John L. Comaroff

Out of Control: an afterword

The main foundations of every state, new states as well as ancient or composite ones, are good laws and good arms.
Machiavelli, The Prince, p. 77

What might a legal anthropologist, especially one trained in the assertively narrow tradition of British African Studies, have to contribute to a profound, provocative discourse on law and social control in Classical Athens? What angle of vision is he likely to bring to a topic with which he has only sketchy acquaintance, a topic remote in both time and space from the worlds – the material worlds, the scholarly worlds, the cultural, moral, jural worlds – with which he is familiar? How, equipped only with his naivete, does he proceed to enter into a somewhat arcane conversation among a circle of experts?

With an odd mix of hubris, humility, and hesitation.

But first let me acknowledge an intellectual debt which is not unrelated to the matter at hand. Although unschooled in the history of the ancient world – thanks, largely, to a rather unfortunate colonial education – I owe at least some of my own roots in anthropology to a reading of Sir Henry Maine's *Ancient Law*. The late Max Gluckman – doyen of modern legal anthropology and the charismatic core of the Manchester School when I began my career there – was wont to declare, loudly and often, that any anthropologist worth their salt had to have a close knowledge of Maine. Anthropology in the Maine-stream, my peers and I used to call it, a little derisively; although never, of course, to Gluckman's imperious face. One passage in *Ancient Law* remains with me more than any other. It happens to be about classical Greece. In “developing” their law, argued Sir Henry (1917:44):

the more progressive Greek communities ... soon ceased to attach any superstitious value to rigid rules and prescriptions ... One of the rarest qualities of national character is the capacity for applying and working out the law, as such, at the cost of constant miscarriages of abstract justice, without at the same time losing the hope of the wish that law may be conformed to a higher ideal. The Greek intellect, with all its nobility and elasticity, was quite unable to confine itself within the strait waistcoat of a legal formula; ... Greek tribunals exhibited the strongest tendency to confound law and fact ... [Q]uestions of pure law were constantly argued on every consideration which could possibly influence the mind of the judges.

Maine was deeply concerned about this. In his view, “no durable system of jurisprudence” – not even in a society as “precociously mature” as classical Athens – could be produced in a world with such scant respect for the strict application of rules. Which meant that Greece could not serve as an evolutionary model, a legal *fons et origo*, for the development of the rest of humanity. In retrospect, of course, the very idea that *any* system of jurisprudence might have assumed that historical role is, well, imprudent. And yet there *is* something enduringly important to be learned from his account. In describing it as he did, Maine showed – inadvertently, it is true – that classical Greek law, *in its practice*, anticipated what American realism was to essay, in its theory, many centuries later: that *no* system of jurisprudence, no living legal culture, no regulatory order – not even ones in which the language of formal precept and principle is at its most pervasive – has ever evinced a truly consistent body of “abstract justice” at the core of its everyday, manifest workings. Or been founded on unvarnished, rule-governed reason; this *pace* Hobbes (1995: 110, 115), who shared with Maine both the belief that “laws be the strongest sinews of human society” and the axiom that “law is nothing but reason dilated, ... nothing else but obedience to reason¹”. Here, observe, is the irony: ancient Greek law exhibited a “precocious maturity” for precisely the reasons that, according to Maine, it had no evolutionary future. If his description is to be believed, this was a legal order whose dynamics were rooted in a complex dialectic of “law” and “fact”, of principle and practice, of rule and process². Like *all* legal orders, past and present (Comaroff and Roberts 1981). Which, notwithstanding its singularities of substance and differences in detail, makes it recognizable, immediately, to a student of African law. Also to a *fin de siècle* legal anthropology according to whose canonical truths all “systems” of jurisprudence – to the extent that they are “systems” at all – are, finally, ensembles of performance, practice, poetics, politics, precepts, and principles under perpetual construction, perpetual contestation. This, to be sure, informs David Cohen’s own highly original contribution to our understanding of the social workings of the classical world and, by extension, to the comparative study of law, *sui generis* (see e.g. Cohen 1995).

Here, then, is where that mix of humility and hubris comes in. It grows out of a disciplinary genealogy that, beginning with Maine and ending in contemporary African legal anthropology, renders law in classical Athens at once recognizable and yet different, familiar yet strange; a genealogy, in other words, that authorizes my reading the essays in this volume not from the conventional perspective of

¹ As is clear from his “Three Discourses” (1995), and especially “A Discourse of Laws”, Hobbes (1995: 115) saw law and reason as mutually constitutive, *sensu stricto*. “Twins” was the term he used for their relationship, adding not only that the “absence of one, is the deformation of the other” but that they are *convertibilia* – capable of being converted into each other, explain Reynolds and Saxonhouse (1995: 115, n. 29) – and, therefore, “inseparable”. Elsewhere (1990), Hobbes added to this an ethical dimension, measuring “the virtue of a subject” in terms of obedience to the law.

² And, as we are reminded by Plato’s “Republic”, of “strength” and “justice”, a point brought home to me recently in reading an “everyman” edition of the text, translated many years ago (1935: 14–17).

modernist, Euro-American legal scholarship, valuable though that vantage patently is, but through a comparative, Africanist-inflected optic. This I do on the old anthropological assumption that a critical hermeneutic, a hermeneutic founded on epistemic estrangement, sometimes destabilizes the firmest of empirical truths – and the taken-for-granted concepts by means of which we produce them. Which is salutary in light of Cassirer's (1956: 261) somewhat didactic reminder that, in Greek, "the term *episteme* is etymologically derived from a root that means firmness and stability".

Modernist concepts, classical worlds

social control ... is a subject on which nearly everything remains to be done.

