

## SYMPOSIUM

### INTRODUCTION: NATIONALISM, IDENTITY, AND LAW

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The four papers that make up this Symposium have an important common theme. They are all concerned with the idea of ethnic identity. Nobody who reads newspapers or watches television can fail to be aware of how much this subject is in the news. Ethnic identity has had and continues to have a powerful impact on modern politics, both national and international. The most dramatic effects are on war and peace. Ethnic identity bears a share of the blame for the murder and chaos in Yugoslavia, and it sets off bombshells and gunfire at many points around the world. Ethnic identity gone wild has torn Rwanda apart; and has worked incredible mischief in the ashes of the Soviet empire. In fact, as Daniel Moynihan put it, "nation states" no longer go to war with each other, "but ethnic groups fight all the time."<sup>1</sup> Ethnicity has its impact short of war as well: It is an issue that disturbs domestic peace in country after country—not least of all, the United States of America.

Ethnic identity, indeed, has elbowed its way onto the center stage of politics in many countries, including this one. Whatever is central to politics, and burdens the mind of society, becomes a central issue in the legal system as a matter of course. Ethnic identity arises as an issue in every field of law. Immigration is an obvious example; but there are so many other effects, from cross-racial adoption, to land claims of native Americans. This last one, of course, is an issue this Symposium addresses in some detail.

Ethnic identity is a form of nationalism. But the "nation" is, to a certain extent, a modern invention. I use the term "invention" advisedly. Nobody who writes on the subject these days can or does ignore Benedict Anderson's notion of the "imagined community";<sup>2</sup> or, for that matter, Hobsbawm's argument about the "invention of tradition."<sup>3</sup> The root idea here is that ethnic identity is not natural and inborn, nor the product of ancient tradition; instead, it is socially constructed. It is, in fact, one of the bastard children of modernization.

This insight, to be sure, can be carried too far. How well do Anderson's observations apply to countries of the Third World, each of which has its own special history of action and reaction?<sup>4</sup> Despite Anderson, too, many peoples of the world, and for a very long

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1. DANIEL PATRICK MOYNIHAN, PANDAEMONIUM: ETHNICITY IN INTERNATIONAL POLITICS 5 (1993).

2. BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM (1983).

3. Eric Hobsbawm, *Introduction: Inventing Traditions*, in THE INVENTION OF TRADITION 1 (Eric Hobsbawm & Terence Ranger eds., 1983).

4. See PARTHA CHATTERJEE, THE NATION AND ITS FRAGMENTS: COLONIAL AND POSTCOLONIAL HISTORIES (1993).

time, have had a sense of themselves as a group, an entity separated from their neighbors. They are aware that they speak a common language, which other people do not speak; that they have special habits, customs, ways of life; and that the people in the next village or camp or over the next mountain are different—radically different, or so it may seem. Curiously enough, this observation may be most true of smaller communities, of “tribes” and less true of the peoples of Europe, for example. Peasants in a village some distance from Paris, in the sixteenth century, did not spend much time thinking of themselves as “French.” Nationalism grew rapidly in the eighteenth and nineteenth centuries, especially the latter; and it developed in its own special way in each country,<sup>5</sup> to some extent in each region.<sup>6</sup> It has now spread all over the world.

All this talk about “social construction” or the “invention of tradition” does not mean, of course, that national feelings, ethnic feelings, are unreal; they are, on the contrary, incredibly powerful. “Nationalism” satisfies some deep-seated need; it originates, perhaps, in the “primordial attachments of an individual to a group.” This makes it kin to emotions that “existed long before the group to which such passionate loyalty was attached became the modern nation-state.”<sup>7</sup> Whatever the source, the strength of these emotions—their political force in the modern world—has to be reckoned with.

