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Articles

Foreword: Constituting Nations—Veils, Disguises, Masquerades

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Since Plato's time, people in the West have been engaged in a strange socio-legal combat. On one side of this engagement stand those who would rip the veil from before power. On the other stand those who profit from hiding the reality of power behind veils of dogma or law. While some within the intellectual and political elites in the West have engaged in intense search for what lies behind the veil, others within those elites have as furiously worked to reinvent those theories, systems or explanations that might continue to shroud reality from a populace at once interested in the 'truth' and afraid to face it. Foucault again reminds us:

> Our historical gradient carries us further and further away from a reign of law that had already begun to recede into the past at a time when the French Revolution and the accompanying age of constitution and codes seemed to destine it for a future that was at hand.[1]

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1. MICHEL FOUCAULT, I THE HISTORY OF SEXUALITY: AN INTRODUCTION 89

Law, like politics, and the constitution of states, exits simultaneously as fabricated for public consumption, and as arranged for private advancement. In this sense, Jean-François Lyotard reminds us that "[a] subject is whatever constitutes itself"[2] grows fangs.

> Individuals implement social practice through action, through mobilization of individuals within sub-groups who are motivated to act through the invocation of cultural instructions—'greed is good,' 'just war,' 'equality of opportunity,' and others have all been cultural instructions invoked to mobilize social sub-groups to act—and in acting assert communal power. Thus, communal power does not lie with any particular person, or in any particular position, or with an organization, or in a particular thing, to the exclusion of others. Communal power lies in the possibility of invocation—by *any individual* who can pull the necessary cultural levers.[3]

The instrumentalities of law, like those of theory and philosophy, have been used both to cloak and unmask the relationship between authority and power. "[T]he legal system itself was merely a way of exerting violence, of appropriating that violence for the benefit of the few, and of exploiting the dissymmetries and injustices of domination under cover of a general law."[4] Yet, law accomplishes these tasks under a cover of neutrality and impartiality. "This power inheres in the law's constitutive tendency to *formalize* and to *codify* everything that enters its field of vision."[5]

The instrumentalities of constitutionalism and self-determination have been used to constitute nations where none had existed before and burst apart others that had thought themselves whole and complete.[6]

India also serves as testament to the power to remake or create a national consciousness even where cultural, linguistic and

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(Robert Hurley, trans. Vintage Books 1990) (1978 trans.) (1976).

2. Jean-François Lyotard, *'The Earth Had no Roads to Begin With,' in* POSTMODERN FABLES 103, 104 (Georges Van Den Abbeele, trans., University of Minnesota Press 1997) (1993).

3. Larry Catá Backer, *Agnus Dei: Miscausation and the Constitution of Community*, 2002, manuscript on file with author.

4. MICHEL FOUCAULT, I THE HISTORY OF SEXUALITY: AN INTRODUCTION 88 (Robert Hurley, trans. Vintage Books 1990) (1978 trans.) (1976).

5. Richard Terdiman, *Translator's Introduction to Pierre Bourdieu, The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 809 (1987).

6. *See* PETER FITZPATRICK, MODERNISM AND THE GROUNDS OF LAW (2001).

religious difference are as great as those traits that these communities share in common. The example of India has not been lost on European integrationists. "The conclusion of a study of various transnational links between the (then) six member countries in the late 1960s was that 'if . . . India is seen as a nation, then Europe may well be described as an emergent nation.'"[7] European states, like India, have been adept at manipulating the multiple possibilities for communal definition—emphasizing either region, 'nation,' or empire as the appropriate repository of sovereignty as advantage required.[8]

In the face of these disjunctions between the law as formulated and the law as practiced, between what is seen and what is felt, between what occurs and what is believed, many choose to remain comfortably within the postulates and assumptions from which the law springs. Much of what passes for the study of law in the United States assumes the answers to the difficult foundational questions, so that time can be spent worrying about the most efficient means of enforcing those assumptions through law, or investigating the utility of law to serve the assumptions. Even at its most theoretical, this American approach is practical law in the service of the status quo, of the *grundnorm*, the justificatory principles on which social ordering is based.[9] The more difficult task, the more discomfiting task, requires focusing a critical eye on the very foundations on which legal and other ordering systems are based. Such an undertaking constitutes the core strength of any normative system—the power to provoke, survive and transform itself on the basis of invited constant self-examination. To those closed and ultimately decadent systems in which such thoroughgoing self-evaluation of the most fundamental level of organizational structuring is forbidden, this exercise is viewed as a sign of weakness and indecision. Yet the opposite is true. Systems unused to critical self-examination tend to fall away when the veil is ripped away from the fundamental illusions on which such systems are based.

