BOOK ANNOTATIONS

Legitimacy: The Right to Rule in a Wanton World. By Arthur Isak Applbaum. Cambridge, MA: Harvard University Press, 2019. Pp. 1, 294. $41 (hardcover).

Reviewed by Alexandre Abitbol

Rulers, academic philosophers, and the ruled have varying and conflicting views about what counts as legitimate government. In *Legitimacy*, Arthur Isak Applbaum reinvigorates the concept of legitimacy with philosophical spring-cleaning, political theory, and creative applications. The book is divided into the three parts. In the first, Applbaum makes conceptual space for a substantive account of legitimacy, relegating views that rely exclusively on procedure or pedigree to mere, mistaken conceptions of a broader concept. In the second part, he proposes a specific substantive account of legitimacy on which government is morally right in governing when it realizes and protects the freedom of the governed over time. This, he claims, will only be the case when government is a "Free Group Agent." Reasoning from what agency requires of individuals—how we properly exercise our capacities for reflection and action—Applbaum proposes criteria for successful group agency. In the third part, Applbaum discusses three principles of legitimacy that follow from the Free Group Agency view, tracing implications to contemporary questions of governance.

Applbaum begins with the philosophical labor of clarifying what is meant in talk about legitimacy. Legitimacy is about the right to rule. Criteria of legitimacy identify what government must do in order to claim respect for its directives. Applbaum responds to both folk and philosophical theories that commonly take procedure or pedigree to be the only criterion of legitimacy. These theories have trouble dealing with validly elected governors that oppress the governed. Their proponents must either embrace or gracelessly escape the conclusion that oppressive governments can be both legitimate and heinous. Applbaum argues that embracing these kinds of proceduralist views either prematurely cuts off debate about

the criteria of legitimacy or confuses the best way to acquire legitimacy with the criteria of actually having it.

Applbaum also addresses what follows from government being legitimate. There are two common positions in the academic literature on what respect is due to legitimate directives: either a duty to obey or mere acquiescence in justified coercion. If legitimacy gives rise to a duty to obey, then directives—trivial or terrible—must be followed lest citizens violate an obligation or rebut government's legitimacy. On this view, it becomes difficult to situate praiseworthy acts of civil disobedience in an otherwise respectable governing order. However, if legitimate government is merely justified coercion, we lose resources to characterize the immorality of those who violate the law and are left only with a vocabulary strained through the rulers' use or threats of force. On this view, we can call a tax evader selfish or applaud her incarceration, but we have little to say about the wrongfulness of her violating the law.

Applbaum aims for a middle position between these extremes. He argues that legitimacy is the moral power to create and enforce institutional orders, which correspond to moral liabilities for subjects (the *power-liability view*). Transposing Hohfeldian incidents into the moral context, he argues that legitimacy involves a broad array of moral relations. Governments can sometimes change what subjects are morally required to do, but they also change what subjects and officials may morally do in a multitude of ways. This power exists separately from whether, and to what extent, individual directives are worthy of our respect. While government directives may sometimes impose duties, that depends on the substance of those directives. This position invites a richer use of moral vocabulary to evaluate our and others' relationships to the law.

Applbaum provides the example of Clamdigger who crosses Beachowner's property to reach the water. Suppose a court wrongly decides that Clamdigger does not possess a right-of-way in a valid, final determination of law. On Applbaum's view, we can observe that the ruling has changed the parties' normative circumstances such that Beachowner does not have a moral duty preventing her from blocking beach access (unless, for example, the duty derives from Clamdigger's right of survival). Moreover, in light of the legal error, we might take the view that Clamdigger does not have a duty to halt at Beachowner's obstruction should she create one.

Applbaum preserves the possibility of legitimate government making mistakes in its moral math without losing the right to rule. His position reorients legitimacy discourse to the substance of what rulers do. Government, and our evaluations of it, cannot rest on procedural laurels. Rather, the richness of the relationship between rulers and the ruled requires a more nuanced assessment of what government does with its right to rule.

In the second part, Applbaum offers an account of group agency. He notes that our concept of agency is not fundamentally limited to individuals, but can also apply to groups. To be free, individuals must be able to exercise capacities of *self-governance*: to assess reasons for action (*considering*), choose to act in light of those reasons (*willing*), and to act according to one's choices (*doing*). In addition, individuals must be *independent*, not dominated by others. Therefore, a group agent must also be self-governing and independent.

Applbaum proposes an account of how individuals' capacities for self-governance can be *constituted* as one group agent's: meshed aims and plans, representation, or procedure. We collectively exercise our capacities for considering, willing, and choosing by agreeing on ends and means, delegating people to do the same, or aggregating our capacities according to some procedure. Similarly, Applbaum proposes an account of the ways through which individuals can become part of the group agent such that it is appropriate to consider her the joint author of the agent's actions—the procedure of polling people's preferences does not make a polity. Instead, our consent, principles of fair play, or practical necessity combine or *conscript* us into a group agent.

This account of group agency applies to amalgamations of individuals as diverse as string ensembles and organized crime syndicates. A properly constituted group agent becomes its own locus of respect and responsibility, not just the sum of individual moral evaluations. When a group agent, properly constituted and conscribed, performs Tchaikovsky or a kidnapping, we can assess the performance of the whole group, not only how each individual performs.

However, legitimacy concerns political group agency, in which the group agent threatens and carries out coercion against conscripted members and augustly aims to change

their normative status. Applbaum argues that government is legitimate when it is a free group agent that counts the individuals composing it, as free members, and protects their freedom over time. He proposes, under those circumstances, purported intrusions into individual's freedom are not unduly coercive because they either leave individuals sufficiently free, or do not actually restrict freedom. Foregoing the endless opportunities of anarchy may, many argue, still leave individuals sufficiently free. In addition, many argue that the author of a law, that restricts her own freedom, is not left less free.

In the final part, Applbaum argues three necessary conditions follow from the free group agency view. They are a *liberty* principle constraining *what* government can decide, an *equality* principle indicating *who* is to decide, and an *agency* principle showing *how* to decide. Applbaum traces the implications of these principles leading to sometimes orthodox, sometimes surprising conclusions.

First, the liberty principle requires that government protect an adequate set of basic rights and liberties consistent with an equal set for all. Applbaum argues that this justifies counter-majoritarian institutions that delineate the domain of what governors may do. This leads Applbaum to endorse a judge's moral and legal authority to strike a constitutional clause—a legal norm with unassailable pedigree—should it overstep.

Second, Applbaum argues that citizens are treated as political equals when governed by legitimate law with votes of fair value. As legitimacy requires more than mere pedigree, voting procedures must, at bottom, be outcome-sensitive. A facially neutral voting procedure that systematically deprives members of a minority of their vote's fair value, subjecting them to the domination of a majority, fails on this principle. Instead, legitimacy may even require a contrived gerrymander to ensure fair value.

Third, and most original, Applbaum argues that we are tyrannized when governed by a failed or seriously defective group agent. For example, government becomes illegitimate when policy is implemented at random or with inadequate information. Similarly, we are tyrannized when the procedures that bind our capacities for agency are flouted as when intelligence agencies do not share sensitive information with legisla-

tors in a timely fashion. Americans are constituted as a group agent through procedures that include Senate oversight. While individual citizens may not have the right to timely access that information, undermining oversight is an attack on legitimacy.

Applbaum applies his thinking to the case of foreign interventions, devoting one of the book's seven chapters to the topic. He argues that it may be possible and permissible for outside actors to force a people into the conditions for legitimate government: intervention might not be objectionably paternalistic. First, he argues that we can paternalize a people without paternalizing individuals personally. Second, he argues that paternalism is either not objectionable or not paternalism at all when a set of individuals constitute, respectively, a defective or failed group agent. Applbaum proposes that we can acknowledge that individuals are functional agents and simultaneously that they have not yet managed to adequately combine their capacities for self-governance in the form of a group agent entitled to non-interference. He concludes that, in these circumstances, the intervenor does not paternalize any given individual because the intervention is not for her sake, but rather for the people with whom she lives side by side.

Applbaum has produced a thoughtful book that creatively engages with contemporary problems of politics and offers legitimacy as an orienting guide. He effectively deploys philosophical resources and distinctions to make talk about legitimacy more useful than existing folk and philosophical theories allow. At a time when our understanding of justice grows more demanding and definite, it is useful to have another concept to formulate the basics of our relationship to rulers as the ruled.

However, one concern that emerges is how much work thresholds and ideals perform: treating something *as if* the ideal has been reached just because it has passed some minimal threshold. Idealization is rampant in our thinking and the book. When approaching shortcomings in aspirations for individual agency, group agency, or political equality, Applbaum urges we treat those that pass a minimal threshold as embodiments of the ideal that can be further guided by it, instead of thinking in degrees or imperfectly generalizable particulars. While his is the most common approach to a world where

most manifestations of any ideal are imperfect in one way or another, it may be particularly perverse in this context.

When considering the criteria for government to have the right to rule, *as-if* reasoning may mislead. Although the power-liability account admits richness in moral relations, it may not adequately attend to the shortcomings of barely legitimate states. Consider a government that manages to protect people's freedom over time more or less, but systematically distorts its practices in favor of property owners. I would argue that, for Beachowner, any pre-erroneous-ruling duty not to obstruct beach access survives the decision. This is because, for property-related mistakes in moral math, this government may not have the power to impose liabilities on subjects. That is, we should not treat it as if it were legitimate.

Also, *as-if* reasoning and Applbaum's strict liberal commitments may produce overly permissive foreign interventions. There are circumstances in which it may be paternalistic to intervene even if a people fall below some threshold of free group agency. Most directly, an association of latter-day anarchists could be forced into what Applbaum calls a "civil condition." However, intervention because of their failure to constitute a free group agent appears paternalistic. More fundamentally, I confess reservations that we can specify a meaningful threshold applicable to all the world's peoples. Should a deliberative democracy that eschewed elections be invaded or embargoed? What about a country where the constitutive procedures enabled one of only two political parties to disenfranchise a historically marginalized minority systematically?

Digital Pirates: Policing Intellectual Property in Brazil. By Alexander S. Dent. Redwood City, CA: Stanford University Press, 2020. Pp. xi, 208. $26 (paperback).

REVIEWED BY LAUREN AVERY

Digital Pirates: Policing Intellectual Property in Brazil opens with a colorful description of a *camelódromo*, or informal market, in Campinas, Brazil. The author admits that he was visiting the market for another purpose—to research Brazilian country music for another book—when he was struck by the contradictions of the *camelódromo*, noting that even the street markets of New York City could not prepare him for this experience.

Both police and consumers seemed to simultaneously participate in and denounce the abundance of pirated goods in the market, inspiring him to explore this phenomenon in more depth.

Dent's goal with writing *Digital Pirates* was to localize the "brokenness" of the global intellectual property system. His argument is that digital piracy in Brazil and enforcing intellectual property is not simply a battle of good versus evil; instead, it is far more complicated, because consumers, regulators, and law enforcement officers both benefit from and disapprove of piracy. The book explores how this central tension manifests in many aspects of Brazilian society, from entertainment to international relations. He frames his argument using various theoretical and analytical tools from anthropology and social sciences. The most important framework is "digital textuality," which he defines as a method of inscription (which involves fixing text in a form that allows it to be reproduced and transferred) that occurs on a massive scale, unhindered by distance or time. Though the concept of digital textuality itself is somewhat nebulous, Dent anchors this theoretical foundation in concrete examples from Brazil's history. Furthermore, Dent offers a unique perspective and experience to the narrative. Dent is fluent in Portuguese, and the book includes interviews with local consumers, law enforcement, regulators, and activists. These personal anecdotes and experiences of observing attitudes towards piracy first-hand are the most memorable parts of the book.

Although Dent's theoretical framing can be dense and difficult to navigate, his specific interactions with Brazilians drive home the inherent tension between purchasing pirated goods and recognizing the problems that piracy presents for innovation and intellectual property. This tension is present whether the pirated goods are purchased out of necessity or as a statement against corruption and corporate greed. His narrative effectively forces readers to confront the discomfort present in the legal battle between strict enforcement of intellectual property rights and recognition of the root causes of piracy. In this sense, his argument that policing digital piracy in Brazil is not simply a matter of moral right versus moral wrong is highly convincing and applicable to other countries as well.

Chapter One explores the "gap" between legitimate and pirated goods by starting with an application of digital textualism. As a particularly illustrative example, Dent describes a set of advertisements from what Dent calls the National Antipiracy and Illegality Forum (NAIF), a nongovernmental organization (NGO) with a strong presence in Brazil. In it, a magician attempts to use "tricks" in the form of pirated goods during his magic act, which leads to the equipment failing to perform or exploding altogether. Dent contrasts these advertisements directly with the attempts by the vendors in the *camelódromo* to legitimize themselves, either by unionizing or by asserting that the NGOs and law enforcement are corrupt.

Chapter Two looks at antipiracy efforts in Brazil, and the concerns underpinning efforts to crack down on piracy. Dent gives a fascinating analysis of the Brazilian concept of *limpeza*, or cleanliness, and an underlying fear in Brazilian society of filth and promiscuity in consumer goods. Dent's interviews with regulators and law enforcement portray pirated goods—items from unknown sources and of questionable quality—as "dirty" or "garbage" and as associated with poverty and crime. These concerns about pirated goods being associated with filth and open sexuality, Dent says, stem from a uniquely Brazilian fear of forgetting where things come from. These untraceable, illegitimate objects can then be tools of corruption, organized crime, and oppression.

Chapter Three departs slightly from piracy to look more broadly at the difficulties in "policing" the internet. Specifically, Dent explores the physical and digital relationship between Brazil and Paraguay. Many of Brazil's pirated goods arrive in Brazil from China via Paraguay. Dent gives a memorable analysis of the symbolism of Paraguay in informal discourse, both as a slang term for something deceptively cheap and as a paradigm of a lawless and non-modernized nation.

Chapter Four looks specifically at cellular phones and their role in Brazil's economic development and intellectual property enforcement. Landline telephones never achieved the same kind of pervasiveness as cell phones have today, and they remained luxury goods until cell phones—especially pirated ones—came to replace them. Dent's interviews with Brazilians suggest that they feel that their nation "skipped" a stage of development by jumping directly to ubiquitous cell

and smart phones. Some individuals in Dent's accounts lament the fact that Brazil could not follow the "correct" path of development, with the correct path paved by Western and Asian countries. This is one example of an "interruption" in Brazilian development and intellectual property.

