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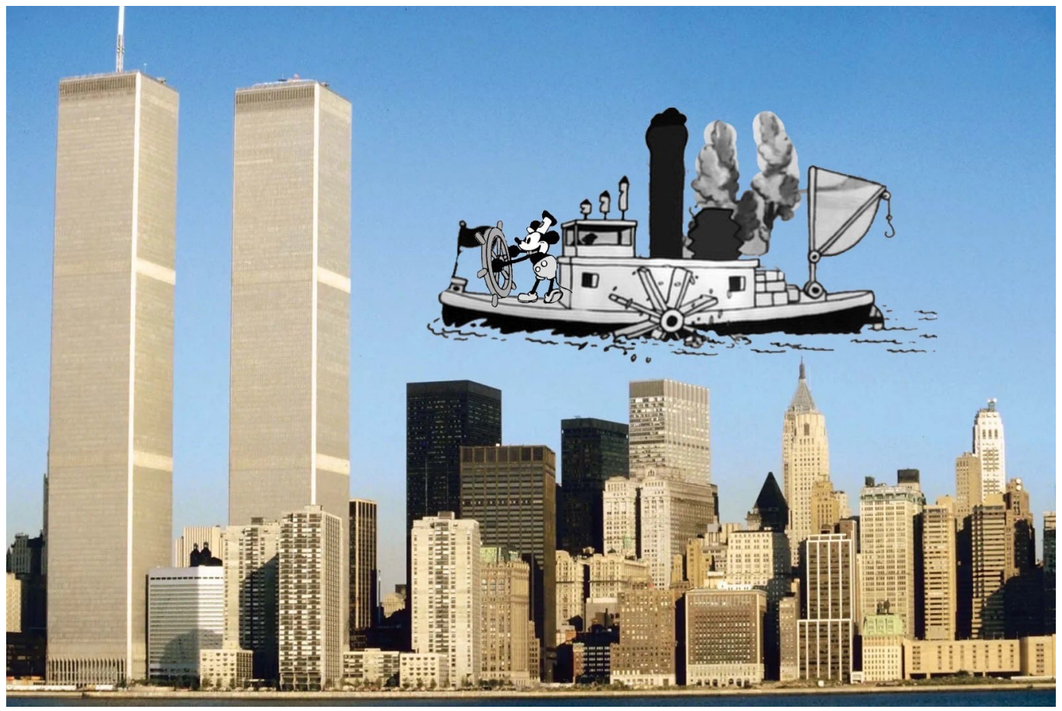
SELECTIONS FROM JUSTICE: PRIMITIVE AND MODERN



BOB BLACK

Neighborhood Justice Centers were, I've argued, not a solution to any social problem. But I agree with their focus on disputes, not on crimes as such. Some crimes are unilateral predation, not bilateral disputes. But most crimes, including most of the most feared crimes, arise from disputes. Restorative Justice and reintegrative shaming, although they purport to reject repressive, punitive justice, in fact fundamentally agree with its conservative, individualist, right-and-wrong, law-and-order, crime-and-punishment conception of interpersonal conflict. Beware Mennonite probation officers and armed humanists. Shaming, officially administered, is obviously punishment. That conception, I've argued,[371] is incompatible with anarchism. And, anarchism aside (where it is likely always to remain), that approach is costly, cruel, oppressive, and even on its own terms a disastrous failure. The only within-the-system reform which would represent a substantial improvement would be substantial de-criminalization. [372] But less of more of the same is not enough.

In a modern anarchist society, as in primitive anarchist societies, the emphasis would be on dispute resolution, not on sin, guilt, shame, crime, and punishment. There would be no law, especially no moralizing law such as Braithwaite and other conservatives endorse. Moralizing law is the major source of mass incarceration, police brutality, and most violent crime. But it generates business for politicians, police, the private prison industry, Fox News commentators, organized crime, and criminology professors. Including the criminology professors who organize conferences on anarchism, criminology and justice. Unless the anarchists offer a radical alternative, they will continue to be scorned, and rightly so.

To my regret, the criminologists are finally trying to make some inroads among anarchists. On March 26-27, 2016, there was held the "1st Annual Anarchism, Crime, and Justice Conference at Fort Lewis College in Durango, Colorado, USA." According to the announcement: "This conference is structured around challenging and abolishing punitive justice, while promoting community-based alternatives such as restorative justice, transformative justice and Hip Hop battling. . . . " There follows a long list of the standard leftist Social Justice Warrior issues: 27 "topics of interest." One of them is "green anarchism"; another is "anarchism." [369] Two workshops on anarchism out of 27. At this anarchist conference, as at some earlier ones, the anarchism is an afterthought. The organizer was Anthony Nocella II, whom I have previously abused here.

There is no suspicion that possibly "justice" itself has become, for modern anarchists, a problematic goal or value. The anarchist correct line on criminal justice, has – unknown to the vast majority of anarchists – been authoritatively settled. Anarchists are to be for restorative justice, transformative justice, and Hip Hop battling (whatever that is). I'm sure some anarchists have heard of Hip Hop battling (I haven't, but, I am an elderly white man), but probably not the other stuff. If it resembles the "song duels" among the Eskimos, who were anarchists – where disputants, face to face, sing insulting songs about each other, and the audience reacts – well, that might be *one* anarchist dispute resolution mechanism.[370] It seems inappropriate, however, in cases of securities fraud, armed robbery, identity theft, homicide and rape.

I. INTRODUCTION

In all societies, there's some trouble between people. Most societies have processes for resolving disputes. These include negotiation, mediation, arbitration and adjudication.[1] In their pure forms, negotiation and mediation are voluntary. Arbitration and adjudication are involuntary. The voluntary processes are typical of anarchist societies, since anarchist societies are voluntary societies. The involuntary processes are typical of state societies. In all societies there are also self-help remedies.[2] These are often effective, but they only provide justice when might and right happen to coincide. In primitive societies, justice is not the highest priority.