The three articles that follow provide a window behind the veil of law, constitutionalism and the creation of nations. The subjects

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7. John Pinder, *European Community and Nation-State: A Case for a Neofederalism?, in* THE EUROPEAN UNION: READINGS ON THE THEORY AND PRACTICE OF EUROPEAN INTEGRATION 189, 192 (Brent F. Nelsen and Alexander C-G Stubb, eds., Lynne Rienner Pub., 2nd ed., 1998).

8. Larry Catá Backer, *The Euro and the European Demos: A Reconstitution*, 2002 Y.B. EUR. LAW (Oxford) - (forthcoming 2002).

9. *See* HANS KELSON, GENERAL THEORY OF LAW AND STATE(1945).

of their study—Ireland/Northern Ireland and Israel/Palestine—stand at the psychological core of Western legal and political theorizing since the middle of the 20th century. Each paper focuses, for the most part, on the Western exercise in critical self-examination, ripping veils of misdirection in the constitution of systems of governance or ideas of the nature and extent of the constitution of nations.

John Strawson examines the multiple realities of legal discourses of Israel/Palestine.[10] He exposes the many irreconcilable layers of discourse, of normative reality, used to construct the foundational norms of an Israeli state and those used to construct a Palestinian nation. "The legal issues of self-determination, human rights and the law of war lie at the heart of the problem not as passive legal doctrine, but as I shall argue as contested narratives."[11] The post colonialist view of Edward Said provides insights into the problem of two visions occupying the same geographic space.[12] On the one hand, the Oslo Accords "reappear as colonial instruments through which the occupied agreed to certain terms of their occupation."[13] Yet on the other hand, Israel is constructed against a different set of colonialisms. "The realization of Israel takes place in the context of weakness, distaste and horror .... The Western constructions of the East merge with the construction of the Jew. Whereas the East is a disordered and backward space, the Jews are disordered Other within. Palestinians and Israeli Jews are thus condemned to a relational existence in both space and representation."[14] Nation, within this context, is devoid of a geography, or in another sense, a single geography supports multiple conceptions of nations stacked one on the other. Immigration and self-determination by one is viewed as invasion and national destruction by the other. Aggressive opposition to immigration and rejection is viewed as an extension of the sort of genocidal religious prejudice and nation rejection that had followed the other since the 2nd century of the common era. Law offers a limited promise in this situation. "Wisdom in law is the ability to construct the competing arguments in a relational form."[15]

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10. John Strawson, *Reflections on Edward Said and the Legal Narratives of Palestine: Israeli Settlements and Palestinian Self-Determination*, 20 PENN ST. INT'L L. REV. 363 (2002).

11. *Id.* at 364.

12. EDWARD W. SAID, ORIENTALISM: WESTERN CONCEPTIONS OF THE ORIENT (1978).

13. Strawson, *supra* note 11, at 380.

14. *Id.* at 384.

15. *Id.* at 384.

Patrick Hanafin[16] and Barry Collins[17] explore the realities of Ireland from two different perspectives. Hanafin deconstructs the imagined reality of Ireland as imposed by its modern founders. Here is a chronicle of personal fantasy adroitly manipulated into state policy.[18] Here is art—the aesthetic turn—transformed into the mythology of the origin and character of the state.

> Yet paradoxically this projection of mythical rhetoric led to the instantiation of a political reality that was to reflect the values of this imagined Gaelic Romantic notion of Ireland. This new state was indeed a fake. Yet, it was for its citizens only too real in its narrow minded, craven 'bureaucratic dinginess.' This use of rhetoric by the elite reflects Threadgold's thesis that the telling of stories by elites can lead to the creation of particular institutional realities.[19]

This myth making was not focused on the arts or theater. Politics and the law provided the necessary stage for mythmaking on this scale. The Irish Constitution itself served the purpose which in pre-literate Greece had been reserved for Homer. Law, and particularly foundational-law making, provided the supreme authoritative site on which these myths could not only be created, but also from which a state could be established along the aesthetic lines of the myth.[20] Neutral provisions of basic law, such as this, have been used to subvert the very order they represented.[21] In the case of Ireland, "Constitutional documents give the notion of identity in diversity, a means of binding together the diverse strands of the polity into a cohesive whole. This may be taken to be the illusion of identic wholeness to which politics, both postcolonial and otherwise, succumb."[22]

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16. Patrick Hanafin, *Constitutive Fiction: Postcolonial Constitutionalism in Ireland*, 20 PENN ST. INT'L L. REV. 339 (2002).