In the nineteenth century, it was often the elites—as likely poets as politicians—who preached and taught the sermon of nationalism. These elites were struggling to make a conscious unity out of scattered peasants and villagers; their peoples were often ethnic minorities trapped in the cages of empires. In Europe, this was the century of Czech nationalism, Flemish nationalism, Hungarian nationalism, Bulgarian nationalism, and so on. The leaders were trying to create a sense of solidarity, of identity. They were also, very often, quite literally trying to construct a *language*, out of a welter of dialects and speech-ways. Nationalist “mythology” supposes languages to be “the primordial foundations of national culture.”<sup>8</sup> The truth is quite different—national languages are “almost always semi-artificial constructs.”<sup>9</sup> Almost every other aspect of ethnic identity is this sort of construct. Another “construct” is history itself. The movements tried to create a “truly living past,” full of glorious or heroic or tragic “tableaux”; the point was to strengthen the notion of a single people, with a single historical experience. Thus we have William Tell and the apple, “Alexander Nevsky slaughtering the Teutonic Knights,” Joan of Arc, the Jews by the “waters of Babylon,” and the “last Welsh bard lamenting on a crag above King Edward’s advancing army.”<sup>10</sup>

Today, the elites are less evident in the spread of nationalism, having been replaced by the media: books, newspapers, radio programs, movies, and most significantly, perhaps, television. The media at one and the same time homogenize and divide. They

5. LIAH GREENFELD, NATIONALISM: FIVE ROADS TO MODERNITY (1992).

6. For a case study, see, e.g., PETER SAHLINS, BOUNDARIES: THE MAKING OF FRANCE AND SPAIN IN THE PYRENEES (1989).

7. WILLIAM PFAFF, THE WRATH OF NATIONS: CIVILIZATION AND THE FURIES OF NATIONALISM 196 (1993).

8. ERIC J. HOBBSBAWM, NATIONS AND NATIONALISM SINCE 1780: PROGRAMME, MYTH, REALITY 54 (2nd ed. 1992).

9. *Id.*

10. ANTHONY D. SMITH, THE ETHNIC ORIGINS OF NATIONS 180 (1986).

flatten out local dialects and promote a single standard language, at least in their broadcast zones. They also disseminate a kind of world culture. People all over the world—particularly young people—tend to dress alike, listen to the same music, dream the same dreams. They certainly watch the same programs. They want the same consumer products. As Eugeen Roosens has pointed out, practically everybody hankers after the money and goods of the modern world: “commodities that put one in command . . . [and] objects that offer hedonic advantages.”<sup>11</sup> There is, in fact, a “kind of transcultural consensus . . . about the value of a number of products of the modern world.”<sup>12</sup>

At the same time, millions of people, especially members of minority groups, decide that their dreams cannot be realized without a space, a homeland, independence or autonomy; only in this way can they get control of education and the courts, force recognition of their speech-ways, and have television stations of their own; only in this way can they escape from the poverty, misery, and oppression that is imposed on them; only in this way can they acquire the goods and trappings of modernity. The road to the dream requires claims of rights that rest on group membership. Group membership, in turn, is defined in terms of common descent, common culture and tradition. The paradox, then, is that the future seems attainable only through deliberately exalting a (partly fictitious) ethnic past.

In any event, national movements grow up out of these aspirations; sometimes, they cause bloody wars; sometimes, too, they sow the evil seeds of genocide. What June Starr calls the “myths” of nationalism<sup>13</sup> can be potent—and deadly. But these aspirations have also led, in *some* countries—a fortunate few—to genuine attempts at establishing a working pluralism. One example that comes to mind is Switzerland. Another candidate is Singapore. In Belgium and Canada, accommodation is shaky; but so far the center holds. Even in these countries, however, “pluralism” has its limits. Belgium may be willing to grant equality to Flemish and Walloons, but not to Moroccan guest-workers; French-Canadians, only too eager to see themselves as an oppressed minority, are far less forthcoming when confronted by native peoples.<sup>14</sup>

The United States is a rather complicated case. It is one of the group of so-called “immigrant countries”—countries settled largely by people who wandered in or were brought in from someplace else. Australia, Argentina, and, less obviously, Singapore, fall into this category. These countries have a special problem in building a national identity. Blood and descent are powerful ideas (or myths) in the shaping of ethnic identity. Many nations think of themselves, or talk about themselves, as if they were some sort of super-clan, a grotesquely extended family. For them, the language of ethnicity “is the language of kinship.”<sup>15</sup> But immigrant countries have to find some other myth; in no way can they all claim to be children of the sun god, or scions of some noble tribe or clan.

