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Book Review

CULTURAL LAW: INTERNATIONAL, COMPARATIVE, AND INDIGENOUS, by James A.R. Nafziger, Robert Kirkwood Paterson & Alison Dundes Renteln¹

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CULTURAL LAW: *International, Comparative, and Indigenous (Cultural Law)* is a treatise that explores the relationships between culture and law. It is a pioneering and remarkable contribution to a burgeoning field. While there have been books about law and culture generally,³ as well as books about the specific contexts in which law and culture intersect, this is the first book to tie these elements together in a comprehensive volume.

Designed as a course text and reference work, the book begins with some of cultural law's articulations, moves on to definitional terms and debates, and then turns to culture and law in specific contexts. It is filled with case excerpts, scholarship, and media articles alongside authorial commentary and discussion questions. This terrain is vast—and there is no necessary complementarity between the specific contexts of culture and law—so it is not surprising that the book is hefty in both volume and content.

This review provides an overview of the book's content, as well as an analysis of its approach and orientation. In so doing, it seeks to position this text against the broader background of law's fraught relationship with culture. It proceeds in three Parts. First, the review highlights the contribution this text makes to the field. Second, it parses the organization and content of the book. Third, it

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1. (Cambridge, UK: Cambridge University Press, 2010) 1040 pages.
 2. LL.B. (Osgoode), M.Sc. (London School of Economics), LL.M. (Harvard); Ph.D. candidate at the University of British Columbia Faculty of Law.
 3. See e.g. Pierre Legrand, *Fragments on Law-as-Culture* (Deventer: WEJ Tjeenk Willink, 1999); Roger Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Aldershot: Ashgate, 2006); Lawrence Rosen, *Law as Culture: An Invitation* (Princeton: Princeton University Press, 2006).

explores dimensions of the relationship between law and culture that were not included in the book and suggests why these exclusions might matter.

I. THE EMERGENT FIELD OF CULTURAL LAW

From a purely functional perspective, *Cultural Law* fills a void and suggests a field of study in one fell swoop; for the first time, the disparate domains of culture and law appear under one cover. Given the breadth and depth of the subject matter, the authors have done an impressive job of distilling fields of law and swaths of literature into manageable excerpts and commentaries. Their method permits the book many possible uses: as an introduction to culture and/or law, as a reference text for a specific context, as a course book, and as a starting text for further research.

The authors are well-recognized academics who work under the umbrella of cultural law. James A.R. Nafziger is a professor of law who works in the fields of international law, sports law, and cultural heritage law. Robert Kirkwood Paterson is a professor of law who works in the fields of international trade and investment law, as well as cultural heritage and art law. Alison Dundes Renteln is a professor of political science and anthropology who works in the fields of law and cultural rights. The specific contexts in the book loosely mirror these fields of interest, with perhaps the exceptions of religion and language. The authors share an abiding interest in international law, which is visible throughout.

From a theoretical perspective, the book makes a significant contribution by reclaiming the field of culture for law. It comes on the heels of the momentum generated by scholarship in various disciplines proclaiming a world “beyond culture,”⁴ a world of “radical hybridity,”⁵ and a cosmopolitan world of “pluralism internalized.”⁶ This book expresses the continued existence and relevance of culture in the world. It refuses the hand of the postmodern iconoclast and turns instead to case law to demonstrate the persistent role that culture plays in legal disputes of all sorts. The chapters on specific contexts confirm the endurance of culture as an organizing category.

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4. Akhil Gupta & James Ferguson, “Beyond ‘Culture’: Space, Identity, and the Politics of Difference” (1992) 7:1 *Cult Anthro* 6 at 6.
 5. See e.g. Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton: Princeton University Press, 2002) at 25; Homi Bhabha, *The Location of Culture* (Oxon: Routledge, 1994).
 6. Jeremy Waldron, “Minority Cultures and the Cosmopolitan Alternative” (1992) 25:3&4 *Mich JL Reform* 751 at 754.

The corresponding theoretical inquiry, however, must be the nature of the reclamation itself. There is a two-part question lurking in the background: Is the field of cultural law sufficiently unitary to study in this way; and, then, should these phenomena be categorized as part of this same field? It is possible, in the legal register, that cultural heritage and sports have little to do with religion and language; they are certainly not regulated by similar laws. This is ultimately an issue of categorization, and it will fall to each reader to decide.

II. ORGANIZATION AND CONTENT

The authors set out their subject matter clearly, beginning with introductory concepts and settings before turning to specific contexts. A reader who engages with the text in order, from beginning to end, will find that the chapter content flows logically. The first two chapters provide an overview of concepts and definitions and offer a proposed framework for thinking about cultural law.