17. Barry Collins, *The Belfast Agreement and the Nation that "Always Arrives at its Destination,"* 20 PENN ST. INT'L L. REV. 385 (2002).

18. *See* Hanafin, *supra* note 16, at 344.

19. *Id.* at 351 (citing TERRY THREADGOLD, FEMINIST POETICS: POIESIS, PERFORMANCE, HISTORIES 148 (1997)).

20. "The aim of the Constitution's primary framer, Eamon de Valera, was to create a more authentic notion of Ireland than that contained within the text of the 1922 Constitution. In this sense, the Constitution of 1937 acted as a belated means of enunciating the elite's notion of a separate Irish polity." Hanafin, *supra* note 13, at 352.

21. *See* Vivian Grosswald Curran, *The Legalization of Racism in a Constitutional State: Democracy's Suicide in Vichy France*, 50 HASTINGS L.J. 1 (1998).

22. Hanafin, *supra* note 16, at 359. Ireland thus privileged the Gaelic-Romantic tradition "in the postcolonial period due to the emergence of the

This normative function of constitution making mirrors the acts of judicial law making in the United States. In the U.S., "all sides attempt to use the courts, as vehicles for the approval of lifestyle. In this enterprise, particular facts make no difference—cultural facts are the real issue, facts completely disembodied from the concrete."[23] The constitution of Ireland thus operates on several planes—as an ordering document, as the focus of the constitution of the nation, as a memorialization of a catalogue of the national essence. Yet, the "so-called monolithic notion of Irishness, which it is assumed is captured in the text, is not the end of the constitutional story."[24]

Barry Collins looks at the constitution of Ireland from the context of a different ordering document, the Belfast Agreement.[25] While Hanafin shows the way in which De Valera used the authority of the Irish constitution to memorialize a mythology of the Irish,[26] the authors of the Belfast Agreement construct through that Agreement a fictive retroactive foundation of a new legal order for Ireland.

> In relation to a reading of the Belfast Agreement, an obvious question poses itself: How does the nation fit into this logicao-juridical paradox of legal authority? . . . . On the one hand, the constitutional discourse must be the embodiment of the nation: In order to claim legal authority it must invoke the authority of the nation as the entity from which legal authority is derived. On the other hand, the constitution must itself bring the nation

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adherents of this philosophy as the dominant group in the spectrum of Irish nationalist thought." *Id.* at 349. The Framers thus found it impossible to reconcile their theocratic aspirations with their republican ideals, a task Hanafin considers impossible, "as the divine and the secular are twin faiths that cannot live in harmony." *Id.*

23. Larry Catá Backer, *Tweaking Facts, Speaking Judgment: Judicial Transmogrification of Case Narrative as Jurisprudence in the United States and Britain*, 6 S. CAL. INTERDIS. L.J. 611 (1998).

> Law as judgment and jurisprudence as norm-affirming teaching have little to do with the stories presented. . . . The "facts" of each case merely provides a point of departure for the expression of judgments and theories pre-understood, and pre-digested. The relationship can only be understood by taking into account the critical mediating role played by the stories as restructured by the courts. The *particular* stories themselves become an object of law-making as they are reconstituted to serve as a vehicle for the expression of judgment.

Id., at 633.

24. Hanafin, *supra* note 16, at 360.

25. Agreement Reached in Multi-Party Negotiations, Dublin, Belfast, London, 1998, cited at Collins, *supra* note 17 , at n.1.

26. *See* Hanafin, *supra* note 16, at 341.

> into existence by constituting (or embodying) the nation; thereby authorising the nation as a source of law. In short, constitutional discourse must presuppose that the nation already exists in order for the nation to be produced as an origin for legal discourse.[27]

In the Belfast agreement it is never clear "which origin, which nation is being claimed as the legitimating authority of the new legal institutions in Northern Ireland."[28] And in this ambiguity of multiple essences tied to a single geography, Ireland/Northern Ireland comes to resemble Israel/Palestine as to its paradoxes and multiple existences. Thus, Collins provides the essence of connection between the ambiguities of multiple construction trenchantly explored by Strawson and the aesthetics of nation building within the four corners of a constitution explored by Hanafin.

