



GW Law Faculty Publications & Other Works

Faculty Scholarship

2009

The Enduring Connections Between Law and Culture: Reviewing Lawrence Rosen, Law as Culture, and Oscar Chase, Law, Culture, and Ritual

Paul Schiff Berman

George Washington University Law School, pberman@law.gwu.edu

Follow this and additional works at: https://scholarship.law.gwu.edu/faculty_publications



Part of the [Law Commons](#)

Recommended Citation

57 Am. J. Comp. L. 101 (2009)

This Book Review is brought to you for free and open access by the Faculty Scholarship at Scholarly Commons. It has been accepted for inclusion in GW Law Faculty Publications & Other Works by an authorized administrator of Scholarly Commons. For more information, please contact spagel@law.gwu.edu.

LAWRENCE ROSEN, *LAW AS CULTURE: AN INVITATION* (Princeton Univ. Press, 2006) AND OSCAR G. CHASE, *LAW, CULTURE, AND RITUAL: DISPUTING SYSTEMS IN CROSS-CULTURAL CONTEXT* (New York Univ. Press, 2005)

*Reviewed by Paul Schiff Berman**

THE ENDURING CONNECTIONS BETWEEN LAW AND CULTURE

In an era of globalization, "culture" is sometimes treated as a dirty word. For those who see the world as increasingly "flat,"¹ culture can seem to be merely a retrograde imposition of local prerogative that stands in the way of progress.² Likewise, those who seek greater harmonization of human rights norms, commercial trade rules, or other legal standards may view culture as simply a monkey wrench in the machinery of global consensus and cooperation.³ In such debates, culture is often conceptualized as fundamentally pre-modern, something "they" cling to, but that "we" have long since jettisoned.⁴

* Dean and Foundation Professor of Law, Sandra Day O'Connor College of Law, Arizona State University. I owe thanks to Gosia Zawislak for editorial and research assistance.

1. See, e.g., THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* (2005).

2. See, e.g., Lawrence E. Harrison, *Introduction: Why Culture Matters*, in *CULTURE MATTERS: HOW VALUES SHAPE HUMAN PROGRESS* xxi (Lawrence E. Harrison & Samuel P. Huntington eds., 2000) ("A growing number of scholars, journalists, politicians, and development practitioners are focusing on the role of cultural values and attitudes as facilitators of, or obstacles to, progress."); Pratibha Jain, *Balancing Minority Rights and Gender Justice: The Impact of Protecting Multiculturalism on Women's Rights in India*, 23 *BERKELEY J. INT'L L.* 201, 207 (2005) ("We ought to ensure that multiculturalist notions conform to universal human rights norms . . ."); cf. Jean-Michel Servais, *Universal Labor Standards and National Cultures*, 26 *COMP. LAB. L. & POL'Y J.* 35, 47 (2004) (criticizing the notion "that some cultures are more open to progress than others [and] that cultural diversity will inevitably lead to opposition on questions of values and even constitutes an obstacle to development" but acknowledging the premise "that being too respectful of national considerations can lead to failure").

3. See, e.g., José A. Láinez & Mar Gasca, *Obstacles to the Harmonisation Process in the European Union: The Influence of Culture*, 3 *INT'L J. ACCOUNTING, AUDITING & PERFORMANCE EVALUATION* 68 (2006), available at <http://inderscience.metapress.com/media/mftkvluwjmj1d367rvvtk/contributions/3/1/a/t/31at8fuht2tja3xt.pdf>.

4. See, e.g., Mary Douglas, *Traditional Culture—Let's Hear No More About It*, in *CULTURE AND PUBLIC ACTION* 85, 87 (Vijayendra Rao & Michael Walton eds., 2004) (describing belief of development economists that "something called 'culture' is

Two recent books—*Law as Culture* by Lawrence Rosen and *Law, Culture, and Ritual* by Oscar Chase—provide a welcome response to this “anti-culture” bias. Both works point to the enduring claims of culture as the necessary and inevitable mechanism by which human beings construct meaning out of reality. Indeed, the capacity for culture is seen as a crucial part of our very evolution as a species.⁵ Thus, culture is not simply a set of customs we can choose to put on or take off like clothing; it is woven into the fabric of our being. Accordingly, cosmopolitans no less than localists are using cultural categories, reflecting cultural assumptions, and betraying cultural presuppositions.

