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Cautionary Tales

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REVIEW ESSAY

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Abstract. In a critical, interdisciplinary study of the construction of national identity of Aotearoa New Zealand, Nan Seuffert unearths the raced and gendered constitution of this postcolonial nation state.

Nan Seuffert, *Jurisprudence of National Identity: Kaleidoscopes of Imperialism and Globalisation from Aotearoa New Zealand* (Aldershot and Burlington, Vermont: Ashgate, 2006).

> Nations are imagined political communities. . . , which need boundaries, and enemies. Law is integral to the construction and maintenance of these boundaries, and the identification of enemies. Nations are stories that are told about collective identities, which also shape the stories available for individual identities. . . . A nation is *imagined* because no member can ever know all of those who make up the nation, and therefore each carries a fictional image of the nation. It is an imagined *community* in the sense that all members of the nation are imagined as part of a fraternity. This part of the fiction typically masks various forms of inequality, exclusion and exploitation. . . . The nation is also imagined as a sovereign state, territorially limited, internally united and free of interference from other nation-states. . . .[1]

As this concise and acute orienting passage promises, much is achieved in the 139 pages of this, Seuffert's first book, and the richness and complexity of *Jurisprudence of National Identity* reflects its author's own history of boundary-crossing. A U.S.-born and -educated lawyer whose qualifications

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would fit her neatly for the paradigmatic career of a successful U.S. law professor, Seuffert has spent her teaching and scholarly career at the University of Waikato in New Zealand, in a law school founded on the (perhaps now more than then) radical premise of a bicultural Maori-Pakeha institution, and on a commitment to the study of law in social contexts.

Seuffert's early work on domestic violence marked her as a rigorous and highly original thinker with a distinctive commitment to quilting theory to practice and scholarship to teaching—her (self-) searching theorizing of "situated" lawyering in the 1996 *Sydney Law Review* article "Locating Lawyering: Power, Dialogue and Narrative" should be required reading for any lawyer or legal academic with an orientation toward social justice. Similarly, *Jurisprudence of National Identity*, perhaps best generically described as critical legal history, should be read by anyone teaching, writing about, practicing, or making law in "post-9/11" contexts, including constitutional law, immigration law, public international law, and the law of national security and anti-terrorism, which latter increasingly infects domestic criminal procedure.

The range of readership with much to learn from *Jurisprudence of National Identity*, although wide, is dwarfed by the scholarly range that informs the book. Seuffert's uncompromisingly engaged and restlessly ambitious scholarly bibliography moves across fields from criminal justice and jurisprudence to postcolonial discourse theory, studies of gender and sexuality, immigration law, and securities regulation; however, the persisting threads running through the body of work are its doubled focus on national imaginaries, and on what Marianne Constable calls the "traditional concerns of jurisprudence—law and its relation to justice."[2] The differing facets of Seuffert's work, including an expertise in commercial law rarely found in scholars with a deep and wide-ranging grounding in the critical theoretical traditions (Jeanne Schroeder and David Gray Carlson are perhaps the most prominent of a handful of such scholars who spring to mind), are drawn together skillfully to produce a coherent, nuanced, and foreboding study of the "constitution" of New Zealand, warning insistently of Seuffert's conclusion that "looking forward as though into unmarked space upon which history will be created results in recreating history."[3]

Seuffert's method involves close readings of textual artifacts of histories of two periods of New Zealand "law, policy and national identity,"[4] the "free trade imperialism of the mid-nineteenth century and the neoliberal globalisation of

the late twentieth century,"[5] with sweeping glances backward to the earliest British colonial incursions into Aotearoa in the late eighteenth century and forward to post-9/11 immigration and anti-terrorism legal discourses and practices. Methodologically grounded in postcolonial discourse theory and the critical accounts of legal institutional discourses pioneered by Peter Goodrich and Terry Threadgold, Seuffert's study is committed to an intersectional analysis of the racing and gendering of the developing Aotearoa New Zealand nation state,

> highlight[ing] the repetition of colonial tactics . . . tracing the outlines of the "good citizen" of free trade imperialism, and the "global entrepreneur" of free trade globalisation, embodying and enacting law and policy reform and national identity, ... positioning . . . these raced and gendered identities in crucibles of institutions of power, agency, resistance, mimicry, negotiation, coercion, complicity and compromise [to produce] historically specific configurations: white male colonial citizen/subjects (momentarily) performing free trade imperialist citizenship; Maori men criminalised at the boundary of a nation; white women as leaders of a state feminised by the dispersal of national sovereignty into the global economic order; indigenous Maori men as global entrepreneurs, or "corporate warriors" negotiating commercial deals to "settle" colonial injustices; Maori women as bearers of a reconstructed traditional Maori culture, and "hysterical" activists; and "raced" immigrants paradoxically embodying both the boundary of a bicultural nation that recognises only Anglo-Europeans and indigenous Maori, and . . . dispersal of the nation into the global economic order.[6]

