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Susan H. Williams

Indiana University Maurer School of Law, shwillia@indiana.edu

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THE USES OF MYTH: A RESPONSE TO PROFESSOR BASSETT

*Susan H. Williams**

In his essay, Professor Bassett traces the roots of the “myth of the nomad,” a myth which was used to justify the dispossession and destruction of Native Americans by colonial settlers. Bassett’s primary focus is on a careful exposition of the sources and uses of the myth. The historical evidence he presents is persuasive and interesting, and his analysis is often thought-provoking.

I find myself, however, in some disagreement with Bassett over the function this type of work serves. While Bassett recognizes that “[w]e are all creators of myths,”¹ he insists that we should “bring to light” the myths in the law and expose their “insidious uses[s].”² As Bassett observes, the first-year property course offers numerous opportunities for the unmasking of such myths. Bassett seems to suggest that we view his fascinating essay as one such attempt to “demythologize the law.”³

It is not possible, nor would it be desirable, to “demythologize” the law. The law is constructed upon, and often even constituted by, myths.⁴ The effort to eliminate those myths would produce legal concepts that were far less human, and probably no more humane. Our task, as both teachers and scholars, should be to recognize and evaluate the myths we use, but not necessarily to abandon them. Bassett’s essay offers a fine beginning for this project of understanding.

A myth is simply a kind of shorthand—a condensed codification of accumulated cultural understandings cast in an imaginative, and therefore memorable, form.⁵ The importance of myth, and its value,

* Assistant Professor of Law, Cornell University, Ithaca, N.Y.

1. Bassett, *The Myth of the Nomad in Property Law*, 4 J. LAW & RELIG. 133 at 151 (1987).

2. *Id.* at 152.

3. *Id.* at 151.

4. Cf. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 45 (1983) (“No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.”); J.B. WHITE, *WHEN WORDS LOSE THEIR MEANING* 11 (1984) (“Social and political institutions are . . . complex sets of understandings, relations, and activities. They are ways of talking that can be learned and understood, and they play their part in constitution a world.”).

5. This definition of myth, while far from uncontroversial among cultural anthropologists, does, I think, represent a starting point with which many would agree. See, e.g., C. LEVI-STRAUSS, *STRUCTURAL ANTHROPOLOGY* 202-28 (1967); Stanner, *The Dreaming*,

lies not in its superficial truth or falsity, but in the cultural understandings that it represents and the effectiveness with which it represents them. The simple fact that something is a myth—that it does not reflect an historically accurate or objectively verifiable reality—is not a sufficient reason to reject it. Nor is a demonstration of the myth's historical or cultural contingency an adequate refutation of its cultural content. Myth, with all its incongruity and contingency, is the stuff of which culture is made, and culture is the raw material of the law.

Although we cannot, in general, judge a myth by its historical inaccuracy or contingency, we can assess the continuing vitality of a myth by attempting to understand it on its own terms. I see at least three stages in this empathetic critique. First, we must attempt to precisely describe the myth itself. Given the variability of cultural phenomena such as myths over both time and place, description is no easy task. But if we are to understand a myth, we must first clearly describe it. Second, we must discern and define the cultural insights represented by the myth. This second step requires that we empathetically enter into the experience of those who believed the myth, so that we can understand the cultural vision that the myth reified for them. And, third, we must somehow judge the character of the myth. Measured by its coherence with our own intuitions—moral, metaphysical, or otherwise—the cultural vision implicit in the myth may be good or bad, accurate or inaccurate. In this short response to Bassett's essay, I can only point out a few of the issues that might arise in such an analysis of the myth of the nomad.