J. S. Mill, On Liberty p. 130

First a small caveat, however. This volume, like the conference from which it grew, is, quite deliberately, an exercise in diversity: conceptual diversity, orientational diversity, theoretical diversity, topical diversity. All of which makes it impossible to conjure out of it any kind of synthetic whole that is equal to, or more than, the sum of its parts. To do so would be pure artifice; indeed, a synoptic illusion (cf. Bourdieu 1987). But there *is* a point to the diversity. It lies in the creative tension that hovers just beneath the angular surfaces of the discourse here, a tension that arises from two things. One is an implicit ensemble of premises, presumptions, propositional truths that, for all their wide ranging thematic concerns, are *shared* by the contributors – despite being quite controversial outside present company. The other is a clutch of foundational differences among those contributors, differences of principle and perspective that, for the most part, go unspoken – and yet make a real difference to our grasp of law and order in the classical world. Where better, then, to begin interrogating these tensions, where better to take a first critical step into the hermeneutic circle, than by subjecting to scrutiny the most pervasive trope of the volume, its most marked term: social control.

Rethinking Social Control, theoretically

Most of the foregoing essays – although not all, as we shall see – appear to have been written on the unstated assumption that social control, *qua* concept, is self-evident; that we all know to what, as a signifier, it refers. Taken together, these essays assay various aspects of "its" workings in classical Greece, addressing, often to insightful effect, the mechanisms by which social order³ was accomplished. At

³ The uncritical use of this term, too, has been subjected to challenge. See e.g. Strathern

one moment in the course of their presentation at the conference, however – it was at 15.43 on Thursday, June 18, 1998, to be precise – their discursive flow was ruptured. Just as, for Victor Turner (1957), social dramas opened up the seams of a seamless world to reveal the conflicts concealed by the ordinariness of everyday life, so that moment at Munich – a moment of theater, almost – disclosed a tension at the heart of the conversation there; a tension previously obscured by the axiomatic, collective terms of reference around which the discourse had been organizing itself.

It happened like this.

Jochen Martin had been taking great pains, as he does in his chapter above, to lay out the principles of social control endemic to Roman society. Jon Elster, having listened patiently to his account – which, as I recall, was heavier on taxonomy than on analysis – asked him, rather suddenly, what would the consequences have been if, every time he spoke of *social control*, Martin would have substituted *social conflict*. The rhetorical force of the challenge, like a joke that depends for its humor on the circumstance of the telling, is difficult to recapture here; what Elster was *really* asking, I suspect, was what ontological difference it would make if one were to replace a purely normative perspective with a political one. It is, of course, a crucial question. But, behind it, lies a yet deeper problem, a problem of ontology: exactly what species of concept is “social control” in the first place? How do we differentiate it from, say, the idea of “society” – with apologies to those turn-of-the-millennium neoliberals who do not believe in the existence of the latter (cf. Tester 1992: 8f.) – especially if, by that term, we intend something like Durkheim’s notion of a normative moral order? Nor only Durkheim. John Stuart Mill (1962: 130) long ago suggested that “Society” enforces its “own ideas and practices as rules of conduct, ... compel[ling] all characters to fashion themselves upon the model of its own [ways]”; to wit, Mill described this, explicitly, as “social control”. Foreshadowings here, also, of more recent social theory, not least the Foucaultian conception of the capillary power of the modernist state, and, in particular, of its forms of governmentality.

In short, to the extent that it is a concept at all – a heuristic concept, an analytic concept, an ontological concept – what might *social control* actually denote? One or more institutional mechanisms? An ensemble of processes? A repertoire of rules, along with the modes of their enforcement? A more or less dispersed set of dispositions and disciplinary practices? Is “it” located *within* persons or populations, or *outside*, as an exogenous force that acts upon them? More specifically,

(1985: 111f.), who observes that “order” has long had a double valence in anthropology: on one hand it refers to *pattern*, to the abstraction of everyday social practices, their reduction to form, design, legibility; on the other, it evokes the *regulation* of those practices. The conflation of the two things, she argues, has major theoretical consequences. But that is a topic for another time. Note that, in his essay above, Elster also refers to two understandings of “social order”; they are yet different from those identified by Strathern.

on what imagining of society – or, if you prefer, of social life – does its description and analysis depend? Note that the problem, phrased thus, points to a first principle: that “social control” is not a thing in or of itself; that what it is cannot be determined empirically or descriptively; that, ineluctably, it is a *theoretical* construct, even if, as in some of the essays above, it is deployed, largely undefined and unspecified, for primarily descriptive purposes. Which, I suspect, is why Versnel (*infra*) had so much difficulty in deciding what manner of beast it is, concluding finally that, beyond a “horrifying variety of ... definitions”, social control “*does not exist*”. (The italics are his, the emphasis mine.) Put another way, its use *always* entails some or other *a priori* take on the workings of the social world, on its nature, its construction, its persistence, its historicity. This theoretical scaffolding may or may not be made explicit. And it may be the product of principled argument or simply be presumed. But it is never absent. In the classical tradition of the social sciences – and, here, in the social science of classical Athens – the default position seems, indeed, to be a Durkheimian structural functionalist one⁴. According to that tradition, as everyone with even a rudimentary education in sociology or anthropology is aware, the social universe is essentially a rule-governed place in which there exist mechanisms for protecting the “natural order of things”, mechanisms to deal with dysfunctional or (literally) unruly behavior, mechanisms known analytically by their effects, mechanisms that, analogically, evoke the homeostatic operations of the living body, mechanisms that, together, are subsumed under the sign of “social control”. It hardly needs saying that this model of social order has little purchase any more. It has long been discredited. And yet it lives on as a kind of autonomic orthodoxy, a reflex vision of social order to which many of us return in the heat of the heuristic moment⁵; there are also, to be perfectly blunt, a few scholarly backwaters in which it sustains an anachronistic authority. Recall, in this respect, Ian Jarvie’s (1965) cursory-but-convincing explanation for the persistence of sociological paradigms, most notably of functionalism, in the face of repeated refutation; it is an explanation that resonates closely with, but goes beyond, Kuhn’s (1962) paradigmatic account of the (re)production of scientific knowledge⁶.