Moreover, as both books make clear, law and culture cannot be disentangled. Rather, as Rosen points out, “law is so deeply embedded in the particularities of each culture that carving it out as a separate domain and only later making note of its cultural connections distorts the nature of both law and culture” (Rosen, p. xii). From this perspective, we must not see law as simply an autonomous system of rules that regulates disputes. Law is instead constitutive of how members of a society envision themselves and their relations to each other.⁶

Because of the ongoing importance of culture, we should not be surprised that efforts to harmonize both substantive norms and procedural systems run into difficulty on the ground. This is not news to comparative lawyers, of course, given their consistent efforts to conceptualize and categorize differences among legal systems. Yet,

the adversary of rational economic behavior, and that ‘traditional culture’ [is] holding the poor nations back from development”); Diana Ayton-Shenker, *The Challenge of Human Rights and Cultural Diversity*, UNITED NATIONS DEPARTMENT OF PUBLIC INFORMATION (1995), <http://www.un.org/rights/dpi1627e.htm> (contrasting universal human rights, conceptualized as “a modern achievement, new to all cultures” with “traditional culture,” which may not effectively provide such rights).

5. See Rosen at 3: “[Human beings’] categorizing capacity—the key feature of the concept of ‘culture’—was not something that happened *after* we became human but something that actually *preceded* our present speciation. Thus, the acquisition of the capacity for culture, through the selective advantage it offered, contributed enormously to our evolution into *homo sapiens*.”

6. This perspective echoes the formulation of Clifford Geertz:

[L]aw, rather than a mere technical add-on to a morally (or immorally) finished society, is, along of course with a whole range of other cultural realities . . . an active part of it. . . . Law . . . is, in a word, constructive; in another, constitutive; in a third, formational.

. . . .

. . . Law, with its power to place particular things that happen . . . in a general frame in such a way that rules for the principled management of them seem to arise naturally from the essentials of their character, is rather more than a reflection of received wisdom or a technology of dispute settlement.

Clifford Geertz, *Local Knowledge: Fact and Law in Comparative Perspective*, in *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 167, 218, 230 (1983).

even for them these books are likely to be useful, in that they offer a richly textured analysis of culture as the driving force behind this inevitable legal pluralism.⁷ And while neither book really tackles the ultimate questions of how best to design legal institutions, procedural mechanisms, or discursive practices to manage this pluralism, they do make it clear that assuming cultural considerations out of the equation is simply not an option. This insight alone makes these books a welcome addition to the legal literature.

* * *

In order to discuss two books centered on law and culture, we need at least a working approximation of what we (or at least Rosen and Chase) mean by the word "culture." Not surprisingly, defining "culture" is a complicated task. Indeed, scholars have long wrestled with this definitional question, and there is no necessary agreement on what the term encompasses.⁸ Yet, both Rosen and Chase appear to adopt a relatively similar understanding. In their view culture is far more than items of culture as understood in common vernacular, for example when we talk about "arts and culture." Thus, culture is not limited to film, theater, clothing, and exotic rituals and customs. Instead, culture is seen as an entire cosmology. In Rosen's terms, culture is the "capacity for creating the categories of our experience" (Rosen, p. 4). From this more expansive perspective, culture can be understood first to be the glue that binds together the various domains of human life: economics, kinship, politics, and law. (Id.) Second, culture is the force that causes the collective experience of a group to be "not only logical and obvious but immanent and natural." (Id.) Thus, culture is the way in which "we create our experience, knit together disparate ideas and actions, and in the process fabricate a world of meaning that appears to us as real." (Id.) Using this definition of culture, we can more easily see its inextricable linkage with law as part of the process of meaning-making.

* * *

7. See, e.g., Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007); Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC'Y REV. 869 (1988). There is, of course, an increasingly rich literature on legal pluralism in the international and transnational arena. See Berman, *supra*, at 1157-59 nn. 2-7 and accompanying text (summarizing literature).