Chapter one is intended to show culture in different contexts. It opens with the *Yahoo! Inc v La Ligue Contre Le Racisme et L'Antisémitisme* case, which pitted a French law prohibiting the exhibition and sale of Nazi materials against the US Constitution's First Amendment protection for free speech.⁷ This case places culture, understood as a national, historically-contingent posture towards speech, in the legal forum. Chapter one then takes the reader through different cultural orientations towards dispute resolution, business transactions, and diplomacy. The readings in chapter one, coming at the beginning of the book, seem somewhat superfluous. If the aim is to show culture in various contexts, then it is difficult to reconcile these settings with the specific contexts explored in the following chapters. Moreover, because these excerpts contain discussions about the "non-litigious nature of the Japanese"⁸ or "five ... Korean cultural values,"⁹ they seem to trade on essentialized understandings of groups.

The second chapter is a deft evolutionary march through the definitional terms and disciplinary debates of each field. It situates the term "culture" through the entertaining and helpful debate that Clyde Kluckhohn and William H. Kelly present in "The Concept of Culture."¹⁰ The chapter then traces the evolution of the concept of culture from E.B. Taylor through to Clifford Geertz, providing solid

7. 169 F Supp (2d) 1181, 30 Media L Rep 1001 (ND Cal 2001); *supra* note 1 at 1.

8. *Ibid* at 11.

9. *Ibid* at 14.

10. In Ralph Linton, ed, *The Science of Man in the World Crisis* (New York: Octagon Press, 1980) 78; *supra* note 1 at 100.

grounding in various anthropological theories of culture. When the chapter turns to law, the treatment is equally thorough. The authors sketch the jurisprudential debates between legal positivism and natural law, and beyond.¹¹ The Hart-Fuller debate¹² is positioned alongside the cases of East German border guards who had killed individuals attempting to flee the country, in accordance with national law, but who were later prosecuted for their actions in the European Court of Human Rights.¹³ The chapter then skilfully introduces entire disciplinary specialities, including international law, comparative law, and Indigenous law.

Chapters three through ten provide a series of case studies of cultural law. The first three of these chapters examine the area of cultural heritage law. These chapters cover everything from theft of cultural materials to art forgery to artistic moral rights. A theme that emerges here is the contested ownership of cultural things. From the Indiana art dealer's Byzantine relic, to the Hindu labourer's discovery of the Pathur Nataraja, to the salvage rights in the Titanic, the issues of "whose culture" and "whose object" are prominent. Chapter six is about intangible cultural heritage, which is distinguished from traditional knowledge. It explores the different ways they interact with law, including intellectual property rights and Aboriginal custom.¹⁴ Chapter seven focuses on museums as repositories of cultural heritage and as institutions that are in dialogue with society.¹⁵

Chapter eight moves beyond cultural heritage to examine the nature and law of sports. It explores the consequences of institutionalization and commercialization and includes cases about contested doping results, participatory discrimination, and sport as a cultural exception in the European Union.¹⁶ Chapter nine addresses religion, primarily in the global context. It considers religion in the public sphere generally and offers readings about religious dress from different jurisdictions.¹⁷ This chapter could have usefully spent time exploring the relationship between religion and culture. Religion is an increasingly salient feature of cultural diversity, yet contemporary scholarship frequently conflates the two

11. *Ibid* at 123-32.

12. HLA Hart, "Positivism and the Separation of Law and Morals" (1958) 71:4 Harv L Rev 593; Lon L Fuller, "Positivism and Fidelity to Law—A Reply to Professor Hart" (1958) 71:4 Harv L Rev 630.

13. *Streletz, Kessler and Krenz v Germany* (2001), 40:4 ILM 811, 33 EHRR 751; *K-HW v Germany* (2001), 40:4 ILM 773, 36 EHRR 1081; *supra* note 1 at 134.

14. *Ibid* at 614.

15. *Ibid* at 674.

16. *Ibid* at 740.

17. *Ibid* at 831.

domains.¹⁸ Finally, chapter ten describes the relationship between language and culture.¹⁹ The concepts and debates from the first two chapters gain some traction here as the reader considers the place of language in discussions about identity and nationalism. These readings consider the Nigerian gradualist approach toward linguistic unification, French commercial signage in Québec, and foreign accent discrimination in the United States.

This summary of the chapters raises the categorization issue again. Are museums sites of cultural law that are helpfully separated from cultural heritage and art law? Should religion and language be considered contexts of cultural law, or are they better thought of as inherent aspects and manifestations of culture? Nonetheless, the case studies are organized and comprehensive; they cover the principal sources of law in each area and offer thoughtful discussion.

III. LAW'S CULTURE AND CULTURE'S LAW

In this Part, the review addresses two related perspectives on law and culture that are not explored in the book. The first chapter of *Cultural Law* introduces a framework that encompasses these perspectives, and the authors are clear that it is intended as the beginning of a conversation, not a final framework for cultural law. They propose a set of relationships between law and culture:

1. Law embodies culture and formalizes its norms.
2. Law promotes, protects, conditions, and limits cultural attributes and expressions.
3. Law harmonizes cross-cultural differences, confirms cultural rights, and establishes international standards.
4. Culture reinforces legal rules.
5. Culture conditions and constrains the adoption, interpretation, and vitality of legal rules.
6. Cultural expressions and symbols promote legal relationships.²⁰

The first perspective asks how the “law and culture” project might change if we accept that culture and law are mutually constitutive. The six-part framework incorporates this proposition in its twin notions that law embodies culture

18. Will Kymlicka, “The Three Lives of Multiculturalism” (UBC-Laurier Institution Multicultural Lecture, delivered at The Chan Centre for the Performing Arts at UBC, 15 April 2008), [unpublished].

