual autobiography to what was at times a rousing exhortation to pursue an anthropology of law on topics of pressing concern. This essay will continue the process of evaluation by reviewing *The Life of the Law*, which necessarily entails a broader consideration of legal anthropology's prospects. This is because the book itself is both synthetic and programmatic: Nader brings together the different strands in her large oeuvre and assembles them in ways that give, at times, a different meaning to her work; and, taken as a whole, the book is also a manifesto for a more relevant and engaged anthropology of law.

The Life of the Law began as the 1996 Cardozo Lectures at the University of Trento, Italy, and the middle chapters are, to greater or lesser degrees, only slightly revised versions of the lectures Nader gave in 1996, with the introduction, first chapter ("Evolving

I would like to thank Elizabeth Boyle first for asking me to write this review essay, and then for her insightful suggestions as the essay took shape. Elizabeth Mertz invited me to participate in an anniversary book session at the 2004 Law & Society Association Annual Meeting in Chicago on the work of Laura Nader, and I benefited from the spirited conversation during the session itself on Nader's work and its relation to current legal anthropology. The other panelists were, besides Laura Nader herself, Carol Greenhouse, Bill Maurer, and Jan Hoffman French, and our exchanges helped form several of the ideas here. Finally, I would like to thank Sally Engle Merry, who helped me consider different possibilities for a review essay on legal anthropology. Please address correspondence to Mark Goodale, Institute for Conflict Analysis and Resolution, George Mason University, Fairfax, VA 22030; e-mail: mgoodale@gmu.edu.

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an Ethnography of Law: A Personal Document"), and epilogue reflecting new additions, commentary, and the use of current source materials through the end of 2000.[1] Although the set piece revisions of the original lectures stand as substantive contributions to three main topics—the relationship between law and anthropology, the continuing importance of reconceptualizing "law" as a bundle of hegemonic controlling processes, and the constitutive effect on legal drift of plaintiffs' decisions (different versions of which, or portions thereof, have been published in other places)—the book's lasting value will come from the way Nader accentuates a series of arguments that had been largely implicit throughout her writings and professional activities and, even more, the way she locates these arguments in relation to a prospective anthropology of law.

But before examining each of these in detail, it is worth pausing to consider what I would argue is an important dimension to Nader's work, without which her professional commitments cannot really be understood, and one that continues to animate her ethnographic and theoretical engagements: her enduring belief in the urgent need for an anthropology of law *as such*. Apart from her own research activities—and the directive role she has played in the research of many others—she has also been the leading advocate for legal anthropology outside of relatively insular anthropological circles, a path that has brought her before a long series of incredulous, dismissive, or, at best, tolerant audiences of government officials, lawyers, judges, corporate boards, and the various powers-that-be among the law and society community.[2] Although one can imagine that it would have been much easier for Nader to have simply redoubled her efforts within anthropology itself—where legal anthropology has not enjoyed widespread subdisciplinary success—she chose instead to continue to insist on anthropological approaches to law in a wide range of settings. Yet these

[1] The clearest sign that *The Life of the Law* is a pre- (September) 2001 work is the fact that it does not refer to the "war" on terror, the invasion and occupation of Iraq, the passage of the PATRIOT Act, or any of the other developments that Nader believes require critical scrutiny by legal anthropologists, and indeed other sociolegal scholars.

[2] A classic example of this is her experience at the 1976 Pound Conference in St. Paul, where then Chief Justice Warren Burger launched the alternative dispute resolution (ADR) "revolution." Although she was presumably invited in order to legitimate what she would later come to see as an "anti-law campaign" led by a consortium of lawyers, corporations, and, eventually, conflict resolution professionals, she refused to simply bear cross-cultural witness to the benefits of "alternative mechanisms governed by the ideologies of harmony and efficiency" (Nader 2002:140); rather, she confounded participants by arguing for the *expansion* of the formal legal system in order to provide access to more people seeking redress for a wider set of complaints. This response, although derived from her ethnographic work among U.S. consumers, was greeted with bafflement and derision and occasioned a retort by none other than Herman Kahn, the infamous thermonuclearist, who "came to the podium waving his arms" (2002:139).