The voluntary processes deal with a dispute as a problem to be solved. They try to reach an agreement between the parties which restores social harmony, or at least keeps the peace. The involuntary processes implicate law and order, crime and punishment, torts, breaches of contracts, and in general, rights and wrongs. The difference interests me, among other reasons, because I'm an anarchist who lives in a statist society. I'm also a former lawyer.

Most modern anarchists are ignorant of how disputes are resolved in stateless primitive societies. And they rarely talk about how disputes would be resolved in their own modern anarchist society. This is a major reason why anarchists aren't taken seriously. I have a lesson for the anarchists. But I also have a lesson for modern legal reformers. Using examples, I'll discuss disputing in several primitive stateless societies. Then I'll discuss an attempt to reform the American legal system which was supposedly inspired by the disputing process used in one African

Anarchist criminologists can probably do little to de-legitimate the state. But they can do at least as much as I've done here. Instead, they legitimate the state by indirection, by pretending that there isn't always an iron fist inside the velvet glove. Unlike me, they get paid to write books and articles. They are writing the wrong books and articles.

Aside from Ferrell's 1998 article in *Social Anarchism*, the anarcho-criminologists have hitherto not, to my knowledge, addressed their fellow anarchists. And Ferrell said nothing about RJ, with which by then he must have been familiar. RJ programs originated around the time the NJCs did, and they have long outlived them, regrettably. But, like the NJCs, they have never involved large numbers of participants from the general public (or "the community"). Most people generally, like most anarchists, and like most students of criminal justice, have heard little or nothing of RJ, as Sullivan & Tifft admit.[367] This is one reason why RJ programs persist undisturbed, off in a corner of the criminal justice system.[368] Nobody cares if they work or not. They work for those who work in them.

Restorative justice, even as idealized by Tifft & Sullivan, is incompatible even with their own pacifism. Their statism, pacifism and mysticism are mutually incoherent, as well as incompatible with any type of anarchism. It is just as well that the anarchists are ignorant of RJ. But it is not so well that they have not advanced beyond their traditional, somewhat outdated, and incomplete critique of law to envisage anarchist societies with disputing processes which are as voluntary as life in society allows for.

come across any examples – they are all now nothing but minor, auxiliary parts of the criminal justice system. They are on as long or as short a leash as courts, prosecutors and police allow them under the local arrangements. The solution has, as usual, become part of the problem. By its voluntarist and humanist pretenses, RJ in a small way legitimates the criminal justice system, and maybe it opiates a few people, as religion sometimes does.

It may be that Restorative Justice is becoming passé. An imposing *Handbook of Criminological Theory* published in 2016 does not mention it.[365]

The trouble with criminal justice reforms is that *nothing ever goes away*. Penitentiaries (the very name – evoking "penitence" -- reveals an affinity with RJ), insane asylums, probation, parole, pre-trial diversion, compulsory schooling, indeterminate sentencing, determinate sentencing, juvenile courts, small claims courts, drug courts, community justice centers, community policing, RJ, reintegrative shaming – we still have all of them somewhere, and we have most of them everywhere. Their coexistence is proof that the system is incoherent. But coherence is not a requirement for social control. In Germany, the Nazi Party, the Gestapo, the S.S., military courts, state police, local police and local courts had overlapping, often vaguely defined jurisdictions. There were jails, prisons, mental hospitals, labor camps and concentration camps operated by various authorities – something for everybody who fell afoul of a Kafkaesque system: "The confusion of powers liberated policy-makers from the constraints of morality and law." [366] Redundancy is functional for systems.

tribal society. The idea was to insert mediation into the bottom layer of the U.S. legal system at the discretion of judges and prosecutors. It was a failure. I will come to the conclusion that you can't graft an essentially voluntary procedure onto an essentially coercive legal system.

If I'm right, the case for anarchy is strengthened at its weakest point: how to maintain a generally safe and peaceful society without a state. Many anthropologists have remarked upon this achievement.[3] Few anarchists have. The controversy over anarchist "primitivism" has been almost entirely pointless, because it goes off on such issues as technology, population, and the pros and cons of various cultural consequences of civilization (religion, writing, money, the state, the class system, high culture, etc.). The possibility that certain structural features of primitive anarchy might be viable in – indeed, may be constitutive of -- *any* anarchist society, primitive or modern, has received no attention from any anarchist. Primitivists urge anarchists to learn from the primitives[4] -- but learn *what*? How to build a sweat lodge?

II. FORMS OF DISPUTE RESOLUTION

When a conflict arises between individuals – whether or not it later draws in others – initially, and usually, it may be resolved privately by discussion. Negotiation, a bilateral procedure, is undoubtedly a universal practice[5]: "It is the primary mode of handling major conflicts in many simple societies throughout the world."[6] In the terminology I adopt here,[7] where a conflict is resolved by negotiation, there has been a conflict but not a dispute. There is first a *grievance*: someone feels wronged. If she expresses her grievance to the wrongdoer, she makes a *claim*. If

she gets no satisfaction, she has several alternatives. She may take unilateral action, actively or passively. The active way, “self-help,” is to coerce or punish the wrongdoer, but, sadly, that is often not feasible.[8] Nonetheless, where real alternatives scarcely exist, as in the Inner City, some people resort to violent unilateral retaliation.[9] The passive way is “lumping it”: caving: doing nothing.[10] This is how many grievances, instead of rising to the level of disputes, fall into oblivion: “You can’t fight city hall” or various other too-powerful oppressors. Lumping it – avoidance -- may also be universal, but it’s especially common in the simplest and in the most complex societies: among hunter-gatherers and in statist class societies with vast power disparities.[11]