In Chapter Five, Dent continues discussing "interruptions" by highlighting another fundamental tension: Brazilians view pirated cell phones as simultaneously necessary and embarrassing. They are perceived as necessary because many individuals distrust the institutions that provide cell phones; they feel justified in purchasing pirated goods at cheaper prices as a check on mega-corporations that allegedly provide poor cell service. However, many Brazilians feel a growing sense of embarrassment and even fear that pirated cell phones may be more vulnerable to "cloning" (in which another user acquires the identification number of a handset and uses it as their own, at the expense of the phone's owner) or exploitation by criminal gangs.

Dent's anecdotes and interactions with Brazilians are the strongest and most memorable parts of *Digital Pirates* because they expose the central tension between enforcement and deregulation of piracy. These illustrations ground the dense theoretical frameworks in more concrete examples. Notably, this approach tackles issues with both global and local relevance. The pervasive themes of increased scrutiny and enforcement of antipiracy measures, as well as the role of international organizations and NGOs, emphasize the global importance of Dent's analysis. The strength of Dent's argument truly comes in the juxtaposition of these global measures with features that are uniquely Brazilian. Examples of Brazil's specific approach to piracy and digital textualism abound and include the discussions of *limpeza* and sexuality, Brazilian attitudes towards Paraguay, and local concerns about Brazil "skipping" stages in its development.

Indeed, the most memorable and elucidating moments of the book come from the breadth and depth of Dent's sources. Throughout the book, interviews with law enforcement and vendors, comments from online forums, photographs of markets, historical advertisements, legal proposals, and pop culture augment his. A movie called *Elite Squad* is referenced frequently for its portrayal of cell phones as both a blessing and a curse, since gang members are able to continue criminal activ-

ity around Brazil from within prison using cell phones. Most importantly, these personal anecdotes and interactions humanize the consumers, vendors, and enforcers in Brazil's markets. This humanization strongly supports the argument that digital piracy and intellectual property in Brazil are complex, both morally and legally.

It is extraordinary that Dent manages to maintain such an academic, observant position towards the piracy itself. Throughout the book, he neither condemns nor praises the digital piracy or the enforcement efforts attempting to counter it. In his introduction, he explicitly states that digital piracy has neither heroes nor villains. Indeed, he walks a fine line throughout the book. On the one hand, he appears sympathetic at times to the individuals purchasing pirated goods, and at other times, he critiques the assumptions that these consumers make about the economy, intellectual property, and Brazilian economic development. On the other hand, Dent understands the desire for greater enforcement of intellectual property rights in Brazil. He also does not hesitate to critique such efforts from both NGOs and law enforcement.

It is true that avoiding the portrayal of pirates versus police as good versus evil was sometimes unsatisfying. In one poignant example, a vendor at a *camelódromo* who was involved in efforts to unionize vendors discussed the many threats on her life from rival union leaders. In one attempt, she only survived because one of the assassins had grown up with one of her best friends and spared her life. In this and many other examples throughout *Digital Pirates*, it is challenging not to feel profound sympathy for the vendors and consumers of pirated goods. Other anecdotes about the dangers of pirated technology—such as criminal gangs using animals (namely, doves and house cats) to smuggle pirated cell phones into prisons to allow incarcerated gang leaders to continue criminal activity—draw the reader to the other side and seem to suggest the urgent need for greater regulation and enforcement of antipiracy laws. It is actually Dent's position as a critical voice of these two extremes that makes his narrative so convincing.

Despite this, the strength of Dent's sources also contributed to the book's greatest flaw. *Digital Pirates* is extraordinary theoretical, and the discussions of complex theoretical frameworks can become dense, complicated, and difficult to distinguish. His weaving of "digital textualism" and "intellec-

tual property maximalism" throughout the book cements these two terms in the reader's mind. However, much of Dent's in-depth discussions of competing theories of communication, anthropology, and social science can be daunting to readers unfamiliar with those fields. At times, the terms and frameworks he introduces appear only once, and do not come up again, which makes them less memorable than the pervasive theories he expands upon, such as digital textualism. Further, some of the theoretical segments seem to be so high-level and abstract that they drive home how ambitious Dent's project truly is. At many points, he is addressing digital piracy and even piracy in general, on a global level. At other points, he explores the role of technology in human communication. Such incredibly broad themes and the immense amount of literature discussing them can only be touched on the surface in *Digital Pirates*. Dent's uniquely compelling arguments and perspectives, especially on ideas of digital textualism and intellectual property enforcement, could be strengthened by a greater use of empirical data from his experiences in Brazil. Specifically, Dent's analysis could be deepened by exploring other pirated media. He explores CDs, DVDs, and cell phones in great depth, but piracy over the internet, including illicit streaming and pirated downloads, are not covered as closely.

Overall, *Digital Pirates* is a very worthwhile read. It addresses a topic that is only growing in importance and its multidisciplinary approach makes it highly relevant technology, law, anthropology, social science, economics, and communication. Digital textualism is a fascinating framework for exploring digital piracy in other growing economies. As national and international bodies increasingly attempt to exert control over both illicit piracy and innovation in general, such a comprehensive case study of Brazil will be a valuable resource.

Dent makes a significant contribution to the existing scholarship. Brazil's role as a major emerging economy, paired with growing international scrutiny of piracy and of existing intellectual property frameworks, make this a valuable and ambitious project to undertake.

The legal components that he touches upon, such as the international Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), will continue to be major players on the international stage, and national efforts (including NGOs, such as NAIF in Brazil) will likely become models for

other countries to follow in combatting and controlling piracy. In the age of coronavirus, where reliance on digital media and communication has only grown, anxiety about piracy is sure to increase. *Digital Pirates* confronts this anxiety head-on and challenges the ideas underlying consumers' reliance on digital media.

Laying Down the Law: The American Legal Revolutions in Occupied Germany and Japan. By R.W. Kostal. Cambridge, MA: Harvard University Press, 2019. Pp. 1, 472. $55.00 (hardcover).

REVIEWED BY MARIA CIACCI

In *Laying Down the Law*, R.W. Kostal takes on the large task of exploring the American efforts to achieve permanent demilitarization through compelled democratization in both occupied Germany and Japan. Kostal's overarching thesis is that one of the primary missions of the United States' military occupations of Germany and Japan was to replace fascism with "liberal legal and political modernity." The American leadership saw World War II as a battle between incompatible social ideologies and ways of life, and the key to the pacification of the Axis powers was thought to be "political demilitarization." In order to achieve long-term national security, the United States sought permanent demilitarization through the eradication of fascism, which was blamed as the cause of the aggressive militarism of Germany and Japan. Kostal's book thus explores how the United States went about achieving the goal of establishing the liberal rule of law in Germany and Japan and the extent to which the United States was successful.

Over the course of six chapters, each addressing individually and comparatively the German and Japanese occupations, Kostal also seeks to demonstrate the limits of American attempts at democratization. Kostal argues that some of the shortcomings of the mission were self-imposed; the "dubious moral authority" of American legal reformers and the ultimate prioritization of national security over democratization undermined the mission and rendered the process incomplete. Thus, Kostal provides insight into why and how the democratization began and how it ultimately fizzled out. Kostal does a thorough job of explaining how a variety of factors led to an

incomplete American mission. However, Kostal's book may have benefitted from the inclusion of German and Japanese historical perspectives to help the reader navigate the disparity between today's reality, where Germany and Japan are well-respected democracies, and the reality Kostal describes of a haphazard attempt at establishing democracy in two war-torn, fascist nations.

Chapter One is focused on the planning, or lack thereof, that went into the respective occupations and the extent to which American occupation forces were able to assemble organized knowledge about the legal systems of Germany and Japan. The clear takeaway from this chapter is that the mission the United States embarked on was monumental, and even with the best of planning, it would have been a herculean task to establish long-lasting democratic regimes successfully in the razed German and Japanese societies. Kostal spends the chapter emphasizing, almost ad nauseum, how ill prepared American occupying forces were. Suffering from a lack of resources, planning, unity, theoretical frameworks, and expertise, both occupation forces had to make significant compromises in pursuit of their mission.

In Germany, denazification was the primary goal, and it required an overhaul of the Nazi legal system. This would require extensive review of German laws, and the American occupying force had neither the time nor the expertise to do this adequately. In Japan, the lack of expertise was even more pronounced, and the unexpected, abrupt end of the war in the Pacific meant that little research or planning was done prior to the occupation. Thus, Kostal successfully imparts on the reader the impression that the United States went into the occupying efforts underprepared and overpromising, which in turn helps to explain certain failures as the events unfold. The extent to which American forces were underprepared supports Kostal's later point, explored in Chapter Six, that ultimately, democratization efforts came second to more overt and pressing national security issues. Despite the fact that it was painted as a war of ideologies, most effort and planning was spent on military pursuits.

Chapter Two focuses on early occupation efforts to subjugate the German and Japanese legal systems as precursors to building back up the legal regimes as liberal rule of law ones. At times, this chapter feels redundant as the emphasis is again

on the sheer lack of planning and expertise that the occupying forces had as they set out to transform legal systems that they hardly understood. In both Germany and (especially) Japan, the American occupying forces relied on leadership that was primarily composed of American lawyers who could not speak the local languages. In Germany, there were some German legal experts, but they did not have decision-making authority and often had little influence over major decisions. For example, one German legal expert, Karl Loewenstein, was deeply concerned with the lack of German remorse for the Nazi atrocities, and he felt it would be detrimental to involve the Germans in the democratization process before headway was made with the denazification efforts. However, General Lucious Clay, the leader of the German occupation, did not heed Loewenstein's advice and soon let the German people partake in the denazification and democratization processes. Clay made this decision largely due to the fact that he realized both that he did not have the resources to carry out his mission as envisioned and that humanitarian issues were more pressing as society had been crippled by the failed war efforts.

In Japan, as discussed in Chapter One, experts on Japanese law and society were even scarcer than in Germany. General MacArthur, the leader of the Japanese occupation, actually preferred that there were few Japanese experts; MacArthur felt that experts would be too respectful of Japanese viewpoints when his purpose was radical reform. Like in Germany, MacArthur also sought to make use of the preexisting Japanese government infrastructure, particularly because he wanted the Japanese people to take an active part in the democratic process. However, giving a role to old elites also provided an opportunity for resistance against the agenda of American occupying forces; this is a theme that runs through the remaining chapters. Overall, Chapter Two is successful in impressing upon the reader just how unprepared and uninformed the American occupiers were. However, given that this message was already painstakingly delivered in the first chapter, at times readers may wonder what deeper overall message they are supposed to glean from the second chapter.

Chapter Three describes the efforts to pass new constitutions in Germany and Japan. The drafting effort in Japan came together incredibly quickly, in just over a week. Kostal argues that the lack of expertise on the issue facilitated a faster ap-

proach as the drafters did not appreciate the complexity of their task and thus did not belabor their disagreements. A small group of Americans essentially drafted the new Japanese constitution, and the Japanese were given little choice but to adopt it as is, save for minor amendments. In Germany, the drafting process looked markedly different. For a variety of practical reasons, including lack of resources and time, General Clay thought it was important that the Germans lead the drafting process with American oversight, despite the fact that the denazification process had hardly made headway. Thus, the same German legal establishment that allowed Nazism to proliferate was responsible for drawing up democratic constitutions that would be the foundation for future liberalism.

A theme that emerges strongly from this chapter and colors the rest of Kostal's theses is the influence and control of the leaders of the German and Japanese occupations, Generals Clay and MacArthur, respectively. Both men acted with little oversight or specific guidance from Washington and therefore wielded incredible amounts of discretion and power. Kostal's analysis of the different ideologies, approaches, and circumstances of Clay and MacArthur is helpful in understanding his broader points about the United States' lack of preparation and coordination. However, precisely because of this analysis, this chapter is also where the reader may begin to question how despite such different cultures, circumstances, and occupation policies, both missions are commonly viewed today as successes given the enduring democracies of Germany and Japan.

Chapter Four recounts the efforts to remake the Japanese and German judiciaries into bulwarks that protect individual rights and serve the constitution. Since constitutions are only meaningful if there are enforcement mechanisms for the rights provided, an autonomous judiciary is critical. Furthermore, constitutions are given life and meaning through judicial interpretation; therefore, the success of the democratic constitutions would depend on the ideals and cooperation of the judiciary. Despite the importance of creating a strong backbone for democracy by reforming the judiciary, both occupying forces largely failed in this respect. American leadership felt it was important to put experienced individuals on the bench, but this came with a crucial problem: many experienced judges in Germany and Japan had been willing opera-

tives of repressive, fascist regimes. In Japan and especially Germany, U.S. occupying forces did not adequately purge the German and Japanese elites of complicit fascists, which meant that many former elites were restored back to power, which they could wield to resist judicial reform. Kostal does a thorough job of explaining the shortcomings of the efforts for judicial reform, which sets the stage nicely for an understanding of the further limitations of the democratization mission.

In Chapter Five, Kostal describes another object of American democratization, the criminal justice system, which played a large role in the tyranny of fascism. However, as discussed in Chapter Four, the fact that conservative elites had made their way back into the judiciary meant that there was resistance and lack of progress in this effort. Although Kostal emphasizes the fact that former Nazis were so quickly given control of the new criminal justice system, the Japanese elites come across as being the group most resistant to criminal justice reform. Kostal explains that Americans viewed the Japanese as having a completely arbitrary and unjust criminal justice system, and MacArthur sought to impose radical reform as a result; this led to strong resistance. In contrast, the former German system was seen as fundamentally sound, it just needed to be restored by denazification.

Once again, the reader is left curious about the details of German and Japanese history for a greater understanding of American viewpoints on these issues and local resistance to reform. Although the familiar themes of a lack of expertise and past ineffectiveness at purging fascism help to explain the failures of effective judicial reform, one cannot help but wonder if more expertise and political purging would really have been enough to succeed at the momentous task of overwriting Japanese and German history and culture. Thus, despite recognizing Kostal's goal of explaining the American historical perspective, the reader would have been better aided in assessing the success of the occupations if provided with more German and Japanese historical context.

Finally, Chapter Six discusses the fact that American democratization efforts were ultimately undermined by their prioritization of national security. As Kostal explains in the beginning of the book, national security was always the reason for pursuing democratization of the Axis powers; the Americans did not take on the task just out of commitment to some

greater good. Therefore, when the Communist threat began to occupy American attention as the primary national security concern, it is of no surprise that commitments to democratization waned. American forces undermined the democratic institutions they themselves had attempted to set in place by oppressing radically leftist political groups and undermining individual rights by subjecting local populations to unconstitutional searches and seizures and preventing access to judicial remedies. Thus, American credibility was greatly undermined, and the United States stood in the way of the processes it had set into motion itself. Racial disparities in the United States also served to subvert the success of a democratic system and the American commitment to individual rights. Overall, what is left is an American attempt at democratization that is very much incomplete, in no small part due to the United States' own failure to commit fully to the project.

