

COPYRIGHT NOTICE:

Lawrence Rosen: Law as Culture

is published by Princeton University Press and copyrighted, © 2006, by Princeton University Press. All rights reserved. No part of this book may be reproduced in any form by any electronic or mechanical means (including photocopying, recording, or information storage and retrieval) without permission in writing from the publisher, except for reading and browsing via the World Wide Web. Users are not permitted to mount this file on any network servers.

Follow links for Class Use and other Permissions. For more information send email to: permissions@pupress.princeton.edu

Introduction

The creation of legal meaning
takes place always through an
essentially cultural medium.

—*Robert Cover*

Parables of the Law

In the 1950s an Australian aboriginal man named Muddarubba threw a spear and killed an aboriginal woman when she called him by a name that refers to male genitals. You may, the white judge told an all-white jury, find the aboriginal defendant innocent. If, however, you think that even by the standards of his own group he should not have killed the woman, you must find him guilty of murder. But if, notwithstanding our own belief that such killing is wrong, you think that what this man did was acceptable by the precepts of his own group, you may find him guilty not of murder but of the less serious offense of manslaughter. The decision, he concluded, is up to you.

Late in the Second World War, a German woman's neighbors told Nazi officials that she was making defeatist statements. The woman was accordingly sent to prison, from which she was released at the war's end. The woman then sued her neighbors. By denouncing her to the existing regime, she argued, the defendants had violated a provision in the law code, which long predated the Nazi era, that allows one to sue another for acting "against good morals" (*contra bonos mores*). Accordingly, she asked the court to exact some sanction on her neighbors for having subjected her to the Nazi imprisonment.

A Japanese man was residing in New York City. He had lived in the United States on other occasions and was actually quite knowledgeable about American law. But, as he told a colleague, he always wondered which agency of government you were supposed to go to if no one in the apartment building would talk to you.

Coming to Law

The history of human beings begins before the history of being human—and with it begins a crucial aspect of how we might usefully think about law.

Since the 1920s, paleontologists have made a series of stunning discoveries and have drawn from them a no less stunning conclusion. It began when scientists discovered the remains of early hominids who were capable of making and using tools. Previously, scientists had assumed that such behavior could not occur before we were fully human. But as the evidence grew, two inferences became inescapable. First, the capacity to make tools was part of a larger process of establishing the categories of one's everyday experience and manipulating these categories through the symbols that make them manifest. Thus, organizing work groups along lines of kinship or gender or, eventually, being able to communicate emotions and commands through speech, were, like the fabrication of tools, critical to being able to successfully conceptualize and work one's world. Moreover, this 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*.

The conclusion that follows is of enormous significance: Human beings possess the capacity to create the categories of their own experience, and this capability, having largely replaced instinct, came before—and was instrumental in creating—the animal we have become.

Culture—this capacity for creating the categories of our experience—has, in the view that will be central to our concerns, several crucial ingredients. As a kind of categorizing imperative, cultural concepts traverse the numerous domains of our lives—economic, kinship, political, legal—binding them to one another. Moreover, by successfully stitching together these seemingly unconnected realms, collective experience appears to the members of a given culture to be not only logical and obvious but immanent and natural. This sense of orderliness operates at both a conceptual and a relational level, organizing our view of daily life as commonsensical and our ways of orienting our actions to others as systematic and workable. Features that may not seem to be linked are, therefore, crucially related to one another: Our ideas of time inform our understanding of kinship and contract, our concepts of causation are entwined with the categories of persons we encounter, the ways we imagine our bodies and our interior states affect the powers we ascribe to the state and to our gods. In short, 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.

Law is one of these cultural domains. Like the marketplace or the house of worship, the arrangement of space or the designation of familial roles, law may possess a distinctive history, terminology, and personnel.

But even where specialization is intense, law does not exist in isolation. To understand how a culture is put together and operates, therefore, one cannot fail to consider law; to consider law, one cannot fail to see it as part of culture.