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efforts do not add up to a disciplinary *cri de coeur*; Nader is not concerned with the status or vitality of legal anthropology as a matter of professional identity or prerogative. She advocates for, and has spent her career helping to develop, legal anthropology because she believes that anthropology, and, in particular, its most distinctive methodology—ethnography—*must* be used to shine an absolutely unique light on the workings of law. If, as Oliver Wendell Holmes said,[3] "[i]t is perfectly proper to regard and study the law simply as a great anthropological document" (1920:212), then for Nader the question becomes this: is it, in fact, read *as* an anthropological document, or something else? Likewise, what are the consequences when this all-powerful anthropological document is read normatively instead, or as a set of rules written to benefit the state, or corporations, or an economic elite?

Nader's collected work can be taken as an attempt to answer these questions. In other words, she wants to examine the process, the reasons—that is, ideology—that a latter-day formalism continues to dominate legal theory and practice, a formalism that has proven so resistant to Holmes's (and Nader's) arguments for alternatives because it is so effective as an epistemological bulwark of economic and other types of inequality. Anthropology, with its tendency to relativize apparently natural or universal phenomena, and as a result of its more recent canonization of cultural critique, brings together research on legal process, consciousness, and structure in ways that recognize the "centrality of law in social change," but also, more important, challenge the power of "legal hegemonies" simply by revealing them (Nader 2002:10). This means that for Nader the value of legal anthropology does not lie primarily in its capacity to contribute to an alternative jurisprudence anchored in social practice (contra the legal realism she invokes), but in its nonpareil potential—heretofore unrealized—for circumscribing law in its dominant registers.

To understand Nader's commitment to an anthropology of law in this way is also, indirectly, to clarify an apparent conflict between her unabated and quite public advocacy for legal anthropology on the one hand and, on the other hand, the reluctance of anthropologists and others to either include legal anthropology in the subdisciplinary pantheon—anthropology of religion, kinship, economic anthropology, medical anthropology, etc.—or, even more, grant it legitimacy. This last position was most emphatically taken

[3] Although it must be admitted that when Holmes invokes a law-as-anthropological-document metaphor in order to express his early belief that the "life of the law has not been logic, it has been experience" in another way (cited in Nader 2002:89), he could only have been referring to the anthropology of Bachofen, Maine, McLennan, and Morgan; i.e., the pre-ethnographic ethnology that studied legal categories comparatively and historically in order to demonstrate unilineal cultural evolution.

by the British legal scholar Simon Roberts, who is among the non-Americans most identified with research and writing on anthropology and law. In a 1978 article, Roberts famously posed the question "do we need an anthropology of law?" and went on to answer it in the negative. Roberts arrived at this conclusion by first adopting a relatively narrow working definition of the legal and then observing that anthropologists do not gain from limiting their research to this arbitrary, basically jurisprudential, sphere of inquiry.[4] Instead, Roberts argued, anthropologists should *continue* studying the political and social contexts of order and disputing without trying to fit such studies into preexisting frameworks through either the use of universal analytical concepts (Max Gluckman's position) or the adaptation of folk legal categories (Paul Bohannan's position). Roberts's position became orthodox in the United Kingdom, and an erstwhile anthropology of law was either absorbed by other subdisciplines within social anthropology—e.g., political anthropology—with predictable theoretical consequences, or its traditional questions—though not methodologies—were taken up by comparative lawyers, legal philosophers, and eventually British critical legal studies scholars.[5]

But as it turns out, the contrast between Roberts and Nader was not simply another contribution to the long series of "wasteful and debilitating quarrels ... [and] interminable wrangling over definition, over research strategy and over the construction of an analytical framework" (Roberts 1978:4), as many may have assumed. Indeed, in the same article in which he expressly rejected an anthropology of law, Roberts went on to indicate several areas in which a prospective "anthropology of dispute and order" (my description) should focus. Remarkably, at least two of the areas he identified correspond with what developed into cutting-edge directions in legal anthropology in the United States over the last 20

[4] In the interests of full disclosure: Roberts was one of my teachers and mentors in graduate school and introduced me to legal anthropology at the London School of Economics (LSE) during 1990–1991. I am fortunate that although he took a skeptical approach to legal anthropology on analytical grounds, he nevertheless continued to teach in the subject and encourage others to pursue it.