Over the course of his book, Kostal successfully demonstrates the flawed American efforts to achieve national security through democratization of Germany and Japan. The United States attempted to achieve sweeping political and legal reform with limited planning, resources, and expertise in the face of opposition from the ruined Japanese and German societies. Kostal clearly imparts the reader with the impression that much less planning and care was taken with this mission than is popularly thought. Through his analysis, Kostal demonstrates that the tendency of mainstream opinion to credit the United States with the success of the enduring Japanese and German democracies is misguided. The United States certainly established some framework for democracy during the occupations, but as Kostal painstakingly illustrates, the United States' efforts were incomplete, as well as undermined by the very people who initiated them. Thus, credit for the current democracies of Germany and Japan must lie beyond the efforts made during the Allied occupations.

Although Kostal successfully achieved his goal of illustrating the limitations and deficiencies of the occupation missions, at times, the reader may be left wishing he had explained more of the long-term outcomes of the two nations, and how they were related to the occupation. While the reader will come away with an understanding of the challenges the occupying forces faced and the mistakes that were made, it can be difficult to appreciate this broader point when from a cur-

rent perspective it seems like the occupation missions were successful in establishing democracy, despite the divergent paths Clay and MacArthur took. Kostal may respond to this by noting, as he does earlier in the book, that he aims to provide a depiction of American history rather than a historical account focused on Germany and Japan themselves. Kostal's task would likely have been too large if he were to focus more on the German and Japanese historical perspectives as well as developments post-occupations. Since Kostal could not take on both tasks in this single book, perhaps his greatest success is that the reader will certainly be left with a curiosity to do further reading on the effects of the American occupations on the democracies of Germany and Japan from post-occupation up until modern times.

Citizenship 2.0: Dual Nationality as a Global Asset. By Yossi Harpaz. Princeton, New Jersey: Princeton University Press, 2019. Pp. cciii, 203 by Yossi Harpaz (2019).

REVIEWED BY SEAN CONNERS

Yossi Harpaz's *Citizenship 2.0: Dual Nationality as a Global Asset* explores a phenomenon that has developed as a result of the acceleration of globalization since the 1990s and onward: the strategic acquisition of dual citizenship. As a result of countries tolerating multiple citizenship around the world, Harpaz posits that a subsect of the global population consisting of nonimmigrants is obtaining citizenship that they perceive as less of a practical necessity and more as a valuable piece of property. The focus of the book is on a particular type of dual citizenship, which Harpaz calls compensatory citizenship. Harpaz defines this phenomenon as "dual citizenship from a Western or EU country that is acquired by individuals living outside Western Europe and North America."

The book is structured around three main examples of this compensatory citizenship: (1) Serbian citizens gaining access to Hungarian citizenship and thus gaining increased access to the European Union (what Harpaz calls coethnic citizenship acquisition); (2) strategic cross-border births by upper-class Mexican parents who travel to the United States for the birth of their children so that their children are able to acquire United States citizenship; and (3) Israeli citizens gain-

ing E.U. citizenship through ancestry (an example of ancestry-based citizenship acquisition).

Before exploring these examples and providing anecdotal accounts of actual people and families that have gone through the process of acquiring dual citizenship, Harpaz outlines his own definitions of citizenship and provides an overview of the current dual-citizenship landscape throughout the world. Harpaz characterizes the travel mobility of various citizenships as a sort of peer ranking by countries on the global stage and uses the freedom to travel offered by passports as a key part of the analysis of various citizenship statuses. To further analyze citizenships across countries, Harpaz looks to the components of security, economic opportunity, and civil and political rights. From these components he forms a citizenship quality index and uses it, along with a passport travel mobility index, to rank countries into three tiers of desirability.

This premise of *Citizenship 2.0* is completely divorced from any discussion of identity, culture, or any of the other personal aspects that go along with citizenship in one's country of origin. This reminds the reader that the book and its analysis come from a Western perspective. As a result, some of the underlying analysis that sets the foundation for the rest of the book should perhaps be taken with a grain of salt. A ranking of citizenships based on first-tier, middle-tier, and third-tier countries felt outdated given the almost-colonial perspective it took. Furthermore, the logic of the analysis is circular. Relying on an analysis rooted in Western ideals, the book posits that anyone not in a Western or developed nation is likely to desire a compensatory citizenship as a means to "make up" for the fact that they are not in such a country. This foundational analysis does, however, prove useful in understanding the various dynamics at play throughout the book. As the reader learns through the personal stories of families, certain subsections of populations in what Harpaz calls middle-tier countries do desire a second citizenship status from the so-called first-tier countries.

Harpaz gives more weight to issues related to culture, identity, and personal ties later in the book when he dives into the personal accounts of individuals and families that have undergone the acquisition of a second citizenship. For example, in the discussion of Mexican citizens who strategically give birth to children in the United States, Harpaz notes that many of them rarely end up using their American citizenship in any

substantial way simply because they prefer their lives in Mexico over any potential life in America. Harpaz notes that most of the families obtain the second citizenship as a sort of insurance policy against civil unrest in their home country. In other instances, families see the second citizenship as a means to gain access to the American higher education system later on. As one man interviewed says: "Some people have the *American Dream* . . . but I have the *Mexican Dream*. Compared to the middle class in the U.S., I live much better." Such stories were a refreshing glimpse into the actual attitudes of individuals, as opposed to the more generalized presentation of citizenship in a Western or developed country as more desirable from the onset.

After setting the stage with an overview of the current state of citizenship and its relative desirability in different circumstances, Harpaz lays out his research on global citizenship patterns and presents four key findings on how the worldview on citizenship has changed and how it continues to change.

Harpaz first describes how the status of citizenship based on country of origin has shifted. Additionally, the emergence of citizenship industries and services that help individuals obtain citizenship have helped to commodify citizenship in a transactional sense. Through three specific instances of citizenship acquisition, Harpaz illustrates how citizenship has begun to be viewed as more of a property interest to be acquired, rather than a status of civic identity or virtue.

Next, Harpaz describes that citizenship as a territorial right is now seen as a way for certain populations to gain greater travel freedoms. Harpaz explains that these populations desire certain passports that give them more options for visa-free travel into other territories. Prior to this shift, the idea of citizenship was arguably more about the right to live in a country. By showing examples and common pathways to citizenship in three scenarios (all of which include nonimmigrants obtaining citizenship without moving to the new country), Harpaz makes a persuasive and powerful argument that citizenship can increasingly be looked at as an additional passport, bringing with it greater ease when traveling.

Harpaz then looks at the changing role of identity in citizenship and finds that the attitudes towards citizenship are becoming more instrumental rather than sentimental. This, he

asserts, pushes the pursuit of dual citizenship towards maximization of personal utility, rather than the formally-stated, usual justifications of dual citizenship. He calls this piece of the story "the rise of the sovereign individual." This aspect of citizenship was traditionally based on a sense of loyalty to one's home country and the difficult choice to immigrate to another country and leave that home behind.

However, by illuminating the phenomenon of dual citizenship, *Citizenship 2.0* demonstrates a shift wherein traditional objections to dual citizenship, which were often rooted in nationalist ideals, become less powerful. As a result, individuals and their families have fewer qualms about obtaining a second citizenship, seeing it instead as a sort of insurance policy against their home country. This was perhaps the area in the book where Harpaz takes the most time to carefully construct thoughtful narratives around what is ultimately a personal journey and certainly not just a set of statistics. This is particularly so in the examples of upper-class Mexican families who strategically obtain American citizenship for their children. Harpaz characterizes their motivations as a certain kind of "capitalist cosmopolitanism" that allows these families to have greater access to cross-border business opportunities despite desiring to stay in their home country for a better quality of life. For the Israelis obtaining E.U. citizenship as well, he found that the justification against loyalty to Israel was rooted in the idea that these individuals were seeking restitution from ancestors who were wronged by their country. And in the cases in Serbia, Harpaz found a greater sense of shame than in the other two examples. The examples in Serbia show that the traditional view of loyalty and concerns of national ties still play a role in the current thinking of dual citizenship acquisition.

Lastly, Harpaz characterizes dual citizenship as a device that illuminates the global sorting mechanism that comes along with the rights and advantages of obtaining certain citizenships over others. Harpaz observes that the demand for ancestry-based citizenship is much higher in less developed countries, suggesting that compensatory citizenship can be seen as a ticket for a sort of upward mobility. This section of the discussion lacked a more in-depth look at the impact such dual citizenship acquisitions have in countries of origin. Certainly, Harpaz touches on the issue by acknowledging that global

class mobility through dual citizenship can exacerbate issues of income inequality in less developed countries. He also sheds light on the fact that, particularly in Mexico, the increase in compensatory citizenship threatens to undermine the unification and sense of equality in Mexico. However, this issue feels like a more interesting aspect to the story than the space it is given in the book. This emerged as an important issue that should have been given more attention.

The essence of the *Citizenship 2.0*'s thesis can be most aptly summarized by the following line from the conclusion: "Citizenship is changing form an ascribed [status] to an achieved status." In this regard, Harpaz's research and narratives robustly support his position. It is a particularly convincing argument, especially when told through stories from the perspective of a subsection of the population that acquires a second citizenship with little to no intention of ever using that second citizenship, thus showing the ancillary nature of citizenship in certain contexts. In the end, the reader is left with the changing sense of the definitions of and paradigms on citizenship, illustrating citizenships as more of an achievement in certain circumstance rather than a birthright. The effect on the reader is a questioning of the expanding role of globalization as it relates to citizenship. This trend of "compensatory citizenship" gives the sense that the policies that support these acquisitions likely won't last for long, and that the world may see a return to a slightly more traditional and territorial view of citizenship in the near future.

Let The People Rule: How Direct Democracy Can Meet the Populist Challenge. By John G. Matsusaka. Princeton, NJ: Princeton University Press, 2020. Pp. xii, 298. $29.95 (hardcover).

Reviewed by Maxwell Dikkers

Democracy isn't quite broken, but it is drifting, and has been doing so for quite some time. Control over policy has shifted away from the reach of voters and into the grasp of unelected technocrats and judges. This process has been taking place for decades, but recently "the people" have started to notice, and the result has been a rise in populist politics across Western democracies. In *Let The People Rule: How Direct Democracy Can Meet the Populist Challenge*, John Matsusaka argues that

the solution is not to turn more power over to the technocratic elite and wait for populism to blow over. Instead, he posits that the people need a greater say in policymaking and that the best way to make this happen is through direct democracy.

Let The People Rule presents an approachable and compelling case for allowing voters to have direct input in policymaking at all levels of government. Providing this opportunity to the people, Matsusaka suggests, will create a release valve for the current pressure on our democracies and will rebuild faith in the democratic form of governance. Referendums are not a novel idea and, in fact, have long been in widespread use throughout the United States, Western Europe, and some other parts of the world. However, promotion of their more expansive use, particularly at the national level in the United States, is this book's goal. Matsusaka leverages experiences with direct democracy around the world, particularly the lessons learned from the 2016 Brexit referendum, to create a set of suggested reforms and best practices to be implemented in the United States and elsewhere.

In advocating for reform, Matsusaka builds a cogent case based on need, history, and expected payoffs. The book moves quickly through evidence and presumes no reader background in law or social science, which makes it highly suitable for a general audience, but perhaps somewhat rudimentary for those with prior knowledge of the field. Matsusaka correctly opts for clarity and brevity to maintain a sharp set of arguments, but there are sections where greater depth on particular issues or counterarguments could have strengthened his case. The main criticism to be levelled is that Matsusaka leaves the reader thinking: "So what next?"

After proposing six potential reforms for the United States, half of which stand no chance of enactment in the near or medium future, and highlighting some referendum best practices, the book offers no obvious suggestion for how to start the process. We are told that small experimentation begets larger experimentation but are offered no concrete first step to bring the referendum experience from the state level to the national stage. Matsusaka marshals evidence to support his claim that referendums don't have a natural partisan benefit and yet never fully addresses the fact that neither political party in the United States appears eager to seek direct voter input on national issues. Nonetheless, *Let The People Rule* lays

the groundwork for a move towards a greater use of direct democracy by building an affirmative case for referendums while dispelling some common misconceptions and concerns surrounding their use. At the end, the reader is left with the impression that national referendums are both a natural next step in the development of true democratic governance and a critical way of ensuring policymaking remains aligned with the will of the people.

Part I seeks to remind the reader that *Let The People Rule* is not a solution in search of a particular problem. Democracies across the world are struggling as they face increased pressure from populist politicians and parties. The populist forces in the United States, the European Union, and elsewhere are a symptom of voters perceiving, correctly, that their influence over policy is slipping away. In the United States, the direction of this drift in control is towards the ever-growing administrative state, increasingly powerful and unelected federal judges, and, perhaps most frustratingly, legislators who are disconnected from the preferences of their constituents.

The growth of the administrative state in both the United States and the European Union is posited to be inevitable due to the sheer complexity of the problems we expect the government to now address. Rolling back the size to a more manageable era is both impossible and undesirable at this stage. But there are also remarkably few levers of control for the people to exert their will over policies advanced by individual agencies. The Deputy Assistant Administrator of Plant Quarantine at the U.S. Department of Agriculture may be a political appointee, but how much influence does a farmer in Nebraska, for example, have over that official? The U.S. federal judiciary has an even less direct line of control from voters and yet faces increasing policy responsibility, in part due to the growing complexity of government, but also due to the ossification of the U.S. Constitution, which turns Supreme Court justices into "superlegislators" beyond reversal.

Legislators themselves, almost by definition, should be responsive to the will of the people, but evidence suggests there is a significant disconnect between voter preferences and policy outcomes. Of course, this is partly built into the design of a representative democracy, but voters do expect some congruence and will become dissatisfied when repeatedly overruled. Matsusaka quickly dismisses campaign finance reform and re-

districting as solutions to this problem, arguing on the latter that more competitive districts inevitably lead to a greater number of people whose views aren't shared by their congressional representative. Given the drift in policymaking, the people are right to express concern about the loss of control and this feeling is unlikely a momentary blip in public opinion.

In Part II, *Let The People Rule* examines the history of direct democracy in both the United States and around the world. In doing so, the book shows that voters directly weighing in on policy is far less unusual than the casual observer might believe. Matsusaka starts by drawing a distinction between initiatives, proposals originating from the citizens themselves, and referendums, proposals coming from the government. Both have a long history in the United States and are in widespread use at the local and state level across the country.

