

University of Michigan Journal of Law Reform

Volume 25
Issues 3&4

1992

Introduction

Joseph L. Sax

University of California (Berkeley) Boalt Hall School of Law

Follow this and additional works at: <https://repository.law.umich.edu/mjlr>



Part of the [Cultural Heritage Law Commons](#)

Recommended Citation

Joseph L. Sax, *Introduction*, 25 U. MICH. J. L. REFORM 539 (1992).

Available at: <https://repository.law.umich.edu/mjlr/vol25/iss3/2>

This Introduction is brought to you for free and open access by the University of Michigan Journal of Law Reform at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in University of Michigan Journal of Law Reform by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mLaw.repository@umich.edu.

INTRODUCTION

Joseph L. Sax*

Reading through the articles in this Symposium is like walking deep into a dense forest. The experience is exhilarating, but edged by a concern that the farther you go, the less sure you are of where you are. The articles here reveal the problem of cultural preservation in all its complexity and many-sidedness. This is not one of those symposia where the authors seek to outdo each other in self-condemnation for the wrongs perpetrated by colonial invaders on hapless indigenous people. Neither is it a lament for the assault on science by advocates of modish multiculturalism. The essays here are serious efforts to understand and to explore the implications of one important strand of the contemporary interest in "communities" as a focus for political, moral, and cultural life.

Several of the articles directly address fundamental issues posed by concerns for cultural preservation. In his article for this Symposium, Jeremy Waldron urges that there is a deep tension between the cosmopolitan and communitarian accounts of the good life, and that the latter, out of which arise the currently popular claims for preservation, needs to provide answers to some momentous questions.¹ Waldron suggests that claims for cultural preservation build on the notion "that each person needs to be a member of a particular cultural community" in order to flourish.² Programs and policies to promote and preserve traditional cultures follow. But, Waldron suggests, the assumption may not only be unproven; it may be positively wrong. He offers the contrasting images of the ultimate cosmopolitan, Salman Rushdie, a self-described mongrel and hybrid, and the pure communitarians who call for his execution. Perhaps, Waldron suggests,

the hybrid lifestyle of the true cosmopolitan is in fact the only appropriate response to the modern world in which we live . . . a world formed by technology and

* James H. House and Hiram H. Hurd Professor, University of California (Berkeley) Boalt Hall School of Law.

1. Jeremy Waldron, *Minority Cultures and the Cosmopolitan Alternative*, 25 U. MICH. J.L. REF. 751 (1992).

2. *Id.* at 786.

trade, by economic, religious, and political imperialism and their off-spring, mass migration and the dispersion of cultural influences. In this context, to immerse oneself in the traditional practices of, say, an aboriginal culture might be a fascinating anthropological experiment, but it involves an artificial dislocation from what is actually going on in the world.³

Anticipating the argument that claims for cultural sovereignty do not call for such judgments, but only for being left alone, Waldron observes that those who seek to protect traditional communities often seek "special subsidization and extraordinary provision by those who live in the real world where cultures and practices are not so sealed off from one another."⁴

Waldron's is not the only article to take a skeptical stance toward the now popular claims of communitarianism. Indeed, several of the articles here can be understood as a rich elaboration on the questions Waldron has so provocatively posed and on his assertion about the nature of the modern world. On the other hand, several of the articles are sympathetic to the claims of indigenous peoples, and one at least provides a quite different view of the inevitability of tension between modernity and cultural preservation. Dean Suagee notes that increasing reliance on what are called soft energy paths (using renewable resources like sun and wind and conservation techniques like insulation) can mitigate or avoid conflict with the needs of traditional economies for such things as "habitat" for subsistence economic activities.⁵ Suagee's article calls attention to one of the reasons that the claims for preservation have gained ground of late. Our environmental failures undermine the old confidence in science, progress, and modernity—the very things that comprise the cosmopolitan outlook. The claim is that traditional ways of life have something to teach the contemporary world.

Historical experience provides another angle of vision on the issues and is the focus of a fascinating article by Nomi

3. *Id.* at 763.

4. *Id.*

5. Dean B. Suagee, *Self-Determination for Indigenous Peoples at the Dawn of the Solar Age*, 25 U. MICH. J.L. REF. 671, 674-78 (1992).

Stolzenberg and David Myers.⁶ They trace the decline of the Jewish *kehilah*, a form of political organization in which Jews lived as a separate community in the alien (and often hostile) environs of a host nation. While acknowledging functions reserved to the host sovereign, such as taxation and military service, the *kehilah* incorporated a residual sort of sovereignty that maintained and governed (through sanctions like excommunication) a distinctive community of Jews.⁷ What does the experience of the historic *kehilah* have to say to advocates of autonomous communities in the contemporary world?