Like Goodrich and Threadgold, too, Seuffert is a teller of tales out of school, of "alternative jurisprudences" silenced, suppressed, and marginalized by relentlessly monologic constitutional imaginaries, such as in her accounts of Maori women's resistance and agency in the latter decades of the twentieth century, and the Maori activist plowmen and "pacifist fencers" who opposed government land grabs a century earlier. This latter story adds to the burgeoning literature on the vexed histories of the suspension of habeas corpus in times of "national emergency." And Seuffert's account of the demonization of the Maori leader Te Whiti by the Native and Defence Minister who "attempt[ed] to justify ignoring the rule of law by holding Maori prisoners without trying them and charging them in court" by "claim[ing] that there

were 'extreme or highly exceptional circumstances' justifying the suspension of the writ of habeas corpus"[7] suggests that the some of the most egregious strategies of the "war on terror" have a long and undistinguished history. Indeed, Seuffert calls them "medieval."[8]

She is also an acute debunker of dominant stories of national identity, as in her demolition in "Immigration: Anxiety, Paradox and Belligerence" of the putative factual basis for the anti-Asian immigrant discourse that characterized New Zealand's electoral politics at the turn of the twenty-first century, which she exposes as just the most recent in a series of powerful politico-legal fantasies characteristic of the "legal orientalism" that Teemu Ruskola has theorized. Equally devastating is her deconstruction of the discourses on Maori corruption and conspicuous consumption that accompanied the Treaty Settlements that in the last two decades of the twentieth century harnessed the rhetoric and practices of the "new enterprise society" to assimilationist ends.

Seuffert's scholarly range is exemplified in the three chapters explicitly engaging intersections of race and gender that both span and anchor the book. "Jurisdiction: Colonial Marriage Law, Concubinage and Polygamy" shows how the apparently innocent matter of jurisdiction can be an instrument of racist state violence, and gestures toward a case both for complicating, if not collapsing, distinctions between private and public law in cultural constitutional scholarship, and for the critical importance of marriage laws for feminist constitutional scholarship. Seuffert documents to chilling effect the co-optation of indigenous women's political action in a "logic of assimilation" through systematic "(mis)recognition" of their dissonant voices in "Producing Race and Gender through National Identity in Law." In that chapter, too, her case study of Fisheries law and policy in New Zealand in the late twentieth century points to the frequent imbrication of jurisdiction-stripping in increasingly characteristic contemporary reversals of reforms of racialized structural subordination. And in "White Women Leading the Nation: Shifting Law and Policy Terrain, Cleaning Up the Mess," she counsels against unreflective feminist triumphalism in the face of the election of women as heads of government. Her analysis of the history of the Shipley and Clarke Prime Ministerships, she suggests, may indicate that "women become national leaders at times of instability, or when the position is faced with particular challenges," and that in governance as in life under patriarchy, even women Prime Ministers "have to work harder and perform better for less money, prestige and authority than men would be likely to accept."[9]

Seuffert makes a compelling argument for New Zealand's special salience as a cautionary case study for the Western nation in the post-postcolonial era: at once "colonised . . . at the height of Britain's free-trade imperialism" and "a world leader in implementing the law and [economic and social] policy reform . . . known as 'structural adjustment.'"[10] Indeed, her ability to engage the global and the local; to trace the imbrications of law, economics, and social policy in nation formation; and her skill with the materials of critical legal history are perhaps best exemplified in her fifth chapter's "history within a history." This chapter shows how ground gained by Maori challenges to national monoculturalism in the 1970s and 1980s, achieved by the emergence of the theory and practice of "parallel development," foundered on a national reimagining, which she describes as a shift "from [a national ideology of] caring to [one of] competition," resulting from New Zealand's enthusiastic adoption in the early 1980s of "the international economic trend known as structural adjustment, Reaganomics, Thatcherism."[11]

At the same time she insistently advances a broader argument about what can be learned from the telling stories she teases out from New Zealand's constitutive texts: stories of national identity, once told, tend to replicate themselves and always exclude or erase other narratives at least theoretically open to both citizen-subjects and those others who find themselves engaging with the nation's boundedness. So, too, plausible constitutional stories repeatedly, perhaps necessarily, depend on founding acts of violence and continuing violent suppression of alternative accounts of belonging; stories of national unity likewise do violence; and the opportunities lost in forging radically inclusive national identities *matter* to individual lives and the fabric of intersubjective relations in ways that, insistently and discomfortingly, call us to ethical introspection, and then challenge us to act differently. And passages of change in histories of the deployment of stories of national identities for differing political ends, whether "threats to a nation, . . . justification for shoring up a nation's boundaries, or . . . reflections of national identities"[12] point toward stories of communities as yet unimagined, to forms of political life that might realize "the possibility of justice."