[5] Although it is difficult to demonstrate this point conclusively, it is worth noting that after 1978 no Ph.D. dissertation in legal anthropology was awarded at the LSE until 2003, when Toby Kelly completed a research project entitled "Law at Work: Law, Labour, and Citizenship Among West Bank Palestinians" (http://www.lse.ac.uk/collections/anthropology/theses.htm). One can imagine how significant it was that *the* legal anthropologist at the LSE during this time was both antagonistic to the development of an anthropology of law and a faculty member in another department (law). The LSE has been one of the most influential center for scholarship and doctoral training in anthropology in the United Kingdom, and so the trend I describe here can be taken to represent a much broader one outside of the United States, especially since the LSE continues to train a sizable percentage of professional anthropologists from Western and Eastern Europe and, as always, developing countries.

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years: the intersections between law and power, and the importance of legal discourse.[6] I believe these correspondences are entirely coincidental, but they underscore the broader point that if Roberts and Nader are in fact at odds, the real points of divergence are not primarily analytical. Nader, like many American legal anthropologists, has been much more willing to adopt a discursive approach to law while letting the question of what "law" is either float or remain embedded as an aspect of legal discourse itself. This approach does not beg the question; rather, to refuse to enter into debates about the boundaries of law as such is simply to recognize—and problematize—the fact that the constitution of "law" is itself a key cultural process. And, as I have already described, Nader has argued that because of the rise of legal hegemonies and their consequences, the study of law becomes invested with an ethical dimension such that scholars cannot simply consider what law is, but must primarily study what law does, and, if relevant, lay an intellectual groundwork to contribute to a shift in law's instrumentalities.

In order to evaluate Nader's work, therefore, it is first necessary to distinguish between these alternative legal anthropological frameworks. In doing so, we see again Nader's commitment to an anthropology of law that is nondisciplinary; her major concern, rather, is to develop a socially necessary orientation to law and legal processes that combines analysis, ethnography, and ethics in a way that is open to social scientists, and others, more generally. And this brings the discussion back to *The Life of the Law*, because in it Nader has given us the fullest statement of her vision for an anthropology of law, in part by pointing toward several areas where research should be focused, areas that are either currently embryonic, or areas that have not yet drawn the attention of scholars.

The Political Economy of Transnational Law

In her 1990 book, *Harmony Ideology: Justice and Control in a Mountain Zapotec Village*, Nader develops a sociolegal theory that she calls the "harmony law model," which embodies "a configuration of compromise, reconciliation, and win-win solutions" to disputes that is employed "as a means of pacification . . ., first as a

[6] As Roberts writes, in describing the "directions which deserve to be pursued further": "[w]e need to know much more about how rules are used, and particularly their relationship to the pursuit of interests and the exercise of power in settlement processes"; "[t]here is much more to be learned about the different forms which settlement-directed talking may take, and the conditions under which these forms are likely to be encountered"; and, "[t]here is . . . a need to look much more closely at what people say and how they say it in the context of disputes . . . [T]alking provides one of the most important vehicles through which people try and exercise control over each other" (Roberts 1978:7).

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requirement of conquest, then as a counterhegemonic response . . . to more than five hundred years of dealing with colonization" (2002:28–9). The application of this model to Mexico meant broadening the scope of analysis to encompass the transnational movement of legal ideas and practices that were being employed hegemonically and, eventually, counterhegemonically. In other words, the development of a "comprehensive theory of village law" (2002:29) required Nader to locate even the most apparently localized law in relation to the Spanish colonial empire, then the Mexican nation-state, and, finally, the currents of transnational missionizing and, later, development. At the same time that Nader was applying the harmony law model in the Zapotec case, she was studying the linkages between calls for legal reform, economic injustice, and the rise of transnational corporate capitalism (1989, 1993, 1997). Given her early and formative role in critiquing the emergence of ADR in the United States, it is not surprising that she was among the first to analyze the ways in which the political uses of what I have described elsewhere as "sympathetic legalities"[7] both reflect and serve, as Nader explains, "the distribution of international power" (2002:150).[8]

