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Book Reviews

Jinee Lokaneeta, Editor

Toward Comparative Jurisprudence: Differing Approaches to Culture in Law and Society Scholarship

Law and the Culture of Israel. By Menachem Mautner. Oxford: Oxford University Press, 2011. 280 pp. $71 hardback.
Indigenous People, Crime, and Punishment. By Thalia Anthony. Abingdon: Routledge, 2013. 280 pp. $145 hardback.
Colonial Discourse and Gender in U.S. Criminal Courts: Cultural Defenses and Prosecutions. By Caroline Braunmuhl. London: Routledge, 2012. 182 pp. $140 hardback; $54.95 paperback.

Reviewed by Alison Dundes Renteln, Professor of Political Science, Anthropology, Law, and Public Policy, University of Southern California

In the twenty-first century, governments wrestle with the question of how to make sense of law in a multicultural world. As they figure out proper interpretations of cultural conflicts, these matters often emerge in the courtroom. Meanwhile researchers in comparative jurisprudence, criminology, and postcolonial studies explore the degree to which justice systems succeed in accommodating claims of minority groups and indigenous peoples. Here, I consider this burgeoning scholarship on culture and jurisprudence. The works I discuss illustrate how some analysts investigate clashes between groups and the state in their interpretation of cultural conflicts.

In *Law and the Culture of Israel*, Menachem Mautner, calls for a reconsideration of the multicultural state in the context of Israel. This erudite, interdisciplinary work draws on cultural studies, legal history, and political theory to interpret the evolving nature of multiculturalism in Israel. He suggests that multiculturalism has unique features because of the complex sets of divisions there. Debates among legal elites reflect philosophical differences between secular and religious Jewish communities over the national identity and the fact that the political system has excluded Arabs, for the most part.

Israel has experienced difficulty in part because of having modeled its judicial system after the United States, i.e., the "Anglicization and liberalizing of the law" (pp. 38–41). It is also one

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of few modern democracies without a written Constitution. His view is that the struggle in Israel has been to reconcile the 'Jewish state' and the 'Democratic State', and he demonstrates this with nuanced explanations of political movements, economic development, intellectual history, and judicial politics. Without assuming knowledge on the part of the reader, Mautner lays out conflicts that emerged in legal circles and explains their significance for the shifting nature of Israeli national identity. The work is lucid and well structured. In Chapter 5 he shows how the group advocating a religious state that follows Halakhah and traditional Jewish culture clashed with the secular Jewish group that advocated the familiar tenets of liberalism. The latter suffered from what he terms "the problem of cultural thinness" (p. 27) by comparison with the religious group that followed a long tradition.

Mautner offers an incisive analysis of flaws in the legal system. He questions the dramatic expansion of doctrines like standing, improper interpretation of other doctrines, and adherence to legal formalism. Of particular concern is the behavior of the Supreme Court during the 1980s and 1990s, the focus of Chapter 4. Toward the end of the book, Mautner turns to the "culture wars." Invoking Gramsci's concept of hegemony, he contends that Israel moved from hegemony to multiculturalism. Indeed, this is the moment when the question of Israel identity came to the fore again (p. 115). Ultimately, Mautner expresses a worry that Israel lacks a shared value system. Making reference to Rawls and his notion of an "overlapping consensus," he expresses concern about Israel's ability to fulfill its responsibilities as a democratic state.

The final two chapters focus on minority rights in Israel. Mautner argues for greater recognition of the rights of Arabs by taking steps such as including Arabic text to the anthem, adding signs of Arab cultural heritage to the national flag and national emblem, and making Arabic an official language of the same status as Hebrew (p. 214). His two policy prescriptions are to make "Israeliness. . .an inclusive super-category that encompasses all its citizens, both Jewish and Arab" (p. 212). Second, Israel should redefine its status as a "Jewish and Democratic state" so it includes being a "multicultural" state. (p. 213). He suggests that Israel should be called a Jewish and democratic state with an Arab national minority (p. 214).

Mautner argues that Israel has made serious mistakes. The book includes criticisms such as that problematic judicial activism eroded public confidence in the Court and politicized judicial appointments, as with the brilliant jurist, Ruth Gavison. Although some will welcome Mautner's comprehensive assessment of Israeli legal history, others will wish he had offered even more trenchant criticism of Israeli policies and actions. The intellectual breadth of this work makes it an exemplar of law and society research. This

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important book should be assigned in law and society, cultural studies, Middle East politics, and political theory courses.

Another interesting book, *Indigenous People, Crime, and Punishment* (2013), by Thalia Anthony, examines how the Australian judiciary has interpreted "Indigenous differences" in various time periods. While many focus on the implications of allowing immigrants to raise cultural defenses, fewer examine cultural biases in state law against indigenous peoples. Her work offers a provocative account of the representation of indigenous people in the Australian legal system: "This book explores the recognition dilemma in criminal sentencing: how courts recognize 'Indigenous alterity' in the Anglo-Australian legal order while upholding its whiteness" (p. 4).

