Legalism

Community and Justice

Edited by

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Justice, Community, and Law

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Justice is commonly associated with law. That they are, or should be, related goes generally without saying in the English-speaking world (Selznick 1992: 435, Gardner 2000), and in many European languages the two are equated lexically. Yet the application of law does not always produce justice: there is a tension between the generality of the law on the one hand, and the requirements of particular cases on the other. There is little agreement amongst theorists over how to understand this tension or, indeed, how to characterize the relations between justice and law. For Selznick (1992: ch. 15) they have a special affinity, but law only 'promises' justice. In Dworkin's (2011) account, both justice and law form part of a general theory of morality and value. Sen, meanwhile, builds a theory of justice that puts public reasoning, not law, at its centre: a concept such as 'human rights', he says, should not be 'locked up' within the 'narrow box of legislation' (2009: 364). At issue are different understandings of law, as well as different theories of justice.[1] Such theories are inevitably linked to particular cultural and political ideals and, as the examples in the present volume suggest, the ideas that underpin western debates are not universal.

Both law and justice are frequently, although often implicitly, associated with ideas of community, to provide a finite set within which retribution or distribution is made and laws are valid (cf. Sandel 1984, Selznick 1992). Yet 'community' as a broader concept is no less elusive than is justice. Although much used (and abused) by historians, legal thinkers, and political

[1] Sen, for example, understands law as a matter of coercive rules. In Dworkin's 'interpretivist' view, law includes the principles that provide the best moral justification for enacted rules (Dworkin 2011: 401–2). Waldron (1996) points out that ideas about justice seem inevitably to incite argument and suggests that laws, in the form of rules, may provide at least practical answers to disagreement.

philosophers, the term remains strikingly indeterminate, leaving it open to be read through our parochial common sense. Meanwhile, the ethnographic and historical record shows that neither the idea of self-evident community among human beings ('the family of man') nor that of social order within a self-contained set of people (the 'political' community as a moral unit) is universal.[2] 'Community' hence needs to be examined, rather than taken for granted.

Law, community, and justice—each a rather indeterminate concept—quite commonly intersect, then, but in various, often unexpected, ways. Legalism—the use of explicit rules and generalizing categories—provides a basis for cross-cultural comparison of law, as we saw in the first volume of this series (Dresch and Skoda eds. 2012). This is the starting point, in the present volume, for examining empirically the relations between law, justice, and community, finessing disagreements that stem from different theoretical perspectives and providing glimpses of distinctive social imaginings.

LEGALISM AND JUSTICE

If we regard legalism as a distinctive type of thought and action (Fallers 1969), the tension between law and justice is readily apparent. Legalism addresses life through rules and 'generalizing' categories, such as vendor and purchaser, tortfeasor, resident, and immigrant. It simplifies, specifies, and classifies. Legal categories and rules also 'constitute' social phenomena (Pottage and Mundy 2004), allowing not only the formal reproduction of relations that might exist anyway, such as marriage (Lucas 1977, Gillis 1983), but relationships or institutions that could not exist otherwise, such as mortgages and copyright, corporations and charitable status; and these in turn give rise to obligations. Once established, law is generally taken to reflect moral assumptions, which may be invoked by appeal to specific laws. As Dresch (2012a: 15) notes in the first volume in this series, laws stand apart from practice, evoking an order that outlasts the particular moment.

[2] That the 'family of man' is not everywhere recognized will come as no surprise. Anthropologists, however, are used to overlapping forms of identity, such as 'kinship' and 'clanship', that reach indefinitely far afield (Dresch 2012a: 37), and to cases where bounded 'society' is thought of not as the precondition of ordered sociability, but as allowing the violent rejection of fellow humans: see e.g. S. Harrison 2005, 2012. For a discussion of how different scales of shared life and intimacy inform talk of justice in our own world, see Rorty 1998.

Laws, in the form of rules, can be applied to make decisions—about liability, punishment, compensation, property relations, and so on. On an individual level, Ramble (2008: 308–10) suggests of a Tibetan case that written law may avoid the cognitive effort of making moral choices; it precludes the need to make decisions on the basis of sincerity and moral judgement which might be criticized by others. However, when it comes to resolving conflicts, the requirements of justice may not be well served by the generality and universalism of rules. Max Weber commented adversely upon the courts of the rational and bureaucratic state, in which judges, he said, apply laws in a mechanistic fashion (Weber [1918] 1994: 147–8); others, too, have criticized the inflexibility of a legalistic approach to decision-making (Chroust 1963: 14, Shklar 1964). As Schauer (1988: 547–8, 1991a: 646) points out, any rule-based system is inevitably both over- and under-inclusive, for rules capture more or fewer cases than may seem appropriate in a given instance, or can have been intended by the legislature. Legalism, in short, is an imperfect technique for achieving justice (Frier 2013a: ch. 9). This worry is not restricted to European traditions, and a tension between law and justice recurs in the Islamic world. Clarke (2012), for instance, discusses the dilemmas faced by *sharīʿah*-court judges in modern Lebanon who are supposed to apply Islamic law (as defined by the Lebanese state), but face a widespread view that merely applying rules, no matter that these are derived from scripture, is incompatible with the role of a true Muslim. That role demands personal engagement with the morally needy. 'Humanity' towards others is rhetorically opposed to the formal aspects of legal practice, with which judges are regarded as being overly preoccupied (2012: 107).

This tension has long been recognized. Aristotle described 'equity' (*epieikeia*) as a correction needed when law is defective owing to its universality (*Nicomachean Ethics* V. 10);[3] Cicero in turn appealed to *aequitas* to build a concept of fairness, as mediating between a general rule and the specific case (Frier 1985: 120). In England the practices, principles, and maxims of equity were designed explicitly to temper the rigours of the law, eventually becoming formalized in the practices of the Chancery courts and, thus, aspects of law themselves (Milsom 1981: ch. 4).

Justice is regularly invoked as the standard which laws and legal processes ought to meet. Medieval times saw allegations of 'many

[3] Aristotle makes a distinction between 'legal justice' (*nomimon dikaion*) and justice in general (*dikaion*). His point is that the former may need to be corrected by equity in order to achieve a just outcome. The argument is obscure at points and hard to render clearly in English, not least because our lexical distinctions among equality, justice, and fairness are different from the Greek (Finnis 1980: 193–4).

laws and lityll right' in England (Carpenter 1983: 210), while in more general European discourse law itself was both right and just, something that transcended the activities of the ruler but which he ideally embodied, and in accordance with which he should act when making specific laws (Kern 1939: 151–2). While law-making was important, however, it was not all the ideal ruler did, and not necessarily the foundation of regal justice. Dunbabin (1965) describes how twelfth- and thirteenth-century French writers argued that the monarch should rule well, on the basis of his moral qualities and upbringing, and should be concerned with the good life of the multitude.[4] Louis IX of France (r. 1226–1270) was famously depicted as an ideal monarch dispensing justice to petitioners under an oak tree at Vincennes (Clanchy 1983: 52, Skoda 2012a: 284). Such visions involved hierarchy and obedience, and the idea that kings should rule with mildness and clemency rather than through compliance with explicit laws. Koziol (1992: ch. 7) describes the justice of French kings meted out to the deserving poor, primarily on the basis of mercy. The rich, by contrast, could rely upon laws of property, which safeguarded their interests—not least by setting the terms of arguments.[5]