⁴ Cf. Elster (*infra*), who also notes that writings on social control – especially “older” ones – have often fallen “into an unthinking functionalism”. I shall return to Elster’s views below, since they have important implications for the way in which we engage the topic at hand, *tout court*.

⁵ In many different ways. Elsewhere (1980), I have noted, for example, that much of what are still taken to be the basic social “facts” of African kinship and marriage – and taught as such – are derived almost entirely from structural functionalist ethnographic studies in the British modernist tradition.

⁶ Summarily stated, for Jarvie (1965), it is not simply the nature of the (social, institutional, and educational) contexts in which specialist knowledge is produced and disseminated that give it its paradigmatic character; nor is it just the means by which that knowledge is produced. It is also the manner in which different modes of social scientific explanation resonate with everyday, culturally dominant ways of knowing and explaining events in the world.

That the treatment of social control is always theory-driven – that its substantive description depends on a prior vision of the workings of the social world – is underscored, tellingly, by the *absence* of the term from accounts of social life written from the vantage of other theoretical paradigms, modernist and postmodern alike. In most species of Marxism, for example, it dissolves itself into social relations of production, into the forms of exploitation, alienation, and domination inherent in them, into the ideological scaffolding and “ideological state apparatuses” (Althusser 1971) that buttress them, into the political and social practices by which they are sustained, into the “habitus”, the “structuring structures”, via which they disappear below the level of discourse (Bourdieu 1977); this, French Marxist anthropology would have us believe, is as much the case in precapitalist as in capitalist “formations”, albeit in different guise (see e.g. Meillassoux 1981). Similarly methodological individualism. None of the various theoretical perspectives subsumed within its broad penumbra give any explicit attention to “social control”, this being a corollary of seeing all forms of constraint on social action – and, by extension, of treating social order – as an emergent property of interaction (e.g. Blau 1964) or transaction (e.g. Barth 1966). Similarly, too, as I have already intimated, critical postmodernisms of one kind or another, stretching from Foucault (1977) on modernist disciplinary institutions to post-Gramscian approaches to hegemony (see Comaroff and Comaroff 1991: 19ff.).

But even *within* the structural functionalist tradition, those who, after Georg Simmel, took conflict to be endemic to society – and sustained a highly political view of social life – paid little heed to social control *per se*. Or, more accurately, sought its logic elsewhere. To take one celebrated instance, Max Gluckman and his colleagues in the Manchester School, who might well have posed exactly the same challenge to Martin as did Elster⁷, presumed, as a first principle, that human beings *everywhere* pursue their own interests according to culturally conditioned means and ends⁸; that *all* social orders, and the institutions at their core, are founded on rules and norms that are intrinsically ambiguous, open to negotiation, and variously mobilized in the competitive pursuit of position, property, power; that the processes to which this gives rise are the instrument by which social arrangements and cultural values are reproduced; that, ultimately, the aspirations and ambitions of living persons are constrained to the degree that they run up against the opposing actions of others – and, hence, the countervailing social forces implicit in those actions. It is thus, and *not* by abstract principles of social

⁷ Although it is as well to note that, in his now classic writings in legal anthropology, Gluckman (see e.g. 1967) gave much more weight to the normative dimensions of dispute (and hence social control, broadly conceived) than he did in his political anthropology (see e.g. 1963).

⁸ In fact, the Manchester School, being part of the classical tradition of British anthropology – whose orientation was strongly sociological – would *not* have used the term “culturally” conditioned. For reasons that lie deep in the history of ideas and the political economy of knowledge, “custom”, “traditional beliefs/values”, even, in some circumstances, “cosmology” were preferred. But the essence of the matter remains the same.

control, that social behavior is “reduced to structure”, so to speak⁹. Interestingly, this so-called “conflict structural functionalism” has been portrayed as a kind of structural Marxism (or, with respect to Gluckman himself, Maxism) of and for noncapitalist societies¹⁰; for societies, that is, founded on status rather than on class.

It is not surprising, then, that “social control”, as a marked trope, scarcely appears in the Manchester lexicon. To the extent that the term is used at all, it is simply an abstract way of describing the final limits of social existence. Indeed, for Gluckman et al, most of the things treated in the essays above as mechanisms of social control were more liable to *produce* conflict, contention, and inequity – or to sustain unequal relations of power – than to remove them, regulate them, or mediate their effects. Take, for example, the curses which Thür (infra) refers to as a “kind of self-help”; curses that often invoked divine intervention; curses that, he says, “right[ed] wrongs”. Or the oaths in which Versnel detects a “double strategy ... of social control”. For the Manchester School in Africa, curses and oaths of this kind – performatives that are replete with the “magical power of words” (Tambiah 1968) – were instruments by means of which the material, social, and sacred authority wielded by some over others was (re)produced; or, conversely, if less so in practice, a “weapon of the weak”. In other words, they were *political* resources rather than normative means of righting wrongs, of regulating antisocial activity, or of sanctioning illegalities. Faraone (infra), of course, realizes this. While he is as concerned as are the other contributors with the mechanisms of social control in the classical world – in this case, with curses and their capacity “to inhibit certain types of abuse [in the] Athenian political system” – he begins by noting how these verbal performatives were used “sometimes to control social disputes and sometimes to exacerbate them”. Which, in turn, raises another set of questions that lurk close to the core of most of the essays in this volume: When is a social act to be deemed an instance of “control” or “regulation” rather than, say, the pursuit of self-interest, an expression of power, or an assertion of resistance? Are such things at all distinguishable? By what means? Who or what precisely *is* it that exercises social control? Individuals, institutions, constitutions, constabularies, society? These, too, are profoundly theoretical issues. To wit, our present and future