Bassett's essay initiates the first step in this empathetic critique by searching out the sources of the myth in the Elizabethan experience in Ireland and in social theory contemporaneous with the settling and expansion of the American colonies. He uses these historical materials persuasively to define the outlines of the myth and to evoke the experience of those who believed in it. And Bassett, quite clearly, draws an emphatic normative conclusion from these

READER IN COMPARATIVE RELIGION, AN ANTHROPOLOGICAL APPROACH 269-77 (W. Lessa & E. Vogt eds. 1965); cf. C. GEERTZ, *THE INTERPRETATION OF CULTURES* 1-13 (1973) ("culture consists of socially established structures of meaning"). Even those who accept this basic definition would, of course, disagree about the method of analysis that should be applied to decipher the cultural meaning of myths. The purposes and materials of legal analysis differ from the purposes and materials of cultural anthropology; thus, the question of method must be addressed independently by legal scholars. The particular method that I have suggested is simply a first approximation of an approach that obviously will require a much more sophisticated exposition.

materials: the myth was destructive, in that it was used unjustifiably to harm Native Americans and others, and it continues to be dangerous and destructive today.⁶

This is, for most of us, an unexceptional conclusion. But it is reached without the benefit of the intervening analysis I have suggested. Therefore, we are left without any explicit explanation of why the myth is destructive, why it should be abandoned.⁷ One possible answer is suggested by Bassett's frequent references to the fact that the myth of the nomad represented a distortion of the lifestyles and cultures of many of the Native Americans with whom the colonists came into contact.⁸ This historical inaccuracy cannot, however, be the source of Bassett's doubts about the validity of the myth itself. The claims about the moral and social status of nomads which form the heart of the myth are independent of the appropriateness of any particular application of the myth. We might simply ask whether Bassett (or those of us who are inclined to agree with his conclusion) would find the myth equally unacceptable if it were applied to one of the American Indian tribes that more closely resembled the nomadic mode.⁹ If his objections would remain unchanged, as I think it clear they would, then historical inaccuracy is neither a necessary nor a sufficient element in his negative assessment of the myth.¹⁰

So how should we go about explaining, examining, or justifying our common conclusion that the myth is destructive and should be abandoned? It is not sufficient simply to point out that the myth is historically inaccurate, that it served the purposes of the dominant cultural group, or that it was used to justify cruelty and violence. These facts may be relevant, of course, but they are not determinative:

6. See Bassett, *supra* note 1, at 135, 150.

7. I assume that the fact that the myth caused great human suffering is not a sufficient reason to abandon it. There is, of course, the obvious point that the same idea may be capable of causing both great evil and great good. Assuming, however, that some ideas carry inevitable harmful consequences, such ideas may, nonetheless, be valuable and worth preserving. The tremendous cost we pay for some of our myths clearly requires that we provide a stronger justification for those myths, but it does not make them necessarily illegitimate. Democracy may also be a myth, and one for which many people have died and killed, but that does not prove that we should abandon it.

8. See, e.g., Bassett, *supra* note 1, at 133, 144, 149.

9. For example, some northern New England Indians were, in fact, primarily nomadic hunter-gatherers. See W. CRONON, *CHANGES IN THE LAND* 37-39 (1983).

10. As Bassett points out, the descriptive distortion imposed by the myth is nonetheless significant because it indicates how strong the need to believe must have been. In order to overcome the often contradictory experiences of everyday life, the myth of the nomad would have required a particularly strong ideological or material foundation. See Bassett, *supra* note 1, at 135.

a myth may be suspect for all of these reasons and nonetheless contain cultural insights that we find both valuable and true. Again, the essential questions are: what exactly does the myth say, what is the cultural information it carries, and do we find that cultural vision, or any part of it, true and valuable?