19. *Supra* note 1 at 915.

20. *Ibid* at 64.

(relationship #1) and that culture reinforces legal rules (relationship #4). However, the framework does not quite permeate the rest of the book. This has two consequences. First, the case studies do not always explore the boundaries of each category or address the possibility that the fluid nature of culture might render law's application difficult or inappropriate in certain instances. Second, the rich theoretical debates about the nature of the relationship between culture and law do not appear in the book, and the historical debt that cultural law owes to legal realism and to the law and society movement, among others, is left unexplored.

The mutually constitutive relationship between law and culture has two elements. Law is steeped in culture; its concepts and reasoning styles are inherently cultural.²¹ This is *law as culture*. In this sense, law both contains and produces culture. This is what Benjamin Berger means when he describes law as a cultural form; law is not neutral or culture-less but rather constrained by its own “in-forming commitments.”²² It is equally true that culture carries the regulative force of law for its adherents. This applies particularly in the religious context, where religious norms govern commercial and family matters, sometimes in tribunals that operate alongside those of the state. This is *culture as law*. Jeremy Waldron puts it this way: “[T]he cultural side presents itself in some sense as *law* for those who live by it.”²³

There is no doubt that a course book—by its very nature, a comprehensive and introductory text—cannot touch upon every subject in depth. Nor would it be fair to require everything to do with culture and law to be in one book. It is simply that the reader is left with the persistent sense that the book glosses over the significance of this field of scholarship. Most importantly, the book could do a better job exploring the implications of the broad and deep application of law to cultural/cultured individuals and groups. If law presupposes certain cultural understandings and equipment, and culture contains regulatory norms of its own, to whom should the law apply and in what circumstances? Is it fair to apply the same law to two individuals who understand both the law and their own behaviours differently? This is the concern animating the cultural defense in criminal law, explored in chapter one, and it is the question at the heart of cultural law: What does the coexistence of culture and law mean for each of them at a foundational level?

21. Rosen, *supra* note 3 at 5.

22. Benjamin L Berger, “Law’s Religion: Rendering Culture” (2007) 45:2 Osgoode Hall LJ 277.

23. Jeremy Waldron, “One Law for All? The Logic of Cultural Accommodation” (2002) 59:1 Wash & Lee L Rev 3 at 17.

The book's second shortcoming relates to culture in society. Culture is fundamentally about identity. By providing the reader with a concrete concept of culture and focusing on legal disputes and texts, the book overlooks the scholarship on culture as identity and its significance for law. This scholarship focuses on ascriptive groups and rights within the liberal democratic state. It begins from the primordial debate about how to understand the self—as situated or unencumbered—and then considers what we need to make a good life, how we develop our identities, and why our identities matter.²⁴

This political philosophy literature on recognition, difference, and multicultural citizenship shares the common premise that individuals are often also members of identity groups. These identity groups may categorize individuals based on their ethnicity, nationality, religion, or culture.²⁵ These categories are generally understood to mark the collective dimension of people's identities. The role of the state in acknowledging these identities is at the core of this scholarship. This role merges into law when it turns to the theoretical and policy prescriptions required to realize and to preserve our individually and collectively identified selves. The prescriptions that follow include several types of cultural measures, most of which are located in law and certainly engage law in foundational ways.²⁶

The book comes close to contemplating how culture as identity matters for law when it enters the sphere of culture in courtroom settings, and it comes even closer in the chapters on religion and language. But the religion chapter, due to its primarily international perspective, does not squarely address religion and identity. The language chapter attends to this issue, directly asking how language shapes identity and tackling the complexities of multilingual accommodation, but it should not be the entirety of the discussion.

IV. CONCLUSION

This book is a major contribution to the emergent field of cultural law. It nimbly ties together previously disparate cultural domains and provides the reader with

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24. See Charles Taylor, "The Politics of Recognition" in Amy Gutmann, ed, *Multiculturalism: Examining the Politics of Recognition* (Princeton: Princeton University Press, 1994) 25; K Anthony Appiah, "Identity, Authenticity, Survival: Multicultural Societies and Social Reproduction" (*Ibid* at 149); Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995) at 25; Joseph Raz, "Multiculturalism: A Liberal Perspective" in *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford, Clarendon Press, 1994) 170.
25. Taylor, *supra* note 24 at 65 (noting other possible categories, such as gender and sexuality).
26. Jacob T Levy, (Oxford: Oxford University Press, 2000) at 125.

the legal framework governing each of them. This alone makes it an invaluable resource tool for academics, practitioners, and students. In addition, the book makes an admirable effort to provide a framework for cultural law. The authors' ability to see and synthesize this new field marks the beginning of a much larger project. We should be grateful to them for pointing the way.