8. See, e.g., RAYMOND WILLIAMS, *KEYWORDS: A VOCABULARY OF CULTURE AND SOCIETY* 87 (rev. ed., Oxford Univ. Press, 1983) (noting that "[c]ulture is one of the two or three most complicated words in the English language").

Having established a working understanding of culture, we are now better positioned to appreciate the central themes of the two books. Turning first to Rosen, *Law as Culture* functions as an elegantly short and clear introduction to, and summation of, some of the core concepts that have animated his important body of scholarly work. Strolling casually across a range of cultural contexts, Rosen looks for certain common issues that he argues all legal systems must address. He identifies four in particular. First he emphasizes the way in which "social control is fabricated through a mix of 'formal' and 'informal' mechanisms" (Rosen, p. 8). Second, he considers how "facts are created for purposes of addressing differences and rendering the process of determining truth and consequences consistent with common sense." (Id.) Third, he links law's reasoning process with the style of reasoning deployed elsewhere in the culture. (Id.) This linkage allows us to see how law both reflects and helps construct broader patterns of logic and rationality for the community. And finally, Rosen identifies law's role in helping to "create a sense of an orderly universe well beyond its role in addressing whatever disputes may arise" (Rosen, pp. 8-9). These four attributes of law then provide the organizational framework for the book, as Rosen devotes one chapter to each.

Rosen not only identifies these four roles, but also argues that these roles (though of course not the way the roles are played out) are common across legal systems (Rosen, p. 8). This turns out to be crucial to his project, because he is seeking to steer a course between the vain search for universals, on the one hand, and the reification of the particular, on the other. Indeed, to the extent that anthropologists often seem to insist upon cultural specificity and the distinctiveness of individual cultures, Rosen rejects such work as "an exercise in butterfly collecting" (Rosen, p. 12). Thus, he is, perhaps surprisingly, *not* interested in cataloging the ways in which culture *x* does things this way and culture *y* does things that way. Instead, he appears to see the anthropologist's role as one that tries to identify common *conceptual problems* across cultures, problems that are *addressed* in many different ways, but that are nevertheless amenable to some universal generalizations.

It is possible, of course, to quibble with Rosen's attempted middle-ground position between the universal and the particular. One might, for example, think that, by seeking to identify common conceptual problems across all legal systems, he is imposing a kind of conceptual universalism. On this view, what Rosen derides as butterfly collecting might actually be a wise acknowledgment that not just the answers but the very questions a legal system is asked to solve are culturally distinct.

Nevertheless, it would be difficult to dispute that Rosen's

approach yields important insights that are helpful in understanding most (even if possibly not all) legal systems. For example, he argues persuasively that law encompasses a continuum of formal and informal structures and that the seemingly more “official” forms of law cannot be understood separately from the broad range of social control mechanisms (Rosen, p. 15). Thus, as in Stewart Macaulay’s well-known study of American business behavior, even such a seemingly legalistic realm as contract law often operates more as a way of clarifying expectations and cementing relationships—particularly among those who see themselves as repeat players—than as setting the stage for a breach of contract lawsuit.⁹ Moreover, it may be that the fear of losing these relationships functions as a much greater potential sanction than the fear of being sued. Thus, “[i]n even so ‘legalistic’ an environment as contract law. . .it is the full array of social control mechanisms that informs the meaning and applicability of the law and the role it plays in the broader process of exchange” (Rosen, p. 15).

Not only must law be seen as encompassing this web of formal and informal sanctions, but also, according to Rosen, we need to see it in terms of both imposing order *and* creating flexibility (Rosen, pp. 22-23). This again is counter to the way we often conceive of law. In Rosen’s framework, cultures create a balance between “the order law seeks and the open-endedness that life requires to fashion a world that. . .gives order and flexibility to individuals and groups alike” (Rosen, p. 23). Accordingly, law lives entwined with culture, and we need to look at the panoply of formal and informal systems in order to see that, as with the contractual relations Macaulay identified, dispute resolution is only one part of a larger system that needs to create a sense of orderliness, while still preserving options for future relations. On this view, even a seemingly inflexible legal command such as an eye for an eye may be seen as a “structured limitation on potentially escalating violence” and therefore a means of preserving future relations (Rosen, p. 22).