The idea that a good (and just) ruler might need to be merciful by relaxing the rigours of the law, not blindly applying rules, is found elsewhere. Accounts left by the Kangxi emperor of late seventeenth- and eighteenth-century China indicate that he could be motivated by compassion in capital cases (MacCormack 1996: 162–3); some medieval Indian stories depict the king as a force for justice, opposing the letter of the law (Davis 2012: 101–2), although others depict severe formalism. A persistent line in medieval European thought, meanwhile, opposed law and 'love'. Clanchy (1983) describes the prevalent idea that 'agreement prevails over law and love over judgement', an ideal reflected in out-of-court settlements, disapproved of but sanctioned by formal courts and in the 'lovedays' specifically set aside for reconciling disputants (1983: 50).[6]

[4] The idea of the well-brought-up ruler, whose *formation*, in the French sense, is the foundation and guarantee of appropriate relations between ruler and subjects, is apparent in China, the Islamic world, India, and elsewhere. Instead of producing the perfect society the hope is to produce the perfect man.

[5] Southern (1953) makes similar points about medieval England, where the rich had law and thereby a certain form of freedom, as he puts it.

[6] This does not, of course, mean that lovedays were necessarily a more equitable means of resolving disputes, and later medieval writers depicted lords abusing these procedures, 'so that right and law may not run their course' (Clanchy 1983: 60–1). The limitations and burdens associated with 'informal' societies have been noted elsewhere (Colson 1974). 'Kinship', 'friendship', and 'brotherly love' may allow forms of exploitation that are difficult to formulate and thus to contest.

Meanwhile, in eastern Tibet, justice (*jömdri*) is something enacted by a good mediator to achieve settlement (Pirie 2009), and in the Islamic world amicable settlement (*ṣulḥ*) has often been the very point of justice (Othman 2007).

Laws might fail to live up to standards of justice, then, but conversely they have been regarded as the answer to judicial iniquities. In the 1280s, only a century or so after the establishment of the king's courts in England, a series of scandals and actions against corrupt law officers led to denunciations of royal judges as perjurers, murderers, and thieves, and at least one of the responses was to turn to law and compile a summary of historical usages and the provisions of charters, *The Mirror of Justices* (Whittaker 1895). Laws, despite the problems they present, are persistently and widely associated with what is 'right', as for instance in early Britain (Taylor, chapter two in this volume). Indeed, for the eighteenth-century jurist Blackstone (1765-9: i. 42–3), as for several medieval theorists, unjust law was not really law. Often laws are associated with religion, as in the Armenian law-code described by Thomson (chapter one in this volume) or, in a very different form and context, in the legal rulings, or *fatāwā*, sought from Islamic *muftī*s in Yemen (Messick 1993). Law and legalistic rules and practices might, then, be regarded as exemplifying higher principles. In so far as they stand apart from practice, they can be thought the very stuff of justice as much as something inimical to it.

RECIPROCITY, STANDARDS, AND EQUALITY

Hart (1994: 159) suggests as a precept of justice the principle 'treat like cases alike' and, of course, 'treat different cases differently'. Legalism, by providing explicit rules and categories, can define similarity and difference. However, those formulating the laws must still decide which criteria of likeness are relevant (1994: 160), and not all traditions, or periods within a tradition, make the same sorts of choice. 'The differences among varying *conceptions* of justice … are differences among the features of people that are seen as relevant to the adjudication of their competing claims' (Rorty 1998: 51, his emphasis).

Johnston (2011) suggests that the roots of the idea of justice are intertwined with reciprocity. This is a quality of exchanges between people, which might be balanced or imbalanced, and is found at its most basic in provisions for retaliation, revenge, and compensation. There are numerous examples of laws that provide for exchange, if only by specifying weights and measures (Whitman 1996). There are

laws, too, that specify in detail the circumstances in which compensation may be sought for injury within relations based, amongst other things, on retribution (Dresch 2006, 2012b, Pirie 2009).[7] Even punishment involves a form of reciprocity or balance, in the sense that the punishment must fit the crime.[8] This is the domain of what Aristotle termed 'corrective justice', balancing relations between people by restoring the *status quo ante*.

We can, however, point to societies that eschew compensatory exchange in favour of community. Within the Tibetan realm, Amdo tribespeople pursue revenge, and the settlement of disputes involves compensation (Pirie 2009, 2010). By contrast, the villagers of Ladakh prioritize communal solidarity and reconciliation; they condemn all forms of vengeance and hardly even entertain claims for amends, instead conceptualizing their common life in terms of what is 'straight' (Pirie, chapter nine in this volume). The residents of Bridewards in Tudor London, discussed by Ingram (chapter eight in this volume), were also preoccupied with moral 'cleanliness', rather than with compensation. Their practices of shaming, punishment, and exclusion were ostensibly carried out by reference to rules, known standards, and procedural formality, but there was extensive use of discretion and opportunity for manipulation. Concepts of 'justice' hardly accord with local concerns in either case. At best, 'corrective justice' is an empirically contingent ideal.

Aristotle also distinguished 'distributive justice' as a quality of processes whereby benefits and burdens are appropriately allocated, implicitly within a given community.[9] Justice in this sense can go beyond the context of any legal system, often referring to some (ideal) state of society as a whole and its institutions. Rorty (1988) suggests that the rhetoric of justice emerges as an abstraction from a sense of loyalty or trust towards those with whom one has a close connection; justice, in general, involves a larger loyalty to humankind. Such ideas sometimes embrace an account of why some groups or persons

[7] In cases of this kind 'circumstance' is the key. The seemingly simple question of how much is owed often finds no clear answer, or the answers are marginal features of a text, but who is responsible for payment in what setting is defined by law. Dresch (2012b) suggests that in some cases what Hart called 'secondary rules' are extremely prominent.

[8] The displacement of private claims to right by the monopolistic claims of public justice remains the great theme of early English legal history (see e.g. Hyams 2003, Lambert 2012a). In general, the state now depicts itself as the centre and source of all law despite many private rights and powers preexisting any act of legislation (cf. Finnis 1980: 292).