⁹ To the degree that the Manchester School saw the limits of conflict, and the ultimate constraints upon it, to inhere in “social structure” – a view that emerges clearly in Turner’s classic *Schism and Continuity in an African Society* (1957) – it might seem that there is a parallel between its perspectives and the position advanced by Jochen Martin (infra). However, this is only so to the degree that conflict (the dominant trope of the Manchester School) and control (the construct with which Martin is concerned) are regarded as synonymous – which takes us back, yet again, to the exchange between Elster and Martin, and to the difference between normative and political treatments of the dynamics of social order.

¹⁰ Note, in this respect, that all the scholars of the Manchester School were sometime members of the Communist Party. While the parallel between Marxism and Maxism – or, at least, Maxism as a Marxism for precapitalist societies – was not explicitly made in the writings of the School, it was mentioned to me several times by Gluckman in the last years of his life.

understanding of law and society in ancient Greece depends upon the manner in which they are addressed.

Few, of course, would still hold to the social theory of the Manchester School¹¹. Like the structural functionalist paradigm of which it was a variant, it has long passed into anachronism, although much anthropology and sociology continues to be written in its wake. But that is not the point here. My object is to reassert a truism that, alas, is often only recognized in the breach: that even the most innocent of analytic concepts carries an epistemic load, a load that ought never to be taken as read. Note once more why Versnel ran into such difficulty in his effort to find a satisfactory definition of "social control". It proved impossible, he says, because "everyone" simply assumes that they "know what it is". As it happens, the essays in this volume – although tending, as I said earlier, to resort, *conceptually*, to the Durkheimian reflex – gesture, in their analytic *substance*, to a more nuanced view. Those who, like Faraone, explicitly address the ways and means of social regulation treat them, to a greater or lesser extent, as Janus-faced: as likely, at once, to engender dissent as to resolve it; as likely to heighten inequity as to provoke reactions to its excesses; as likely to underwrite hierarchical social tendencies as to conduce to an egalitarian justice; as likely to be a political tool as a social constraint. In other words, these ways and means are seen less as things in themselves than as social *processes* whose dynamics were integral to the construction of classical Athenian society. What is to be found on the underside of this volume, then – partially visible, partially obscured, wholly understated – is a complex theory about the workings of this ancient world. Of which more later.

Whatever theoretical dispositions we bring to the description and analysis of the Athenian world – note the plural – a great deal hangs on the way in which we portray its normative scaffolding. On what manner of rules and principles was it erected? How are we to construe the relationship between those rules and the practices of everyday life? Did the former determine the latter? Or were they merely a means of rationalizing the outcomes of conflict, alike epic and ordinary? Could it be that they were strategic implements and/or tactical tools for constructing social and political realities? Or were they, more straightforwardly, the mechanisms by which unruly social activity was brought to order? These questions have provoked a substantial comparative literature (see e.g. Comaroff and Roberts 1981; Moore 1978). They are obviously critical to any account of law, social control, and democracy in classical Athens.

¹¹ Taking Gluckman and the Manchester School as an exemplar within structural functionalism to complicate the problem of social control is, of course, a somewhat arbitrary choice. I could as easily have taken, say, Edmund Leach, whose *Political Systems of Highland Burma* (1954) is one of the most enduringly interesting studies produced in the classical tradition of British anthropology; Leach's complex view of structure, and his then highly novel take on the representation of social systems in motion – illustrated by his contentiously brilliant account of the "oscillating equilibrium" of Highland Burmese politics – also makes it plain why, from a theoretical position that problematizes the normative bases of social existence, "social control" is not a useful analytic construct.

Interrogating Norms, Exploring Emotions

First, though, a short step backward in order to move forward.

Jon Elster (*infra*; see n. 4 above) argues that the very term “social control” is “insidious”. Why? Because it suggests that “societies” are themselves capable of regulating the behavior of their members. And that they do so, essentially, for benign purposes. The very notion that this may be the case, that an abstraction can act on its own account, he adds, “violate[s] the *principle* of methodological individualism” (*italics added*). Only human beings act. What is more, so-called mechanisms of social control may in fact produce the very (“harmful”) behaviors that they ostensibly regulate. The conclusion? That, instead of focusing on “social control”, we address ourselves to “social norms”. This, of course, is itself a theoretical choice: it arises out of the very methodological individualism – which, with due respect, is less a “principle” than a “position” – for which Elster himself speaks so cogently. Nonetheless, the more general point is well-taken: it is impossible to make sense of the phenomena described in this book without paying attention to the nature of the normative.

Where to begin? As it happens, Jon Elster’s essay provides the most apposite place, perhaps because he approaches the topic at its most general, using classical Athens more as illustration than as an object of analysis. Elster makes a series of important, more or less explicit claims. Among them, the first and most fundamental is that norms, being enforceable by sanctions of one kind or another, are significant determinants of behavior; the second, that legal and social norms¹² may be usefully distinguished, even though the line between them is fudged as a matter of course in everyday life; the third, that social norms are associated with diffuse, informal sanctions, while legal norms are buttressed by the formal ways and means of legal systems; the fourth, that social norms are backed not merely by material sanctions but also, and “more important[ly]”, by emotional ones. Leaving the first to last – this because it undergirds all the others – let us ponder these propositions for a few moments.