Rosen also argues provocatively about the ways in which law creates facts. The verb in that phrase is, of course, crucial, as Rosen believes that law does not simply adjudicate pre-existing facts, but rather constructs what we understand to be the relevant details of a dispute. He notes that, even when there is little dispute about the events that have occurred, “something must first be regarded as a fact if it is to count as such” (Rosen, pp. 68-69). For example, we may think that honesty is best revealed through demeanor, or instead we

9. Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIO. REV. 55 (1963); see also Stewart Macaulay, *Freedom from Contract: Solutions in Search of a Problem?*, 2004 WIS. L. REV. 777 (updating and expanding the analysis).

may think it best understood through examining a witness' kinship network. Likewise, someone's socioeconomic background may be deemed relevant to understanding intent or it may be deemed irrelevant. And, of course, a legal system may define the boundaries of a case broadly or narrowly, to include a whole range of interactions among the parties and their families over time, or as a completely distinct single act to be adjudicated in isolation from any other.

To explore this idea of fact creation and definition, Rosen tours across a broad landscape of U.S., English, Continental, Japanese, and Arab case studies past and present. He begins by recounting the lengthy history of the development of the English jury, as contrasted with the development of fact-finding on the European continent (Rosen, pp. 70-88). This history charts how continental and English systems responded to the Lateran Council of 1215, which removed priests from the administration of ordeals.¹⁰ In place of this divine intervention, legal systems were forced to create new finders of fact: in England, juries; on the continent, judges steeped in the law of the Church. A second example for Rosen is the development of legal conceptions of probability in the seventeenth century. Here he traces the ways in which notions of probability evolved "[a]s the Protestant Reformation took hold, as science struggled with levels of certainty, and as standards for grading moral acts diversified" (Rosen, p. 88). Next, Rosen elaborates on his notion of how evidentiary rules reflect and reinforce cultural assumptions by describing some of the more bizarre facets of American evidence law—for example, are people really more likely to tell the truth while dying or while very excited than in other contexts?—and then contrasting the U.S. rules with the presuppositions underlying Japanese and Arab evidentiary rules (Rosen, pp. 94-105). He notes the more rigidly hierarchical nature of Japanese society and ties this cultural form to the use of compulsory conciliation and apology for resolving legal disputes. As Rosen points out, "conciliation forces higher-ranking persons to honor their obligations, allows people a clear acknowledgment of their rank, and encourages extralegal pressures" (Rosen, p. 97). Turning to Arab courts, Rosen points out that because a person is identified largely in terms of those with whom he or she has established bonds of indebtedness (Rosen, p. 98), it is not surprising that rules of relevance are far looser, allowing a judge to take into account a much broader set of relationships than would be typical in a U.S. court. As Rosen notes, "What an Arab judge deems indispensable a British or American judge is cautioned to ignore" (Rosen, p. 100). Finally, Rosen turns to the ways in which evidentiary rules reflect

10. For Rosen's account of this history, see pp. 79-80.

conceptions of the Self, ideas about expertise, and other cultural conceptions. For example, because Arab cosmology assumes inner states such as intent are discoverable through a person's relationships and external acts, inquiries about past associations and social background are deemed relevant (Rosen, p. 110). Similarly, local experts who know the social interactions are welcomed, while U.S. courts, in contrast, have come increasingly to rely on experts possessing institutional stature rather than personal connections (Rosen, p. 125).

In the final two sections of the book, Rosen turns to more abstract issues of metaphor and cosmology. He argues, as others have,¹¹ that law is steeped in the metaphors we use to understand human behavior and interaction (Rosen, pp. 131-39). Further, he suggests that cultures have reasoning styles, which also play out in legal rules (Rosen, pp. 139-45). Even the very idea of precedent is suffused with a conception of time as linear and progressive. As to cosmology, Rosen argues for the important role of law in maintaining a culture's experience of the world "as a unified and sensible whole" (Rosen, p. 171). Moreover, he goes further and suggests that "the predominant point of some legal systems may be the maintenance of cosmological sense rather than 'practical' dispute resolution" (Rosen, p. 175).