Yet despite the fact that legal anthropologists (e.g., Maurer 1997; Merry 2001, 2003, 2005) and sociolegal scholars more generally (e.g., Dezalay & Garth 2002) have certainly studied and critiqued the various dimensions of transnational legality, there has been insufficient attention paid to what can be understood as the political economy of transnational law: the ways in which the transnationalization of legal ideas and practices has actually accelerated a much older process of global capitalist consolidation. So even though the critique of transnationalism has led to an emphasis on boundary transgression, cultural hybridity, and the partial destabilization of traditional epistemologies, at the same time transnational legalities such as human rights, the law merchant, and the evolving regulations covering transnational migration, are being harnessed for very specific political-economic purposes. Nader would like to bring both of these approaches together—the critique of transnationalism with political economy—in order to, in part, reveal the ways in which the discourses of openness, democratization, and liberal legality obscure and thus facilitate global corporate hegemony. This is an important synthesis that opens several new spaces for legal anthropological research, particularly

[7] These are legalities that are formally understood and constituted as humanitarian, social reformist, and counterhegemonic, yet become disciplinary when appropriated by transnational corporate capital and its nongovernmental proxies (Goodale 2002).

[8] See also Avruch and Black's (1996) important study of the exportation of ADR to countries in the Pacific, which Nader also draws upon.

since the type of political economy of transnational law that Nader's work implies would require ethnographic documentation of the integrated linkages between transnational legal institutions, legal actors across a wide range, the state, and multinational corporate entities.[9]

From Social Justice to Harmony and Back Again

Nader has been a close observer of the interplay between the persistent tendency toward legal centralism and the emergence of alternative paths to what Auerbach (1983) describes as "justice without law." Yet unlike Auerbach and others, Nader has studied alternatives not as a matter of legal history, or jurisprudence, but as a historical development that is both an important type of socio-legal practice and, at times, a reflection of broader movements to extend or reinforce hegemonic control over "workers, ethnics, consumers, and other more generally disenfranchised citizens" (2002:138). Nader entered academia and began studying law in culture at the same time that the United States was being shaken by the rights revolution.[10] This period demonstrated to her that a vigorous engagement *with* the legal system—either by opposing it when unjust, or using it to seek justice (or both)—was in many cases a much more effective strategy for the "generally disenfranchised" than the pursuit of informal or alternative solutions to what was, in fact, a problem of restricted access to the machinery of law.[11] Moreover, if the solution to marginalization and systemic

[9] As Nader quite emphatically asked at the 2004 LSA session devoted to her work, in order to draw attention to this gap in current legal anthropological research, "What about the corporations?"

[10] Nader began her doctoral fieldwork in the same year (1957), for example, that Martin Luther King Jr. founded the Southern Christian Leadership Conference.

[11] Indeed, Nader's general refusal to adopt what in some circles is an all-too-easy anti-legalism parallels the provocative reflections made by E. P. Thompson on the role of courts and the formal law as apparent instruments for the protection of ruling-class interests in eighteenth-century England. Thompson, who was a neo-Marxist social historian, dissents from the simple antilegal view. As he explains:

> Thus the law . . . may be seen instrumentally as mediating and reinforcing existent class relations and, ideologically, as offering to these a legitimation. But we must press our definitions a little further. For if we say that existent class relations were mediated by the law, this is not the same thing as saying that the law was no more than those relations translated into other terms, which masked or mystified the reality . . . For class relations were expressed, not in any way one likes, but *through the forms of law* . . .
>
> We reach, then, not a simple conclusion (law = class power) but a complex and contradictory one. On the one hand, it is true that the law did mediate existent class relations to the advantage of the rulers; not only is this so, but as the century advanced law became a superb instrument by which these rulers were able to impose new definitions of property . . . On the other hand, the law

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oppression was *more*, not less, formal law, than an equally clear corollary for Nader was the fact that conflict was the driving motor of social reform. In order to achieve substantive equality, groups whose interests were previously denied legal status, or who were prevented from protecting their existing rights, would have to publicly struggle to effect the needed changes.