[9] Legal theorists make a further distinction between procedural and substantive justice. These concepts can, in very general terms, be associated with the regularity of legal proceedings and the fairness of the result, respectively (Kramer 1997).

enjoy rights or powers that others do not, but more often they express an ideal of 'equality' or, at least, the fact that all in a given community enjoy the same procedural rights (Hart 1994: 163–7).[10] Rawls (1971) thus builds a theory of justice upon egalitarian premises by imagining a society founded *ab initio* by agreement amongst its members. This leads, through a search for 'reflective equilibrium', to conclusions about equality of basic liberties and of opportunity—not of outcomes. Johnston (2011: 218) remarks that as a vision for justice among persons presumed to be free and equal, Rawls's theory has no peer. Yet individualism is not a human universal. As Sandel (1984: 87) points out, it is a liberating vision, which casts the human subject as free from the dictates of nature and the sanction of social roles. But it is also a vision that does away with notions of hierarchy and obedience, honour and heroism, and that renders secondary the qualities of mercy and compassion, as well as bonds of affection. The laws that ostensibly guarantee justice in such cases must also exclude others: 'every act of self-legislation is also an act of self-constitution … the community that binds itself by … laws, defines itself by drawing boundaries as well' (Benhabib 2001: 363). Indeed, Rawls, in his later writings (1999), conceives of law as necessarily drafted for 'a people', defined by cultural and historical affinities.

Rhetorics of justice, for all their claims to abstract universality, tend to obscure the fact that what people think or claim to be a just social order varies from one self-defining group or polity to the next (Berman 1988, Rorty 1988). Nonetheless, no matter how inchoate the ideal, justice is likely to be fought for. Patrick Lantschner (chapter three of this volume) describes how forms of justice were often the explicit object of dispute in late medieval Italian communes. Such struggles could, variously, take the form of petitions and proceedings within the judicial process or outright, sometimes violent, rebellion. What was at stake in such revolts was jurisdiction, that is, the power to administer justice and to provide what, at that moment, appeared just laws. Discrete moral units—the famous 'city-states'—all claimed against their neighbours to exemplify justice, while appealing to a common legal rhetoric and, in practice, participating in a broader field of shared morality.

[10] Aristotle asserted that 'justice is equality, as all men believe it to be, quite apart from any argument' (*Nichomachean Ethics* V. 3), which drew him into difficult questions of 'proportion' and thus 'geometrical' equation. His world distinguished between Greeks and barbarians, free-men and slaves, men and women, and some men were of greater merit than others. In a modern setting different substantive rights accrue from 'merit' and provide the basis for selection to office.

ARGUMENT AND ORATORY

Within our empirical examples, claims and theories about justice are often accompanied by a reference or appeal to some form of law or legalistic argument. Instead of regarding justice as a (universal) ideal—something to be achieved through law—it might be better to regard laws as providing, at least in some cases, the resources through which claims to justice can be articulated. E. P. Thompson (1975) describes how laws in eighteenth-century England provided ideological and instrumental support for a ruling class, but how even an 'atrocious' law like the Black Act—which was used by the gentry to consolidate power at the expense of the peasantry—formed part of a framework of law and legalistic argument which could sometimes be turned against the powerful. In our own time the language of human rights provides conceptual and rhetorical resources that have proved popular, even amongst those whose cultural background does not involve a parallel idea.[11] Claims made in such terms have a sharp moral edge.

It would be a mistake to see appeal to laws as merely instrumental, however, even on the part of the comparatively powerless. For those who would argue for their rights, or affirm their honour, it may be important simply to be able to articulate a claim to justice. Laws offer a model of what should be the case, or a 'model form' of claim. It is widely recognized in the common-law world, for example, that many litigants want above all to 'have their day in court'. This is not a new phenomenon. Bossy (1983: 291) describes an 'inpouring' of disputes into royal law courts throughout Europe from the end of the fifteenth century, while Beattie (1986) describes how litigants of modest means pursued expensive criminal cases in seventeenth- and eighteenth-century England. Historians have sometimes noted the existence of laws that are referred to by litigants but never applied by a judge—in ancient Greece, for example (R. Thomas 1994, Lanni 2005a).[12] The chance to articulate one's demands, condemn the actions of others, or assert one's status in legalistic terms seems to be valued in and of itself. How else are we to understand the persistence of the sixteenth-century English litigants

[11] Anthropologists often implicitly criticize laws for doing violence to indigenous concepts and emphasize the processes of 'translation' required to render indigenous concepts in legal terms, or vice versa (Wilson and Mitchell 2003, Merry 2005, 2007, Jean-Klein and Riles 2005). Nonetheless, international standards provide a powerful language, attractive precisely because it gives access to a range of argument that can be heard in contexts where it matters (Benhabib 2001: 376, Comaroff and Comaroff 2006: 25–6, Goodale and Merry 2007).

[12] The Amdo code discussed by Pirie (2009 and this volume) seems to have been used in a similar way.

described by McComish (chapter five in this volume), who repeatedly took their grievances to court against a rich and unscrupulous opponent with little prospect of a just result? Merry (1990) describes litigants in the lower courts of the US who carefully frame their arguments in legal terms and resist attempts by judges and lawyers to redescribe them in simpler moral language. Rather than allowing themselves to be pushed towards informal settlement, they strive to have their cases heard in legalistic terms.[13] Laws, in such cases, provide resources for argument. They specify concepts, categories, and rules according to which claims to justice may be articulated and heard, setting the terms of available debate (J. B. White 1985: ch. 2).

Legal resources and forms of argument may also, of course, be manipulated. For a long time in Europe, rediscovered Roman law was regarded as an authoritative source and could be cited, for instance, to claim 'property' against arguments based upon customary 'possession' (Wickham 2003: 144–50): Roman law had prestige, prevailing over other arguments. Access to prestige and the associated legal expertise is often enjoyed unequally. McComish's unscrupulous litigant was able to manipulate the court process, or avoid its consequences, within the English common law. Yet the willingness of the less privileged or powerful to engage with legal processes cannot be ignored and the possibilities offered by legalistic argument arise more broadly than in the courtroom.

By creating universal and explicit categories, legalism makes a social vision the subject of evaluation and judgement. Debates among sixteenth- and seventeenth-century European philosophers, for example, often concerned justice, either directly or indirectly (Brett 2011). Ideas about natural law and the *ius gentium* provided the terms for more specific argument, for instance concerning the treatment of mendicants, an issue raised by the Poor Laws (Brett 2011: 15–6). We can compare debates among jurists in the Hindu, Roman, and Islamic worlds concerning issues of social and individual morality, which were often conducted and articulated in terms of laws and legal categories.[14] In such contexts, particular

[13] Lawyers criticize the changes to civil procedure in England and Wales introduced by reforms that followed Lord Woolf's recommendations in 1996 on the basis that they promote out-of-court settlement at the expense of allowing litigants to feel that their case has been properly heard (Pirie 2013a: 144). US initiatives to promote 'informal' justice at an earlier date were criticized by anthropologists on the same grounds (e.g. Nader 1979).