All of this makes for an entertaining introduction to the interaction of law and anthropology. Indeed, though none of the insights contained here is particularly new to anthropology (and Rosen himself has trod similar ground in his previous work),¹² this book is a lovely and easy-to-read entering point into the variety of ways law and culture intermix. As such, its ideal audience is, perhaps, lawyers who have a comparative bent but who do not have much detailed background on the deep relationship of law and culture.

Even given Rosen's obvious decision to be a bit more breezy and introductory in this book, one could still quibble with just how breezy it is. Thus, as discussed above, Rosen frequently generalizes about "Arab" legal systems, without providing any differentiation among different subsets of "Arab." Similarly, his various other legal classifications—continental systems, common law systems, Japanese systems, Cheyenne systems, and so on—have a tendency to feel a bit schematic and lacking sufficient nuance. Nevertheless, Rosen offers enough detail to make his key points, and of course the breeziness of his book is one of its strengths; the book is an easy read, and that is

11. See, e.g., ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* (2000); STEVEN L. WINTER, *A CLEARING IN THE FOREST: LAW, LIFE, AND MIND* (2001).

12. See, e.g., LAWRENCE ROSEN, *THE ANTHROPOLOGY OF JUSTICE: LAW AS CULTURE IN ISLAMIC SOCIETY* (1989).

great praise for a work as serious-minded and thoughtful as this.

* * *

Oscar Chase's book is focused less on the general cosmology of law than on the specific issue of dispute resolution processes. Yet, like Rosen, Chase argues for the deep connection between culture and disputing. Moreover, perhaps because Chase is a law professor rather than an anthropologist, he takes an additional step and attempts to draw normative conclusions from this core observation. Thus, he suggests that "[t]he recognition and understanding of this relationship [between culture and disputing] will enrich our capacity to evaluate recommendations for change—particularly when they involve borrowing from other societies" (Chase, p. 2).

Chase starts, like Rosen, with what some might term a "primitive" dispute system; in this case the example is the Azande of Central Africa (Chase, pp. 15-29). Here, it is easy to see how dispute institutions are culturally embedded and play a role in disseminating (and of course shaping) cultural values, beliefs, and social arrangements. Next, Chase turns to the dispute resolution processes of modern industrialized societies, arguing that here too, no less than for the Azande, dispute resolution is a culturally inflected process (Chase, pp. 30-46). Indeed, echoing Rosen's argument about fact creation rather than fact discovery, Chase contends that rules of law and evidence function like oracles (Chase, pp. 39-43). He notes that the application of reason to observable facts reflects "methods of science that have dominated Western thought since the end of the Middle Ages" (Chase, p. 41). Yet, this seeming scientific rationality is undermined in every modern legal system by rules that sacrifice accuracy in favor of other cultural values. Thus, "[l]egal processes tell the decider how the real must be sorted from the false" (Chase, p. 42).

Having laid this groundwork, Chase then takes a turn that differentiates his book from Rosen's; he draws explicit lessons for law reform. Most fundamentally, he argues that "[a]ny proposal to borrow procedures from another society should prompt a cultural inquiry" (Chase, p. 48). Thus, processes that work in one culture may fail elsewhere because the processes may reflect deeply held worldviews. This may be particularly true of dispute processes, "because they are so public, dramatic, and repetitive." (Id.) For example, the oft-noted American reliance on law may reflect core features of American culture more generally. Chase relies on the insights of Robert A. Kagan in this regard, arguing that the American reliance on law arises from an idealistic culture that demands comprehensive solutions to social problems, while at the

same time mistrusting government bureaucracy and therefore demanding that such solutions be reached through decentralized processes.¹³ The result, for Kagan, is a reliance on litigation. And Chase rightly points out that trying to reform this reliance on adversarial legalism may not “work” because it is so central to culture.

Of course, observing the tie between law and culture cannot fully answer the normative law reform question. This is because law and culture operate in a reflexive loop, each influencing the other. Accordingly, a change in law may actually change culture over time. Thus, a legal reform or transplant from another system may be rejected because of lack of cultural fit, but alternatively it may be adopted and ultimately come to seem natural, thereby effectuating broader cultural shifts.