Treating norms taxonomically is hardly new, of course: the literature of legal anthropology is littered with efforts to parse them into various kinds, to attach adjectives of distinction to them, to establish which among them are of most consequence in regulating human behavior – and by what means. Indeed, Elster’s contrast between social and legal norms is reminiscent of Gluckman’s (1967) famous effort to separate moral rules from the rules of law; the difference between them in the African case allegedly being that, where violations of the former were likely to elicit informal rebuke – and often *did* provoke stern public reactions on the part of indigenous authorities – only the latter were actually enforceable in “traditional” courts. Echoes here, too, of the time-worn, troubled opposition between “custom” and “law” (see e.g. Moore 1971: 13f.; Comaroff 1995), often said to be distinguished from each other not just lexically (see e.g. Schapera 1938 on

¹² Social norms are defined here as “non-outcome-oriented injunctions to act”.

Tswana *mekgwa* ["custom"] and *melao* ["law"]; or Gluckman 1967 on Barotse *mikwa* and *milao*)¹³, but also by their degree of formality, by the species of sanction called forth by their breach, and by the kinds of emotional attachments evoked by them (see below).

In point of fact, there is much comparative evidence to suggest that, alike in everyday social life and in specifically judicial contexts, it is often impossible to sustain such distinctions. Courts and constabularies almost everywhere can and do find (at least putatively) lawful ways to punish those guilty of repeated moral delinquency. Or of contravening closely-guarded "customary" taboos that, strictly speaking, fall beyond their purview. Conversely, many legal infractions are allowed escape the law – nowhere, after all, can *all* rules actually be enforced – only to become, by either design or default, the subject of informal, diffuse, more or less public sanction. In our own work on African law, Simon Roberts and I (1981) found that it made little sense to separate jural from moral or social norms, let alone law from custom, in the context of dispute¹⁴. The way in which vernacular rules came to regulate relations, interactions, and transactions among people, and to mediate the disagreements among them, depended much more on the social logic of conflict, on its form and content, than on anything intrinsic to the rules themselves *in abstracto*: on whether a particular struggle involved, as the object of argument, ruptured relations or social obligations, property or promissory contracts, deaths or debts; on the immediate acts or events that brought it to light; on the precise nature, and prehistory, of the social ties between the parties involved; on their intersecting intentions, their contrapuntal strategies, their respective tactics of both the short and the long run; on their location in a wider field of social and political connections. And other things besides.

As with custom and law, moral and jural rules, so with social and legal norms. On one hand, it seems eminently sensible, *prima facie*, to differentiate between various sorts of injunction¹⁵; although it *is* a matter of opinion whether or not this particular antinomy – between the social and the legal, that is – provides the most appropriate terms for doing so. On the other hand, not only was the distinction often blurred in practice; according to Elster himself, social norms were not at all important in solving "collective action problems" or regulating unruly behavior in ancient Athens. In fact, he goes so far as to say that the contrast between the two types of norm actually turns out to have been rather tenuous in this context – where, as David Cohen (1995; see above) has shown, the legal system was itself a "vehicle of confrontation and competition". So why make the distinction in the

¹³ Interestingly, *thesmoi* and *nomoi*, as Hölkeskamp (*infra*) describes them, seem to bear more than passing similarity to these two pairs of African terms; see below.

¹⁴ Note that, in this context, there was no distinction drawn between criminal and civil law: all infractions of "law and custom", including crimes such as homicide, theft, and bodily assault, were initiated by a complainant against a named respondent.

¹⁵ Doing so, of course, has a long history in the modernist social sciences. We need hardly remind ourselves that Durkheim (1964: 68 ff.) made a strong plea for "classify[ing] jural rules according to the different sanctions which are attached to them".

first place? And why, in the circumstances, reduce the problem of social control to the calculus of norms? Elster does not answer these questions directly, but three reasons emerge, one from his own essay, the other two from those of Maffi, Miller, and Hölkeskamp.

The *first* is this. By specifying two sorts of norm, and by making clear the dissimilar consequences occasioned by their breach, it becomes possible for Elster to formulate the following proposition: that it is emotional rather than material sanctions – guilt, shame, fear, desire – that persuade human beings to comply with social norms¹⁶. Is this true? Perhaps, perhaps not. For one thing, no attention is given, in the formulation, to moral or social or other kinds of sanction. For another, materialities and sentiments are, arguably, phenomenological refractions of one other – which would make it impossible to affirm Elster's proposition without falling into tautology. Nonetheless, he *is* making an important point here. Or, more accurately, he is replaying one that goes back to the dawn of modern sociology. It was Durkheim, Victor Turner (1967: 30) reminds us, who was first fascinated by the problem of “why many social norms and imperatives were felt to be at the same time ‘obligatory’ and ‘desirable’”. Turner himself went on to demonstrate how, in the context of symbolic behavior, of which the enactment of social sanctions is obviously an instance, the obligatory actually *does* become desirable. And vice versa. “Law”, Thurman Arnold ([1962] 1969: 47) once said in a very different connection, “is primarily a great reservoir of emotionally important social symbols”. This is even more salient today than it was when Turner, or Durkheim before him, raised the matter: ours is an age, an age increasingly dubbed “neoliberal”, in which social theory is turning ever more toward the psychology of affect – most notably of desire, anxiety, trauma, ambivalence – in order to make sense of postmodern selfhood, subjectivity, even sociality. Hence, in contrasting different kinds of behavioral injunction so as to bring to the fore the emotional aspect of norms and sanctions, Elster is making a salutary case, one rarely heard in the comparative study of law. He is asking us to take sentiment seriously – which, elsewhere in this volume, and in a rather different register, William Miller also does – in explaining how it is that disciplinary regimes become positively valued, voluntarily internalized, and publicly authorized. The point is far from trivial. It bears a good deal of further thought.