As useful as negotiation can be, it doesn’t always work. It doesn’t always produce agreement. Dyads may deadlock. Whereas in a triad, the decision might be made by majority rule, or through mediation.[12] Or feelings may run so high that the parties may refuse to talk to each other, or if they do, the talk may turn violent.[13] And negotiation isn’t always fair, because disputants are never exactly equal. If one party has a more forceful personality, or a higher social status, or more wealth, or more connections, if there is a settlement of the dispute, it is likely to favor him unduly. Among the rationales for involving a third party – whether a mediator, an arbitrator, or a judge – is to equalize the process by bringing in a participant who is impartial and independent. However, impartiality is the ideal but not always the reality of mediation. [14] The third party may also serve as a face-saving device for acquiescence in a settlement which, if negotiated

practices,” under which workers are treated a little better than usual, their ideas are listened to, they are allowed a measure of self-managed servitude, and they receive a stable income. Never mind that these enlightened businesses are all but nonexistent. These pacifists of course commend a program for worker pacification -- another of their lion-and-lamb scenarios: “When this level of well-being exists in a workplace, feelings of envy and resentment toward [higher-paid] co-workers *and coordinators* are significantly reduced. People feel restored.”[361] And work harder! They’re suckers. Or rather, they would be suckers, if they existed. This never happens.

“Coordinators” is a euphemism for *bosses*. The class-collaboration ideology which Tifft & Sullivan witlessly endorse is nothing less (well, maybe even less) than the old “Progressive human resource management (HRM)” perspective in industrial relations studies, which is almost forgotten today.[362] During their many tranquil years in the academy, the American workplace has become a harsher place of longer hours and more dangerous conditions over which workers, whose levels of unionization have fallen sharply, have less influence than ever.[363] And yet Tifft & Sullivan intuit an “increased sensitivity” of bosses to the personal needs of workers![364] It’s obvious that in all their lives, neither of these guys has ever had a real job.

Anarchists should actively combat Restorativist influences everywhere. We want a new world. We don’t want to “restore” anything. Let’s be lions, not lambs.

The expansion and entrenchment of RJ are directly proportionate to its institutionalization by the state. If some of the earliest RJ programs maintained some autonomy from the state – I haven’t

And yet, for the anarcho-liberals Tifft & Sullivan, RJ will always be "at its core a form of insurgency and subversive in nature."[358] Tifft & Sullivan still pretend to be outsiders. I don't doubt their commitment and sincerity. But it's not unusual to find in the same person a pure heart and an empty head. Tifft & Sullivan are obviously not outsiders. Outsiders would not have been invited to edit the *Handbook of Restorative Justice.* The nondynamic duo would be the Prodigal Sons of academia, except that they have never been prodigal. They didn't have to go home again. They never left.

Not only Tifft & Sullivan, but lots of other Arjays of the writing kind, have repeated, long after it became monotonous, that RJ is really great: it's the conquering new "paradigm." Poor Thomas Kuhn! We just have to expand RJ -- somehow – to tackle the structural sources, the economic and social sources of interpersonal crime.[359] Never repudiate RJ: always expand it. But that would mean, not resolving individual conflicts, but rather *fomenting* social conflicts. There are no individualized answers to what used to be called the Social Question. "A criminology which remains fixed at the level of individualism," writes John Braithwaite, "is the criminology of a bygone era."[360] *Any* criminology is fixed at the level of individualism, and largely fails to fix anything.

For Arjays, and not just the Mennonites, social conflict is bad! Violence is especially bad! (except when it is state violence to implement Restorative Justice). Sullivan & Tifft like to invoke Kropotkin, but Kropotkin was unequivocally a class-struggle revolutionary anarchist. They have written approvingly of workplace arrangements, with "restorative structures and

bilaterally, might appear to be (and might actually be) a surrender to the other side.

If the victim (as he sees himself) voices her grievance to third parties, now there is a *dispute* which implicates, if only in a minor way, the interests of society. A dispute is an "activated complaint." [15] The appeal, whether explicit or implicit, depending on the individual and the society, might mean calling the police, filing a lawsuit, or just complaining to people you know. It might mean going to court – the court of law or the court of public opinion. Mediation (voluntary) and adjudication (compulsory) are distinguishable from negotiation and self-help inasmuch as they necessarily involve a third party who has no personal interest in the outcome of the dispute.[16] Mediation could be considered assisted negotiation.[17]

Some primitive societies -- especially the smallest-scale societies, the hunter-gatherers – have no customary dispute resolution processes. There is not only no authority, there is no procedure for resolving disputes or facilitating settlements: no mediator or arbitrator.[18] Thus, among the Bushmen, interpersonal quarrels usually arise suddenly and publicly, in camp. They range from arguments and mockery to fighting, which is usually restrained by others who are present, but which occasionally turns deadly. But if the dispute gives rise to ongoing enmity between individuals (and their associates), often one of the disputants moves away to join another band (this often happens anyway); or sometimes the local band separates into two.[19] This is typical for hunter-gatherer societies,[20] such as the Eskimos.[21] These might be considered active forms of lumping it. In some other foraging societies, including some in

Australia, avoidance or exile are possible outcomes of formal disputing processes.