11. EUGEN E. ROSENS, *CREATING ETHNICITY: THE PROCESS OF ETHNOGENESIS* 157 (1989).

12. *Id.*

13. June O. Starr, *Passionate Attachments: Reflections on Four Myths of Nationalism*, 28 *IND. L. REV.* 601 (1995).

14. ROSENS, *supra* note 11, provides material on both of these countries.

15. DONALD L. HOROWITZ, *ETHNIC GROUPS IN CONFLICT* 57 (1985). Horowitz also points out that members of such groups often “call each other brothers and call distantly related groups cousins.” *Id.*

How "Americanism" came to be defined is a complicated story. During much of American history, the people who ran the country could make some simple assumptions about what American identity consisted of. Basically, American values were the values of English-speaking Protestants, seasoned and spiced with some ideas from the American revolution, and influenced by the particular conditions of American life, and an overarching belief in something called "equality."

Of course, the meaning of "equality" was not self-evident; and it has changed over the years.<sup>16</sup> Not everybody fit the dominant pattern; not everybody was allowed or *expected* to fit. There were, for example, black slaves, who definitely did not count as equal. Women's rights were less than men's, and were not on the same plane of authority. There were also native peoples, objects of exploitation and war. There were scattered immigrants of other sorts. These immigrants were, on the whole, tolerated (though we should not ignore the burning of convents and other nativist games). The new arrivals in fact had one clear, overarching task: They were supposed to assimilate into the American mainstream.

What upset these cozy understandings was mass immigration at the end of the century from southern and eastern Europe: the millions of Poles, Italians, Greeks, Jews, and Slavs who poured in at the gates and harbors of America. This was one factor among many that produced a kind of national panic among old-line Americans. What was happening to the country? What would happen to real, honest-to-goodness American values? Or American culture? The crisis came to a head in the early twentieth century; it led to the notorious "Red Scare" after the first World War;<sup>17</sup> and it reached a kind of climax in the immigration act of 1924, with its national quota system.<sup>18</sup> The statute was blatantly racist in the older sense of that word—biased against such "races" as Italians, Jews, and Poles.

A lot of water has gone under the bridge since 1924. The ideal of assimilation is certainly not dead; but it is under severe attack. The ethnic minorities have become a great deal more assertive. For a variety of obvious reasons, this assertiveness takes a particularly complicated and specialized form if the minority is Navajo or Cherokee; but many other "nations" now claim, if not a share of land, then wealth, or prestige, or, more simply, legitimacy and the right to exist in peace.

Curiously, in countries like the United States, "nationalism" in the classic sense is threatened if not displaced outright by the demands of the constituent "nations." The idea of "nationalism" was always the idea of a super-identity that trumped all other identities. But in a pluralist society, there is no such super-identity; rather, the sub-groups become "nations"—they claim *their* identity as the one that trumps all others, at least within their group. Of course, group members do not necessarily buy this line. Nobody forces a woman of seventy, for example, to become a gray panther; nobody forces a Chinese-American to agitate for the cause; nobody forces an African-American or Latino, or people in general, to become militant about anything. But enough people join enough of the parades to make a real difference in politics and society.

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16. See JACK RICHON POLE, *THE PURSUIT OF EQUALITY IN AMERICAN HISTORY* (2nd ed. 1993).

17. See WILLIAM PRESTON, JR., *ALIENS AND DISSENTERS: FEDERAL SUPPRESSION OF RADICALS, 1903-1933* (1963).

18. 43 Stat. 153 (1924).

What happened to American nationalism has also happened, to a degree, to *internationalism*. The old Marxist left trumpeted the unity of the working class, and expected some kind of international solidarity to emerge among the world's downtrodden. But the new left is not much of an economic left; rather it is a cultural left, splintered into dozens of groups, each with its own special claim on the polity. These groups can and do form coalitions for this or that purpose; but these coalitions are inherently unstable. College campuses have plenty of "rainbow coalitions"—councils and working relationships among various minority groups. These groups are much rarer in the outside world.