Chase explores these interactive transformations of law and culture in his explication of the rise of Alternative Dispute Resolution (ADR) processes in the United States. One might think that given the cultural rationales for adversarial legalism summarized above, ADR would have difficulty taking root here. Yet, Chase traces the rise of ADR to a confluence of cultural factors: “distrust of government, privatization, humanization of large-scale institutions, social progress through individual improvement, and postmodern skepticism about an objective reality” (Chase, p. 94). Thus, ADR is less inexplicable than it might first appear. Moreover, in true Mobius Strip fashion, the change in legal landscape inevitably feeds back into an altered cultural conception about how disputes should be resolved.

Accordingly, while Chase raises normative questions about legal transplantation, it is not clear how such questions actually cash out. After all, it is easy to see why transplants will fail if culture is static, but in Chase’s conception, as noted above, law changes culture just as much as it reflects it. Thus, a transplant could actually effectuate cultural change rather than simply being thwarted by cultural specificity.

To be fair, Chase acknowledges this difficulty. Indeed, in his conclusion, he explicitly states that a more culturally-sensitive analysis will not “necessarily dictate a resolution” of debates about transplants (Chase, p. 139). Instead, he urges only that “the constructive power of dispute-ways should be on the agenda.” (Id.) As such, the outcome of any given transplant discussion, according to Chase, “should depend on an estimate of the cultural clash and constructive strength of a contemplated new direction and, even

13. See Chase at 49 (quoting ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 15-16 (2001)).

more important, the desirability of the value that will be served." (Id.) This is undoubtedly correct as far as it goes, though it is unclear exactly how such estimates will be made. In any event, Chase rightly concludes that seeking technocratic, purportedly pan-cultural, solutions is unlikely to be a successful long-term strategy. And in this insight alone Chase advances the discussion a great deal.

* * *

Both Rosen and Chase are to be congratulated for ensuring that an understanding of the deep ties between law and culture always plays a part in our consideration of the interactions among legal systems and the melding of legal rules. Such deep ties require, among other things, that reformers remain cautious and self-aware. Thus, these two books lay the essential groundwork for future explorations.

Such future explorations will undoubtedly need to push even further to the core legal process questions of the twenty-first century, an era in which both law and culture are likely to become increasingly polyglot. As communication technologies, trade, and migration blur cultural boundaries and even begin to undermine relatively stable ideas about the majority religious, racial, and ethnic groupings that comprise a state, law will face greater pressure to incorporate foreign cultural practices. Yet, at the same time, there are bound to be backlashes, as cultures fight fiercely to retain their dispute resolution mechanisms and legal cosmology just as surely as they resist other perceived encroachments.

Negotiating this complex interplay between cultural bricolage and cultural essentialism is bound to be the crucial question for comparative law in this new era. We will need to develop a jurisprudence for an increasingly hybrid world where cultural conceptions remain crucial, but are in flux.¹⁴ In the end neither book offers much of a roadmap with regard to this sort of jurisprudence. To be fair, this is not Rosen's project at all, and to the extent Chase addresses the question, his analysis is meant to be only an initial foray. Thus, these useful books point the way for subsequent analyses, even while stopping short of tackling the core future issues of law and globalization themselves.

In the end, both books are readily accessible introductions to the cultural analysis of law, and comparative lawyers will find much food for thought. And if these books still leave some of the big

14. For my own preliminary stab at such a jurisprudence, see Berman, *supra* note 8; see also PAUL SCHIFF BERMAN, LAW BEYOND BORDERS: JURISPRUDENCE FOR A HYBRID WORLD (forthcoming, Cambridge Univ. Press 2009) (expanding on this idea).

2009]

BOOK REVIEWS

111

questions of legal/cultural change unresolved, we will certainly not be able to take the next step without heeding the insights they contain. Thus, as we move into a world of increasing legal pluralism and hybridity, Rosen and Chase have laid down important markers to which we should keep returning as we traverse the uncertain road ahead.