E.U. countries present a challenge to Matsusaka's thesis that referendums can help to stem rising populism. Numerous European countries have seen rapid growth of populist parties in recent years despite having long histories of frequent referendum usage. Matsusaka posits that the institution of the E.U. bureaucracy is in part to blame, along with increasing reliance on technocratic administrative agencies in member countries. Much like Americans, Europeans are dissatisfied with the loss of popular control over policymaking power. As with the United States, the book suggests increased direct democracy as an obvious solution. The European Commission appears to be thinking similarly; it has developed the European Citizens' Initiative (ECI) to allow proposals to be submitted to the Commission should a citizen group collect one million signatures representing nationals of at least one-quarter of the member states. It is a process with little teeth at the moment, but one that could grow in significance.

Next, a quick tour of the world reveals national-level direct democracy success stories, budding use of referendums in newer democracies, and some cautionary tales from authoritarian regimes who leveraged referendums to legitimize power. Switzerland is the "preeminent practitioner" of direct democracy, with referendums used at all levels of government and national elections held three to four times a year. However, an unwelcome example of such democracy in action made international headlines after this book's publication, when Swiss voters narrowly passed a ban on face coverings in public, in-

cluding the burka or niqab.[1] This measure will likely impact fewer than forty women in an overall Swiss population of 8.6 million people, and follows a 2009 referendum that banned the construction of minarets. Later in the book, Matsusaka argues that direct democracy might be no more anti-minority-rights than representative democracy. However, there is increased tension to this claim when the Swiss federal government opposed both of these recent measures that many consider to be anti-Muslim.

Italy provides a more compelling example of what can be achieved through referendums. Matsusaka highlights the predominantly Catholic country earlier in the book because of its referendum on the legalization of abortion. He argues, convincingly, that the national referendum on this topic put the issue mostly to rest and notes the stark contrast to the path to legalized abortion in the United States which ran through the unelected Supreme Court justices. Matsusaka is also sure to select examples of growing referendum use elsewhere in the world and notes that the relatively young democracy of Taiwan has been "blazing a trail in Asia" with its 2017 Referendum Act that has eased the process for proposing advisory initiatives. In turning to Latin America, the book identifies two rare examples of referendums backfiring on military dictatorships and hastening the end of those regimes in Uruguay and Chile in the 1980s. While undoubtedly cherry-picking, Matsusaka does in fact show the wide variation in referendum use across the world while highlighting the United States' notable absence from this experimentation.

Part II ends with a return to the United States and the observation that it stands among only a tiny group of nations to have never held a national vote on an issue. To some extent, this is due to the American Constitution, which contains no direct democracy provisions. The detailed discussion of the American Founders and the country's democratic evolution offers some interesting and useful insights but also is surprisingly more in-depth than other parts of the book. Matsusaka might have better served his argument by fleshing out in more detail how he squares the rise of populism in Europe with the

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1. Ivana Kottasová, *Switzerland Narrowly Votes to Ban Face Coverings in Public*, CNN (Mar. 7, 2021), https://amp.cnn.com/cnn/2021/03/07/europe/switzerland-referendum-face-covering-intl/index.html.

widespread use of referendums in those nations. He examines the role of anti-E.U. sentiment, but the picture feels rushed and incomplete on an important point regarding direct democracy's efficacy in stemming populist tides.

Having established the problem to be solved and the history of direct democracy, *Let The People Rule* turns to the solutions, benefits, and risks in Part III. Six potential reforms are advanced:

> Advisory Referendums called by Congress,
> Advisory Referendums called by petition,
> Advisory Referendums required on specific issues,
> Binding Referendums required on specific issues,
> Binding Referendums called by petition, and
> Constitutional Amendments proposed by petition.

The reforms are "approximately ordered from most to least feasible," which also corresponds with the scale of likely impact on national policymaking. Matsusaka focuses these proposals on the United States but is quick to point out that the Constitution would bar the latter three as each would take legislative power out of the hands of Congress. While enacting all of the reforms is certainly not possible in the short or even medium term, Matsusaka expresses a belief in incremental experimentation, perhaps drawing faith from the evolution of democratic procedures over U.S. history.

Even the advisory referendums offer promise, and two famous examples of direct democracy, California's Proposition 13 and the Brexit vote, are examined to frame the potential benefits of referendums. There are obvious upsides for the citizenry: directly choose the preferred policy, communicate preferences to the legislature, reduce corruption in policymaking, and increase policy innovation. Other benefits would extend to legislators as well, such as allowing voters to change policy without changing their representatives and helping to settle major policy disputes. Matsusaka does not go into depth about how these benefits could be leveraged to see the adoption of advisory referendums, which feels like a missed opportunity for the book. However, he does draw on the Brexit vote to highlight two critical flaws to be avoided when designing referendums: failure to provide a concrete proposal to voters

and requiring only a simple majority for approval. The blame for these flaws, and the resulting chaos after the vote, lies with the elected officials who perhaps had too much confidence in an outcome in favor of remaining in the European Union. Matsusaka uses the Brexit experience to inform his best practices suggestions in Part IV.

Three main counterarguments to referendums are directly addressed at length, which significantly strengthens the book's main argument. Primary among questions about direct democracy is whether it is sensible to allow citizens policymaking power when surveys show that Google searches for "What is the E.U.?" spiked in the United Kingdom immediately after the Brexit referendum. Leveraging data and social science theory, *Let The People Rule* argues that voters in American state-level referendums have successfully made informed decisions by using information shortcuts, the wisdom of crowds, and deliberation. Similar state-level data are used to support the thesis that the impact of interest groups and money on referendums is lower than feared and that minorities are not drastically exposed to the will of the majority. To strengthen the arguments, Matsusaka acknowledges that direct democracy is not a cure all and risks do remain, as shown by a number of anti-minority initiatives introduced at the state level. But the book attempts to offer some comparison with the representative democracy that the United States has used for its entire existence. That system too has not had a great track record with minority rights protection and the prevention of interest group capture. Matsusaka later notes: "If the search for a perfect system is futile, we are left to choose from a set of imperfect processes."

Let The People Rule ends with a sharp, but disappointingly brief, Part IV that examines the implementation of direct democracy. In fewer than twenty pages, the book suggests a framework for deciding when to use referendums and runs through four "best practices" for referendum design. Having noted with some realism the dim prospects for binding referendums in the United States, Matsusaka offers a framework that proposes a surprisingly broad use of direct democracy. As a result, it is suggested that everything from legislative term limits, to government debt, to taxes is best decided by direct democracy. It is a sweeping vision that holds appeal and Matsusaka reminds the reader of the breadth of topics already cov-

ered by initiatives and referendums at the state and local level in the United States. The best practices offered at the very end of the book address how to effectively run a referendum to get results that match voters' true preferences. What is missing, however, is how to make that first step towards national "self-rule." The reader is left wondering if the threat of populism is enough for Congress to choose to open the door to direct input from the people.

Overall, in *Let The People Rule* Matsusaka offers a compelling argument that direct democracy at the national level is a sensible and advantageous next step in the evolution of American democracy, and that its usage across the world is increasing. Flaws will surely remain, but referendums, even advisory ones, offer an outlet for populist concerns and can guide policy in a meaningful direction that is more congruent with the preferences of voters. Those citizens animated by "the corporate elite" and "the swamp" deserve a chance to hold the reins.

Pirates and Publishers: A Social History of Copyright in Modern China. By Fei-Hsien Wang. Princeton, New Jersey: Princeton University Press, 2019. Pp. vii, 350. $39.95 (hardcover).

REVIEWED BY YIYANG HU

Intellectual property protection takes center stage in the US-China trade war. Many scholars and critics claim that China's failure to respect intellectual property is because the notion of intellectual property is a foreign concept incompatible with Chinese culture and traditions. In *Pirates and Publishers,* Fei-Hsien Wang sharply rejects such claims by providing a deep examination of the social history of intellectual property in modern China from the 1890s to the 1950s. Instead of discussing copyright legislations in China, Wang focuses her attention on how the actual stakeholders—authors, publishers, translators, and booksellers—"received, appropriated, practiced and contested the very concept of copyright."

In constructing and analyzing the dynamics between the different stakeholders, Wang consults a variety of sources that were previously underutilized by legal historians, including "company records, individual petitions, guild archives, diaries, correspondence, advertisements, bibliographies, book lists,

and the actual books produced at the time." Such a wide range of resources allows Wang to inquire into the history of copyright in China beyond mere legislative efforts and convincingly argue that the notion of copyright has long existed in China and has been constantly utilized by stakeholders in the Chinese book industry to protect their interests. Despite some limitations, this book presents a rich and inspiring reconstruction of the meaning of copyright understood by authors, publishers, and the government in China.

Wang starts her discussion by first looking at copyright in Japan, because *banquan*, the Chinese term for copyright, was not coined in China but rather is a translingual transplantation. The translation was a combination of two words: *ban* (printing blocks) and *quan* (right). The person who made this combination was Fukuzawa Yukichi, a very influential public intellectual in the Meiji era who introduced numerous Western ideas and practices to Japan, ranging from civil rights to eating beef. Fukuzawa's enthusiastic promotion of copyright in early Meiji Japan was driven "not entirely by certain noble Enlightenment ideals, but by his struggle to protect his livelihood against unauthorized reprinting at the time." The Meiji Restoration was a period in which Japan decided to launch a series of reforms modeled after European countries to catch up with the West, which made Fukuzawa a figure with considerable political and social influence and substantial knowledge and authority about the Western world. To protect his economic interests, Fukuzawa retained a portion of printing blocks so he could know how many copies were indeed produced and displayed his status as a block-owner on the actual copies of his book by stamps or statements that read "copyright of Fukuzawa." Such practices were not invented by Fukuzawa; instead, they were commonly used by book publishers in Tokugawa Japan, who in turn borrowed the practices from Ming-Qing booksellers in China. For example, Ming-Qing booksellers would declare their ownership of the books on the title page. As shown by the images of several Ming-Qing books Wang includes in this chapter, seals or colophons with trademark-like decorative patterns or detailed information about the block-owner were commonly used to increase the publishers' branding power or to express their individuality.

Despite presenting a comprehensive picture of the initial appearance of *banquan*, the order in which Wang presents her

findings is somewhat confusing as to the true origin of copyright in China. Wang's claim at the beginning of this chapter that "to trace the journey of the very concept of 'copyright' to China, one has to start in Japan," is confusing and in conflict with her later narrative. While the term "copyright" might have been solidified and came from Japan, the concept of "copyright" did not, as evidenced by Wang's discussion on the impact of the early conventions and customs in the Ming-Qing book trade on the bookselling business in Japan. Introducing the Ming-Qing book traders' practices first followed by a discussion of the strong influence Chinese culture had on Japanese elites and Fukuzawa's story last seems to be the more logical and natural progression.

In the next three chapters, Wang identified four major forms of *banquan* before the enactment of China's first copyright law in 1911 by the Qing government:

(1) *Banquan* as ownership of the tangible means of production (e.g. the printing blocks); (2) *Banquan* as a kind of incorporeal property created by the author's mental labor;

(3) *Banquan* as a privilege granted by the state to authors and booksellers for their contributions to society; and

(4) *Banquan* as a type of license / privilege granted by the state to authors / booksellers after their books passed the state's review and examination.

These four forms coexisted and smart Chinese booksellers commonly invoked them in different contexts. To illustrate Chinese booksellers' understanding of *banquan*, Wang focuses on several individuals in these three chapters. Lian Quan, for example, a leading publisher in the Qing Dynasty utilized almost every means possible to fight against piracy and secure his *banquan*. Not only did he sign contracts with Yan Fu, one of modern China's most influential translators, and pay him generous royalties, Lian Quan also petitioned the government for *banquan* protection orders. Moreover, he submitted the textbooks he published to the Ministry of Education for approval, wrote op-eds arguing for the enactment of the copyright law, and actively participated in the Shanghai Booksellers' Guild. This story is a very vivid illustration of how *banquan* was a fluid concept to stakeholders at the time and was utilized in different contexts for the protection of their own interests.

After the promulgation of the first copyright law in China by the Qing government, the two forms of *banquan* associated with privileges granted by the state faded away. However, the idea of content review remained in the Copyright Law of the Great Qing and China's subsequent laws. Booksellers in Shanghai continued their own *banquan* customs even after the promulgation of the official state law. In fact, they preferred to employ the guild's customs instead of the state law in registering their *banquan*, settling piracy disputes, cracking down, and punishing local pirates. In the period where there were consistent political upheavals, the effectiveness of the state copyright law was largely compromised. In contrast, the Shanghai Booksellers' Guild was able to maintain minimal *banquan* protection for its members not only locally in Shanghai but also later in northern China primarily due to booksellers' own initiatives. Authors, despite being the supposed copyright owners per the state copyright law, were instead left powerless in the booksellers' copyright regime. A good follow-up discussion to include would be whether the lack of protection of authors' interests had discouraged authors from producing original work and hence impacted the industry.

The last chapter discusses copyright after the establishment of the People's Republic of China in 1949. The new Chinese government proposed that the struggle against piracy would end through socialist reform of the publishing sector, book market, and the very act of intellectual creation. The Chinese government dismantled the cultural market through collectivization, and in theory eliminated the piracy problem, "because *banquan*, either as author's ownership of their artistic or intellectual creations, or as publishers' ownership of the tangible means of production, was no longer seen as a legitimate form of private property." Prior to China's Reform and Opening-Up in 1978, the term *banquan* had already become unfamiliar to the younger generations. As China opened and moved away from the planned economy, the problem of piracy returned, and bootlegged products flooded the Chinese marketplace. Wang attributed the demand for pirated goods to Chinese readers' and customers' limited buying power. However, Wang fails to consider that due to heavy censorship in China, many books were simply not available through legitimate channels at all. This omission is especially disappointing because Wang spends a large portion of the book discussing

how Chinese booksellers utilized state censorship for their copyright protection. Unsurprisingly, as China began to fully participate in the global economy, there was a great deal of foreign pressure to impose copyright protection in China. While China eventually managed to promulgate its copyright law, this legislation emerged largely from external pressures rather than internal initiatives. This is one of the reasons that this effort, like the previous ones, "failed to strike root on the ground." The Chinese central government enforces copyright protection only when nagged. Local authorities only act when there are orders from Beijing, and only to the extent that quotas are met. As a result, authors and publishers in China realize that, like their predecessors, they cannot simply rely on the state to protect their copyrights. It is their own responsibility to track down pirates, initiate lawsuits, and maintain an orderly market if they want to protect their economic interests. By discussing efforts made by contemporary Chinese corporations such as Alibaba and Pinduoduo that are familiar names to Western readers, Wang makes her narrative much more convincing.

Copyright in China has a complicated history. To say that copyright is a foreign concept is not completely wrong. Both the first Chinese copyright law under the Qing dynasty or the PRC copyright were largely promulgated under foreign pressures and transplantations of foreign legal codes. However, the idea of intellectual property was not foreign, and Wang eloquently explains China's long and sophisticated book culture and industry practices since the Ming-Qing Dynasty.