[14] Davis (2012) describes law as a form of consultation at the hands of Brahmins in India; Watson (1995), among others, emphasizes the academic and esoteric nature of arguments conducted by Roman jurists; while Schacht (1964) and Weiss (1998) depict Islamic jurisprudence as a largely scholarly and intellectual endeavour.

forms of interpretation are made possible and may themselves be subject to debate; that is, to jurisprudential argument.[15]

In the modern world, laws may be deployed by the powerful to clothe their activities in 'a wash of legitimacy, ethics, propriety', as the Comaroffs (2006: 31) put it. Decisions by heads of state to intervene in or attack other nations are justified by reference to the legal instruments of international bodies or legal experts' opinions. However, this also means that such actions are open to criticism if they are ultimately perceived to lack legal legitimacy. In the UK, following the decision of Tony Blair's government to invade Iraq in 2003, the opinion of the Attorney General and the extent to which that opinion had been properly considered by the Cabinet became the subject of intense scrutiny.[16] As J. B. White (1985: 238–42) points out, while law is a resource for justifying power, it also invites argument over the nature of the authority it defines; it requires explanation. Law—the language of justice—lays itself open to challenge.

Among more recent theories of law and justice, Dworkin (2011: 11–12) acknowledges that morality is an interpretive enterprise. Waldron also recognizes the recurrence of disagreement debated in the name of justice, but his conclusion that the integrity and univocality of justice necessary for law must be questioned (1996: 40).[17] As we have seen, it is problematic to assume that justice is univocal or amenable to legal definition. At least in some cases, laws might be invoked as discursive resources more than as definitional statements. In Sen's (2009) view, a theory of justice must serve as a basis for practical reasoning, for judging how to reduce injustice and advance justice, rather than aiming to characterize a perfectly just society. He criticizes 'arrangement-focussed' approaches to justice which concentrate on the perfection of institutions (2009: 5–6), and specifically Rawls's idea that we need a sovereign state to apply principles of justice by choosing a perfect set of institutions (2009: 25).[18] Legally enforceable rules may, of course, be created and employed by a ruler to regulate society, with the aim of standardizing and governing (Diamond 1973, Fitzpatrick 1992, Tamanaha 2008), or developed by merchants to

[15] The use of analogies and syllogism and the positing of exceptions, limiting examples, and hypothetical cases is found equally within the common law at different periods (Brand 2007, 2012, Schauer 2009), in Islamic jurisprudence (Schacht 1964, Weiss 1998: ch. 3), in China (MacCormack 1996: 166–74, Bourgon 2011: 183–5), in Hindu *dharmaśātra* literature (Davis 2010), and amongst Roman jurists (Watson 1995).

[16] Not least during the inquiry led by Lord Chilcot: www.iraqinquiry.org.uk.

[17] Waldron traces this position back to Kant's ([1797] 1996: 89–90) account of the need for laws in society and characterizes law as 'the offspring of politics' (1996: 38).

[18] Although Sen is dismissive of the extent to which enforceable rules may provide a foundation for this enterprise, if we understand legalism as providing resources for argument, its relevance to this account of justice and practical reasoning is obvious.

regularize trade relations (Pirie 2013: ch. 8). Even in small communities, rules and categories may provide standards and facilitate the enforcement of discipline, as evident in the city-wards described by Ingram (chapter eight of this volume) and the Sorbonne statutes described by Sabapathy (chapter six of this volume). But once a rule is made explicit, it is liable to be debated, contested, or construed in court.

Justice is readily invoked in debates over what is to be done, then, whether the issue is one of compensation, punishment, or exile, and in theories about how society is to be ordered; it is often the ostensible justification for legislation. Rhetorics of justice can obscure the arbitrary nature of rules, however: legalistic processes can produce answers when the justice of the case at hand is not clear, but they may cut through moral ambiguity at the expense of justice. At the same time, and unlike the uncertain obligations of kinship and 'brotherly love', legal categories may make it easier to contest exploitation. Laws facilitate debate by making rules and categories explicit. For jurists and scholars these may be intellectual debates about the nature of rights or the details of a moral vision for the world, while for the weak or marginalized, they may simply provide the possibility to articulate a claim to fairness and justice.

COMMUNITY

Since the 1980s, 'community' has become an important term for historians, or at least for those who want to get away from the state. The best-known and most influential example is Susan Reynolds' ([1984] 1997) *Kingdoms and Communities*, the main purpose of which was to remind us that most of medieval life was marked and organized by 'lay collective activity'.[19] Such activity informed even the early Middle Ages, she argues, and people thought of themselves as belonging to communities long before these were theorized as 'corporations', which means that legal texts, grants of customs, or learned treatises present a very partial picture: 'we do not need to deduce the absence of transpersonal or collective relations from the absence of evidence about them' (Reynolds 1997: xlvi, see also Reynolds 1981). But where there is such evidence, she says contrarily, it indicates state involvement and the intrusion of legal specialists, thus community's demise. The position that Reynolds adopts

[19] Hence, among other things, 'feudalism' was not the whole story (Reynolds 1994). The impact of *Kingdom and Communities*—although the book was much criticized—was considerable, with more than four hundred citations on Google Scholar alone as of early 2013; it is still fiercely argued over, and remains a core item on undergraduate reading lists.

makes it difficult, if not logically impossible, to prove the existence of 'community' on the ground, although somehow it must be there.

At least two different issues are at stake, marked by the fact that the term 'community' can refer to an abstract idea of sociality, but also to a numerable group of people. Ferdinand Tönnies (1887, with many later editions) distinguished *Gemeinschaft* from *Gesellschaft*. The first, usually translated as 'community' rather than 'society', was characterized by natural togetherness, which was surely part of what Reynolds had in mind; the idea of people living 'everyday' lives without the need for state administration. Regardless of the uses to which Tönnies' ideas were later put, this has a commonsensical appeal. It did not, that one can see, cross his mind to ask seriously where the boundaries of such community lay.[20] Reynolds, in her later work, does begin to wonder and lays the blame for boundaries, hence communities one could count and distinguish, on rulers and 'legal specialists'. Between the two reckonings of community, generic and plural, lies a very real set of questions.

There is, of course, no *a priori* reason why 'community' should be a less plausible category of analysis than other heuristic assumptions—that of the necessary existence of self-interested individuals, for instance, or of vertical power relations. But once a concept is situated at the level of common sense it becomes slippery, and in Reynolds' writing, communities at times appear almost ahistorical: 'perhaps communities [note the plural] as such were always there' (Reynolds 1997: xli). This argument she backs up by reference to anthropology: 'virtually all traditional societies studied by social anthropologists seem to be full of collective activities and generally unbothered about justifying them or setting limits to them' (Reynolds 1997: xliii). Does this mean that we ought to understand 'community' as a human universal, one that by definition defies historical analysis because it is always already present?[21]

While puzzled anthropologists can invoke 'indigenous categories' to suggest at least an idea of local debate, historians working on sparsely

[20] One might wonder why this was. The romantic tradition of the *Rechtsschule*, with its mystical enthusiasm for the 'folk', continued to colour German thinking through the nineteenth century, which may well have been enough to encourage a view of community as needing no explanation. (On Gierke see later in this introduction.) Julius Goebel's *Felony and Misdemeanor* (1937), which Dresch mentions in chapter four of this volume, goes to some trouble to oppose imaginings of a 'folk peace'.