In more complex class societies, avoidance (or, from organizations: “exit”[22]) is also common. Thus American suburbia has been called an “avoidance culture.”[23] But in modern urban society, avoidance can be more difficult. Battered wives, for instance, are not always in a position to move out. And avoidance, even where practicable, may be just bowing to superior force. The absence of a formalized dispute resolution process is arguably why the Kalahari Bushmen, when studied in the 1960s, had an even higher homicide rate than the United States at that time.[24] One ethnographer describes a New Guinea society where, in his opinion, the absence of third-party dispute resolution processes is why a dispute over a pig could escalate into a war.[25] Nonetheless, some primitive societies which lack even these mechanisms are reasonably orderly and peaceful.[26]

In arbitration, the parties (or the plaintiff) empower a third party to hand down an authoritative decision, as a judge does.[27] It’s not mediation: “Mediation and arbitration have conceptually nothing in common. The one involves helping people to decide for themselves; the other involves helping people by deciding for them.”[28]

But arbitration is not adjudication either, because of several differences. In adjudication, the decision-maker is an official, an officeholder who is not chosen by the parties. There, the third party decides according to law – a law which is not of the parties’ own making and which is not, for them, a matter of choice. In the United States, some business contracts and many collective

– “The Anarchist Genius of Restorative Justice?” He is a “lay theologian,” a former student of Howard Zehr, and, like Zehr, a Mennonite.[357] If Howard Zehr is an anarchist, which he has never claimed, he has fooled everybody, including himself, for forty years. The only thing anarchism and Restorative Justice have in common is that they are currently fashionable. For both, their vogue may be waning.

Throughout my relatively long life, there have been fads and fashions. That time includes my several involvements with academia. My impression is that the pace is increasingly speeded up, and the turnover is faster (is this “future shock”?). The mini-skirt fashion of the 1960s, despite the bitter resistance of gay fashion designers, stubbornly persisted for longer than did the NJC fad of the 1980s. Of course there still exists the occasional NJC, just as one occasionally sees a *jeune fille* in a mini-skirt. More often, actually.

RJ may still be expanding, here and around the world. It may never go away, as the NJCs (however labeled) will never go away, because RJ has been institutionalized in court systems, universities, consulting firms, NGOs, and in demi-academic journals like the *Dispute Resolution Magazine* (published , I repeat, by the American Bar Association) and the *International Journal of Dispute Resolution*. And also in court-annexed reconciliation processes, benevolently operated by state-paid paraprofessionals. There are many conferences. There are many training programs for practitioners in many countries, and at least one graduate degree program. There are grants. All this replicates, and indeed outdoes, the NJC history.

and the state as tools of the powerful -- only their version is sentimental and mystical. Despite their opportunity to be more up- to- date and well-informed than the classical anarchists, these two, in their 1980 book, added nothing to the stale old leftist critique except a few hippie grace notes. I thought they would drop out of the academy. Given their ideology, they could no more make research contributions to criminology (necessary for tenure) than a creation scientist could make research contributions to biology (necessary for tenure).

Instead, they found a way to have it both ways: Restorative Justice. A review comparing their 1980 and 2001 books recognized that the second is to some degree an attempt to redress the shortcomings of the first, but “it is still the case that specific details as to how alternative systems would deal with acts such as theft, assault, rape, or murder are sorely lacking here.”[354]

A 1998 article by one Jeff Ferrell, now Professor of Sociology at Texas Christian University -- which has been reprinted in at least five anthologies which I have no intention of looking at -- is just an epitome of Tifft & Sullivan (1980), adding nothing except a few post-modernist grace notes.[355] But by then, Tifft & Sullivan had discovered Restorative Justice. Today, these anarchists are among the foremost expositors and advocates of RJ. Ferrell has apparently not dabbled in Restorative Justice. It’s not edgy enough.

I’ve come across several brief online articles linking anarchism to RJ without showing any critical understanding of either.[356] I came along another one by Brian Gumm – yet another guy whose name is not yet a household word in anarchist households

bargaining agreements provide for arbitration. Arbitrators are usually drawn from a body of trained experts, the American Arbitration Association, which is a membership organization with codes of professional standards.[29] Often the arbitrator has some expertise in the industry.[30] The arbitrator interprets and enforces a law which the parties have previously made for themselves.

Because arbitration is coercive in its result, and better for those with more power than for those with less, from the1980s, many businesses have incorporated mandatory arbitration clauses into consumer contracts so as to restrict consumer remedies and keep consumers out of the courts.[31] One Federal Circuit Court held that such contracts are unconscionable and therefore illegal.[32] The problem became so serious that many Congressional hearings were held.[33] Nothing resulted. In 2010, the U.S. Supreme Court upheld consumer arbitration clauses which preclude judicial review.[34] As a (predictable) result, “few plaintiffs pursue low-value claims and super repeat-players perform particularly well.”[35]

Sooner or later, Alternative Dispute Resolution (ADL) is always co-opted: usually sooner.

However, in primitive societies, arbitration is rare,[36] so I will not be discussing it any further. If anarchists ever bother to think about such things, they might consider whether there’s a place for arbitration in their blueprints for the future. The more complex, hierarchic and coercive their societies may be, the better suited they would be to compulsory arbitration: bringing the state back in, on the sly. I am thinking, in particular, of anarcho-syndicalism .

In adjudication, a dispute – a “case” – is initiated by a complainant in court. In criminal cases, the complainant is the state, not a private party, but for present purposes, the difference from civil cases doesn’t matter. The court is a previously constituted, standing tribunal. Court proceedings are initiated voluntarily by a public official or a private party, but after that, although the litigants still make some choices, they are subject to pre-existing rules of procedure and the decisions of the judge. They are always subject to the pre-existing laws of the state.[37] Characteristic features of adjudication as an ideal stress “the use of a third party with coercive power, the usually ‘win or lose’ nature of the decision, and the tendency of the decision to focus narrowly on the immediate matter in issue as distinguished from a concern with the underlying relationship between the parties.”[38] In short: “Judges do not merely give opinions; they give orders.”[39]

In adjudication (litigation) the case is decided by a judge who doesn’t know the parties. He doesn’t care about the background of the dispute. He is not interested in repairing the relationship between the parties, if they had one. He is not supposed to consider those matters. The judge should be impartial and disinterested, deciding the cases on the basis of the parties presenting “proofs and reasoned arguments.”[40] His decision “must rest solely on the legal rules and evidence adduced at the hearing.”[41] Rules of evidence, which are more numerous and complex in the United States than in any other legal system, narrowly circumscribe the admission of evidence, especially at trial. Resolutions of cases arising from interpersonal disputes are “constrained in their scope of inquiry by rules of evidence . . .

reconciled, because of their relationship. Or witnesses didn’t show up for preliminary hearings. A complainant might get somebody arrested, not to get him prosecuted, but just to harass him for his bad behavior.