Stolzenberg and Myers point out that as Jews became full citizens, the rationale for the *kehilah* evaporated.⁸ Indeed, the debate over the emancipation of the Jews in France during the time of the French Revolution focused clearly on the transformation that would take place.⁹ To acquire the rights of a citizen, individual rights, necessarily meant dissolution of a Jewish community as a legal entity with rights and powers over its people.¹⁰ The very existence of an idea like the rights of every Frenchman was in tension with the concept of a self-governing community with its own rights and privileges.¹¹ Stolzenberg and Myers conclude that

the protection of autonomous legal orders cannot fully be achieved *within* the framework of a unitary national system of law [To expect that such orders can be maintained is] a pipe dream. The full protection of an alternative legal culture can only be obtained at the price of dismantling central political order, except in cases, like that of the Amish, where the alternative order is extremely marginal and insular.¹²

In another of the articles in the Symposium, Carol Weisbrod uses an unreported 1947 case from an Ohio county to suggest the difficulties that can be presented even by the quintessentially

6. Nomi M. Stolzenberg & David N. Myers, *Community, Constitution, and Culture: The Case of the Jewish Kehilah*, 25 U. MICH J.L. REF. 633 (1992).

7. *Id.* at 638-40.

8. *Id.* at 640-41.

9. *Id.* at 641-42.

10. *Id.*

11. *Id.*

12. *Id.* at 669.

insular and self-reliant Amish.¹³ The issue is shunning. A member of a conservative Amish community used a car to get a sick child to medical treatment, as a result of which he was shunned, that is, avoided and boycotted. His own brother was told to have no dealings with him and other members were forbidden to help him with his harvest. His father was told to remove him from the farm he was operating under lease, and when he hired men to help him with his harvest they were banned. Though he left the conservative group for a more liberal Amish group, he apparently did not leave the physical community, and the shunning plainly harmed him both financially and psychologically.¹⁴

The question raised by the case was whether the state should have intervened in the affair to protect the shunned party. If the state does so, it undermines the autonomy of the Amish community. The court said the question before it was whether the continued shunning denied the plaintiff the right to leave the church. He had exited, but the church remained in a position to exercise power over him. Presumably the church took the position that no mere resignation ended its authority over the plaintiff. Whatever one's response to the case, it is hard to avoid the conclusion that determining the point at which state intervention is appropriate can be sticky. As one ups the ante in terms of church repression of what "we" consider basic liberties, we are pressed back on the question that Waldron poses: where do our basic loyalties reside—with communitarianism, or with such cosmopolitan values as civil liberties?

From shunning one can move quickly to polygamy, ritual suicide, and child sacrifice. Carl Schneider adds an interesting example in the context of a child custody battle.¹⁵ One parent belongs to a fundamentalist sect which dissociates itself from everyone who does not follow its extremely strict precepts, such as separation from all outside activities.¹⁶ It teaches that all who do not follow the sect's practices are "unclean."¹⁷ Should the state respect such practices, or ignore them when custody is in question? These are not questions put to rest by invoking words like autonomy and sovereignty.

13. Carol Weisbrod, *Emblems of Federalism*, 25 U. MICH. J.L. REF. 795 (1992).

14. *Id.* at 814-19.

15. Carl E. Schneider, *Religion and Child Custody*, 25 U. MICH. J.L. REF. 879 (1992).

16. *Id.* at 881.

17. *Id.*

Several of the articles focus on what most people consider the strongest case for recognition of separate, autonomous communities: the case of indigenous people. Marie Deveney offers the example of a Canadian case where Cree Indians sought to prevent a power company from building roads and airports and damming rivers.¹⁸ The Cree asserted that these actions would destroy their distinctive culture, making it impossible to continue subsistence activities such as hunting and fishing that were central to their identity as Cree Indians.¹⁹ A Canadian court found that the Cree culture did not have enough "distinctiveness" left, noting that the Crees participated significantly in modern culture, as illustrated by their clothes and modern homes, telephones, and diets, including the consumption of Kentucky Fried Chicken.²⁰ Deveney makes an astute observation addressed to those who (like the Canadian judges) are perhaps too quick to emphasize the dominant posture of the modern world, and its elements, as pervasive everywhere, even in the heart of traditional communities; and to those who are too ready to draw conclusions about the decline or inauthenticity of traditional communities in our time. As Deveney puts it, "[C]ultural insiders often perceive meaningful distinctiveness and cultural persistence where outsiders see only assimilation, and . . . cultural insiders often assign a different hierarchy of values to elements of their cultures than do outsiders."²¹

One of the foci for the debate is the question of "authenticity." It is suggested that one should be wary of allowing members of the dominant culture to decide whether a traditional community is "authentic" and thus worthy of efforts to maintain or to restore it. What may seem inauthentic and already destroyed beyond repair to "us," as outsiders, may appear entirely different to members of a fried-chicken-eating Indian tribe.