As a book originally published in English, *Pirates and Publishers* provides important insight on intellectual property in China to Western readers, but also to native Chinese, like me. As someone who was born and raised in China, this book connected the dots for me—my copy of the last Harry Potter book with a plot that made no sense, low-quality books in the school library, or DVDs that are clearly bootlegged but still have the "copyright is reserved" statement printed on their packages. Copyright can be a dull subject. However, Wang manages to make the book very enticing by focusing on individual's real stories instead of rigid legislation, adding personal touches to this hotly contested topic in China.

Since this is a book about the social history of copyright in China, it is inevitable that many Chinese terms, book titles,

and names are discussed. The general approach adopted by Wang in the book is to use *pinyin*, the romanization of the pronunciation of Chinese characters of the Chinese terms throughout, while providing an English translation of the terms when they first appear. However, as a native Chinese speaker, I found it a bit difficult to follow, since the same *pinyin* could mean many different words. While there is a glossary of Chinese terms at the end of this book, I think it would be better if the actual Chinese characters are also included when the terms first appear.

Overall, this book is a must-read for anyone who wants to have a good understanding of copyright in China. More than just a study of the social history of copyright in China, this book also yields important modern-day, real-world implications. As Wang insightfully identifies, "if nation-to-nation negotiations and foreign pressure have failed to yield a satisfactory outcome, working with the local enterprises from within and from the ground up to enhance copyright protection in China might be a better solution." This approach might especially work well for intellectual property issues in areas that are not strategically important, such as literature and movies. However, in critical areas, such as technology, in which state power might be involved, working with local stakeholders is less likely to be effective.

China's Gilded Age: The Paradox of Economic Boom and Vast Corruption. By Yuen Yuen Ang. Cambridge, UK: Cambridge University Press, 2020. Pp. xv, 257. $39.99 (hardback).

REVIEWED BY JACK KATZENSTEIN

Conventional wisdom tells us that corruption by state officials is a drag on growth. From this basic proposition, follow two others. First, highly corrupt countries must not be growing quickly. Second, developing countries should try to root out all corruption, by, for example, putting into place non-extractive institutions and paying bureaucrats, and other officials, salaries that discourage rent-seeking. However, as Yuen Yuen Ang points out in her new book *China's Gilded Age*, China threatens that neat and attractive narrative. The Chinese bureaucracy, which oversees the country's economy, is highly corrupt, yet China continues to grow rapidly. Professor Ang offers

a compelling explanation that helps the reader understand the evolving role of the Chinese bureaucracy, and raises difficult questions about how the West understands corruption abroad and at home.

Ang's basic analytical move is to "unbundle" the concept of corruption. While most measures of corruption take the form of a single aggregated index, Ang distinguishes between four types of corruption. The first is "petty theft," which Ang defines as "acts of stealing, misuses of public funds, or extortion among street-level bureaucrats." Think of a police officer pulling you over, then taking a bribe to let you go free. The second is "grand theft," or "embezzlement or misappropriation of large sums of public monies by political elites who control state finances." Grand theft is looting of the government's finances at a high level. Think high-level officials siphoning money from state accounts into their own piggy banks.

The final two categories of corruption are transactional in nature. "Speed money," Ang's third category, entails petty bribes that businesses and citizens pay to bureaucrats to get around hurdles or speed things up." To understand speed money, imagine a bribe paid to a local official to obtain a permit to conduct business. Finally, there is "access money," which captures bribes paid to high-level officials by businesspersons in exchange for unique privileges, such as construction contracts, state-sanctioned monopolies, exemptions from regulatory regimes, or similar rewards.

Not all forms of corruption are equally damaging to growth, Yuen argues. Both petty theft and grand theft are unambiguously harmful (Ang likens them to "toxic drugs"), but the impact of transactional corruption is less clear. Speed money could help individuals and businesses overcome excessive red tape and work around rigid bureaucratic rules, but still, the bribers must pay the costs of speed money transactions. Ang likens it to "painkillers" which can reduce pain but do not offer any health benefits. Access money, on the other hand, are the "steroids" of capitalism. By facilitating large transactions, they offer capitalists massive opportunities and therefore can "turbocharge" growth. As a result, the prevalence of access money is not strongly correlated with GDP. In other words, it is possible to grow even when this type of corruption is endemic in a country. However, like anabolic steroids, access money produces distortive effects. Access money

can lead to excessive investment in real estate and construction (both areas in which bureaucrats can offer unique opportunities to bribers), and therefore can provide incentives to abandon other economically productive activities. Because of its exclusive nature, access money can also lead to inequality. Finally, Ang argues, access money leads to entrenched interests opposed to structural economic reform.

Ang's taxonomy generates valuable insights into the nature of corruption generally. For example, she points out that as capitalist economies develop, transactional forms of corruption, which are more easily disguised than theft, predominate (and Ang is clear that she views China as a "capitalist dictatorship"). However, unified corruption indices and popular perception both undercount this transactional corruption. As a result, developed countries with higher levels of transactional corruption are perceived to be *less* corrupt than they actually are. By contrast, developing countries with higher levels of theft-based corruption are perceived to be *more* corrupt than they are. Indeed, while this is a book about China, one of Ang's most potent ideas is that we should look at institutionalized transactional corruption in the United States as merely another type of corruption, rather than as a non-corrupt or post-corrupt system.

Unbundling corruption also allows for comparison of different countries that goes beyond aggregate corruption levels. One particularly telling example is Ang's comparison of China and the United States. While aggregate corruption levels are far higher in the former, access money is the predominant form of corruption in both. Ang's explanation is that in the United States, access money corruption is "institutional," that is, both legal and channeled through institutional arrangements such as lobbying, political action committees, and agency capture. In contrast, corruption in China is "enmeshed in personal relationships."

However, as this comparison suggests, Ang's taxonomy can only explain so much. Why do not all countries in which access money predominates, have turbocharged growth? That certainly is not the case in Japan, another such country, nor is it in the United States. More broadly, how can countries with vastly different corruption profiles have different growth outcomes? Ang's point is not that corruption profile has a *causal* impact on growth, but rather that access money corruption is

at least *compatible* with high growth. To understand fully why China has been able to grow, Ang explains how the Chinese bureaucracy functions, and how access money in particular has been harnessed to unleash growth.

Chinese bureaucrats are poorly paid, at least on paper. The Chinese Communist Party (CCP) therefore faces a problem common to many developing countries: How do you keep bureaucrats from stealing from the state–or the people–through rent-seeking? If bureaucrats are not paid enough, corruption is to be expected. However, simply paying more is not always an option. Increasing salaries in the bureaucracy can take a toll on a nation's balance sheet, and it does not always correlate with better outcomes. China's solution, as Ang brilliantly dissects it, is a "profit-sharing system" that allows street-level bureaucrats to "top up" their salaries with rents, while aligning their financial interests with the CCP's developmental goals.

The Chinese bureaucracy is massive and decentralized, and province- and city-level bureaucrats have significant autonomy over development and social policy. As the Chinese economy transitioned towards a state-directed capitalism (or "market socialism" in the CCP's only terms) in the 1980s and 1990s, the role of the bureaucracy changed alongside it. Today, subnational party secretaries build and direct industries, promote investment, manage land, and spur construction. The bureaucracy's power to command rents is derived from this role as a visible hand guiding the market. High-ranking bureaucrats are able to engage in large-scale bribery, while street-level bureaucrats typically receive "fringe benefits" that are linked to the economic performance of their city or province.

As Ang points out, this corruption is constrained and put to developmental use by two forces. First, Chinese bureaucrats take the long view. They understand that the rents they can extract in the long term are maximized if they promote development. This means, for example, that bureaucrats are more likely to take a cut out of agency fees (Ang calls this a "commission"), than taking a cut of tax revenue (what Ang calls a "dividend"), because the latter is detrimental to long-term growth. Agency fees, in turn, increase alongside economic activity, and as a result, even corrupt officials are incentivized to foster growth. Second, since the late 1990s, China has built up its capacity to monitor and prevent theft-based corruption in its

ranks by implementing centralized state bank accounts, cashless payments of fees and fines, and other anti-corruption tools. As a result, it has become very difficult for bureaucrats to engage in theft-based corruption, while their ability to engage in transactional corruption remains relatively unconstrained. Predictably, since the 1990s, access money corruption (largely in the form of high-value bribes) has exploded, while other types of corruption have declined.

This profit-sharing system aligned the interests of bureaucrats with the broader goals of the CCP. Party secretaries are incentivized to take risks and undertake bold projects–and are forced to compete with other regions for investors. As a result, the CCP has allowed the "coexistence of corruption and growth." Ang vividly illustrates this mechanism through the examples of the fallen CCP leaders Ji Jianye and Bo Xilai, both of whom were imprisoned on corruption charges, but only after delivering rapid growth in their respective regions.

Ang's explanation of how China got to where it is today despite high levels of corruption is compelling, but she can only provide questions regarding China's future. The first big question concerns the future of the profit-sharing system. Since coming to power in 2012, Xi Jinping's anti-corruption campaign has cracked down on bribery at all levels of Chinese bureaucracy. While theoretically Xi's campaign could boost growth in the long term, Ang is skeptical. The current profit-sharing system is reliant on a corrupt but risk-taking and bold bureaucracy. As corruption is reduced in the bureaucracy, that risk-taking activity needs to be transferred to the private sector. However, Xi is also cracking down on private sector liberties.

This suggests a limit to Ang's "Gilded Age" metaphor. America's Gilded Age was followed by a Progressive Era that sharply cracked down on certain forms of corruption, leaving in place only "institutionalized" corruption such as lobbying and political action committees. Ang claims that Xi's anti-corruption campaign represents the beginning of China's own Progressive Era, but she is doubtful that corruption in China will be similarly institutionalized. So what shape will China's own Progressive Era take? Here, her vision for China's future seems at times contradictory. On the one hand, she charts the success of Xi's anticorruption campaign, while on the other she suggests that corruption in China will remain "personal in

nature." If a corrupt but competent profit-sharing system is not the future for China's bureaucracy, then what is?

Despite these unanswered questions, *China's Gilded Age* is an original and compelling account of growth in China that pushes back sharply against broad narratives and biases in analyzing growth and corruption. Ang convincingly dispenses with the simple ideas that corruption is by definition bad for growth, or that corruption should be analyzed as a single metric. Ang also points to biases that infect how Western analysts look at corruption in developing countries as well as their own. In particular, Ang shows that we cannot simply impose Western ideal conditions on developing countries. Instead, those countries should look for transitional strategies, like China's profit-sharing system, but tailored to the conditions and needs of each particular country. For Ang this is not endorsement of the more distasteful byproducts of "transitional strategies," such as a corruption and inequality, it is simply a fact. More troubling for an American reader, Ang shows that the "ideal conditions" themselves conceal the corruption that continues to exist in Western societies in an institutionalized, transactional form. Indeed, an inescapable lesson of Ang's book is that we cannot divide the world in pre- and post-corruption societies. Not only is corruption compatible with growth, it might be its ever-present companion.

Restoring the Global Judiciary: Why the Supreme Court Should Rule in U.S. Foreign Affairs. By Martin S. Flaherty. Princeton, NJ: Princeton University Press, 2019. Pp. xiv, 325. $35.00 (hardcover).

Reviewed by Jinyoung Lee

In *Restoring the Global Judiciary: Why the Supreme Court Should Rule in Foreign Affairs*, Martin Flaherty calls for a more robust judicial role in shaping U.S. foreign policy and defending fundamental human rights. Weaving together American history, constitutional law, and international relations theory, Flaherty delivers a powerful interdisciplinary critique of the unitary executive theory and refutes the idea that the president should unilaterally dominate decision-making in foreign affairs. His argument is compelling for several reasons. First, Flaherty adopts an originalist interpretation of the Constitu-

tion, a perspective that many of his critics hold, to argue that a strong judiciary in foreign affairs matters is precisely what the Founding Fathers intended. Second, Flaherty's expertise in both international relations theory and constitutional law makes for engaging storytelling that helps the reader understand evolving legal doctrine in the context of global politics. Finally, the book is particularly timely following the end of the Trump Administration, in which a chief executive with no prior foreign policy experience exerted wide latitude on foreign policy decisions like the withdrawal from the Paris Agreement and the unwarranted proclamation of a national emergency on the southern border.

In light of these demonstrations of executive dominance, Flaherty argues that the Supreme Court must reclaim its role in defending human rights and maintaining the separation of powers. While this is a compelling argument, Flaherty falls short in offering concrete solutions to make this a reality, given the established legal precedent. Ultimately, however, this book is an important counterweight to the current scholarly literature that is dominated by the belief that only the executive should dictate foreign affairs. It is a must-read to all those that care about human rights, the rule of law, and America's standing in the world.

The book is divided into four parts. Part I begins with the origins of the Constitution. Relying on constitutional text and debate, Flaherty explains the fundamental role of foreign affairs in the creation of the Constitution: it was principally designed to address the weaknesses of the Articles of Confederation in responding aptly to foreign threats. The Constitution equipped the federal government to centralize its foreign policy, giving it tools like the power to enter treaties with other nations, the power to retaliate against trade sanctions, and the power to create an effective national army. Through this textualist interpretation, Flaherty argues that the Founders intended the separation of powers doctrine to apply to foreign affairs as much as to domestic affairs. For example, under Article III, the Founders gave the judiciary the original jurisdiction to hear cases or controversies that implicated foreign affairs, such as those involving ambassadors and other public officials and cases of admiralty or maritime jurisdiction. Flaherty's choice of constitutional interpretation is very effective because textualism is often employed by proponents of the unitary ex-

ecutive theory to support their views on strong presidential powers. Instead, Flaherty shows that textualism also points to the Founders' belief that the federal courts must fulfill their vital role in protecting individual rights under international law and serve as an important check on the foreign affairs powers of Congress and the President.

In Part II, Flaherty analyzes specific cases and controversies to show how the Supreme Court stayed true to the Founders' vision for a strong judiciary that works to protect individual rights under international law. In the beginning, the Court dealt with admiralty cases, naval captures, and hostilities arising on the high seas between nations. It pushed back against any congressional violations to the law of nations, such as the case of *Murray v. Schooner Charming Betsy*, in which the Court rebuffed Congressional support for the capture of neutral vessels. Flaherty explains that the Supreme Court continued to play this critical role into the 20th century, although it began to face growing resistance from the executive branch due to the development of a new "national security state" following World War II and the Cold War. He focuses on two contradictory landmark cases: *United States v. Curtiss-Wright Export Corp*, which stood for the proposition that the executive was the "sole organ" in foreign relations, and *Youngstown Sheet & Tube Co. v. Sawyer*, in which the Court reasserted its role as a check on presidential power, even during wartime. This tension grew as the United States transitioned from isolationist country to global hegemon, and as numerous administrative agencies devoted to national security emerged, such as the CIA, the National Security Council, and the Joint Chiefs of Staff. Concurrently, international law began to shift its focus from admiralty to international human rights doctrine.