Now these continuing relationships weren’t usually multiplex relationships. But they resemble them in one very important way. To the disputants, their relationship is often more important than their current dispute.

So, some academics therefore proposed that mediation was the best way to deal with prior relationships cases. After all, in the anthropological literature, offenses usually involved people in relationships, or at least knew each other. So, let’s us mediate prior relationship cases too. So said the U.S. Department of Justice, conservative judges, several of the more intellectual members of the legal elite, and some quasi-scholars at think tanks. All the new mediation agencies focused on prior relationship cases.

XI. THE ANARCHIST ACADEMICS: A SORRY STORY

The anarchist academics are by now almost as welcome in academia as the Marxist academics are, and for the same reason. They’re harmless, but they add a touch of the picturesque. Their inclusion is all the easier because they are almost indistinguishable from the Marxists, who by now have tenure. What, then, does an anarchist criminologist espouse? Not anarchy! He espouses “restorative justice.”

I’ve already scorned Larry Tifft & Dennis Sullivan, who are apparently the first avowed anarchist criminologists. They are bleeding-heart radicals with a conventional leftist critique of law

(meaning: Communist) comrades' courts is hardly reassuring. They were coercive arms of authoritarian states. And whatever else they accomplished in the way of dispute resolution, their highest priority was always state security.[77] These courts have by new been normalized, as the Russian, Chinese, and Cuban regimes have reconciled with capitalism.

Originally, the establishment wanted alternatives to adjudication – for other people. It wanted to limit access to the courts. The "litigation explosion" quickly became a cliché. The courts were supposedly swamped, mostly by the little people with their little problems. Surely alternate dispute resolution (ADR) was the answer. The core ADR nostrum was mediation.

A social science theory got into the picture. In the late 1960s, there was a famous study, by the Vera Institute, of the processing of felony cases in New York City. The politicians and the newspaper editors were concerned about what they called the "deterioration" of these cases.[78] This just means that very few cases went to trial. Look at what's happening! First the problem was supposed to be too many cases. Now the problem was not enough cases. Somehow, it was concluded that these problems had the same solution.

The study made the genuinely startling discovery that most felony arrests involved people in some sort of prior relationship. Felonies are the serious crimes in Anglo-American law, such as manslaughter, which is what Mr. A was convicted of. For rape, 83% of arrests involved prior relationships. For homicide, it was 50%. Felonious assault: 69%. Even some property crimes fit the picture: 36% of robberies, and 39% of burglaries. *These* are the cases that deteriorate. Often the complainant and the defendant

"[42] U.S. courts are designedly better, in the terminology of Donald L. Horowitz, at identifying the "historical facts" of the particular case (whodunit) than the "social facts" which might be illustrative of the general circumstances which regularly give rise to cases like the one at bar.[43]

That doesn't mean that courts are very good at that either. Poverty is never put on trial; poor people are put on trial. But the courts, despite the title of a book by a reform-minded judge,[44] are never on trial. It isn't difficult to show that the ideal of the rule of law, thus institutionalized, is a failure even on its own terms. Anarchists and others have shown that repeatedly.

My main topic is mediation as practiced in more or less primitive societies, and its implications for contemporary anarchism. I emphasize that mediation is voluntary. The parties choose to submit their dispute to a mediator, not for a ruling, but for help. They, or the complainant, may select the mediator, or he might be "appointed by someone in authority, [but] both principals must agree to his intervention."[45] Mediation is not primarily concerned with enforcing rules, although, the parties may cite rules to support their positions. In mediation, unlike adjudication, there is no such thing as irrelevant or inadmissible evidence.[46] The purpose of mediation is not to identify who is to blame, although the parties will do lots of blaming. The purpose of mediation is not to enforce pre-existing rules, although the parties will usually invoke rules. The purpose of mediation is rather to solve an interpersonal problem which, unresolved, will probably become a social problem.

These forms of dispute resolution I am describing are ideal types. One legal philosopher, Lon L. Fuller, insists that they should be

kept distinct because each has its own “morality.” Often in reality they are not so pure (such as the Ifugao example which follows, which Fuller was accordingly unable to understand[47]). Even the distinction between voluntary and involuntary processes, which I consider so important, is often not a bright-line distinction. Power is insinuated into many relationships which are not officially or overtly coercive.[48] If consent can be a matter of degree, nonetheless, one may ask “what proportion of nonconsensuality is implied in such a power relation, and whether that degree of nonconsensuality is necessary or not, and then one may question every power relation to that extent.”[49]

One inevitable consequence of involving a third party is that a third party always has his own agenda.[50] That is not necessarily a bad thing. American arbitrators of business/business and labor/management disputes are chosen and paid by the disputants, and they might lose *their* business if they are perceived to be biased or –so to speak – arbitrary. Elsewhere, the third party facilitator might be a socially prominent tribal mediator who strives to build a reputation as a successful problem-solver (bringing in more mediation business -- for which he, too, is paid[51]). Or he might be an American judge looking to be re-elected, or aspiring to higher office.

Undoubtedly “every process, every institution has its characteristic ways of operating; each is biased toward certain types of outcomes; each leaves its distinctive imprint on the matters it touches.”[52] Third-party dispute deciders or resolvers are usually of higher social status than the disputants.[53] That may be essential to their effectiveness: they have to be taken seriously. Obviously, mediation on these terms may not be

person. Then he has to provide beer or rum for everyone present. This isn’t mediation. It’s adjudication with a biased judge who has more control over the temporary assembly than an American judge has over a temporary jury. It’s court TV that isn’t filmed.