Peter Welsh of the Heard Museum offers another perspective sympathetic to native claims.²² Welsh raises what might be called the negative claims of community. That is, native people are seen by others as a distinctive community, and

18. Marie R. Deveney, *Courts and Cultural Distinctiveness*, 25 U. MICH. J.L. REF. 867 (1992).

19. *Id.* at 871.

20. *Id.* at 872.

21. *Id.* at 873.

22. Peter H. Welsh, *Repatriation and Cultural Preservation: Potent Objects, Potent Pasts*, 25 U. MICH. J.L. REF. 837 (1992).

often not in a positive way. "We" see Indians, and we have views about them. In the crudest sense, they are views of the sort purveyed by old-fashioned cowboy-and-Indian movies. Today those stereotypes are fading, but serious issues remain for institutions like museums. What do their collections of aboriginal artifacts explicitly or implicitly say about indigenous people? Claims for autonomy are in part defensive—partly a search for equality, partly an effort to come to terms with a history of conquest and subjugation, and a continued status as among the poorest and least-powerful citizens. There is an issue of getting control of one's own (collective) life. As Welsh puts it, it is a question of "principles that proclaim the right of communities to . . . control the manner in which their lives are interpreted."²³

The newly emphasized positive self-identification of Indians as Indians often plays itself out in a struggle over possession and control of artifacts held in museums and in collections. Welsh uses the idea of "potency" of objects to illustrate the different perspectives of different communities, and to suggest that—however one conceives the conditions of the contemporary world—important questions about the treatment of "potent" objects must be addressed. "The same objects at the same time can be potent in different ways for people from different backgrounds. Calling something scientifically significant is calling it potent."²⁴ And so, of course, is calling it sacred. When two different groups claim the object, potent for each, a decision must be made as to which claim will prevail. To see the problem from a perspective like Waldron's is to assume that the scientific (cosmopolitan) claim should prevail. But as Deveney's example of the Cree Indian case nicely illustrates, this is the perspective of the outsider. Even in the modern world, even in a culture that is profoundly affected by interdependence and supranationalism, a vital cultural group with roots in traditional life may still exist. It may feel very much a "human yearning or need to belong" that is real and entitled "to exist and . . . to be protected from decay, assimilation, and desuetude."²⁵

23. *Id.* at 859.

24. *Id.* at 858.

25. Waldron, *supra* note 1, at 757, 759.

Joseph Carens²⁶ presents an entirely different issue to the case of indigenous peoples: to what extent should they be allowed to preserve their minority culture at the expense of the majority? In particular, he discusses the case of Fiji. Contrary to the typical pattern of imperialism, the British deliberately took steps to preserve and protect the native Fijians' culture, including restricted alienation of land and maintaining the power of the native Fijian chiefs. As part of this protection, the British imported laborers from India to work the plantations. Now, a century later, the Fijian Indians constitute a slight majority of the Fijian population.

The native Fijians, although numerically a minority group, control eighty-three percent of the land. The Fijian Indians have, however, been much more successful economically than the native Fijians. The two groups have little in common and rarely interact. Fiji became a democracy after British rule ended; however, several years ago, after the Fijian Indians gained control of the government for the first time, a group of native Fijians overthrew the government through a bloodless coup. Today, Fiji has adopted a new constitution which guarantees native Fijians a majority in Parliament and fortifies the power of the native Fijian chiefly establishment. Carens, attempting to reconcile conflicting sympathies for both groups, asks:

Can one criticize the coup but endorse institutions and practices that contributed to the sense of ethnic identity that lay behind the coup? Can one endorse an ideal of equal citizenship and insist that Fijian Indians are morally entitled to be treated as equal citizens, yet still defend the constitutional entrenchment of certain rights and privileges for native Fijians?²⁷

These few snippets from the articles in the Symposium should give some idea of how deep and tangled this forest of cultural preservation is. As I noted at the beginning of this Introduction, I doubt that those who enter this intellectual thicket will find an obvious exit path labelled "The True Way." But they may find, like most mind travellers, that the pleasure is in the journey, not the destination.

26. Joseph H. Carens, *Democracy and Respect for Difference: The Case of Fiji*, 25 U. MICH. J.L. REF. 547 (1992).

27. See *id.* at 577.