More immediately, however, it also opens a window onto another dimension of the analysis of social regulation and, with it, a *second* justification for paying attention to social norms and sanctions: their didactic aspect.

In *The Prince*, Machiavelli (1961: 121) offers a suggestion that is, well, Machiavellian: “[I]n the event someone accomplishes something exceptional, for good or evil, in civil life”, he says, that person “should be rewarded or punished *in a way*

¹⁶ Elster phrases this proposition, which is made in passing, in rather abstract terms. He does *not* return to it in his conclusion, where he discusses the limited purchase of informal social norms on everyday life in ancient Athens. It is not clear, therefore, how his general argument about the emotional force of those norms applies to the case in question.

that sets everyone talking". The same point, transposed into an analytic key, has long been made of social sanctions in general: that their efficacy resides not merely in punishing an offender appropriately, but also, and even more, in the impact they have on the community that inflicts, and bears witness to, the act of punishment (Radcliffe-Brown 1952: 210–211). In short, they are more or less ritualized, more or less dramaturgical exercises in public pedagogy – and, patently, one of the vectors through which self-regulating, self-disciplined subjects are made in any historical context. But the pedagogy of the law is not exhausted by sanctions-in-action. Legal texts, statutes, and discourses also have a didactic dimension. Albert Maffi makes this clear in his chapter on legislation and social order in Plato's *Laws*, whose preludes, he explains, teach not merely laws, in the lower case, but the positive values of The Law. And, by extension, the values of the positive law. By these and other means are social norms, and the culture of legality of which they are part, internalized, naturalized, reproduced; by these and other means, too, do the minutiae of a population's behavior come to be ordered, supervised, regulated; foreshadowings here of Foucault, centuries before the rise of modernist modes of governmentality.

In sum, it is the instructional aspect of the law – in both its texts and its practices, its explicit and its tacit teachings – that transforms a legal system into a *regime of regulation*, a workaday world of disciplined subjects governed by taken-for-granted rules, routines, orientations, dispositions. At times this has unexpected sides to it. Thus, moving away from ancient Athens, William Miller demonstrates the almost comic perversity of some American statutory law as embodied in the Uniform Code of Military Justice. In doing so, he recalls Ernest Gellner's (1970: 43) complaint that social scientists have tended to be blind "to the possibility of ... social control through the employment of absurd, ambiguous, inconsistent or unintelligible doctrines". Not so Miller. His is an acute lesson in the persuasive force of absurdity, of its subtle role in the physics of social regulation.

The didactic dimensions of the vernacular law – and the means, both sensible and absurd, by which it is made into a regime of regulation – depend on another side of the life of social norms. Or, more properly, the social life of norms. Baldly stated, it is that, in any social world, prevailing rules of conduct evince a complex cultural logic; culture being intended not in its old, and now much criticized, anthropological guise, but as an historically labile space of signifying practices in which human beings, differentially empowered and sometimes in contestation, construct and represent themselves and others – and, by implication, the worlds they inhabit (Comaroff and Comaroff 1991: 21–2). Here lies the *third* reason for paying heed to the normative, a point that comes out especially clearly in Hölskamp's chapter.

Social norms, to the extent that they constitute a vernacular grammar of conventional practice, translate the architecture of the social world, as it is apprehended from within, into an ethnosemantics for everyday life. Put another way, they provide an historically-sensitive language of reference – a language of com-

municable signs and silent gestures, a language that may be more or less explicitly invoked in the public sphere (Comaroff and Roberts 1977) – in terms of which the materialities, moralities, politics, spiritualities, and social particularities of an inhabited world may be made commensurable, negotiated, contested. This is why vernacular norms tend so often to take on the properties of a cartography for the resolution of dispute – even where few disputes are actually decided by them – and yet, simultaneously, may be mobilized as a resource in, and a rationalization of, the pursuit of rights, justice, position, and interest. Hölkeskamp, although more directly concerned with the question of literacy and the law in classical Greece, makes it clear quite how complex a body of vernacular rules of conduct can be. What is particularly striking to me about the *thesmoi* and *nomoi* he analyses is the close parallel that they suggest between Athens and Africa. At least in respect of the normative dimensions of the law.

For one thing, the injunctions embodied in *nomoi*, some of which were written and some not, appear to have congealed the “entire relationship between meaning, experience and awareness” (infra); the same is true of vernacular normative repertoires in many parts of Africa. For another, while *nomos*, in the broadest sense, may be taken to have denoted “order”, its more specific connotation seems to have corresponded closely to what is usually rendered by legal anthropologists as “custom”. Which adds an interesting twist to Hölkeskamp’s citation of Heraclitus on the divinity of *nomos* as “the king of all people”. Why so? Because it evokes an old aphorism in African anthropology, mythically associated with Max Gluckman but really of unknown provenance, that “custom is king”. By this was meant not just its dictates enjoyed sovereignty over the hearts, minds, and behavior of “natives” everywhere. Nor only, as John Stuart Mill (1962: 131) would have it, that its “magical influence” made a certain species of rules so “self-evident and self-justifying” as to elevate them to “a second nature”. It also implied that, in its indigenously spoken forms, “custom” – however the term itself might now be understood, given its disreputable colonial history (see e.g. Moore 1986; Chanock 1985) – afforded a vocabulary for imagining a socially ordered universe that stretched back, as “tradition”, to time immemorial. This, in turn, resonates with the fact that, in translating *nomoi*, Hölkeskamp elides custom, tradition, and order, an elision that underscores the salience of vernacular norms in the phenomenological process of constructing, inhabiting, and arguing over the lineaments of the lived world. In fact, taken together, *nomoi* and *thesmoi* comprised a body of “custom and law” very like *mekgwa le melao* among Tswana or *mikwa li milao* among the Barotse (see above). As in Africa, they – *nomoi* and *thesmoi* – are not easily set apart; although, in each case, one term of the pair (*thesmoi*, *melao*, *milao*) tends to be seen, if tentatively, as more “law-like”, more enforceable, more liable to have its origin in legislation. And, as in Africa, it is impossible to understand the regulation of everyday conduct, the negotiation of conflict, or the way in which the interiors of the world are apprehended, without a close understanding of their cultural logic.