This leads into Part III, which I found to be most interesting and demonstrative of Flaherty's greatest asset: his interdisciplinary approach. Flaherty dedicates this unit to the explanation of the twentieth century transformation in international relations, moving away from the traditional interactions of sovereign nation-states (the "Old Order") to the modern world of "disaggregated states" (the "New World Order"), in which "subunits" of a country's government interact with their counterparts through global networks, conferences, and international organizations. In turn, country leaders housed under the executive body—such as finance ministers, health officials,

regulators, military, and intelligence officials—now play an increasingly active role in shaping foreign relations. Flaherty argues that because of this "transgovernmental globalization," there has been a net shift of domestic power toward the executive and away from the rights-protecting judiciary, violating the core tenets of separation of powers doctrine. To illustrate this, Flaherty reminds us of the tragedy of the Canadian citizen Maher Arar who, because of a botched collusion between U.S. immigration and law enforcement and other foreign government officials, was falsely accused of being a member of al-Qaeda and was subsequently deported to Syria, where he was tortured. Later, Arar brought a lawsuit against the United States for this blatant violation of human rights and international law obligations. Yet, the Supreme Court denied Arar his day in court, invoking the "state secrets privilege," which enables the government to withhold evidence on the basis of national security. Arar's story is one of many examples of great storytelling in the book where Flaherty weaves together the dynamics of international police cooperation in the post-9/11 era while analyzing the legal barriers that kept Arar out of court. These case studies bolster Flaherty's broader argument that the net shift in international relations emboldened the executive, while disabling the legislative and weakening the judiciary.

Part IV concludes the book, but not in an entirely satisfying way. Flaherty points out the various "gatekeeping" legal doctrines that have allowed the Court to keep foreign affairs out, such as the state secrets privilege, the principle of extraterritoriality, and other constraints of justiciability, including jurisdiction, standing, the political question doctrine, and immunity. Such grounds have been invoked to keep even the most egregious cases of gross human rights violations out of court and allowed the CIA and other national security agencies to escape judicial accountability. Flaherty finds this shirking of the Court's basic duties to be wrongheaded. While I agree with his sentiment, I was left wanting more: Flaherty did not aptly address the government's very serious and valid interest in national security matters, nor did he propose any solutions on how we can balance these competing interests.

Instead, Flaherty moves on to another legal discussion and assesses the efficacy of international treaties and federal statutes as means to invoke jurisdiction to hear cases that im-

plicate foreign policy. While the Constitution has explicitly made treaties the "supreme law of the land" over state laws, in recent practice this has not been the case. Instead, treaties and other international agreements are essentially ineffective unless Congress ratifies them as internal law of the United States. For instance, decisions by the International Court of Justice involving the United States are not binding domestically without Congressional action because the Supreme Court held the U.N. Charter was not "self-executing." This has allowed the United States to sign human rights treaties yet escape the consequences of violating international legal standards. According to Flaherty, this shift from the treaty supremacy theory to non-self-execution occurred due to the rise of the United States as a geopolitical power, which made treaty violations less perilous than they once were in the Founding Period. In addition, the Supreme Court was reluctant to use international agreements like the U.N. Charter or the Universal Declaration of Human Rights to challenge and overturn state laws. For instance, in cases challenging discriminatory state laws, the Court chose to rely on the Constitution rather than the U.N. Charter or another source of international human rights law. It is unclear, however, what the motivations were behind the Court's willing relinquishment of its responsibility to interpret and apply treaties. Was it an argument for federalism, that state internal laws must be respected over treaty obligations? Was it a sense of American judicial exceptionalism that drove the courts to rely less on international treaties? Unfortunately, Flaherty does not adequately explore these questions.

Flaherty goes on to explain that international human rights law has had better luck through statutory law in the United States, thanks to the Alien Tort Statute (ATS). Under the ATS, foreign victims of human rights violations are able to bring tort lawsuits against other foreigners and foreign governments, and the Supreme Court had jurisdiction to hear those cases. Yet, with the rise of lawsuits against multinational corporations for aiding and abetting authoritarian regimes in the violation of human rights, the Supreme Court has been more reluctant to apply the ATS. In this section, I was curious to hear more about Flaherty's perspective on the foreign sovereign immunity doctrine and the absolute immunity given to international organizations like the World Bank, the International Finance Corporation, and other multilateral banks that

fund controversial projects that often create environmental and social harm. In particular, the recent 2019 Supreme Court decision, *Jam v. IFC*, would be a valuable inclusion to Flaherty's discussion because it marked the first time the Court has held that international organizations could be sued in the United States if their activities harmed local communities because they did not enjoy absolute immunity.

Ultimately, Flaherty ends on a note of optimism. In spite of the ever-growing power of the executive not just in the United States, but also in regimes around the world. Flaherty is hopeful that the judiciary will be able to take back its historic and constitutional role in defending fundamental human rights and restoring the balance of the separation of powers doctrine. His optimism, however, raised more questions for me. I was left wondering how the judiciary can take back its power given the established case law and the current makeup of the Court being dominated by a conservative majority whose views support the unitary executive theory. While the concluding chapter could have done more to explore these current challenges, overall this book is an outstanding resource. Flaherty raises novel legal and constitutional arguments against the growing power of the executive, and in doing so, the book adds immense value to the current scholarship on the intersection of constitutional law, international human rights law, and foreign policy. By eloquently pushing back against the ascendant theory of the unitary executive, Flaherty gifts us with a book appropriate for this particular moment in American politics; a moment that has seen the continuous rise of powerful presidents.

The Right to Truth in International Law: Victims' Rights in Human Rights and International Criminal Law. By Melanie Klinkner and Howard Davis. New York, NY: Routledge, 2020. Pp. xiv, 224. $85 (hardcover).

Reviewed by Caroline Marks

The Right to Truth in International Law: Victims' Rights in Human Rights and International Criminal Law is a comprehensive guide to the right to truth. It illuminates the content and legal status of a relatively elusive right. The book posits that currently, although institutionalized in various international

judicial fora, the right to truth is inadequately fulfilled on the international stage. The authors point to national, judicial inquiries as the only fora with the potential to fulfill the right to truth. The authors are convincing in that the full content of the right to truth is not exacted by all international judicial fora, but they fail to consider that this allows for a more robust expression of the right as a grab-bag of rights and remedies, rather than a rigid list of requisite components.

The first chapter examines the idea of a legal right to truth both analytically and morally, establishing its extra-legal foundation. Klinkner and Davis first explore the foundational, human interest in *knowing*, which serves both to generate the right to truth and define it. The authors acknowledge the need of the families of individual victims of egregious human rights violations, as well as the surviving victims themselves, to know what happened. Lack of knowledge by itself constitutes a suffering that can spawn additional issues with economic security and cultural and religious observance. The authors also identify a societal or collective need to know the truth about human rights violations. They explain that the effects of egregious crimes can be experienced by more attenuated stakeholders, including members of a victimized group. Furthermore, the right to know what happened could also serve society by ensuring transparency, ending impunity, and preventing further violations—all of which stave off political instability.

The chapter then explores the emphasized need for both finding and telling truth in post-conflict, transitional justice scenarios. Although there is an acknowledged limit on the value of truth-finding and -telling in peace-building efforts contingent on the circumstances and nature of the conflict itself, the authors conclude that the need for truth in these situations is undeniable. As a result, the authors claim that the right to truth is a universal right—that it "reflects a universal norm because it is anchored in a universal need and emerges as a part of 'existing norms of universal applicability' ". However, they clarify that while universal, the right is not homogenous. Many rights-bearers at the individual or societal level choose not to pursue the right, or to pursue it in only a limited manner, on various political, religious, and cultural grounds. For example, Orthodox Jews resisted the scientific excavation of the burial site of some 1,600 Jewish residents of Jedwabne,

Poland who were massacred by their neighbors. The excavation was to ascertain information on the number of victims, their identities and how they were killed—all essential to unearthing the truth of what happened—but work was halted by claims that the exhumation of bodies would be contrary to Jewish Law. Thus, the need for truth may be universal, but the content of that need may vary greatly among stakeholders.

Finally, the chapter explores the types of violations that trigger the *need to know what happened* among affected parties. Tracing the history of the invocation of the right, the authors conclude that today, "the right to the truth presumes that massive or systematic human rights violations which also form part of international criminal offences such as genocide, war crimes or crimes against humanity have been perpetrated." Serious violations of international humanitarian law (IHL) are also sufficient. It is on this "basis of a universal human need for truth," that the authors claim the "legal need for the right emerges."

The second chapter traces the legal genealogy of the right to truth through transitional justice movements and under both IHL and international human rights law, looking at various international organizations and their resolutions and conventions and judgments of international, regional and domestic tribunals. The authors demonstrate that the right to truth has been given clear, institutional recognition through the agency of the UN and other bodies. They observe a "global institutionalization of truth-seeking practice." This global truth-seeking practice has formally codified the foundation of the moral right to truth and established its content. The authors synthesize the full content of the right from the myriad international documents in the following chapter.

In the third chapter, the authors identify "the content of the right to truth in terms of its grounding, legal status, general content, continuing nature, and the need for authoritative statements of truth." The right has both a morally grounded individual component based on the victim's need, as well as a broad political justification based on equality under the law and the ideals of a democratic society. Furthermore, although the right to truth is normatively significant, it still lacks certain "legal clarity in content, contour and pathway to realization," precluding the status of customary international law. Despite this, the right to truth has persuasive au-

thority that can guide interpretation of express treaty provisions.

The authors identify three components of the right to truth: *structural truth*, or the political and administrative structure that allowed abuse to occur, *individual truth*, or the fate of victims and particular circumstances of individual violations, and *narrative truth*, or the victim's story in their own words. This analysis informs the authors' working definition:

> "[I]ndividual victims have an imperfect right to the benefit of and a polity has an independent, incongruent, duty to accept the burden of (a) (i) an authoritative structural investigation of both the events and politico-social structures that led to atrocity and (ii) to the individualised, particular circumstances of an individual's suffering; (b) an authoritative reporting or communication of the results of these investigations. The right to the truth also implies (c) an opportunity for victims to narrate their stories."

With this working definition, the book proceeds to analyze the manifestation of the right to truth in three distinct fora: human rights courts, truth commissions and international criminal courts. None of the fora explicitly enumerate the right to truth in their central texts, yet all acknowledge and enact the right to some degree. The authors also point to distinct ways in which each forum fails to account for the entire content of the right to truth. For example, human rights courts may often fail to elucidate the *structural truth*, as bodies of limited jurisdiction. Human rights court tend to exclude *actio popularis*, instead focusing exclusively on the facts and context of the specific rights claim before it.

Following this generalized examination, the book explores the right to truth in specified fora: the IACtHR, UNHRC, ECtHR, various truth commissions, and the ICC. The authors conclude that in every type of fora, there is a strong emphasis on establishing the truth in both practice and jurisprudence, "independent of any over-arching right." The authors thus consider the prospective value of an independently recognized and operating right to truth. The authors have four suggestions. The first is *invigoration through association*, a process in which calling on the right to truth invigorates and enhances judicial responses to atrocity, often in the name of

victims and society. The second is *normative force*, through which framing duties as an expression of the moral imperatives of the right to truth extends them considerable moral force and preempts practical arguments for limiting said duties (i.e. state security concerns). The third is *the public aspect*, which posits that the right to truth involves a public aspect beyond the ordinary publicity presumptively attached to legal procedures and outweighed only by strong arguments against it. Finally, the right to truth enhances *nuanced authoritative fact-finding and declarations*, because it influences institutional framework design to facilitate the realization of the right often beyond that which is strictly, procedurally necessary.

The book concludes with an exploration of the role of the right to truth in law and presents three possible scenarios: the right to the truth as a stand-alone right ("directly enforceable legal right limited to the satisfaction of descriptive and analytical needs only"); subsuming the right to truth under other established human rights ("accepting that truth is inescapably bound in with rights to justice, judicial protection and reparation"); or the right to truth as an overarching moral right (with persuasive, guiding weight). The authors argue that option three most closely resembles reality:

> "the right to truth is an aspirational goal with increasing recognition, linked persuasively with other rights in the sense of providing jurisprudentially sound justifications for developing and refining positive legal rights in directions that help satisfy victim and public interests in knowing what happened."

The authors take the reader through a comprehensive and digestible history and modern analysis of the right to truth. They leave the readers with the stimulating thought that "truth-realisation might only ever partially be fulfilled at the international judicial level." Each international forum provides some, but not all, of the various components of the right to truth. Instead, the authors claim that there is "no escaping that the judicial inquiries capable of fulfilling victim's and society's needs will have to come through state level judicial inquiries."

The authors' analysis of the ways in which international judicial fora both succeed and fail in exacting the various components of the right to truth is astute. However, the assessment

that this fact renders truth-realization at the international level only partially fulfilled, or that state-level judicial inquiries are the sole mechanism "capable of fulfilling victim's and society's needs," misunderstands the purpose of the right to truth.

The right to truth is unique from many other human rights in that it implicates a myriad of stakeholders. The authors identify these stakeholders as the direct individual victim, the families of victims, a victimized community, the relevant polis of a democratic society, and the global community at large. Each victim experiences the abuse differently and may have largely divergent perceptions of the 'just outcome.' Often, right-holders envision fulfillment of their right to truth via some, but not all, components of the right to truth as identified by the authors. Therefore, the right to truth is better realized when understood as a grab-bag of rights and remedies, rather than a rigid and requisite list of components. In this way, right-holders may seek out international fora that suit their conception of the right to truth and a just outcome. Pursuing the right to truth may even involve negotiations among the various stakeholders. Furthermore, although state inquiries can add value, they can also preclude internal negotiations among stakeholders, as states would take lead in determining the exact contours and scope of the investigation and narration. Furthermore, as the authors acknowledge, state inquiries are inconsistently feasible, reliant on political will and resources, and often subject to pragmatic state restraint.

The right to truth, above all else, is aimed at rectifying the lasting, torturous effect of egregious human rights violations. Alleviating this suffering for individuals implicates a variety of means and outcomes. As the book acknowledges, victims pursue the right to truth in different ways and for a variety of different reasons. The scope and type of truth that each right-holder desires and needs may vary drastically. If the right may be invoked flexibly to address and harmonize disparate requests for truth and justice, it may better achieve its purpose. Therefore, although international judicial institutions only address disparate and discrete components of the right to truth, this does not preclude proper fulfillment of the right on the international stage. International judicial tribunals as a venue, while not perfect, are perhaps the most capable of realizing the right to truth.