Yet, in some ways, a new sort of internationalism has emerged; an internationalism of mass culture. That mass culture is more than movies and blue jeans. It also includes a cluster of character traits—and elements of *legal* culture as well. There is, I believe, a distinctively *modern* legal culture;<sup>19</sup> and it includes rights-consciousness. Thus even the despised and downtrodden guest-workers in European countries have a feeling of entitlement, based not on "national citizenship" but on a "more universal model of membership, anchored in deterritorialized notions of persons' rights."<sup>20</sup> Hence even if a Turkish guest-worker, for example, rejects German identity and citizenship, he may feel conscious of himself as a bearer of rights and he may seek to advance his cause by joining with other Turks—by affirming his Turkishness, his allegiance to Islam, his cultural heritage.

The issue of ethnic identity is thus of far more than academic interest. But it is a delicate subject for the law. It is one thing to sit around earnestly talking about how reality is socially constructed. It is another thing to ask a real court, with real judges, to make real decisions about rights and duties, which have real-world consequences (I will return to this point). This difference of course is what led to the dilemma of the Mashpee case, which Professor Carrillo and Professor Perry discuss.<sup>21</sup> I think Professor Carrillo's point is especially well taken: Under modern conditions, for many "tribes," there is and can be no "distinct, impermeable boundary between the tribe and the town, as least as far as culture [is] concerned."<sup>22</sup> That is precisely the dilemma of *all* the identity components in a pluralist society: races, ethnic groups, religious groups, gender groups, the handicapped, students, prisoners, "sexual minorities," and so many others. They all live together, culturally speaking; and none of them has "distinct, impermeable boundaries."<sup>23</sup>

This is so, in the first place, quite concretely and literally. A good deal of racial segregation exists in America; and *some* of the Native Americans live in compact, geographic clusters or reservations. But many blacks, Latinos, and Native Americans must live out their lives in the midst of other Americans. Generally speaking, all Americans are mixed together in one giant pot. The *cultural* boundaries, too, are very

19. Lawrence M. Friedman, *Is There a Modern Legal Culture?*, 7 *RATIO JURIS* 117 (1994).

20. YASEMIN N. SOYSAL, *LIMITS OF CITIZENSHIP: MIGRANTS AND POSTNATIONAL MEMBERSHIP IN EUROPE* 3 (1994).

21. The problem of that case is hardly unique; see ROOSENS, *supra* note 11, for a discussion of the Huron of Canada, another "Indian" group that had lost its language, and most of its distinctive culture, and yet retained a stubborn sense of ethnic identity.

22. Jo Carrillo, *Identity as Idiom: Mashpee Revisited*, 28 *IND. L. REV.* 511, 534 (1995).

23. *Id.*

porous. Groups like to think of themselves as culturally distinct. But the irony is that they are less and less so as the years go on. They have their markers of ethnicity; and yet they all share more or less in the giant world culture—a culture television spreads throughout the world like a viral pandemic.

It is this culture, indeed, that makes the “nations” so self-conscious. This brings me back to the paradox inherent in Anderson’s and Hobsbawm’s message: The search for tradition, the search for a distinctive ethnic identity, is itself a product of modernity.<sup>24</sup> How could it be otherwise? “Customary law,” as Professor Obiora reminds us,<sup>25</sup> is in one sense not customary at all—it has certain roots in the past; but it is necessarily modern, and shaped by modern conditions and modern problems.<sup>26</sup> It was, in the beginning, often a highly artificial construct: “systematic, neat, and fixed rules from ideal reconstructions,” recorded from various sources,<sup>27</sup> which obviously did not reflect the subtle, shifting, complex reality of the culture that gave birth to these practices.

The same tale could be told about “Western” law. I doubt that reconstructions of, say, Tswana law are any more artificial, any more alien to the working legal order, than the *Restatement of Torts*. But this is not the point. The nub of the matter is not the artificial *form* of “customary law”; but the artificial *content*. Western observers can look at customary law-ways—either romantically or in disdain—as ancient, unchanging, and deeply rooted in traditional mores. But any such legal practices, if they existed, could not survive in the twentieth century. This point is independent of the efforts of colonial power to impose law on third world countries, although of course that imposition has also been significant. The real problem is that “customary law” rested on ways of life that no longer exist. A cash economy, jobs for wages, and the market system have been far more destructive to “customary law” than any codes imposed by foreign devils. Traditional patterns are not cut out for the modern world.