By examining a set of cases decided during specific historical periods, Anthony provides an interesting consideration of the status of arguments related to "cultural differences" during the sentencing phase of trials. Explaining her approach, she says: "I use sentencing narratives to provide texture to an understanding of how a postcolonial system engages with Indigenous people through punishment processes. They provide insights into the shift in Indigenous affairs policy and the increasing paternalism of the state since the late 1990s" (p. xii). She is concerned that during the early period courts refer to "Indigenous identifies and culture" to "other" them, thereby reinforcing their status as outsiders (p. 2).

In the 1970s, judges allowed the consideration of evidence about aboriginal life to mitigate sentences, even if some might object because doing so may reinforce stereotypes. Anthony shows that cultural arguments are misused in subsequent decades to demonstrate the inability of aborigines to become rehabilitated; hence cultural factors are introduced to lengthen sentences! Ultimately she is concerned that "Indigeneity has become framed as a threat" (p. 195). In an interesting conclusion, she focuses on overcoming "the postcoloniality of recognition" (p. 199) and promoting "a transformative justice paradigm" that "attempts to reconcile Anglo-Australian law with Indigenous law" (p. 209).

The author draws on her experience in the Northern Territory among particular communities and bases her findings on qualitative analysis of "postcolonial institutional metaphors." Addressing limitations of her methodology, she notes that most of the cases she analyzes involve serious violent or sexual crimes against family members, property and riot offences (p. 26). She acknowledges that her case selection may convey the wrong impression that indigenous people tend to be involved in violent acts. Even though these sorts of offenses are not common, they provide the best evidence of the type of representations in law that she wishes to analyze.

The work provides support for her contention that the criminal law is oppressive and functions as a tool of social control. It seems

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indisputable that the law is paternalistic and has usually not served the interests of indigenous Australians. Rather than demonstrating how the legal process undermines their rights, Anthony could have devoted more attention to discussing institutions that would function better. More detailed elaboration on how the transformative legal order she envisions would operate would have enriched this work.

The book deserves praise for tracing important themes in legal history, its critique of the deployment of crime statistics, and the treatment of interesting jurisprudence. It also contains useful tables of legislation and of cases and inquests. This original monograph addressing indigeneity in the Australian legal system is a welcome contribution that should be widely assigned in criminology and law and society courses.

Over the past few decades, scholars have also written about law and culture by concentrating on the more specific question of whether legal systems should adopt a cultural defense policy. The literature includes works about this defense in countries across the globe (Carstens 2009; Foblets and Renteln 2009; Tomer-Fishman 2010; Wong 1999) including two important monographs in Italian (Basile 2010; Ruggiu 2012). In *Colonial Discourse and Gender in U.S. Criminal Courts: Cultural Defenses and Prosecutions* (Routledge 2012), researcher Caroline Braunmuhl reviews several U.S. criminal cases to identify patriarchal discourse in legal proceedings; she wishes to show that, generally speaking, multiculturalism is bad for women.

Braunmuhl selected decisions for her study that involve violence against women and children, even though cultural defense cases often center on other types of issues, e.g., animal slaughter, consumption of substances, marriage rituals, and loud religious sounds (Renteln 2004, 2014). At the outset, she explains that she will examine "gendered subordination in so-called other cultures" and the use of cultural evidence "...confirms the concern about the possibility of stereotyping to a depressing extent" (p. 1). As she has chosen cases to demonstrate "essentializing," her conclusions are not all that surprising. Moreover, she does not acknowledge that errors made in the several cases she analyzes hardly make judicial error inevitable. A concerted effort to be more careful with better judicial training, new benchbooks, or adoption of formal policies like jury instructions could avoid some of the difficulties she discusses (Renteln 2010; Renteln and Foblets, 2015).

One peculiarity in the book is her decision not to use the names of litigants, although she acknowledges anyone familiar with the subject, will identify them easily enough (p. 34). The main criticism of her work is that she assumes the cultural defense will reinforce stereotypes. While the reader may not disagree with her critique of the cases she has specifically chosen to support her argument, the conclusion she draws simply does not follow.

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It is remarkable that no legal system has officially adopted a cultural defense, even though judges often refer to cultural arguments in their decision-making, and scholars have written extensively about the subject. The absence of formal policies is disconcerting because this leaves litigants at the mercy of the judges; whether information is treated as relevant or taken into account, is largely a matter of luck. Whereas litigants can raise other defenses such as insanity, provocation, mistake of fact, and self defense and sometimes may successfully introduce cultural evidence via existing defenses, in some situations there is simply no way to ensure the consideration of cultural evidence.