These three reasons for taking the normative seriously – arising, respectively,

out of its emotional, didactic, and cultural dimensions – do not suffice, however, as an answer to a prior problem. That problem is highlighted by Elster’s argument for redirecting the study of social control, *ab initio*, toward the interrogation of social norms: Are we to allow that the disciplining of behavior is reducible to rules of conduct and their effects? And ought we to concur that only individuals, not “societies” or the institutions that exist under their sign, have the capacity to influence the actions of other human beings? The resolution of these issues, I scarcely need repeat yet again, depends on higher order theoretical considerations over which reasonable minds might disagree. Nonetheless, the preceding chapters would seem to defy any notion that “social control” – even if we take the term, heuristically and generically, to denote no more than the regulation of human behavior – might finally be understood through the lens of normative injunctions; this in spite of the obvious importance of these injunction in the construction and representation of social life everywhere. As crucial are the processes by which naturalized, embodied, ostensibly unregulated, more or less habituated social practices – as well, patently, as the intentions that suffuse them and the meanings ascribed to them – are produced.

From Norm to Process, Rule to Practice

I have already alluded to the curses and oaths discussed by Faraone and Thür. To an Africanist anthropologist, these conjure up a complex regime of regulation, a regime that grows, on one hand, out of the practical exercise of patriarchal authority and, on the other, out of the metapragmatic capacity of linguistic performatives to bring about the effects that they enunciate. It is a regime with a double valence: while it disciplines the routine behavior of the members of a political community, affirming the legitimacy of patriarchal command, it may also provide a means for the sanction of abuses of power. In contexts with which I am more familiar, the potency of curses appears to derive not from social norms but from the transcendent dominion of the ancestral world: they enjoy the “magical” capacity of “custom” – the Mill here, if I may be forgiven a pun, grinds exceedingly fine – to render a whole world of behavioral minutiae into “second nature”. Of course, custom is itself congealed practice, practice that has become hegemonic, habitual, beyond history. It presents itself, in fact, as vernacular knowledge, “tradition”. In the case of curses and oaths, it embodies the sedimentation of patriarchal authority-as-practiced into the patriarchy as a normative order. Which, by turn, justifies the exercise of various substantive forms of male domination and the sanction of the curse that attends its violation – either against those who defy it or against those who abuse it. In short, norm and practice exist in a dialectical relationship, a relationship that appears to underpin the very nature of order (not to mention the order in nature), a relationship nonetheless that is subject, through contestation or resistance or refusal, to revision, rupture, reformulation. History.

The point? There are two, each being an answer to one half the problem posed a moment ago.

The first is that “social control” is irreducible to the normative, however that term might be qualified; that it is embraced in an ongoing dialectic of rule and process, meaning and practice, human subjects and their sociocultural contexts. An aside here: in light of this, perhaps the concept itself – social control, that is – is better replaced by *regimes of regulation*, which does not carry the same functionalist baggage, points to the profoundly political nature of all discipline, carries within both of its component nouns a fan of multiple connotations, and reminds us of its intrinsic historicity. The second point, offered again with due respect to Elster’s argument, is that such regimes of regulation consist in much more than the contrapuntal actions of individuals upon each other; that, inevitably, they implicate a complex world of signifying practices, a world of congealed of social intentions, a world of internalized values and un-cognized disciplinary routines. In short, the social, material, and cultural architecture of a living moral economy.

I have chosen to illustrate these points, perforce very sketchily, with reference to curses, oaths, and African patriarchy. However, they may as well be extended to, say, the burial ceremonies described by Cynthia Patterson (*infra*). Drawing on the dramaturgical power of death – on its accompanying practices and its emotive framing – to authorize social realities, those rites seem to have been both a site and a vehicle for the enactment of the distinction between the private and public domains; indeed, perhaps even for its practical objectification. (A second, less enunciated theme in these funerals appears to have been the performance of the jural subordination of women, made real through restrictions on travel and clothing; the latter, of course, being a well-established nexus for the construction of embodied, disciplined subjectivity.) Likewise the marriage processes on which Lin Foxall’s essay focuses. Wealthy Greeks living under Roman rule, Foxall suggests, asserted their elite standing, performatively, by adopting the rules and conventions of Roman family law. This, it appears, allowed them to devolve their elevated position to their children, accompanied presumably by the passage of property, thus contriving an enduring jural status for their agnatic offspring. (In Africa, it has been said, such inter-generational transfers are the means by which the immanent principle of descent, as a jural construct, is concretized into corporate patri-lineages; Comaroff 1980: 34f.). Note, once again, the complexly interwoven dialectics of rule and practice, of convention and intention, of legality and materiality, of the manufacture of jural facts through social acts.