The moment we approach law in this fashion—the moment we start to think in terms of connections—the questions we ask and the theories we apply reveal themselves as deeply intertwined. When Muddarubba reacted to the woman’s utterance by throwing a spear at her, was he envisioning her use of that word as a challenge to his manhood—and with it his ability to provide for his dependents in a difficult environment? Or was it, like using an epithet to one’s commanding officer, a challenge to the authority structure that has allowed the tribe as a whole to survive? What sense of the order of the world is set in play for Muddarubba—or, crucially, for the women in their society—by this utterance, and how can we translate the concepts through which their world is composed from one cultural and legal system to another? When the German woman sought relief for the moral wrong she said was done to her by neighbors, to whom did the court turn since, as they said, “good morals” should be gauged by the views of those members of society who are deemed “just and equitable”? Indeed, in what ways did that assessment partake as much of their commonsense assumptions about human nature and human relation-

ships as of the history of German legal thought? And when the Japanese visitor found himself alone in a strange country, what sort of response to his question about the appropriate agency to help would have made sense to him; what is it he thought that law, by virtue of its capacity to summarize his experience, should be able to do about his disturbing sense of loneliness?

It is no mystery that law is part of culture, but it is not uncommon for those who, by profession or context, are deeply involved in a given legal system to act as if “The Law” is quite separable from other elements of cultural life. Lord Mansfield could famously say that the law “works itself pure,” while Lon Fuller could assert that since good is more logical than evil, the result of the reduction of contradiction through common-law reasoning will necessarily be “to pull those decisions toward goodness.” And certainly believers in a given religion may envision the precepts of its attendant law as universally true. But context is crucial: When we hear a court speak of “the conscience of the community,” “the reasonable man,” or “the clear meaning of the statute,” when we watch judges grapple with parenthood as a natural or functional phenomenon, or listen to counsel debate whether surrogate motherhood or a frozen embryo should be thought of in terms of “ownership,” we know that the meaning of these concepts will come not just from

the experience of legal officials or some inner propulsion of the law but from those broader assumptions, reinforced across numerous domains, that characterize the culture of which law is a part. And when we seek law outside of specialized institutions—when a kinsman mediates a dispute or members of a settlement use gossip or an informal gathering to articulate their vision of society—the terms by which they grasp their relationships and order them will necessarily be suffused by their implications in many interconnected domains.

In each instance, law is so inextricably entwined in culture that, for all its specialized capabilities, it may, indeed, best be seen not simply as a mechanism for attending to disputes or enforcing decisions, not solely as articulated rules or as evidence of differential power, and not even as the reification of personal values or superordinate beliefs, but as a framework for ordered relationships, an orderliness that is itself dependent on its attachment to all the other realms of its adherents' lives. Different societies may play up one or another institution as a vehicle for creating and exhibiting this sense of order—whether it be in the elaborate rituals of Bali or India, the theater of tragedy and comedy in ancient Greece, or the drama of a British or American trial—but nowhere is law (in this sense of ordered relationships) without its place within a system that gives meaning to its people's life.

Law doesn't just mop up, it defines. It doesn't just correct, it makes possible. What it defines, the meaning frames it sets forth, is an important force in shaping human behavior and giving it sense, lending it significance, point and direction. [We can view] law not so much as a device or mechanism to put things back on track, when they have run into trouble, but as itself a constructive element "within culture," a style of thought, which in conjunction with a lot of other things equally "within culture"—Islam, Buddhism, etc.—lays down the track in the first place.

—Clifford Geertz

We can, therefore, approach a variety of legal systems looking for the ways in which, as part of their larger cultures, each finds itself having to address certain common problems. Among these are the ways in which social control is fabricated through a mix of "formal" and "informal" mechanisms, the ways in which facts are created for purposes of addressing differences and rendering the process of determining truth and consequences consistent with common sense, the means by which reasoning applied in one domain (like the law) remains linked to the style of reasoning that binds other elements of the culture together, and the ways in which law may create a sense of an orderly universe well beyond its role in addressing whatever dis-

putes may arise. Seen in this fashion, some unusual features begin to present themselves, features that we will return to as we weave our way through a number of these common legal concerns. Three in particular are, however, worth noting at the outset.