[21] This is perhaps what Reynolds herself hinted at in the preface to the second edition of *Kingdoms and Communities*: 'I was seduced by alliteration into using a word—communities—which has virtually lost all meaning' (Reynolds 1997: xi). For other historians writing in a similar vein, 'community' necessarily implies boundedness, although this often goes unthought. Wendy Davies, in her *Small Worlds*, for instance, offers no definition of the term 'community', but points to the limited scope of social relations, which

documented periods have themselves to invest concepts with meaning. Chris Wickham, in his monumental *Framing the Early Middle Ages*, thus proposes an analysis of rural society from settlement patterns revealed by archaeology. Although he is characteristically careful, the tenor of his argument equates nucleated settlement with a sense of community. Hence, after noting that different forms of sociality could exist within the same village environment, he concludes that

> any substantial, closely intermingled settlement . . . must have had a clearly characterized identity, simply because people had to deal with each other on a daily basis. They had mutual interests, in defending common grazing lands against rival villages and nomads, in keeping up irrigation systems in some areas . . . in organizing the local church(es) or synagogue, in keeping the peace, and, of course, . . . in distributing tax liability (Wickham 2005: 457).

Conversely, in areas where

> all settlement seems relatively fragmented and unstructured . . . it is likely that large landowning was relatively weak and the peasantry relatively autonomous. One could also propose that peasantries in this situation had rather less tight social structures than in societies with more organized villages, whether or not these were framed by external powers (Wickham 2005: 515–6).

While this is useful in underlining the material aspects of common life, and in pointing out that 'community' might exist as a result of vertical power relations as much as in opposition to them, even here the comparative absence of internal evidence leaves much room for our own assumptions. How can we know that people who lived together really thought of themselves as a 'community' and what might this have meant to them—and does it matter?[22]

Although anthropological study of 'communities' was once common, and was commonly theorized in American writing (see e.g. Redfield 1955), from the 1970s anthropologists began to avoid the term—roughly at the same time as historians discovered it. Ironically, this was due to a growing concern with history. In 1973, Talal Asad accused anthropology of colonial complicity. A focus on 'natural' communities, such as 'peoples' or 'tribes' ('ethnic groups' had not yet reached academic fame), he

were usually focused on villages, and to village assemblies acting as courts in most matters: 'horizons', she says, 'were extremely limited' (1988: 128).

[22] The anthropological record shows that neighbours do not necessarily cooperate, that local settlements might be riven with conflict, and that people's primary solidarities might cross-cut residential units: see for instance Frankenberg (1957), Gilsenan

claimed, was the result of sundry colonial visions, displacing the complex alliances and social forms found among the people conquered; the image of timeless rural communities was either wishful thinking by order-loving colonial administrators, or the direct result of administration.[23] In order to restore history (and agency) to those who had thus been denied it, anthropology henceforth should concentrate on relations and connections or, if it must, on ethnogenesis. As Eric Wolf put it in his *Europe and the People Without History*, 'the world of humankind constitutes a manifold, a totality of interconnected processes, and inquiries that disassemble this totality into bits and then fail to reassemble it falsify reality' (Wolf 1982: 3).[24]

This argument has been rediscovered several times, most recently by theorists of 'globalization'—a repetition that suggests conceptual difficulties. Yet seen from other disciplines, 'community' is something anthropologists are supposed to be good at, if only because of their focus on long-term fieldwork and on everyday life. A comparative lack of productive debate on 'localism' and its relation to ethnographic experience, however, might tell us more about the prevailing lack of conceptual clarity and the paucity of terms used than about the realities described.

There can be no doubt that humans are intrinsically social beings. But are the many possible forms of sociality best described as 'community', no matter how people themselves think about them? The term has a long history within social science, and this history—as well as the term's simple imprecision—makes it vulnerable to overdetermination. We thus think we know not only what communities are like ('natural', tight-knit, unthought in everyday life), but also what they are for, usually something along the lines of 'providing social order'. This is problematic inasmuch as it takes (political) 'order' to be a universal value.[25] The favourite

(1996), and Scheele (2012a). Even close kinship does not necessarily imply harmony: see Anderson (1982) on Afghanistan, where first cousins—privileged marriage partners—are considered one's worst enemy.

[23] As a careful reading of, for instance, Malinowski's (1922) or Evans-Pritchard's (1940) work shows, few anthropological classics really were concerned with bounded small-scale communities, although structural functionalism—and indeed, colonial administrators—tirelessly postulated their existence.

[24] Wolf's initial concern was with peasant communities in Central America, which led him, very early on, to postulate that 'communities' were not naturally given, but inevitably the result of 'forces which lie within the larger society to which the community belongs rather than within the boundaries of the community itself' (1957: 7). Hence the 'closed corporate peasant community' that he discerns in Mesoamerica is, with its strong moral dimension, the product of the Spanish Conquest and the 'dual economic system' that it established: it was based on land scarcity created by colonization, and provided a cheap pool of labour for colonial agriculture (see also Wolf 1986).

[25] Strathern (1985) points out that 'social control' may be part of our own 'ideology of law', but it thoroughly obscures analysis of certain Melanesian facts. Even such a genial

culprit here is Durkheim, whose image of pre-modern communities as based on small-scale 'mechanical solidarity' (where 'the collectivity has its own way of thinking and feeling', [1900] 1973: 17) seems to have been mainly developed as a rhetorical device to better describe, by contrast, the industrial society of his own time. The latter, he said, was based on 'organic solidarity', an interdependence created by the division of labour.

Durkheim's notion of pre-modern community has been criticized at length—it was 'a caricature', in Tamanaha's (1999: 994) words—but his thought was perhaps most influential not in what it spelt out but in what it took for granted. His metaphors of machines or organisms suggest functional wholes with clear boundaries and a certain stability of purpose. Transcendent 'order', as opposed to individual interest, then becomes necessary to their survival: 'the aim of society . . . is to suppress, or at least to moderate, war among men' ([1893] 1964: 3). These ideas are still not only cited but, more importantly, go unquestioned. Hence, Jürgen Habermas's *Between Facts and Norms* (1996) implicitly rehearses Durkheim's argument, with law in contemporary liberal democracies replacing cooperation and shared morality:

> Today legal norms are what is left from a hot-molded cement of society; if all other mechanisms of social integration are exhausted, law yet provides some means for keeping together complex and centrifugal societies that otherwise would fall into pieces (Habermas 1999: 990).

This is very much the claim that Tönnies made in 1887. If it was suspect then, it is more so now.[26] Between the generic abstract 'society', identified idly by Habermas with the past or the distant, and the more concrete plural 'societies' identified with our world lies a wide domain of interest to which Reynolds pointed. But the plural form (societies for Habermas, communities for Reynolds) keeps displacing the generic abstract. This obscures whole areas of political debate.

In a similar vein, legal thinkers have been keen promoters of 'community' as something curbing naturally individualist tendencies in the interest of the common good (common to whom, we should ask). In Grant

author as Hart can say, 'in a population of a modern state, if there were no organized repression and punishment of crime, violence and theft would be hourly expected' (Hart 1994: 219). In parts of modern states that may be true, but if so, it tells us more about modern states than about humanity in general. The assumed equivalence between community and social order in our own world is of course what makes 'communitarianism' such a good argument for authoritarian rule (Calder 2004).