Bassett begins the process of precisely describing the myth, but in at least one respect his description is unclear. He asserts throughout the essay that the myth of the nomad was used to rob people not only of their property, but also of their human rights.¹¹ His claim seems to be that the myth points to a single set of characteristics, the possession of which disqualifies an individual for both property ownership and personhood.¹² If this is true, then the myth of the nomad could tell us a great deal about the underlying cultural assumptions concerning the relationship between property rights and personhood.¹³

It is, however, unclear to me from the historical evidence Bassett adduces, whether the congruence between property rights and personhood in the myth is so complete. The myth appears to contain two logically and empirically distinct sets of characteristics—a nomadic lifestyle and a non-Christian religion—each of which may have carried particular implications for the subject's legal status. In other words, the pagan nomad may have lacked property rights primarily because he was nomadic—and therefore uncivilized—while he lacked full human rights primarily because he was non-Christian. Personhood and property rights would then rest on very different foundations, and stand in a less direct relation to each other.

Bassett recognizes that these two elements of the myth—civilization and Christianity—are distinct, and acknowledges that the Elizabethans also recognized the distinction.¹⁴ Although Bassett argues that the two concepts were, nonetheless, closely linked for sixteenth century Englishmen, the ambiguous evidence he produces concerning the extent and nature of this connection does not lead to a clear conclusion.¹⁵ In order to understand the cultural categories at

11. See Bassett, *supra* note 1, at 135, 150.

12. See *id.* at 134, 150.

13. For a discussion of this relation, see generally Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957 (1982).

14. See Bassett, *supra* note 1, at 139.

15. Bassett argues that the colonizers found it impossible to assert that a people was uncivilized if they had recognized that the people were Christian. This explains for Bassett the English refusal to recognize Irish Catholicism as Christianity and the persistent English characterization of the Irish as pagans. It is, of course, possible that the English classified Christianity with alleged Irish lack of civilization. It is also possible, however, that the English imposed that pagan classification simply in order to be free of the moral scruples that might

work in the myth, we need to know more clearly and exactly whether and in what ways the concept of civilization and Christianity were interrelated.¹⁶

Having satisfactorily disentangled the pieces of the myth, two difficult tasks remain. First, we must try to understand the cultural vision implicit in the myth. What does it tell us about the nature, source, and justification of a property right that such a right cannot be acquired by someone engaged in a nomadic lifestyle? What is the nature and significance of personhood if it is dependent upon a religious affiliation or a certain degree of virtue? Bassett has provided us with several clues in the search for answers to these questions.

Various theories of property emerge with striking clarity in the quotations Bassett reproduces from some of the sources of the myth. The labor theory of property,¹⁷ the social contract theory,¹⁸ and the utilitarian or economic theory¹⁹ all appear as justifications and explanations of the refusal to recognize the property rights of nomadic peoples. All of these models of property are incorporated, however, into a larger theory which defines the structure of social evolution. According to this theory, nomadic peoples lack property rights as against competing agricultural or commercial peoples because nomadic societies occupy a lower level of development on the evolutionary path leading from primitive or "barbaric" societies to civilized ones.²⁰ To respect the rights of the nomadic people would be to halt

otherwise restrict them in their dealings with the Irish. The evidence Bassett describes does not resolve this ambiguity. *See id.* at 138.

Moreover, even if Bassett is right that the English could not reconcile Christian faith with an uncivilized society, the two concepts—Christianity and civilization—may nonetheless be distinct. The inference may run only in one direction: Christianity may imply civilization, but civilization need not imply Christianity. In that case, the myth might still assign very different roles to nomadism and paganism as the determinants of property rights or personhood.

16. Perhaps the relation between civilization and Christianity might be more clearly illuminated by an exploration of English impressions of groups that cut dramatically across these distinctions. For example, Bassett mentions that the English were aware of the Chinese, who were a non-Christian nation, but a highly civilized one in European terms. *See Bassett, supra* note 1, at 146 (discussing a French work which was translated into English in 1761). Contemporaneous English impressions of China may shed some light on the possibility of including "civilized pagans" in the Elizabethan or colonial cultural categories. If such a category existed, then the "pagan nomad" would be revealed as a combination of two severable sets of characteristics that might have very different implications for the assignment of property rights and the recognition of personhood.