There is nothing resembling a moot in, for example, American suburbia.[74] How do you approximate this institution in a modern city? Here’s an example from Danzig himself. Suppose that there’s a juvenile loitering around outside a store:

“If the complaint [to the police] were replaced by a moot discussion, to which the teenager brought his friends, the shopkeeper and his associates (including his family, other shopkeepers, his employees), *and* the police officers working with juveniles, there would be a fair chance for the kind of interchange which has proven valuable when staged as a one-event ‘retreat’ in other communities.”[75]

If I were the teenager, I’d rather be arrested. Most of those other people have absolutely no reason to waste their time on a trivial problem that doesn’t concern them. Yet these ideas would inspire, or justify anyway, the formation of Federally-funded Neighborhood Justice Centers, which don’t even resemble Danzig’s idea of a moot, much less Gibbs’ idea of a moot.

Their boosters proudly recounted: “Unlike small claims court and housing court, these programs are not watered-down versions of real courts. Their roots are not in Anglo-American jurisprudence, but in the African moots, in socialist comrades courts, in psychotherapy and in labor mediation.”[76] In point of fact, NJC mediation cases mostly originated as criminal prosecutions in ordinary American criminal courts. The reference to socialist

to the judicial system, not a replacement for it. He said that the new structures shouldn't be subordinated to the judicial system. But how could the systems co-exist unless one system was subordinated to the other? One or the other has to decide which system has jurisdiction over which cases. Obviously the courts would make that decision, because that's where cases start.

Danzig's model was the system employed by the Kpelle in Liberia. [71] He called it a moot. He got this from an anthropologist named James L. Gibbs, Jr.[72] The word refers to Anglo-Saxon assemblies whose composition is somewhat uncertain and whose procedures are totally unknown.[73] Gibbs Jr. described a relatively informal proceeding which was attended by the kinsmen and neighbors of the parties. The problem is usually a domestic issue. The assembly is held at the home of the complainant: home court advantage. Anybody can show up for it.

The complainant appoints the so-called mediator, who is a socially important relative of his. That introduces bias right at the start. Apparently the procedure is compulsory for the defendant. The parties testify. They can cross-examine each other. They can cross-examine witnesses. A party might have some respected or articulate supporter speak for him. I'd call that person a lawyer.

Anybody can speak, but the mediator can impose a token fine on somebody who, and I quote, "speaks out of turn." (Meaning, standing for a round of drinks.) The mediator also says what *he* thinks about the case. Then he "expresses the consensus of the group." But he doesn't call for a vote. The consensus is whatever he says it is. The party who is mainly at fault is then required to formally apologize by providing token gifts to the wronged

something to be imported, as-is and unthinkingly, into a neo-anarchist society. But unless it can be imported thinkingly, into an egalitarian society which not only tolerates, but encourages excellence – and therefore a measure of inequality -- mediation will never be as effective as it could be.

III. CASE STUDIES.

I'll begin with examples from the ethnographic literature.

A. THE PLATEAU TONGA.[54]

I begin with a true story about a conflict which arose among the Plateau Tonga of what is now Zambia. Traditionally they were shifting cultivators and herdsmen. In 1948, they were a dispersed, partly displaced, and rather demoralized population of farmers and herders. Europeans had taken some of their best land. At a beer party, Mr. A, who was drunk, slugged Mr. B. These men belonged to different clans and lived in different villages. Unexpectedly, and unfortunately, after several days, Mr. B died.

This was a stateless society. But there were social groups whose interests were directly affected by this homicide. The Tonga are matrilineal. For most purposes, a person's most important affiliation is with a limited number of matrilineal relatives. This is the group which receives bridewealth when its women marry, and it's the group which inherits most of his property when a man dies. It's also the group that's responsible for paying compensation for the person's offences, and for exacting vengeance.

The *father's* matrilineal group (which, by definition, is different from the son's), is also an interested party. It is *also* liable for a member's offenses, but to a lesser extent, and it also inherits from him, although it gets a smaller share than the matrilineal kin-group. By killing Mr. B, Mr. A did an injury to Mr. B's group. For several reasons, Mr. B's group didn't take vengeance on Mr. A or, if they couldn't get at him, against one of his relatives. If it did, a blood feud would result, with back and forth killings until everybody got sick of it. Another reason for not taking vengeance is that the British-imposed court system would have arrested the avenger. Mr. A himself was in fact arrested, convicted of manslaughter, and sent to prison.[55]

But that didn't square things between the kin groups. Mr. B's group had lost a member and it demanded compensation.

The kin groups were intermarried. They also lived among one other. The Tonga lived in very small villages of about 100 people. Most villagers were not members of the same core kin group. But their fellow villagers were some of their friends, and they were some of the people they worked with. The villagers, as neighbors, also had an interest in a peaceful resolution of the dispute.

Before Mr. B died, the A group had made apologetic and conciliatory overtures to the B group. But after he died, all communication ceased. The matter had become too serious. This caused a lot of trouble for many people, especially if they had ties to both groups. Ordinary social life was disrupted. Even husbands and wives might stop speaking to each other, because they were often related to different, and now hostile, kin groups. Something had to be done.

demands on American society. By my definition, these were "disputes." The courts were recognizing many new rights. Alarmed lawyers spoke of a "rights revolution."

Now how did the legal establishment and the college professors react to this? They decided that the courts had heavy caseloads. The way to reduce their caseloads was by somehow preventing people from taking their supposedly minor disputes to court. As a point of fact, there is no evidence that most courts had heavy caseloads.[69] Many lawsuits are filed, but few of them come to trial. Americans mostly go out of their way not to initiate litigation.