For Collins, the Belfast Agreement evidences the sort of post-nationalism that appears at the heart of the political transformations of the last fifty years. This is a post-nationalism of multiple identities co-existing within a single geography which operate jointly but remain separate.[29] The post-nationalism of Ireland brought to life by Collins has been freed from the parochial concerns of Ireland and now infects much of the rest of the world. American academics have begun to explore these issues in form of multi-identity issues.[30] In another sense, the national ambiguity and post-nationalism of the Belfast Agreement replicates the tensions and approaches to integration within Europe.[31]

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27. Collins, *supra* note 17, at 388.

28. *Id.* at 392.

29. Collins rightly cites to the work of Richard Kearney in this respect. *See* RICHARD KEARNEY, POSTNATIONALIST IRELAND (1997).

30. *See, e.g.*, Leslie G. Espinoza, *Multi-Identity: Community and Culture*, 2 VA. J. SOC. POL'Y & CULTURE 23 (1994); Berta Esperanza Hernández-Truyol & Kimberly A. Johns, *Global Rights, Local Wrongs, and Legal Fixes: An International Human Rights Critique of Immigration and Welfare "Reform"*, 71 S. CAL. L. REV. 547, 567-68 (1998). *See also* Richard Delgado, *Rodrigo's Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary*, 75 TEX. L. REV. 1181 (1997) (interrogating the black-white binary for understanding the relationship of racial elites with subordinated groups other than African-Americans, and suggesting alternatives to that antique model).

31. "Harmonization, subsidiarity and cultural solicitude describe the variables of the matrix within which the union of Europe develops. The particular way in which a federal system is manifested, as well as the relationships between supra-national, national and local power, will be a function of the intersection of these three parameters. Within these parameters, federal systems can assume an almost unlimited number of forms, and the form of any federal system can shift depending on the relative importance of each of the parameters in every federal system."

The post-nationalism of the Belfast Agreement described in Collins, like the 1937 Irish Constitution discussed in Hanafin, and the constructions of Israeli and Palestinian nations considered in Strawson, all arrive at their destinations.[32] The fact that none of those destinations might include the addressees of these legal and political manifestations again demonstrates the ways in which legal and constitutional discourse veil the operation of power within democratic systems founded on notions of the rule of law. Indeed, the arrival itself can be understood in a number of ways. The first is that the nation is not constituted like Athena fully formed as a mature adult. Rather, nations must be "understood in terms of the way in which its [the nations'] movement from one discursive position to the next re-orders political subjectivity."[33] The second is that the internal content of nation is a function of its external projection.

> On one level, it is the absence of the nation as a point of origins that guarantees the effectiveness of the Belfast Agreement. Alternatively, what gives the Belfast Agreement its political currency is the extent to which it allows contradictory national claims to be invoked *indirectly* in a legal form; the extent to which the Agreement can be seen by nationalists and unionists to "belong to" each of them separately to the exclusion of each other.[34]

The trick of the Belfast Agreement "is that it is through its 'neutral' legal institutions that the subject is constituted as the addressee of the nation!"[35] We have seen this trick unmasked before. Hanafin describes a constitutional process in which a neutral document—the Irish constitution, purported to encompass an "Irish self that was posited by the post-colonial elite [that] was pure and clean, expelling what it considered to be 'impure' elements."[36] Strawson

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Larry Catá Backer, *Forging Federal Systems Within a Matrix of Contained Conflict: The Example of the European Union*, 12 EMORY INT'L L. REV. 1331 (1998).

32. The reference that Collins makes here is to Lancan's statement that "a letter always arrives at its destination." Jacques Lancan, *Declarations of Independence*, 15 NEW POLI. SCI. 7 (1986).

33. Collins, *supra* note 17, at 405.

34. Collins, *supra* note 17, at 406.

35. *Id.* at 407.

36. Hanafin, *supra* note 16, at 357. "Like the characters in the "Nausicaa" episode of Joyce's *Ulysses*, the Framers of the Constitution wished to conceal the alternative narratives of Irishness, which existed within the body politic, creating a society where control of the body politic as well as the individual body was to be the order of the day." *Id.* at 357.

describes the universalizing inconsistent articulations of the British Mandate.