There is much in Seuffert's canny deployment of her material to disorient a constitutional thinker bounded by the (apparent and often professed) binary of arid textualist pieties and jurisprudentially etiolated instrumentalism persistently circumscribing U.S. constitutional thought. Treaties, unlike "constitutions," resist myths of nonviolent nation making. Seuffert makes a convincing

case, too, for the transhistorical New Zealand constitution, constructed in and from an early "declaration of independence" brokered by the missionary and colonial land baron Henry Williams; the various iterations of the Treaty of Waitangi; sedimentations of "constitutional" court of final jurisdiction decisions on land rights and colonial marriage law; Lockean political theory and Austinian positivist jurisprudence; literature on racial purity and Maori and Asian "Aryanism"; Waitangi Tribunal jurisprudence; and artifacts of governmental policy on matters ranging from social welfare to immigration. Aotearoa New Zealand's founding "document," the Treaty of Waitangi, was in fact multiple versions of a treaty, in English and Maori, which for reasons unrecoverably mired in a stew of militant religion and white racism, competitive European colonial expansion in the South Pacific, economic opportunism, and the "paternalistic protectionism" of English humanitarian discourse in the mid-nineteenth century was "appropriatively mistranslated." Thus the Maori version registered dual sovereignty—Maori and Colonial—which the English version erased, and also provided for Maori control over land, rather than granting the Crown exclusive possession and an exclusive right of preemption as the English version did.

So, too, meretricious versions of pastoral, become, like populist intolerance of difference, national pieties of post-9/11 "official nationalism," are laid bare: Seuffert's account of how the reactionary deployment of stories of the—or a—"Kiwi way of life" undid the modest "move to justice"[13] essayed by the New Zealand Court of Appeal's seizing the "ethical moment presented to" it[14] in the 2003 *Ngati Apa* foreshore and seabed native title case is brief, incisive, and telling. Even one step forward, two steps back law reforms that promise at most the simulacrum of "justice" to violently dispossessed indigenous peoples struggling with transgenerational impoverishment and other legacies of racist (constitutional) laws are constructed as embodying the national history of exclusion in which they purportedly intervene.

Days after this "too little too late" attempt of the Court "at repair work for the injustices of colonisation"[15] the New Zealand government enacted the Foreshore and Seabed Act 2004, extinguishing native title on foreshore and seabed, seizing them as Crown property, while failing to act to remove non-Maori private title to the same areas, despite its rhetoric of a historical understanding of foreshore and seabed as Crown property, and the necessity to protect "traditional rights of public access."[16]

The opportunistic and impoverished national discourse of threats to beach vacation pastoral, "the 'Kiwi way of life', an articulated-on-the-spot collective imagination of golden summers spent camping and barbequing at the beach, swimming, walking and wading, fishing for meals and messing about in boats," reflects Seuffert's keen eye and ear for colonialist tropes, and was matched by the Attorney General's fatuous declaration in support of the legislation that "it is almost innate to being a New Zealander that you have a right to the foreshore and the sea."[17] Seuffert's judgment is both acute and incisive:

> Suddenly one thing "everyone" knew, the imagined national dream, was that Kiwis go to the beach, and assume they have a right of access, and that the beaches are public. Of course, the foreshore starts at mean high tide, and does not include the beaches, the seabed is under the water, and legally, there has never been a generic or comprehensive right of access to the beaches in New Zealand. . . . Further, about one-fifth of the foreshore and seabed is privately owned, with a right to exclude. . . . The decision's perceived threat triggered nostalgia for a fantasy, which is at any rate disappearing with the sale of beachside campgrounds, encroaching pollution, the depletion of fishing stock and increasingly long workweeks and accompanying stress.[18]

In a similar vein, she registers the dissonance between post-9/11 discourses on national identity like the Act and contemporary speeches on immigration and the nation delivered by New Zealand politicians Winston Peters and Don Brash, and evidence of both economic globalization in New Zealand and policy oriented toward it, identifying the emergence of a "climate of aggressive belligerence, a resurgence of the barely sidelined monocultural fortress nationalism that sits oddly with globalisation of economic activity."[19] She also insists that these old stories of race and nation do work in the world: not only did the Act follow hard upon reaction to *Ngati Apa*, but these conservative politicians' harnessing of discourses of intolerance saw an uncanny reinstantiation of anti-Asian immigration policy that had characterized New Zealand at the turn of the previous century, and its reconfiguring in explicitly Islamophobic immigration law. Seuffert suggests, too, that this relegitimation of racist law has "come home" with a vengeance, bleeding into social justice law and policy with the recent abandonment of attempts to redress the disadvantages Maori and Pacific Islander children encounter in a monocultural national education system.