[26] For a critique of the argument in Habermas, see Tamanaha 1999: 995. To an anthropologist the assumption that society, whatever its form, requires 'keeping together' will appear problematic. For relations between Durkheim's published work on this score

Lamond's view, for instance, law is not legitimized by the state, but rather by 'its claim to be entitled to regulate the totality of community life' (2001: 57). Community, then, comes first, and law (perhaps the state as well) is both practically and conceptually dependent on it. This is a common assumption both in legal and in social science writing, as Annelise Riles notes:

> Epistemologically, the deeper assumption … is that norms and communities are more 'real' than the law of the state because they form a context for the law of the state, and context is always more stable and determinate than text (2008: 619).

Although Riles herself, working on legal tools for international banking with little 'natural' community at hand, is suspicious of this preference, to most legal scholars some image of (bounded) community is central. Hence John Finnis (1985) constructs a careful argument to refute Raz's (1979) assertion that the law has no moral authority in and of itself. Law, he says, is a quick solution to daily occurring 'coordination problems': although individual laws might go against a person's immediate interest, that person knows that in the long run he is served by the fact that among a given set of people most submit to the laws.[27]

This emphasis on community, whether implicit or explicit, is particularly apparent with regard to criminal law. Nicola Lacey's (2009: 938) judgement here is damning. The rules of criminalization, she says, have hardly moved on from the nineteenth century: unrestricted utilitarianism prevails, which means that a crime becomes a crime (rather than a tort) because it harms the public—in other words, 'the community'—although what really seems to be meant in most cases is the state.[28] This linguistic slippage is telling. Even for those legal theorists who are cautious in their approach, community remains critical. Hence for Lamond (2007: 618), again, an offence is a crime not because the community as a whole is harmed, but because law embodies the 'will' of the community, and the community as a whole is threatened if this is defied. Similar reasoning leads Becker (1974: 274) to claim that criminal attempts should be punished in the same way as crimes, for both create 'social volatility',

and that of Tönnies see Loomis and McKinney 1955. The continuity in their thought is striking.

[27] See also Finnis 1980, Postema 1983. For a view of 'coordination problems' that is critical of Finnis's approach see Green 1983.

[28] Marshall and Duff (1998: 14) put this very clearly, albeit in a footnote: 'We talk here and elsewhere of "the community" rather than of "the state", on the (ideal) assumption that the state should represent and serve the community: an assumption that clearly raises large issues both about the state and about the conditions for the existence of a community which the state could serve'. In another context, one cannot help noticing

a disregard for common norms that is a 'disvalue' in and of itself. For Marshall and Duff (1998: 20), in the same vein, an act perpetrated against an individual becomes a crime 'insofar as the individual goods which are attacked are goods in terms of which the community identifies and understands itself'. The term 'community' seems needed lest criminal law be reduced to nothing more than the aggressive edge of a government protecting its own interests or that of a specific class.

VERNACULAR CONSTITUTIONALISM

If the approaches discussed above presuppose the existence of 'community', they tell us little about what community might be, unless it is taken simply to correspond to the 'subjects of the law' (Finnis 1985). One reason for this seems to lie in the way in which 'community' is more often than not stripped of its material substance. The definition put forward by the American 'community-guru' (Yar 2004) Amitai Etzioni can stand as an example: communities, he writes, are 'webs of social relations that encompass shared meanings and above all shared values' (Etzioni 1995: 24)—non-material values, that is. History provides a useful check on our thinking here. As both Wickham's analysis (discussed earlier) and Blum's (1971) review of European villages show, whether close to the state or acting independently, local groupings were primarily concerned with the administration of property and infrastructure. Different forms of these are congruent with different forms of life (see also Zeldin 1973: 138–42 for nineteenth-century France). Some degree of 'shared meanings and values' might be necessary, but what held people together (and often excluded others) were common interests in ownership and use-rights.

Conversely, there can be no doubt that nineteenth-century community romanticism was partly a result of profound economic change and the triumph of private property: hence the emphasis on morality as lodged in (non-tangible) 'community values' rather than (tangible) assets, of which few were left, and the totalitarian dangers that community might then evoke.[29] The unwholesome political use to which

that when Rawls (1999) writes of 'peoples', he ascribes to them precisely the features of modern states.

[29] See Linebaugh (2008) for a similar argument made with regards to the notion of 'freedom'. The argument works both ways: as Polanyi (1944) showed, 'economic' transformations are contingent on social and moral redefinitions, in this case with regards to notions of personhood, freedom, and community.

Gierke's (1868–1881) monumental treatise on medieval guilds was put in fascist Germany is an obvious example of the latter.[30] Perhaps a similar fetishism of the collective led to the pronounced moral earnestness and willingness to exclude that Ingram (chapter eight in this volume) finds in his London 'communities'. To avoid being drawn into such rhetoric, it is best to begin with everyday practice. Elsewhere in this volume, material concerns are prominent: the administration of food and wine at the Sorbonne (Sabapathy, chapter six), inheritance and marital matters in the Armenian diaspora (Thomson, chapter one), irrigation systems in Tibet (Pirie, chapter nine), land-sales in rural Algeria (Scheele, chapter seven), employment and expertise in northern Italy (Lantschner, chapter three)—although the ways in which shared assets impinge on notions of common life vary greatly from case to case, and certainly do not lend themselves to sociological formulae.[31] But even in Ingram's London, there is no doubt that the physical cleanliness of the borough was a shared concern.

Attention to material assets and their daily management might be a step towards a more self-aware concept of community. Even more important, however, in a series of volumes devoted to 'legalism', is the law. The most straightforward defence against excessive contemporary common sense here is to turn the lawyers' argument upside down; that is, to look at law as constituting community, not as constituted by it. This is an approach adopted by several papers in the present volume and seems promising more generally. Shared logics of control and enforcement, such as those unearthed by Taylor (chapter two in this volume), and communities explicitly constituted and bounded by law, described for instance by Sabapathy and Scheele (chapters six and seven), then emerge as fundamentally different. In the former, law is little concerned with the limits of specific communities, but takes an underlying logic of 'communality' for granted; in the latter, one of the central preoccupations of local law-giving is the establishment and maintenance of boundaries, thus creating a landscape of mutually recognized moral units. [32]

[30] See Black 1984. Gierke argued that because of the 'inherently communal German spirit', civil law in Germany should not be based on individual but rather on collective rights—an argument that can easily be turned into a justification for exclusion and oppression. On Gierke, see also Lantschner, this volume.

[31] For a southern French case making this point, see T. Jenkins 2010. For a very careful approach to community by way of 'local particularity' and 'habits for coping with reality' in everyday life see T. Jenkins 1999.