So, just when the downtrodden started to claim rights through adjudication, the legal establishment decided that we needed new, informal, ways of rapidly processing the minor disputes of minor people.

There was nothing new about this ploy. 50 years before, "small claims court" was created to decide cases which were too small for lawyers to bother with. It was supposed to provide fast, inexpensive justice, without a lot of legal technicalities, usually without the involvement of lawyers. They called the small claims court the "people's court." The plaintiffs were supposed to be the humble people. But small claims court was really an eviction service for landlords and a collection agency for ghetto businesses. The people who were supposed to be the plaintiffs were usually the defendants.

So, in the 1980s, Richard Danzig, a scholar from the RAND Corporation,[70] proposed a new conflict resolution mechanism. He called for a "complementary, decentralized criminal justice system." By "complementary," he meant that it was a supplement

blame, although the parties will do lots of blaming. The purpose is to solve a problem. This is an ideal type. Ifugao mediation isn't quite pure, because it isn't commenced in a purely voluntary way. But it's much purer than what was later attempted in the United States.

I will define adjudication as when a dispute -- a case -- is initiated by a grievant in a court. A court is a permanent, pre-existing tribunal. It's compulsory. Cases are decided by a judge who doesn't know the parties. He isn't interested in repairing the relationship between the parties, if they have one. He doesn't care what the background of the dispute might be. He's not supposed to consider those things. He decides the case according to the laws of the state. Usually, if the case goes to trial, the judgment is that someone is "guilty" or not guilty of a crime, or that someone is or is not "at fault" in a civil case. Usually, one party wins and the other party loses. In mediation there aren't supposed to be any winners or losers.

That's the ideal of adjudication. I could criticize it as a description of the American legal system, and, I suspect, every legal system. Adjudication doesn't even live up to its own ideal. But I don't even like the ideal version. Instead, I want to discuss what can happen when mediation is inserted into an adjudication system, supposedly as a legal reform.

VI. THE POLITICS OF INFORMAL JUSTICE.

A. *Solutions in Search of Problems*

In the 1960s, there was a tremendous amount of social and political conflict in the United States. Black people, women, poor people, students, prisoners, radicals and other people made

Mr. C, a prominent member of A's group, found a go-between who was related by marriage to both groups. All along, B's group admitted that Mr. B was obviously the wrongdoer. He had a reputation as a troublemaker. Nobody was sorry when he went to prison. B's group's concern was how much compensation it would have to pay. The case had to end with payment of compensation. A feud was inconceivable, because so many people in each group were related to people in the other group, and the groups were intermarried. It was these cross-cutting ties that made everybody want a generally acceptable settlement. In modern societies, usually these ties don't exist.

The anthropologist, Elizabeth Colson, doesn't report the specifics of the settlement. Because it doesn't matter. She wrote an article about this because she'd published a general account of Plateau Tonga society, and some of her readers just couldn't understand how there could be anything but anarchy under a system of, well, anarchy.[56]

B. THE IFUGAO.[57]

About 35 years earlier, the situation would have been dealt with in a somewhat different way by the Ifugao of northern Luzon. They were stateless, pagan wet-rice cultivators. And headhunters. They were anarchists too, but their society was more stratified than Tonga society. An American, Roy Barton, taught school there from 1906 to 1917. His predecessor had been speared. He learned the language and wrote a well-respected book on Ifugao law. I'll be speaking in the present tense, what anthropologists call "the ethnographic present." But the story is based on evidence of practices in the period before 1903, before American authority became effective in the

highlands. Spanish authority had never been effective in the highlands.

Let's assume the same situation as among the Tonga: an unintentional killing by a drunken man. Drunken brawls among young men occurred among the Ifugao too. If the killing had been intentional, the kin group of the victim would have killed the wrongdoer.[58] If they couldn't get at the wrongdoer himself, they would kill one of his relatives. The result is a blood feud. A death for a death, until the groups get sick of it. But an unintentional killing by a drunk would usually be resolved by mediation resulting in the payment of compensation by the one kin group to the other.

The aggrieved party, or in this case one of his relatives, initiates the process. The plaintiff would recruit a go-between, known as a *mankulun*. The only restriction is that the mediator not be closely related to either party. The mediator would be a relatively wealthy man, usually a successful headhunter. He was preferably somebody with experience mediating disputes. He could also recruit more support from relatives and dependents than most people could do. If he arranges a settlement, he is paid a fee by the defendant, and his prestige is enhanced. And like everybody else, he wants the matter to be settled peacefully.

In theory, the defendant is free to reject mediation. In practice, the *mankulun* makes him an offer he can't refuse. If the defendant won't listen to him, "the *monkalun* waits until he ascends into his house, follows him, and, war-knife in hand, sits in front of him and compels him to listen." The defendant is well aware that the mediator has used knives -- maybe this very knife -- to cut off heads. He accepts mediation.[59]

There's a seeming paradox here. In complex societies, simplex relationships predominate. In simpler societies, multiplex relationships prevail. In Tonga and in Ifugao country, there were a lot of cross-links. There were many people with ties to both sides. And there was no state to impose law and order. Instead, the social organization provided very powerful inducements to make peace.

V. FORMS OF DISPUTE RESOLUTION

What's a dispute? I'll adopt a definition used by some (not all) social scientists. A dispute begins with a grievance. Someone feels she has been wronged. She may complain to the wrongdoer. They might resolve the matter. Up to this point, it's been a completely private matter. But if they don't agree, and the victim goes public with the matter, then there's a dispute. Depending on the society, going public might mean calling the police, filing a lawsuit, or just complaining to people you know.