What lessons, finally, does Seuffert draw out of her study of the legal history of this small island nation, a postcolonial fragment of British imperialism? Why do they matter so much to so many of us, including those who profess law in what may be the dog days of the neo-Imperial center of a fantastic imaginary statist global democracy, mouthing egalitarian commitments while practicing at once heedless and ruthless majoritarianism at home and violent colonialism and the proliferating of jurisdictions of exception abroad? And—because the empire always talks back, shaping the colonizer as much as the colonized—we see this lawlessness "seeping back" to the imperial center in a criminal procedural revolution whose logic is diametrically opposed to that of the Warren Court.

The message of *Jurisprudence of National Identity* is that founding injustices return as a species of national repressed, and when they do they replicate, paradoxically infecting not only attempts by postcolonial governments to redress "historical racial injustices"[20] but also immigration law, criminal justice, and a range of policies that shape a raced and gendered nation state. The multiple perspectives that Seuffert brings to bear on her critical history of the constitution of Aotearoa New Zealand are not only productive of a rich and nuanced perspective; they also model a strategy for change, fracturing the vision of the nation circumscribed by the "kaleidoscope of colonisation, reshaped with images of globalisation . . . its lenses ground and polished in raced and gendered colonial tropes."[21] *Jurisprudence of National Identity* concludes that radical "[t]ransformation of, or even progress beyond"[22] the violent logic of colonization requires ethical intervention in the "[i]terations, or repetitions with a difference, [that] are a central theme of . . . [the] book,"[23] seizing the "chance for change, and movement beyond the familiar tropes [producing raced and gendered structural subordination of 'others'] into unknown territory."[24]

Seuffert registers acutely just how difficult such productive engagement with repetition and difference has become since 9/11: sharp reversals of "progressive" reforms in race relations laws and socioeconomic policy have accompanied the new nationalisms thoroughly infected with what the human rights lawyer Clive Stafford Smith has called "the politics of hate," and deploying a logic that Seuffert labels an "ominous . . . business-as-usual matter-of factness."[25] Thus while repetition of the violence, greed and deception that mark New Zealand's constitution "always opens space for the exercise of ethical decisions and the practice of justice," business as usual at this

point in history involves declining "the ethical moment for justice," "a re-enactment of the founding violence of the nation state."[26]

Seuffert's grim warning seems particularly relevant at a time when the U.S. presidential candidate who invokes both hope and change also mouths the pieties of (economic) Reaganism, and can, to take a striking recent example, apparently do nothing other than take up Scalian-style populist cudgels against a Supreme Court decision holding unconstitutional the death penalty in cases of child sexual assault. That relevance is heightened by Seuffert's mapping of the recursive construction of Maori as "internal foes to the nation,"[27] most recently audible in "New Zealand First" politician's Winston Peters's linking of Islamic immigrants to Saddam Hussein and Osama bin Laden; his promotion of the use of biometric technology and "patriotic investigators who are not politically correct" to search homes and businesses in immigration enforcement; and his "construct[ion of] a public enemy in the nation, a 'militant' Maori 'underbelly' in the Muslin community."[28]

It counsels against fantasies that if "we" can only get a woman or a person of color in the White House history will right itself, come unchained from the founding of the nation at the heart of the West's newest empire on the law and economics of racialized chattel slavery. *Jurisprudence of National Identity* is, then, a timely history of and for our times.

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1. Nan Seuffert, *Jurisprudence of National Identity: Kaleidoscopes of Imperialism and Globalisation from Aotearoa New Zealand* (Aldershot and Burlington, Vermont: Ashgate, 2006), 2–3.
2. Marianne Constable, *Just Silences: The Limits and Possibilities of Modern Law* (Princeton: Princeton University Press, 2005), 178.
3. Seuffert, *supra* note 1, at 138.
4. *Id*. at 1–2.
5. *Id*. at 1.
6. *Id*. at 2.
7. *Id*. at 68.
8. *Id*. at 69.
9. *Id*. at 116.
10. *Id*. at 1.
11. *Id*. at 78.
12. *Id*. at 3.
13. *Id*. at 136.
14. *Id*. at 136.
15. *Id*. at 136.

16. *Id.* at 136, quoting F. M. Brookfield, "The Land and Sea Controversy and the Foreshore and Seabed Act," *New Zealand Law Journal* 362, 362 (2005).
17. *Id.* at 136, quoting the Rt. Hon. Helen Clark, "Post-Cabinet Conference: 23 June 2003," available at http://www.beehive.govt.nz, at 5.
18. *Id.* at 136.
19. *Id.* at 131.
20. *Id.* at 9.
21. *Id.* at 138.
22. *Id.* at 9.
23. *Id.*
24. *Id.*
25. *Id.* at 138.
26. *Id.* at 27.
27. *Id.* at 70.
28. *Id.* at 129.