[32] Durkheim in his *Division of Labour* (1893) argued that 'primitive' society was characterized by 'repressive' law (criminal law, roughly) and only later does 'restitutory' law become prominent. In his imagination he takes each community as isolated. In fact, however, one of his key examples of 'mechanical solidarity' was Kabylia, a Berber-speaking area in northern Algeria, whose 'village communities'—and their limitations—are

A focus on legalism's place in defining communities allows some access to what anthropologists would call 'indigenous categories': to what was locally thought to be crucial, and whether social institutions that look to us like 'communities' were conceived as such. Local constitutions, rules, and categories are often as surprising in their omissions as in their emphases: they might carefully regulate eating habits and family celebrations, while paying little attention to violence and interpersonal conflict (Sabapathy, Scheele); they might stress sexual mores over other forms of political and economic interaction (Ingram), emphasize boundaries without ever defining them (Thomson, McComish), or simply take them for granted as something to be claimed contingently (Dresch, Pirie). What many of the codes or other legal expressions of community share, however, are worries about the institutional aspects of common life: attendance at meetings, office-holding, collective labour, taxes, and respect for shared forms of jurisdiction. As we saw in our first volume (Dresch and Skoda eds. 2012), this field of definition and constraint is not the concern only of centralizing government. And again it dispels any notion of 'natural' communities—even though, as Sabapathy reminds us, explicit rules were often seen as second-best, as ways of patching up transgressions that ought to have been unthinkable.

Such an approach requires moving away from notions of law as imposed from above, by states or state-like systems. But it also means questioning the major assumptions of Durkheim's model: that communities are naturally bounded. The opposite seems commonly to be the case, and much of the 'law' discussed in the present volume, as in the preceding volume, even if drafted on the community level, is in effect brought in from elsewhere. Local constitutions often consciously adopt categories and terms derived from a larger, universalizing corpus, if only to orient local debates—and this reference to universality seems to be what gives 'law' its prestige. Law is valued locally precisely because it holds a promise of belonging to a wider world.[33] We thus encounter practical accommodations of scale. Although terms and values may be broadly shared, sometimes across a wide area, they are actualized among people one knows. Much law thus consists, in Taylor's phrase, of 'the local and particular' transformed into the 'general and political', or vice versa. This does not mean a perfect overlap between legal categories and local

discussed in chapter seven of this volume, and which illustrates perfectly the theme of mutual recognition.

[33] See Dresch 2012a: 29, 31, Scheele 2012b. For a particularly valuable discussion of communities' place in a scholarly form of non–European legal theory see Davis 2012: 94–8, 107. Historical and ethnographic examples alike suggest we need to treat

realities, however. The mismatch is particularly visible in the Islamic world, where the sharīʿah provides few forms to express limited community, but where people have long found legal loopholes (Scheele 2012b) or insisted on a limited local exceptionalism (Scheele, chapter seven of this volume).

The relationship between the universal and the particular remains almost everywhere negotiable, because communities rarely, if ever, evolve in isolation. They are always—and often consciously—part of a wider world made up of similar communities with their own prerogatives (Dresch, in chapter four, suggests Greek city-states as an example; Scheele, in chapter seven, describes part of North Africa in these terms) or other kinds of legal domain. We are dealing with what Lantschner (chapter three) calls 'a fractured political and legal space', and our approach to community must take this into account. It is 'fractured space' that makes exile possible, and this is why exile in turn provides such a good perspective on 'community' (Dresch, chapter four). Among other things, one cannot project contemporary notions of 'outlawry' into the past, as this past was constituted not by a seamless state system, where escape was impossible, but by the assumption that sovereignty was always particular. Indeed, Gibbon depicts the states of Enlightenment Europe in terms that might almost apply to Kabylia.

What, then, of the state itself? In the conclusion to her paper Taylor points out, as does Dresch in the conclusion to his, that a tendency exists among historians to assume that states are the inevitable outcome of non-state forms of life. 'Vengeance', most famously, becomes merely a step towards the centralization of power and the concomitant monopolization of violence rather than a distinctive way of understanding moral life (cf. Wormald 1999a: 198, Lambert 2009a, 2012a). Community might easily succumb to the same fate. Peasants, as Redfield ([1955] 1989) reminds us, are made by states. So are communities, in many cases, and this has been the dominant approach in much recent anthropology, in particular with regard to postcolonial societies. Yet an exclusive focus on states risks obscuring non-state categories and values, much as it presents 'states' themselves as overly coherent, taking aspirations of governmentality at face value.[34] A contemporary

Hart's central case of free-standing 'municipal' law as one case among many, and not as a Platonic form to which to which other forms of law approximate.

[34] The failure of states to eradicate other sources of violence on their territory is thus often held up as a sign of weakness, and as evidence against Weber's view. But the key term in Weber's definition of the state as claiming a monopoly of legitimate violence is surely 'legitimate'. This has very real effects on the ground, as states back each other's

example is described in Pirie's chapter on Tibet, where governmental ideas of representation based on individual choice are not rejected or explicitly resisted but simply ignored, as they do not make sense from a local viewpoint. This incompatibility does not preclude longstanding co-existence, but it might nonetheless, in different forms, run deep. Scheele's paper, similarly, deals with communities which, although they acknowledge the presence of states, derive their legitimacy from an assumption of their members' legal personhood being based on property and honour, rather than external recognition. Here, as in contemporary Tibet, attempts to reduce village institutions to state auxiliaries failed miserably (Alain Mahé 2001, Scheele 2009).

Even when a bounded local identity takes form, access to or interest in its values is scarcely uniform. Taylor's chapter on early Britain reminds us there were always people who were too well-connected to be afraid of community censure, and McComish's rogue lawyer reminds us of the theme centuries later. There were also people marginal to community, such as Taylor's 'homeless beggar and exile who have been three days and three nights without lodging and without alms', who could not be held liable. Lantschner's non-enfranchised peasants and day-labourers rejected by guilds provide another case, as do Dresch's and Scheele's 'protected people' and those too poor to be honourable, or Ingram's bawds and prostitutes who were 'constantly denied a settled existence'. All of them were as much part of the picture as those who were able (or willing) to play the game, and at times we might wonder how numerous they were.[35] 'Honour', much like 'respectability', never quite works if really everybody has got it. Law, justice, and community politics might easily be minority pursuits.

LAW, JUSTICE, AND COMMUNITY

In European thought, justice and community have long been connected rhetorically: Aristotle's distributive justice, like Gardner's

claims, often against the express wishes of their citizens. The recent rhetoric of 'failed states', with its suggestion that nowhere can properly be left uncontrolled, should alert us to what is at issue.

[35] Historians are far more alert to this problem than are legal theorists, and perhaps anthropologists. However, the practical problems of evidence and interpretation are serious. For all that we know there existed 'masterless men', 'sturdy beggars' and the like, we mostly know of them only from the perspective of the people who gave them these worried or dismissive labels in the first place.