17. *See Bassett, supra* note 1, at 144 (quoting E. DE VATELL, *LES DROIT DES GENS* 31-38 (C. Fenwick trans. 1916)).

18. *See id.* at 145 (quoting H. GROTIUS, *II DE JURE BELLI AC PACIS* 2.21-5 (1625)).

19. *See id.* at 145 (quoting, *inter alia*, D. HUME, *TREATISE ON HUMAN NATURE* 31 (L.A. Selby-Bigge ed. 1888)).

20. *See id.* at 143 (describing several sources). For more modern discussion of such evolu-

the progress of this evolution to a higher form of society. The various theories of property serve to define this higher form of social organization—as, for example, one based upon a social contract²¹—and also to justify its superior position—because, for example, it protects the use of labor to create value.²² This evolutionary theory places property rights in a matrix of social conditions and relations, many of which have implications for the nature and limits of the concept of property.

Similarly, Bassett ties the notion of personhood, in the historical sources, to some minimal degree of virtue, or virtuous behavior.²³ And virtue, in turn, is considered practically unattainable without a Christian fear of God and, perhaps also, without the restraint imposed by a community of fellow Christians.²⁴ Personhood, then, appears to be dependent upon certain connections to God and to other persons. Without those connections, a human being is morally indistinguishable from any other animal. A closer examination of the nature of these relationships should yield a clearer understanding of the concept of personhood which is implicit in the myth of the pagan nomad.

The final task, once the myth is clearly defined and its cultural conceptions decoded, is to assess that cultural vision in terms of our own normative understandings.²⁵ We can, at this point in the analysis, express an opinion about the myth's truth or value or lack thereof. That opinion will be the result of an informed and self-conscious evaluation of the cultural message of the myth, and not merely an unexamined reaction to the historical uses of the myth.

tionary theories, *see generally* Demsetz, *Toward a Theory of Property Rights*, THE ECONOMICS OF PROPERTY RIGHTS (E. Furobotn & S. Pejovich eds. 1974); P. STEIN, LEGAL EVOLUTION (1980).

21. *See* Bassett, *supra* note 1, at 145 (quoting Grotius).

22. *See id.* at 144 (quoting de Vattel).

23. *See id.* at 142 (quoting an anonymous pamphleteer).

24. *See id.*

25. I have deliberately left ambiguous the method of normative assessment to be applied in this analysis. The choice of a normative theory is, of course, a very large and independent subject. I assume that each scholar will use whatever ethical theory he or she usually uses to assess the law.

When the myth is in some sense a part of "our own" culture, one useful approach may be to search for what John Rawls called "reflective equilibrium." We begin with, on the one hand, a set of moral intuitions and considered judgments and, on the other hand, a mechanism for generating principles. In Rawls' case the mechanism is the original position; in our analysis it is the cultural understandings implicit in the myth. We then compare the principles, and their consequences, with our moral intuitions, modifying and replacing elements of both sets in response to each other, until we arrive at a "reflective equilibrium." *See* J. RAWLS, A THEORY OF JUSTICE 48-51 (1971).

Such an evaluation may lead us to the same conclusion with which we began, but it may also offer us additional insights in the process. We may gain a deeper understanding of why and how the myth worked so powerfully and for so long. We may also discover the extent to which we still share some of the underlying cultural assumptions which the myth reflects—for example, the evolutionary theory of civilization—and we may recognize the connection between such assumptions and some of our otherwise unquestioned legal and moral precepts. Finally, we may learn more about ourselves through the attempt to specify the reasons why we believe the cultural assumptions of the myth must be abandoned.

Myth is a tremendous tool for legal scholars. It is a key to the cultural imagination out of which legal concepts take shape. We must use that tool to its fullest, beginning with an historical explanation of the sources and uses of the myth, but also going on to explore the cultural information the myth represents and the insight it may offer into our own imaginations. Professor Bassett has offered us a beginning; I hope his invitation will be enthusiastically accepted.