In this sense Nader was reaffirming an older theoretical tradition within legal anthropology and social theory more generally that had normalized conflict and analyzed its potential as a basis for social transformation in cases of structural inequality. Thus she watched in dismay as the end of the rights revolution was officially announced at the 1976 Pound conference; what followed in the United States was a lasting swing "away from a concern with justice to a concern with harmony and efficiency, from a concern with right and wrong to a concern with therapeutic treatment, from courts to ADR, from law to antilaw ideology" (2002:139). Nader studied the consequences of the general move from social justice and legal reform to the development of harmony and efficiency models in the United States, while a discourse of acquiescence, compromise, and reconciliation emerged that reflected a post-Vietnam cultural and social psychological fatigue. Despite the pervasive rhetoric that celebrates ADR and "popular justice," and urges serious social reformers to pursue communitarian, nonlegal, and, in the case of one researcher (Tannen 1998), "Asian" approaches to conflict resolution, Nader has been a persistent and sharp critic of what she calls "a cop-out, an avoidance of root causes by means of human management techniques" (2002:149).

It appears that the pendulum that Nader and Auerbach describe, which swings back and forth between legal formalism and the development of nonlegal alternatives to social conflicts, is moving away from ADR in some areas, particularly within international and transnational contexts. Although it is still true that harmony models form an important part of implementation strategies for nongovernmental organizations in many parts of the developing world, and, even more recently—as I was able to determine myself during recent research in Romania—part of the multilayered legal framework emerging from the expansion of the European Union,

mediated these class relations through legal forms, which imposed, again and again, inhibitions upon the actions of the rulers . . .

We ought to expose the shams and inequities which may be concealed beneath this law. But the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims, seems to me to be an unqualified human good. To deny or belittle this good is, in this dangerous century when the resources and pretentions [*sic*] of power continue to enlarge, a desperate error of intellectual abstraction. (1975:262–6; emphasis in original)

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it is also true that one can point to a countertendency over the last 10 years, reflected in the emergence of international war crimes tribunals (versus "truth and reconciliation"), indigenous rights movements (versus negotiated settlements through mediation of claims), and the globalization of human rights, which embody a quintessentially legal framework. Some anthropologists have already begun to study human rights and/as culture (Wilson & Mitchell 2003; Cowan et al. 2001), the relationship between rights-based approaches to social justice and local knowledge (Merry 2001, 2003, 2005), and the increasing use of rights-based strategies by victims of ethnic violence (Ross 2003). But the discursive struggle that Nader describes, between legal approaches to social justice that are dependent on the strategic use of conflict and resistance on the one hand, and those that seek to mediate conflict through compromise, lumping, and the search for "common ground" on the other, has been largely ignored as a topic for research and analysis. New legal anthropological initiatives on this topic would require an anthropology of ideology as much as an anthropology of law, a reevaluation of both the function and meanings of conflict, and, finally, a willingness to reengage with law and legal institutions.[12]

Legal Anthropology as Political Engagement

Finally, in tracing the implications of Nader's work for a future anthropology of law, which is, to reiterate, an approach that Nader hopes will inform the study of law across the social sciences and beyond, we must look closer at what is perhaps the most important argument to emerge from *The Life of the Law*, one which had been, apparently, implicit in her writings over the years but which she now underscores with a sense of urgency. The common thread linking her various theoretical and methodological innovations is a belief that legal anthropological research should be conceptualized and conducted in ways that engage with legal and social problems, not as a simple exercise in theory-practice integration, but as a reasoned contribution to actual movements for social justice and equality, and resistance to corporate hegemony. From Nader's early move away from rules in order to study disputes in cultural context, to her analysis of elite manipulation of law's ideological potential, through the development of a user theory of law and her

[12] To come back to law is not, however, to simply adopt a narrow focus on the formal sites of lawmaking and interpreting. Rather, legal anthropologists should take law seriously in its own terms at the same time they trace its radiations into and through corporate boardrooms, neighborhood mediation centers, political action committees, university research labs, etc.

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contrarian insistence that ADR and other supposedly progressive alternatives to law were in fact reactionary, there is always the concern with the marginalized and ignored, the anonymous would-be plaintiff struggling with law's seeming impenetrability. A legal anthropology in this key is not one that some scholars would want to pursue. But for Nader, one does not really have a choice. As she says, "[a]nthropology is political engagement, whether we want it to be or not. Such recognition liberates the imagination; context as an analytical device is not enough, nor is community" (2002:230). This is her most basic and profound point: the study and critique of law *through* anthropology produces knowledge of political consequence. This means that the anthropology of law will never be able to insulate itself through the sheer power of deduction, like jurisprudence or legal philosophy; in this sense, legal anthropology is both more limited and more humanistic.

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