Negotiation is a two-party, bilateral form of dispute resolution. It probably exists everywhere. But, it isn't the solution to every problem. A dyad can be deadlocked. Very often, as we saw, the involvement of a third party is helpful. My main objective tonight is to contrast mediation with adjudication. My focus is mediation. Mediation is appropriate to anarchist societies. You find adjudication usually in state societies.

I will define mediation as a disputing process which is, above all, voluntary. It's one where the parties choose to submit a dispute to a mediator, not for a decision, but for help. It's not primarily concerned with enforcing rules, although, the parties may invoke rules. The mediator's purpose isn't to identify somebody to

within our own families."[65] In 1914, like many other thoughtful people, he was shocked to discover how tenuous international solidarity really was.

IV. MULTIPLEX RELATIONSHIPS.

Now I will get a bit theoretical. There's something about these disputes which makes them different from many disputes in modern societies. In a modern urban society, in a dispute there's usually only one social relation between the parties. Each party plays a single role. Usually, for instance, your landlord doesn't also know you from church or at work. Your employer isn't your relative, except in the Philippines. Your landlord is not your friend. The anthropologist Max Gluckman called these relationships, simplex relationships.[66] American suburbanites, for example, share few ties, and "even while they exist, most suburban relationships encompass only a few strands of people's lives."[67] But in primitive societies, which are anarchist societies, if you get into a dispute with someone, he might be playing multiple roles in your life. You have a multiplex relationship. Someone may be your brother in law, your creditor, your workmate and your neighbor. This is someone you probably encounter often in your everyday life. These multiple roles may multiply occasions for conflict. But they also motivate both of you resolve the conflict, because all these relationships taken together are probably more important than whatever the dispute is about. And there are typically a lot of other people who have an interest in a peaceful settlement. This is what Gluckman calls a multiplex relationship. He also argued that the more activities the disputants share, the more likely is it for the dispute to be handled in a more conciliatory than authoritative fashion.[68]

Once that happens, the parties and their relatives are forbidden to talk to each other. Whatever they have to say to each other, has to go through the *mankulun*, even if it has nothing to do with the dispute. I think this is very ingenious. It keeps the parties from getting into angry arguments and making matters worse. It makes it possible for the mediator to manipulate everybody for their own good. The conflict imposes a social cost on the village, because it disrupts the ordinary social relations and the economic cooperation between members of the kin groups, as it did among the Plateau Tonga. So it's in the interest of a lot of the local people to have the case resolved. However, separation of the parties is not a typical feature of mediation in primitive societies.[60]

One group of people who especially desire a settlement is people who are related to both parties. The closest kin really have to side with their kinsman, but they don't have to like it. But those who aren't so closely related to one side will be severely criticized if they take sides in the dispute. They want a settlement on almost any terms.

The mediator is a go-between. But he's not just relaying messages. He actively shapes the settlement as it eventually emerges. Mediators almost always do that. I'll quote from Barton again, because this quotation often appears in books about the anthropology of law.

"To the end of peaceful settlement, he exhausts every art of Ifugao diplomacy. He wheedles, coaxes, flatters, threatens, drives, scolds, insinuates. He beats down the demands of the plaintiff or prosecution, and bolsters up the proposals of the defendants until a point be reached at which the two parties may

compromise.” It’s part of the game that the defendant initially refuses a settlement offer. These are proud people. Even a defendant who’s obviously in the wrong is expected to be truculent for awhile. He’s saving face. These are my kind of people. In another society, “Even where a principal’s claim is very strong and the balance of bargaining power lies with him, he commonly makes some effort to show tolerance and good will by giving way to his opponent in at least some small degree.”[61]

However, if the mediator thinks that the defendant is being unreasonable for too long, he may formally withdraw from the case. For the next two weeks, the parties and their kin can’t engage in hostilities. After the truce expires, retaliation, which may include revenge killings, commences. Nobody wants that. Usually the defendant backs down. But not always. It’s possible to start over with a new mediator. But this won’t go on endlessly. In another book, Ralph Barton mentions a case where the defendant deserted his wife and refused to pay compensation to her kinsmen. He rejected the settlements negotiated by *four* mediators. The plaintiff’s kin then speared him. The defendant’s family didn’t do anything about that.[62]

This is not the only way the Ifugaos cope with conflicts, or fail to. A serious crime among family intimates (such as theft, or even homicide, between brothers) is likely to go unpunished. Disputes are between, not within groups. A group can’t punish itself or claim compensation from itself. This is also the situation in some other primitive societies. But it is also true that in legally ordered state societies, law is least effective in regulating intimate relationships, those among people with the least “relational difference.”[63]

The Ifugao mediation procedure which I’ve described is also increasingly inactive as the relational difference among the disputants increases beyond local, more or less face to face social networks so as to implicate people who are more distant socially and geographically. Ralph Barton described the Ifugaos – who were not an especially peaceable people – as occupying concentric “war zones” radiating outwards. As disputes crossed the borders of zones, they became more serious, and more likely to be resolved by violence. In the outermost zone, the word “dispute” hardly applies. There, anybody you don’t know is an enemy, to be killed on sight. There is no doubt that primitive societies in general have often failed to establish mechanisms for the resolution of intergroup conflicts the more closely these approximate war.

But again, this is where states have also conspicuously failed, despite the United Nations, “international law,” etc. They often lack the common ground, the middle ground on which to base resolutions of disputes. We are at our worst at solving our problems when we are either too close, or too far apart. “The relationship between law and relational distance is curvilinear”: “Law is inactive among intimates, increasing as the distance between people increases but decreasing as this reaches a point at which people live in entirely separate worlds.”[64] “This double conception of morality,” wrote Kropotkin, in tranquil late Victorian England, “passes through the whole evolution of mankind, and maintains itself now.” He added that if Europeans had in some measure “extended our *ideas* of solidarity – in theory at least – over the nation, and partly over other nations as well -- we have lessened the *bonds* of solidarity within our own nations, and even