> Whereas "Ashrawi sees the narrative as confiscated, the Israelis see the emergence of the Palestinian identity as a violent challenge to their legitimacy, as a negation of their identity. Israel and Jordan, between them, had effectively removed the Palestinians from the scene. It is all the more ironic that the Israeli victory of the 1967 war, which reunited British Mandatory Palestine, constituted the most decisive spatial advance not just the project of a greater Israel, but also for Palestinian nationalism. In a moment of military supremacy, Israel brought itself head-on into an existential collision with its national Other, the Palestinian national project.[37]

In each of these cases, the nation constitutes a veil through which power relationships are established and then contained by law.

The American constitution, in a moment of post-modern premonition proclaimed: "nor shall any State deprive any person of life, liberty or property without due process of law."[38] And so it does. Yet it does much more. Strawson, Hanafin and Collins work might suggest a deeper interrogation of the majesty of those words. In the name of the nation, the state may take life, liberty or property, as long as it operates within a legal discourse deemed appropriate to the occasion. And it is for the federal government to make that determination in the last instance. Here, as Collins might suggest, "the nation becomes retroactively installed for the subject as an authorization of legal discourse."[39] Strawson might remind us that the 14th Amendment's command provides another example of the post-colonial master-slave binary, an act of colonial imposition by the triumphant Northern States on the vanquished and colonized states of the former Confederacy.[40] Hanafin would help us understand the way in which the 14th Amendment, like the 1937 Irish Constitution, was meant as "a textual projection of a nationalist fantasy of wholeness."[41] A new nation was constructed

37. Strawson, *supra* note 10, at 383.

38. U.S. CONST. amend. XIV, § 1.

39. Collins, *supra* note 17, at 407.

40. "While colonialism has withered, a postcolonial world has taken shape in which the world replicates elements of the old order through which the West assumes a centrality against the periphery of the ex-colonies. . . . In this, law is an important site of imagery and representation which attempts to bestow legitimacy on the metropolitan center as a center of the legal order." Strawson, *supra* note 10, at 363-64.

41. Hanafin, *supra* note 16, at 359. Indeed, Hanafin draws on work focused on the United States and Sri Lanka to inform his reading of the Irish experience,

from out of the ruins of the American Civil War, in many respects a very different nation from the union that existed in 1861. The 14th Amendment was among those textual revisions that memorialized the normative foundations and ideals of this new state. "[W]hen we are dealing with words that are also a constituent act, like the Constitution of the United States, we must realize that they have called into life a being, the development of which could not have been foreseen completely by the most gifted of her begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation."[42] This last overlay of Holmes, when melded with the theory in action of Strawson, Hanafin and Collins, serves as a final admonition to "avoid both the *zookeeper's approach to culture* and the *zookeeper's approach to identity.* We must avoid the possibility of what Jurgen Habermas describes as 'administrative preservation of cultures like forms of endangered species.'"[43]

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citing, Roshan De Silva, *Ambivalence, Contingency and the Failure of Exclusion: The Ontological Schema of the 1972 Constitution of the Republic of Sri Lanka*, 5 SOC. & LEGAL STUD. 365 (1996) (Sri Lanka); ANNE NORTON, REFLECTIONS ON POLITICAL IDENTITY (1988) (United States); and DANIEL N. HOFFMAN, OUR ELUSIVE CONSTITUTION: SILENCES, PARADOXES, PRIORITIES (1997) (United States).

42. Missouri v. Holland, 252 U.S. 416 (1920) (per Justice Holmes).

43. Larry Catá Backer, *Not a Zookeeper's Culture: LatCrit Theory and the Search for Latino/a Authenticity in the U.S.*, 4 TEXAS HISP. J.L. & POL'Y 7, 17-18 (1998) (citing Jurgen Habermas, *Struggles for Recognition in Constitutional States*, 1 EUR. J. PHIL. 128, 142 (1993)). Habermas, in this respect, may provide the basis for a cynical reading of Derrida's definition of the European democratic hegemonic norm as including "respecting difference, idioms, minorities, singularities, but also the universality of formal law, the desire for translation, agreement and univocity, the law of the majority, opposition to racism, nationalism and xenophobia." JACQUES DERRIDA, THE OTHER HEADING: REFLECTIONS ON TODAY'S EUROPE 78-79 (1992).