Metaphor, Fact Creating, and Cosmology

The first has to do with the role of metaphor. This may seem a more appropriate subject for a book on literature than law, but metaphor may well be the key mechanism through which all of the crucial connections among cultural domains take place. To speak of one's body as a "temple," home as a "castle," intellectual life as "a marketplace of ideas," or equality as "a level playing field" is far more than mere wordplay: Such metaphors connect what we think we know with what we are trying to grasp, and thus unite, under each potent symbol, those diverse domains that must seem to cohere if life is to be rendered comprehensible. Indeed, if, as an aspect of our species' nature, thought is not intrinsic, closeted in some "secret grotto of the mind," but extrinsic, living in the publicly worked symbols that give it momentary materiality, then metaphors are central to the creation of thought and to binding diverse categories into a manageable whole. And even if the organization of our categories does not simply replicate the structure of our relations, the linkages—of style, identity, and strength—are integral to the capacity of people to ori-

ent their own thoughts and actions in terms of those they encounter. As we look for the telltale place of culture in law and the inescapable role of law as culture, we will necessarily have to consider the role of metaphor as a unifying agent.

[T]here is in cultures a strain toward conceptual consistency or logical integration, and in social systems a strain toward functional integration in the sense that normatively governed patterns of interaction complement each other. . . . Both “society” and “culture” are abstractions from the same phenomenon—social action. As [Gilbert] Ryle puts it, “. . . the styles and procedures of people’s activities *are* the way their minds work and are not merely imperfect reflections of . . . the workings of minds.” But the requirements of cultural consistency and functional integration are somewhat different. Putting one’s thoughts in order and putting one’s affairs in order are rather different activities for either a person or a community. They proceed along different lines, but tend to react upon one another so as to produce not a one-to-one matching of ideas and social relations, but rather a continuing process of mutual adjustment and challenge.

—Lloyd A. Fallers,

Law without Precedent, 1969, 316

A related consideration is the way any society, or institution therein, creates facts. Again, this may seem an odd way of putting the matter. Why not say “discovers” the facts, or even “acknowledges” them? But if, as category-creating creatures, we are constantly forging the units of our own experience, then “facts,” like anything else, must be fabricated, connected, rendered obvious. So, as we will see, the common law may have developed its form of reasoning in association with its culture’s ways of viewing essential human nature, its ways of construing people’s inner states as part of a particular religious history, and its rules of evidence in association with changing visions of economic and political “certainties.” By contrast, the law of many Islamic or Asian cultures may turn on issues of moral equivalence or social hierarchy, each culture fashioning a baseline from which, out of the totality of sense and imagination, a believable way of grasping facts can be forged. If culture is by definition constitutive, so too must law be formative and not simply formed.

And third, while analyses of law tend to focus on conflict and resolution, rule-making or rule-applying, one can—without in any way downplaying these aspects—also see law as contributing to the formation of an entire cosmology, a way of envisioning and creating an orderly sense of the universe, one that arranges humanity, society, and ultimate beliefs into a scheme perceived as palpably real. Edward Levi once wrote that law “has absorbed within itself a view of the nature of

human beings, and of how their acts and the incidents which overtake them may be classified for favor or penalty.” He could have added that in doing so it reflects and creates a still broader sense of the order of all one’s experience. We may, as Clifford Geertz suggests, “conceive of law as a species of social imagination,” not just, or even primarily, as a vehicle for keeping society functioning; Law, as part of that imagination, may help us grasp the world in which (to use Annie Dillard’s phrasing) “we find ourselves so startlingly set down.” Thus to consider the styles of legal reasoning or the structure of cultural assumptions built into many legal precepts is to offer both a window into the larger culture and, no less importantly, to gain an often undervalued window into legal processes themselves.

In the course of these pages, then, our focus will remain on the kinds of problems that face any legal system and how these issues move in tandem with the features of their broader cultures. The trick, of course, is neither to engage in some quest for the universal nor to approach each legal system as an exercise in butterfly collecting. Instead, it is to focus on connections, to keep turning the kaleidoscope so that as different legal and cultural systems appear we appreciate how differently they may arrange the connections among their parts. In the process we will, necessarily, be attending to the multifarious forms of cultural/legal integration that only such comparison can make visible. We will also be able to consider some of the legal and social

theories that have been central to Western jurisprudence in the light of a broader comparative framework. And throughout we will see how quite different orientations can reveal possibilities and relationships that are vital to the most practical as well as the most theoretical of legal concerns.