Secrets and Spies: UK Intelligence Accountability after Iraq and Snowden. Edited by Caroline Soper. Washington, D.C.: Brookings Institution, 2020. Pp. ix, 189. $ (paperback).

Reviewed by Chandler Michaels

Secrets and Spies: UK Intelligence Accountability after Iraq and Snowden by Jamie Gaskarth sets out to explore and evaluate the United Kingdom's intelligence system, the functioning of its accountability mechanisms, and the effectiveness of those mechanisms. Gaskarth's main argument is that that future intelligence accountability reforms should incorporate task-oriented and vernacular accountability, in addition to formal accountability mechanisms. While Gaskarth's analysis is interesting, its depth is limited by the inherent secrecy of intelligence agencies and risks providing a skewed portrait of intelligence accountability. Additionally, his conclusions do not seem to add anything new to the existing literature on accountability. His analysis is more descriptive than argumentative, and his main contribution is a re-categorization of existing structures.

The introduction opens by identifying some of the United Kingdom's most notable and recent intelligence failures, such as the 2017 terrorist attacks in London and Manchester and the allegations of poor performance and impropriety related to U.K. involvement in the Iraq War. These intelligence failures are used to illustrate the importance of the United Kingdom's secret intelligence and security agencies, both in protecting British citizens, and informing policymaking. Gaskarth notes that commentators tend to appraise intelligence agencies by focusing on three elements: efficiency, efficacy, and ethics. In response to these traditional categories, Gaskarth offers a different tripartite framework, which focuses on authority, efficacy, and ethics. The first aspect, authority, is addressed through formal accountability mechanisms; the second, efficacy, through task-oriented accountability; the third, ethics, through vernacular accountability. Although Gaskarth mentions the full name of each intelligence agency, and even provides a flowchart, it becomes difficult to keep track of the many different acronyms, current and former officials, and relationships between agencies, if one is not already fairly familiar with the U.K. intelligence system.

Gaskarth's methodology used both what was available in public records and semi-structured, anonymous interviews with practitioners and scrutinizers. Though he acknowledges the limits of such information when obtained from secret intelligence agencies, he asserts that this information is the best available and proceeds to analyze the agencies and their accountability mechanisms accordingly. This seems to be the necessary flaw in any analysis of intelligence agencies—most of the information about internal mechanisms, especially accountability, is not available to the public. Although Gaskarth interviews current and former practitioners, there is no way to know whether this is a full or accurate picture of intelligence accountability. The secrecy of such agencies precludes a thorough examination of accountability mechanisms. The public will likely hear only of the most major intelligence failures, which are also the most likely to involve public investigations. This seems to put forth a skewed picture of accountability, although Gaskarth does his best to bolster his conclusions with 'inside' information. The information from the interviews is also somewhat suspect, however, because it is not clear that anonymizing the interviewees would allow them to be more forthcoming with information, since the purpose of confidentiality is to protect the public, not just to save face with their colleagues.

Chapter One focuses on the meaning of intelligence accountability and why it is so difficult to hold intelligence practitioners to account. According to Gaskarth, intelligence accountability boils down to two components: "rendering account," or providing information, and "holding to account," or judging the appropriateness of behavior, based on the information provided as well as other information. Gaskarth addresses the limitations that secrecy places on evaluation of intelligence accountability. He notes that intelligence agencies are subject to both judicial and executive oversight but provides no further argument as to the accuracy of his evaluation of intelligence agencies as a layperson. This seems to be a missed opportunity to justify the value of his analysis. Simply acknowledging a limitation that appears to undermine the value of the entire work is not enough. He also addresses the retrospective nature of accountability and the tendency to separate foreign and domestic spheres as limitations to intelligence accountability. Gaskarth argues that secrecy makes ac-

countability especially important in the intelligence context, because being removed from public scrutiny heightens the risk of abuse. Accountability mechanisms can serve both individual and collective functions in this context by keeping individuals honest and ensuring that their behavior is compatible with the public good. Rather than focus on accountability as important for democratic control, Gaskarth argues that internal account-giving processes can also provide important organizational and operational benefits, such as reinforcing norms, allowing for reflection and learning for the future, and promoting innovation.

Gaskarth then takes a detour to address recent challenges to accountability. In perhaps the most interesting digression in the book, he outlines the difficulties that artificial intelligence (AI) poses for accountability, which is tuned to address human behavior and its failures. As artificial intelligence is increasingly used to identify suspects in intelligence investigations, it may be difficult to pinpoint a responsible actor that can be held to account when something goes wrong. Often, artificial intelligence operates as a "black box," so it may not be clear what triggered an algorithm to identify a certain suspect as a potential security threat. If this intelligence is erroneous and causes serious human consequences when acted upon, the ultimate cause is a machine that cannot be held accountable for its actions. An additional issue with such algorithms is humans, who may inadvertently integrate personal biases that can take on new life through the artificial intelligence, design them. This is especially fraught due to the lack of diversity in U.K. intelligence personnel, which leads to greater bias. To overcome such problems, commentators have recommended mixed human-AI arrangements so that humans can spot check the intelligence. This appears to undermine the very purpose of artificial intelligence in the intelligence sphere. Requiring humans to spot-check AI-generated analyses risks losing the timesaving benefits of the data computing power of AI.

Chapter Two explores the main criticisms and accountability failures of the U.K. system of intelligence, divided into four categories: political issues, operational issues, accounting issues, and ethical concerns. The political section focuses on problems such as poor coordination between agencies, misinterpretation of intelligence, and failure to anticipate threats. The most damaging political issues noted are intelligence fail-

ures related to the Iraq War. Although focused on the United Kingdom's failures, any time the Iraq War is mentioned, Gaskarth uses the opportunity to criticize the United States for its involvement, intelligence failures, and unethical practices. He seems to use the United States as a foil to the United Kingdom's failures in the Iraq War, pitting the United Kingdom as the lesser of two evils, even as he seeks to critique their intelligence agencies. The section on operational issues includes problems with the handling, production, and analysis of intelligence. Gaskarth also addresses accounting errors, such as poor record keeping, waste, and misallocation of resources. The most notable failure in this section is an Intelligence and Security Committee (ISC) report noting that the Government Communications Headquarters (GCHQ) has been unable to account for £1 million in equipment, 450 pieces of which were believed to pose a potential security risk. Lastly, Gaskarth details ethical failures ranging from treatment of detainees to cooperation with international partners on surveillance and rendition, breaches of the Official Secrets Act, and agent running. Here, he again takes the opportunity to compare the United Kingdom's ethical failures to the United States' far more egregious ones. It seems that the inherent secrecy of intelligence agencies once again handicaps Gaskarth's analysis of intelligence failures, as he addresses only the most notable and public failures. It is unlikely that a layperson would have access to detailed information about smaller, everyday intelligence failures that do not make it into the public consciousness. A few major failures may define an agency's public image, and may even spark reforms, but the everyday functioning of the agency is important for evaluating its effectiveness. Seeing how small failures are addressed is key to evaluating accountability mechanisms.

Chapter Three focuses on practitioner views of accountability and features Gaskarth's interviews with anonymous sources most prominently. This chapter is segmented into opinions about three types of accountability: formal accountability mechanisms, task-oriented accountability, and vernacular accountability. The first is self-explanatory; the second deals with accountability and improvement by virtue of the intelligence field's constant evolution; the third deals with accountability as a cultural product of everyday conversations and experiences within the intelligence community. The latter two

types of accountability are not often associated with the general idea of accountability, which tends to focus on formal mechanisms of review, oversight, and holding to account. Gaskarth seeks to add to this reframing to the literature on intelligence accountability. Gaskarth's notions of task-oriented and vernacular accountability give a fuller picture of the way that the job itself and the culture of the agencies help to reinforce formal mechanisms of accountability. Again, this section raises the problem of how much one can trust anonymous interviews for an accurate depiction of agency culture. Gaskarth argues that social and cultural changes in wider society have permeated intelligence agencies and caused them to adopt a more professional approach to their work, and that technological changes have allowed agencies to be more effective in their tasks. Gaskarth's central argument is premised on these three types of accountability, and their differences, but his later analysis seems to meld them together. His argument essentially recategorizes the existing structure as drawn from practitioner experiences. This is somewhat problematic for his argument because it does not contribute much to the existing literature and understanding of intelligence accountability. His argument lapses into description because these types of accountability are clearly already in place in the intelligence agencies.

Chapter Four builds on the description drawn from members of the intelligence community in Chapter Three and details how U.K. practices align with the theoretical understanding of accountability, again focusing on formal mechanisms, task-oriented accountability, and vernacular accountability. This chapter serves to reinforce the framework that Gaskarth set out in the previous chapter, but does not add much in the way of novel information. It focuses primarily on formal accountability mechanisms, which clashes with Gaskarth's argument in the previous chapter that task- and norm-focused accountability tends to be more important in reinforcing the organizational accountability system.

Chapter Five focuses on liaison relationships and international intelligence accountability. The chapter follows the same structure as the previous two, focusing in turn on formal accountability mechanisms, task-oriented accountability, and vernacular accountability. The formal accountability structures are defined by the norms of reciprocity, secrecy, and the control principle (the originator of intelligence is responsible for

its dissemination). This section focuses heavily on the U.S.-U.K. intelligence relationship as well as the rest of the "Five Eyes" network (Canada, Australia, and New Zealand). Though it claims to address formal accountability, this section focuses more on norms of international cooperation than legal accountability, which it describes as fragmentary. The focus on norms seems to fit more with the idea of vernacular accountability as defined in previous chapters. While Gaskarth attempts to draw distinctions between the three types of accountability, in reality they often overlap. Consequently, the distinctions at times feel artificial and this undermines his central argument premised on their differences. The section on task-oriented accountability focuses primarily on the U.S.-U.K. relationship and depicts U.K. intelligence officials as being particularly concerned with how the U.S. intelligence community views their performance and competence. This contrasts with Gaskarth's negative view of U.S. intelligence agencies and seems to suggest that U.K. intelligence officials hold the U.S. intelligence machinery in higher regard than the author does. Finally, vernacular accountability in the international context involves cultural exchanges that imbue officials with a shared sense of what is appropriate or effective. Vernacular accountability is seen as effective with intelligence partners that share U.K. values, like the "Five Eyes," but less so with other states in which the United Kingdom has less confidence.

Gaskarth's conclusion reviews the book's structure and insights, which helps to tie the different concepts together. He then offers lessons to be learned for future U.K. intelligence accountability. Namely, he notes the need for anticipatory intelligence, improved record keeping, and a focus on the ethical dilemmas that emerged during the Iraq War. Gaskarth's argument that future intelligence accountability reforms should take account of task-oriented and vernacular accountability—rather than only formal accountability mechanisms—is effective but does not seem to be particularly novel. In his own analysis, he identifies existing task-oriented and vernacular accountability mechanisms that are already in place in the British intelligence system. Gaskarth attempts to engage in a thorough analysis of a subject on which information is necessarily limited by secrecy, and though he addresses this issue, he does not fully overcome the hurdles that it poses. Thus, the book

reads more like a review of intelligence practices than support for any argument Gaskarth is trying to pose.

The Conflict of Laws in India: Inter-Territorial and Inter-Personal Conflict. Second Edition. By V.C. Govindaraj. New Delhi, India: Oxford University Press, 2019. Pp. viii, 436. $65.00 (hardcover).

REVIEWED BY MADHU NARASIMHAN

In his sweeping treatise, *The Conflict of Laws in India: Inter-Territorial and Inter-Personal Conflict*, V.C. Govindaraj lays out the approaches of the Indian courts and legislature to issues in the field of conflict of laws. Govindaraj notes that he chose to publish a second edition—the first edition of the book was released in September 2011—due to significant recent developments in the law of guardianship and Muslim law. (Regarding the latter category, Govindaraj is referring primarily to the famed August 2017 Supreme Court of India 3-2 decision in *Shayara Bano v. Union of India and Others*, deeming the triple *talaq* form of divorce to be unconstitutional.)

Govindaraj's central argument is that India ought to do more to develop its native conflict of laws system rather than rely too much on rules derived from English law. Overall, the presentation of arguments does not seem to be the focus or strength of the book. While the introductory and concluding chapters hint at the author's overarching arguments regarding Indian conflicts of law, and while other chapters include snippets of commentary and proposals to help resolve conflicts that Govindaraj has identified, much of the book's substance is purely textbook-like. Viewed as a textbook, Govindaraj's work is doubtless an excellent resource.

Govindaraj opens with a discussion of the fundamentals by explaining what "conflict of laws" is and why he prefers this term over "private international law," the other phrase that is often used to describe the field. For the author, the use of "private international law" obscures the fact that this field covers not only the conflicts that emerge from transnational legal matters, but also those that arise within a nation-state's own domestic laws. Private international law is also easily confused with the field of international law, "which can only be public, not private," Govindaraj explains. "Further, the title [conflict

of laws] acquires greater legitimacy viewed in the light of the Indian legal system," he writes. In India, conflict of laws certainly goes beyond inter-territorial or transnational legal issues. Indeed, India is a highly dynamic jurisdiction in which to examine conflicts of law; it has several varied systems of "personal law" for its religious communities, governing issues such as marriage, divorce, adoption, inheritance, and succession. There are laws governing Hindus (with Buddhists, Sikhs, and Jains grouped together with Hindus for this legal purpose); laws for Muslims; laws for Christians; laws for Parsis; and laws for Jews. Conversions and inter-faith marriages, for example, are instances in which these personal law systems might give rise to conflicts of law.

Govindaraj notes that nation-states can attempt to mitigate conflicts of law by seeking to unify their internal laws or acceding to international treaties and conventions (e.g., those administered by the Hague Conference on Private International Law). However, Govindaraj argues that "the Indian conflict of laws is in its state of infancy," suggesting that India needs to take more action to examine and resolve the conflicts that exist. He suggests that Indian courts still rely heavily on the rules of English conflict of law but that there is much opportunity for the judiciary to create homegrown choice-of-law rules. Additionally, the legislature—with the assistance of an organization such as the Law Commission of India or the Indian Law Institute—could bring definition and clarity to the body of case law that the courts have thus far generated in this field. In calling for India to make advances in conflicts of law, Govindaraj points to American work as a beacon: ". . .scholarly exposition of the theories and methods of conflict of laws in the United States, coupled with the three Restatements on the subject, are nothing but awesome."