Coda

Out of control, then – or, more accurately, out of an Africa-tinted encounter with the problem of social control in ancient Athens – emerges a challenge: How best to rethink the nature of law and society in the classical world in light of what we might now call a dialectical jurisprudence? How do we arrive at an outline for the

practice of theory in this context? I, plainly, am not the person to answer these questions. But, to return to my Maine point, so to speak, an observation may be in order: perhaps the “precocious maturity” of Greek law has been a mixed blessing to its scholars. Precisely because it *did* constitute such a hugely complex world, a world that has drawn many raiders to the lost archive, ancient Athens has tended *not* to invite much comparison with the legal anthropology of less ancient elsewhere. My only contribution to a field of scholarship that I admire greatly but know shamefully little about, is to call for more comparison; comparison, in particular, that estranges law and social order in such a way as to discomfort existing orthodoxies. Some, of course, have already begun to rise to the challenge: not least David Cohen, the moving spirit behind the present volume. It is to his work that this passing reflection, finally, is intended as tribute.

Bibliography

- Althusser, Louis*, Lenin and Philosophy, and Other Essays. Translated by B. Brewster (New York 1971)
- Arnold, Thurman W.*, The Symbols of Government (New York 1962) Excerpted in: *William Aubert* (ed.), Sociology of Law (Harmondsworth 1969)
- Barth, Frederick*, Models of Social Organization (Royal Anthropological Institute Occasional Paper 23, London 1966)
- Blau, Peter M.*, Exchange and Power in Social Life (New York 1964)
- Bourdieu, Pierre*, Outline of a Theory of Practice. Translated by R. Nice (Cambridge 1977)
- Bourdieu, Pierre*, The Biographical Illusion (Working Papers and Proceedings of the Center for Psychosocial Studies 14, Chicago 1987)
- Buber, Martin*, Between Man and Man. Translated by *Ronald Gregor Smith* (London 1961)
- Cassirer, Ernst*, An Essay on Man: An Introduction to a Philosophy of Human Culture (Garden City, NY 1956)
- Chanock, Martin*, Law, Custom, and Social Order: The Colonial Experience in Malawi and Zambia (Cambridge 1985)
- Cohen, David J.*, Law, Violence, and Community in Classical Athens (Cambridge 1995)
- Comaroff, Jean and Comaroff, John L.*, Of Revelation and Revolution, Vol. I: Christianity, Colonialism, and Consciousness in South Africa (Chicago 1991)
- Comaroff, John L.*, Introduction, in: *J.L. Comaroff* (ed.), The Meaning of Marriage Payments (London, New York 1980)
- Comaroff, John L.*, The Discourse of Rights in Colonial South Africa: Subjectivity, Sovereignty, Modernity, in: *A. Sarat and T.R. Kearns* (eds.), Identities, Politics, and Rights (Ann Arbor 1995)
- Comaroff, John L. and Roberts, Simon A.*, The Invocation of Norms in Dispute Settlement: The Tswana Case, in: *Ian Hammett* (ed.), Social Anthropology and Law (London 1977)
- Comaroff, John L. and Roberts, Simon A.*, Rules and Processes: The Cultural Logic of Dispute in an African Context (Chicago 1981)
- Durkheim, Emile*, The Division of Labor in Society (Glencoe, IL 1964)
- Foucault, Michel*, Discipline and Punish: The Birth of the Prison. Translated by *A. Sheridan* (New York 1977)
- Gellner, Ernest*, Concepts and Society, in: *Bryan R. Wilson* (ed.), Rationality (Oxford 1970)
- Gluckman, Max*, Order and Rebellion in Tribal Africa (London 1963)

- Gluckman, Max*, The Judicial Process among the Barotse of Northern Rhodesia (Zambia) (Manchester 1967)
- Hobbes, Thomas*, *Behemoth or The Long Parliament*. Edited by *Ferdinand Tönnies* (Chicago 1990)
- Hobbes, Thomas*, *Three Discourses*. Edited by *Noel B. Reynolds* and *Arlene W. Saxonhouse* (Chicago 1995)
- Jarvie, Ian*, Limits to Functionalism and Alternatives to it in Anthropology, in: *D. Martindale* (ed.), *Functionalism in the Social Sciences* (American Academy of Political and Social Science, Monograph no. 5, 1965)
- Kuhn, Thomas*, *The Structure of Scientific Revolutions* (Chicago 1962)
- Leach, Edmund Ronald*, *Political Systems of Highland Burma: A Study of Kachin Social Structure* (London 1954)
- Machiavelli, Niccolò*, *The Prince*. Translated by *George Bull* (Harmondsworth 1961)
- Maine, (Sir) Henry James Sumner*, *Ancient Law* (London 1919)
- Meillassoux, Claude*, *Maidens, Meal and Money: Capitalism and the Domestic Community* (Cambridge 1981)
- Mill, John Stuart*, *Utilitarianism, On Liberty, Essay on Bentham*, together with selected writings of *Jeremy Bentham* and *John Austin*. Edited by *Mary Warnock* (Cleveland, New York 1962)
- Moore, Sally Falk*, *Law as Process: An Anthropological Approach* (London 1978)
- Moore, Sally Falk*, *Social Facts and Fabrications: "Customary" Law on Kilimanjaro* (Cambridge 1986)
- Plato*, *Plato's Republic*. Translated by *A. D. Lindsay* (London 1935)
- Radcliffe-Brown, Alfred Reginald*, *Structure and Function in Primitive Society: Essays and Addresses* (London 1952)
- Schapera, Isaac*, *Handbook of Tswana Law and Custom* (London 1938)
- Strathern, Marilyn*, *Discovering Social-Control*, in: *Journal of Law and Society* 12.2 (1985) 111–34.
- Tambiah, Stanley J.*, *The Magical Power of Words*, in: *Man N.S.* 3 (1968) 175–208.
- Tester, Keith*, *Civil Society* (London 1992)
- Turner, Victor W.*, *Schism and Continuity in an African Society: A Study of Ndembu Village Life* (Manchester 1957)
- Turner, Victor W.*, *The Forest of Symbols: Aspects of Ndembu Ritual* (Ithaca 1967)