(2000: 6) account of justice as allocation, requires that we have some sense of the set within which allocation is to be made.[36] On Rorty's (1988) account, ostensibly universal concepts of justice are, in practice, derived from a more local sense of trust or loyalty. As Berman (1988: 574) puts it: 'justice, in the Western tradition, is itself a shared concept, presupposing a community in which people not only wish to act justly towards each other but also wish to have common beliefs concerning what justice is'. Yet, as Rorty points out, this can entail criticism of those with whom one has no intimate connection, because they do not share the same values. The link between justice and boundaries is surely problematic, but it recurs constantly in discussions of moral theory: Selznick thus elaborates a theory of communitarian justice in which the law takes as its most central question 'what kind of community we should be' (Selznick 1992: 428, citing J. B. White 1985: 42).

In the contemporary world, the equation between community and justice means that the vagueness of community is not merely academically unfortunate, but can be politically noxious.[37] Ford (1999) notes that jurisdictional boundaries in the United States, although generally seen as mere administrative convenience, at times refer to 'communities' whose existence is taken for granted, which can encourage both the ghettoization of 'community' (read: minority) neighbourhoods and the naturalization of problems that occur there.[38] In fact, the various 'community and justice' initiatives in the US that started to become popular in the 1990s have mostly led to the criminalization of 'quality of life offences', such as begging, graffiti, and prostitution (Lanni 2005b: 367), within 'communities' that are forcibly ill-defined in state terms: as Schragger (2001: 455) points out, 'in contrast to the right to vote, a right to belong is incoherent'. This recalls Ingram's discussion in the present volume of Tudor Londoners' efforts to impose moral order within uncertain boundaries, by defining as offences very similar activities to those now criminalized.

In contemporary thought the 'communitarian' argument asserts that some notion of community must underpin any theory of justice

[36] Without conceptual boundaries the overall calculus of loss and profit over time could not work, a point which applies to local theories or justifications (Aristotle is the type case) as much as to economistic reasoning by analysts.

[37] Consider the recent taste for rhetorics of 'community' in the UK, promoted both by Tony Blair's 'Third Way' (Blair 1998, also Giddens 1988) and David Cameron's 'Big Society' (see Kisby 2010)—both put forward as a way of legitimizing the retreat of the welfare state. Here, the term 'community' becomes politically expedient just as local autonomy and social ties on the ground have disappeared.

[38] By reducing justice to subjectivity and presumed intransigent 'cultural difference', such moral mapping reinforces a social order that is already spatially maintained

(Sandel 1982). This implies a recognition that (contra Rawls's 'libertarian' account) the notion of individual rights fails to capture localized ideas about justice and is epistemologically suspect. Approaching justice in terms of individual rights presupposes a world made up of 'unencumbered selves' who are free to negotiate with others who are exactly like them: 'only if the self is prior to its ends can the right be prior to the good' (Sandel 1984: 86).[39] Yet people are never unencumbered and rarely by themselves and, more importantly, their aims, aspirations, and fundamental concepts are framed with regard to the people they live with. 'People do not first make generalizations and then embody them in concepts: it is only by virtue of their possession of concepts that they are able to make generalizations at all' (Winch 1958: 44). Rawls's ongoing popularity is perhaps best understood as 'a social myth whose primary function is to protect community interests' (Berman 1988: 574–5) and, one might add, a myth that justifies the *status quo* to those who stand to gain most from it. The same can, of course, be said about arguments that stress community coherence (see e.g. Walzer 1983).

Sandel's objections to Rawls's liberal vision and the resulting discussions, have resolved themselves into the 'liberalism versus communitarian' debate.[40] But the problems we have outlined above suggest conceptual confusion on both sides. The concept of 'community' in its modern North Atlantic form, as something that might be external to, and possibly opposed to, individual rights while also constituting them, is intimately linked to the concept of the individual. Indeed, the two emerged at about the same time (Black 1984, Berman 1988). As Caney (1992: 287) points out, taking individual rights and community as the only terms of the debate invariably leads to an impasse, where either justice is community-specific—and hence relative—or it is universal, and community is irrelevant while universality is lodged in the individual.

Ideas about justice and community do not report 'natural' phenomena but are ways of ordering the world conceptually. Justice, we have argued, might be a matter of argument and public reasoning—putting people

(Schragger 2001: 435). The US raises certain practical possibilities that are generally absent in Europe: 'townships' can declare themselves and secede from cities, leaving the latter a constantly declining tax base and increasing practical problems that are easily attributed to 'culture' (cf. Dresch 1995, Stuntz 2008).

[39] Rorty suggests that conflict between obligations of justice and ties of loyalty (sometimes conceptualized as a tension between reason and sentiment) might be resolved in 'loyalty to a very large group—the human race' (1998: 48). The complement to this latter abstraction is, of course, the 'unencumbered' individual.

[40] For further references to this debate, see e.g. Walzer 1990 and Caney 1992. The seemingly innocent idea that community, as opposed to merely living together, requires commitment to shared ends (Finnis 1980, Rorty 1998: 53) needs to be treated cautiously.

and things into the right place, conceptually speaking, and evaluating them—while community is a particular way of imagining the social. The two are often rhetorically related, but we cannot assume congruence. In fact we often find striking disjunctions of scale: in this volume the Kabyle village and the early Sorbonne, for instance, are communities existing with reference to notions of justice that, as an inherent part of Islam or of Christianity, are assumed to be universal. The fault lines between particularism and universalism might lie in unexpected places. In Amdo (Tibet), Yemen (Arabia), and the Anglo-Saxon world, claims to justice were enacted in front of an audience, hence dependent on social classifications and aesthetics, yet bounded community was little in evidence, and certainly not equated with justice. An Armenian code, meanwhile, created law for a specific nation, whose members were spread over space and time, but its laws were presented as imperfect means of achieving a form of justice associated with the (universalist) Christian revelation.

The material in the volume at hand is shot through with formalized categories and explicit rules. A focus on legalism, by highlighting local definitions, provides a way of avoiding our usually implicit normative assumptions. Examining these assumptions poses similar questions at home and abroad—of the present as of the past—and highlights (surprisingly) the peculiar place of law. As Berman notes:

> By omitting law from their inquiry into the nature of justice, philosophers such as Rawls and Sandel tacitly accept a positivist definition of law. That is, they assume that justice is essentially a moral category, to be defined by reason alone, and that the definition of justice which is provided by law itself, whether explicitly or implicitly, is immaterial and perhaps irrelevant to that offered by reason (1988: 553).

Allowing that justice may be a matter of uncertainty and debate—itself facilitated by legalism—frees it from the constraints of both sovereign (bounded) community and enforceable laws; to allow that community is open to question is, meanwhile, to problematize claims to justice.

If we want to understand the world in all its variety, including communities that reject legalism, ideals of justice that transcend both laws and political boundaries, laws that cut through moral ambiguity as well as helping to define what is right and just, and forms of mutual recognition that the term 'community' obscures, we need a means of accommodating differences, not reducing them to a few appealing but limited ideals. Communities, laws, arguments over justice, and a sense of moral order must be respected for what they are and not reduced one to another. None of these terms can be regarded as primary.