Govindaraj's work itself is quite awesome in its scope; it is probably the most comprehensive textbook on conflict of laws in India to date. The book discusses the types of foreign law that Indian courts are likely to exclude from their consideration. There is a chapter on the general stages of the resolution process for any conflict of laws. Govindaraj then covers how Indian courts determine the domicile of individuals and corporations. From there, he covers conflicts in several substantive areas of law: the law of obligations (i.e., contracts and torts); negotiable instruments; personal/religious law (with

special attention to marriage, divorce, and children); property law; insolvency and corporations. In the final few chapters, Govindaraj examines how India recognizes and enforces foreign judgments; discusses procedural miscellany (e.g., interlocutory orders, *forum non conveniens*, injunctions to restrain foreign proceedings); praises the Hague Conventions on Private International Law (while noting that India has acceded to four of the 39 conventions); and shows how certain English theories in the field of conflict of laws (e.g., the "vested or acquired rights" theory and the "jurisdiction selection" rule) came to be supplanted over time through the writings of American jurists. He explains why he has chosen to conclude the book on this latter topic:

With the onset of globalism, it is all the more imperative that we [India] cut ourselves off from the umbilical cord, I mean to say the English conflicts rules, and evolve our own conflicts rules, as did the Americans, to suit our needs based on our cultural and social environment.

Even seven decades after India's independence from the United Kingdom, Govindaraj's writing reveals a post-colonial tenor and an urgency for native solutions. As noted at the start of this review, Govindaraj's urge for India to develop indigenous conflict of laws doctrines more robustly, is perhaps the core argument of the book. Granted, he does not call for an entirely insular approach to transnational conflicts of law, but rather he celebrates India's active participation in the Hague Conference, a multilateral platform.

While there is not much else in the way of an overarching argument, the book does propose, at certain points, meaningful reforms that could resolve particular conflicts of law. For example, in his chapter on "The Law of Persons," Govindaraj identifies a conflict between the Hindu Marriage Act of 1955, which contains provisions relevant for Hindus domiciled in India who wish to get married abroad, and the Foreign Marriage Act of 1969, which lays out conditions for Indian citizens who wish to get married abroad. The conditions presented by the two acts may vary and conflict. What if there is an Indian citizen who also happens to be a Hindu domiciled in India? With which of the two acts should that individual comply when attempting to marry abroad? In one neat paragraph, Govindaraj proposes a solution to this problem. The individual could simply be permitted to choose which act they wish to follow, elect-

ing to identify either as a Hindu domiciled in India (in which case, they would follow the Hindu Marriage Act) or as an Indian citizen (in which case, they would follow the Foreign Marriage Act). This could be a workable solution if the Indian courts, or legislature, make it expressly clear that such an elective option (at the expense of the conditions of the other, unchosen act) is permitted. However, there may still be non-legal, identity-oriented questions to consider here: what if the individual does not wish to choose between their Hindu identity and their identity as an Indian citizen, even if only to briefly fulfill a statutory obligation? Govindaraj does not delve into this question.

The book could afford to offer deeper analysis on difficult, significant questions regarding personal and religious law. For example, how might the role of religious laws evolve, grow, or diminish over time in India's secular democracy? Could the rise of Hindu nationalism influence this evolution in any way? For example, the author points out that most of the recent legislation reforming personal law relates to Hindus. (The recent developments in Muslim law that prompted Govindaraj to write this second edition came from the judiciary, not the legislature). It is not clear whether this is because Parliament has been most interested in taking up bills related to Hindus, if other religious communities have not called for reforms to their own laws, or if there are other factors at play. Such a discussion would be useful. Are the Indian adherents of other religions, such as Buddhism or Islam, satisfied with how their laws are currently codified by the government? What types of interfaith dialogues might be needed for legal scholars, advocates, judges, and legislators to understand fully how to resolve conflicts of law that emerge from cross-religious, interpersonal relations? For instance, each religion tends to prescribe its own solemnization ceremony for marriages. Govindaraj notes that a conflict regarding solemnization ceremonies could certainly have arisen for Hindus and Sikhs, for example, under the Hindu Marriage Act of 1955, which governs both communities. Fortunately, Section 7 was added to the Act to specify that a Hindu-interfaith marriage could be validly solemnized according to the religious ceremony of either party. How did that rule come to be? Did interfaith dialogues facilitate that type of flexible, pluralistic law? Moreover, how exactly should India seek to make its internal

laws more uniform even as it continues to create separate sets of personal and family laws based on religious identity? Some of these questions go beyond the strict scope of conflicts of law, but they would nonetheless provide useful, even critical, context for how conflicts of law may develop in the future and how they can be resolved.

The book could also be a more helpful guide to its presumptive audience—the Indian legal profession and those outside of India who are interested in comparative law—if it offered a concise compendium of Govindaraj's proposals for concrete reforms in each substantive area of conflict, such as corporate law, property law, or tort law. Govindaraj has seven Annexures (each presenting the text of a Hague convention), as well as a Case Index and a General Index, following the main text of his book. This could be an appropriate place for a summary of reform-proposals, should there be a future edition of the book.

A final critique relates to the organization of the book. It is somewhat difficult for the reader to see the narrative arc of the treatise, perhaps because the chapters are largely isolated from each other. The links from one chapter to the next are not always seamless and the overarching umbrella topics are not always grouped together or spelled out (e.g., with a statement such as "these several chapters are on substantive law" or "these chapters are on procedural matters"). For example, some procedural issues are addressed earlier in the book while other procedural issues are addressed much later, following the substantive law chapters. There may well be a logic to the book's organization, but it might have been helpful for that logic to be shared directly with the reader.

All in all, *The Conflict of Laws in India* is an important work that raises the call for India to develop its conflict of laws system further. Beyond that call, the book is not necessarily focused on making big-picture arguments, but it does identify some existing conflicts and offers proposals to resolve those conflicts. At times, its analysis could afford to go deeper. Nevertheless, *The Conflict of Laws in India* is a magisterial work written by one of the foremost scholars in the field. It will serve as an informative and thought-provoking read for anyone interested in India's legal systems or in conflict of laws more broadly.

Bitter Reckoning: Israel Tries Holocaust Survivors as Nazi Collaborators. By Dan Porat, Cambridge, MA: Harvard University Press, 2019. Pp. 276. $29.95 (hardcover).

Reviewed by Ariel Reiner

"Don't judge your fellow until you have stood in his place." This statement attributed to the sage Hillel the Elder is codified in the *Mishna*, a Jewish legal text from the earliest centuries of the Common Era. Millennia later, it also framed the legal controversies that the fledgling Jewish state would grapple with in the mid-twentieth century, as it tackled the question of how to respond to a complicated and often overlooked element of the evils of the Holocaust: the role of Jewish people who acted as Nazi collaborators. How, if at all, can a country establish itself as the haven for Jewish refugees of the Holocaust, and at the same time approach the issue of exacting punishment on Jewish immigrants who played a role in the atrocities of the Nazi Regime?

This is the legal and sociological mine field that Dan Porat enters in *Bitter Reckoning: Israel Tries Holocaust Survivors as Nazi Collaborators*. In his introduction, Porat, through the words of survivor Primo Levi, articulates the problem facing the community in the years following the Holocaust: "The condition of the offended does not exclude culpability, which is often objectively serious, but I know of no human tribunal which one could delegate the judgment." Yet, tribunals were formed, and punishments were carried out. For the duration of the book, Porat weaves a chronological narrative of how pre- and post-State Jewry conducted the "Kapo Trials." Porat's goal is to show the reader that Israel's approach to these prosecutions evolved from uncompromising to sympathetic. The first half of the book deals with the pre-State framework, or lack thereof, through which the community responded to former "Kapos", or Nazi collaborators, while the second half traces the legalistic approach Israel took in prosecuting them. Throughout, Porat's purpose is to highlight the evolution in the sentiment surrounding the treatment of collaborators.

Following the war, many Jewish survivors settled in displaced persons (DP) camps. In Chapter One, Porat describes in harrowing detail instances where vigilante justice took the place of even informal adjudication. In one instance, a camp

sergeant interrogated a Kapo, but let him go after yielding no confession. The interrogator concluded that association with Nazis alone was not grounds for retribution. Later that night, survivors who were victims of this man's actions seized him, tied him up next to a creek, and summoned two Jewish Brigade soldiers to serve as observers of their "trial." The death verdict was issued, and the former Kapo was drowned.

While there were other isolated instances of vigilante justice, Porat describes many attempts in post-war Europe for Jewish communities to form "DP courts" to try collaborators. Such proceedings were often devoid of specific charges and were guided by social principles. Because these were not courts of law, punishments were often symbolic, such as stripping the wrongdoer of any leadership roles in the community. This lack of serious punishment led to perpetual frustration and a return to violence that some felt was necessary to seek real justice. Ultimately, when the focus of the trials shifted to the newborn State of Israel, a reckoning was needed.

In Chapter Three, Porat describes the initial phase of the Kapo Trials, which encompassed the early 1950s. During this initial phase, alleged collaborators received unabashedly severe treatment from prosecutors. This was largely due to the Knesset's (Israel's legislative body) passing of the Nazis and Nazi Collaborators Punishment Law in 1950. While lawmakers debated whether the law should distinguish Jewish collaborators from the Nazis themselves, the final product made no such textual distinction, due to what many legislators felt was the need for "equal justice under the law." Porat does an excellent job adding further context to this decision through discussing the cultural tendency of young Israelis to exude strength and self-sufficiency, a sentiment that led to negative perceptions of "cowards" who accepted Nazis instead of resisting them. Following the passage of the law, Kapo trials began in full force, this time, unlike in Europe, through a legal framework.

However, even in this first stage of prosecutions, there was a large gap between the outlook of prosecutors and judges. While Porat is predominantly concerned with the approach prosecutors took, it is important to note that the harshest sentence a Kapo ever received, for a conviction on fourteen separate counts of assault, was just six and a half years in prison. From a judicial perspective, it is hard to argue that even this

first phase was practically severe. This broader view incorporating sentencing makes it a little more difficult to accept Porat's argument that the first stage of the Kapo trials was particularly harsh.

Porat identifies one major shift in prosecutorial outlook in Chapter Six, when a conviction of a Kapo for "war crimes" pursuant to the Nazi Collaborators Law led to a death sentence by the district court. Two out of three judges on the panel felt it was the only option under the written law, what the judges described as a dreadful outcome. The Supreme Court ultimately reversed the sentence, unable to swallow the consequences, but not before prosecutors were alarmed by the result in the lower court. From that point on, collaborators were not charged with war crimes in an attempt to avoid the consequences of the harsh law. Further, collaborators were no longer equated with Nazis but as a distinct category—Jewish collaborators. On paper, Israel was ready to treat its citizen collaborators harshly, but it was not ready for the practical consequence that came along with the message.

Throughout the book, Porat successfully incorporates underlying societal narratives to help explain Israeli society's shift in its approach to collaborators and the spill over into the prosecutions. As the immediate memory of the atrocities began to fade, many cultural leaders started to vocalize their doubts regarding the possibility of judging those who experienced the horrors of the Holocaust. A thought-provoking play began running in the major theatre in Tel Aviv that depicted the contentious work relationship between a young Israeli and a former Kapo and called for the viewer to sympathize with the lived experience of the Kapo over the imagined frustrations of the youth. Around the same time, famous Israeli poet Nathan Alterman published the poem, "Between Two Paths," which underscored the grey area between victim and collaborator.

The book also highlights parallel shifts within the legal community as to how to approach the trials. The leading prosecutor of the time, Attorney General Haim Cohn, was initially firmly in the camp that anyone who assisted the Nazis had to be prosecuted. Just four years later, during the trial of Rudolf Kastner, who was accused of hiding information from hundreds of thousands of Jews regarding deportation in order to save a few thousand, many of whom were close friends and family, Cohn reversed course. "We are unable to judge," Cohn

said. A few years later, now sitting as a judge, Cohn actually reversed the conviction of a former member of the Jewish Police. Cohn went as far as to attack witness's credibility, something Porat takes issue with given the evidence of the defendant's activities. More broadly, the judges on the panel made clear, once and for all, that one could not judge Jewish survivors, simply because of their associations in leadership organizations. Only "sadistic tyrants" and "monsters" as Cohn put it, should be punished.

In Chapter Eight, Porat discusses the trial of Adolf Eichmann, a case involving a high-level Nazi Officer, which seems at first glance to be outside the parameters of the book. However, focusing on a lesser-known aspect of the case, Porat illustrates how the issue of collaborators prominently spilled into Eichmann's trial. As Porat notes, prosecutors used the trial to recalibrate society's thinking by painting a very stark binary between victim and perpetrator. Even defense attorneys refused to call witnesses who would shed negative light on collaborators, feeling that, due to a recent, greater societal sympathy towards Jewish collaborators, such an approach would backfire on Eichmann's defense.

For most of the book Porat leaves out personal opinions and lets the historical narrative speak for itself. However, in Chapter Six, Porat does opine on decisions of lawmakers and prosecutors. He notes that in none of the Kapo trials was there sufficient evidence to convict a defendant for killing a fellow prisoner, but "from a historical perspective it is clear that these functionaries did murder their fellow inmates." Porat argues that if Israel had adopted the paradigm of "honor trials," where judgment would be based on moral law, retributive convictions would have been easier to attain.

While Porat's argument regarding honor courts has merit, he fails to consider fully the possibility that the negative incentives of such an approach may outweigh its goals. As Porat himself notes, misidentification of collaborators was quite common in Israel at the time. Further, calls for justice often were disproportionate to involvement in collaboration. As is clear from his recounting of horrific instances of vigilante justice, anger towards neighbors and the desire for revenge was a cultural norm. Honor courts not based on legalistic rules and evidentiary standards would open the door to spillover, albeit spillover of a civil nature, in which prosecutors and

judges may decide that the benefit of closure for victims outweighs the cost of entertaining vague accusations. In a society grappling with how best to approach its very own who contributed in some way to the atrocities of the Holocaust, the pressures of legal rules, and the outcomes those laws produced, may be exactly what forced Israel to truly reckon and evolve on the treatment of Kapos.

In his introduction, Porat divides Israel's Kapo Trials into a number of phases. While these phases set out in the introduction anticipate a book of rigid legal analysis and organized categories, this blueprint blurs as the book progresses, with a focus more on detailed individual accounts. Yet, the sequence seems clear enough. Rather than guide the reader through raw legal categories and statistical analysis, Porat appears to have made a deliberate choice to bring the reader intimately into the stories, as if sitting in the jury box, through thoroughly researched and detailed accounts. Readers may have hoped for some more reflections by Porat on the evolutionary tale of Kapo trials, but his style, thorough research, and narration of this thought-provoking time in Israel makes this book a pleasurable, insightful, and worthwhile read.