When courts consider cultural evidence, there is often a question of whether expert witnesses can present explanations of the individuals' motivations, whether in a criminal court, family court, employment tribunal, or other forum. Considering how many sociolegal colleagues have testified in court about diverse cultural traditions, it is surprising their involvement has received scarcely any attention.

One of the major worries is that individuals will present fraudulent arguments in court. To avoid this courts will need the assistance of experts and leaders of community groups as well as a test to evaluate the authenticity of the claims (Renteln 2006). Another question is whether it suffices to have an expert present information about the pattern of behavior or custom, or whether it is also necessary to have a second expert who can address whether the cultural imperative affected the defendant or plaintiff in a particular dispute. To ensure proper use of the cultural defense, ideally the expert would attest to both, or else two would be needed. There is naturally a question of whether the state would pay for the experts required to raise the defense. As the U.S. Supreme Court mandated that funding be available for those seeking to raise an insanity defense (*Ake v. Oklahoma*, 1986), it is conceivable this obligation exists.

At the heart of many disputes is the question as to whether the behavior is objectively reasonable. Insofar as individuals are subject to various types of enculturation, what is "reasonable" may be culturally specific. The injustice occurs when individuals attempt to show that their conduct is considered reasonable in their communities, and courts reject that argument as "irrelevant." The adherence to standards of objectively reasonable behavior in criminal law and tort law complicates efforts to have a more nuanced approach to legal issues and may result in a miscarriage of justice. Some are concerned that judicial treatment of reasonableness may reinforce anachronistic and "colonial" approaches.

Sometimes scholars who write about the cultural defense have little knowledge of anthropology. They are unfamiliar with ethnographies, have not consulted the Human Relations Area Files, and

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have not conducted their own fieldwork. They equate analysis of patterns of culture with racializing discourse. This reductionist approach that equates cultural analysis with racism is a common mistake in the literature on this topic. Instead of identifying errors in the analysis that likewise reflect the failure of judges and lawyers to undertake adequate research about the customs, they reject the defense altogether. Such politicized scholarship does not advance our understanding of culture conflict, nor does it help members of marginalized communities who are effectively caught between two cultural communities.

Legal protection of culture is an important topic for law and society. The right to culture is itself part of international human rights law. Individuals belonging to groups feel strong attachment to their traditions, and unless the custom involves a threat of irreparable harm, physical or psychological, they should be entitled to make their own life plans. Although there will be disagreement as to what practices are harmful, those which are clearly not should be permitted, even if they strike others as bizarre.

Individuals will have differing views about the viability of recognizing culture in the courtroom. Before jumping to conclusions, it is far better to consider the phenomena in its diverse manifestations rather than forcing the conclusion by selecting only cases designed to promote an agenda. In the final analysis, jurisprudence requires a comparative approach and the use of empirical evidence. Instead of assuming that the consideration of "cultural differences" will necessarily cause harm, researchers should take stock of the actual uses of it in context.

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The Legacy of Ruth Bader Ginsburg. By Scott Dodson, ed. New York: Cambridge University Press, 2015. 314 pp. $29.99 cloth.

Reviewed by Susan Burgess, Department of Political Science, Ohio University

Associate Justice on the U.S. Supreme Court. Law professor. General Counsel for the ACLU's Women's Rights Project. Pop culture icon. As Scott Dodson puts it, Ruth Bader Ginsburg's "impact on the law over the last half-century cannot be overstated" (p. ix). While her successful challenges to gender norms and her fiery dissents on behalf of voting rights and equal pay are the source of much of her popular acclaim, this fine collection of essays also explores her contributions to the fields of federal procedure, jurisdiction, federalism, international law, criminal procedure, and tax law. The collection is divided into four parts: Shaping a Legacy, Rights and Remedies, Structuralism, and The Jurist. As is perhaps befitting a collection devoted to detailing her wide-ranging legacy, contributors include law professors, media stars, a practitioner, a historian, a sitting judge and even a short previously published piece penned by Ginsburg herself.

As contributor and Legal Affairs Correspondent for National Public Radio Nina Totenberg succinctly suggests Ginsburg "changed the way the world is for American women" (p. 4). Slate Magazine Senior Editor Dahlia Lithwick notes that it has become somewhat cliché to refer to Ginsburg as "the Thurgood Marshall of Women's Rights" (p. 222). Many of the essays in this collection detail exactly how this shift took place, emphasizing the careful legal, professional, and personal strategies that Ginsburg employed, slowly but surely upending gender norms that had oppressed women for years. The collection includes several essays that show just how pervasive those sexist norms were in both private and public life, and how they were addressed by Ginsburg as a law professor,

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