This description almost sounds like an insult; but it is not meant as such. Exactly the same point can be made about “Western” law. The medieval common law was just as unsuited to modern capitalism as old norms of African peoples would be. By the same token, “Roman law” (or what is left of it) is not the real basis of French or German law, whatever antiquarians might think. The raw material has been twisted totally out of shape—and necessarily. Every system has to adapt; this need is no less true of “customary” systems. And adapt they do. Mari Matsuda has given a dramatic account of the way market factors transformed native culture—and native *legal* culture—in Hawaii in the nineteenth century.<sup>28</sup> Even before the imposition of Western *law*, legal consciousness had altered, and traditional patterns had weakened, under the ruthless hammer blows of social change.

24. See *supra* notes 2-3 and accompanying text.

25. L. Amede Obiora, *New Skin, Old Wine: (En)Gaging Nationalism, Traditionalism, and Gender Relations*, 28 IND. L. REV. 575 (1995).

26. There is a rich and growing literature on this point. See, e.g., MARTIN CHANOCK, *LAW, CUSTOM, AND SOCIAL ORDER: THE COLONIAL EXPERIENCE IN MALAWI AND ZAMBIA* (1985).

27. Obiora, *supra* note 25, at 587.

28. Mari J. Matsuda, *Law and Culture in the District Court of Honolulu, 1844-1845: A Case Study of the Rise of Legal Consciousness*, 32 AM. J. LEGAL HIST. 16 (1988).

Ethnic movements often insist that they are movements of restoration as well as liberation. They tend to look back to some golden age or other. They want to preserve and restore ancient cultures. Of course this task cannot be done. The past is completely dead; the members of the group are alive. They are alive, moreover, in the twentieth century, not in the nineteenth or the thirteenth; and they cannot escape the twentieth century world. One scholar has recently described contemporary "Indian tribes" as "an amalgam of traditional identifications and organization, federal pressures, and Indian improvisation."<sup>29</sup> Probably all "indigenous" peoples—probably *all* peoples, of all sorts—are "an amalgam" of tradition and modernity. Anything else would be a social impossibility. There are no "living fossils" among societies exposed to the modern world.

But what then does it mean to "preserve" a culture? What it usually means, in practice, is preserving or restoring a kind of autonomy; a sphere in which whatever the group does practice—its actual culture—is meaningful and respected. And it means that the culture is a way to "get ahead." In practice, autonomy means language, control of television stations, schools, and the voting booth. Linguistically speaking, English is in no way superior to Navajo or Inuit; there are no such things as "better" or "worse" languages (or more "primitive" and less "primitive" languages). Native religions can make as strong a claim to eternal truth, in their own terms, as any of the major world religions. A wide range of norms can also make the claim for equal dignity. Achieving *political* autonomy, however, is never a simple matter—or plural equality, which is the equivalent, culturally speaking, within a single national unit. On the one hand, there should be enough equality for everybody. But the claims are for more than status or dignity. The groups want more than just recognition. They want money, rights, and land. These claims, quite naturally, lead to resistance.

And when we put the matter this way—in terms of claims or demands for material goods—the demands seem crass and even hypocritical, a grab for naked power. Small wonder, then, that courts and other agencies (not to mention the general public) find it hard to sympathize with the wilder claims of submerged minorities. The problem, often enough, is bewilderment, not bias.

Courts find it hard, too, at times, even to recognize that what faces them *is* a submerged minority. No language? No purity of blood? No "authenticity"? Law is concrete, down-to-earth; the cases turn on specific claims to specific land, money, goods. Law is based on standards that are raw, visible, and objective; but the ethnic identity itself can be intensely subjective—*felt*, not seen; experienced inwardly, rather than exposed to view in tangible sense-data.

Sadly, nobody really understands his or her own culture. An outsider just might; but only the rare outsider ever achieves that flash of insight. The rest of us stumble along, groping in the dark. Ethnic nationalism often generates this tragic blindness—on everybody's part, inside the group or out. Still, scholars have a duty to try to break through, to make sense somehow. The four papers in this symposium make a contribution to that end. The last word on the subject, of course, is very far from spoken.

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29. Carole Goldberg-Ambrose, *Of Native Americans and Tribal Members: The Impact of Law on Indian Group Life*, 28 L. & SOC'Y REV. 1123, 1145 (1994).

