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Introduction: Law and the Problematics of Indigenous Authenticities

Nicholas Buchanan and Eve Darian-Smith

INTRODUCTION

While law has long played a role in forging and perpetuating hierarchies between colonizers and colonized, not only in the past but also in the present day, this long-standing asymmetry of power is increasingly being challenged by Native peoples, who are employing law as a technology of empowerment. And increasingly, indigenous groups are making claims not only under Western law, but also under indigenously based systems of legality. The legal pluralism that has resulted has not only been fraught with tensions, but also makes widespread assumptions about the totality of the colonial process untenable.

It is against this background of shifting power dynamics between non-Native and Native peoples that more and more sociolegal scholars have become engaged with issues of law and indigeneity. This growing interest reflects a new awareness and sensitivity to the continued presence of indigenous peoples within former colonial societies. And it also reflects an increasing prominence of Native issues within public institutions and across political landscapes. Scholars are now appreciating that issues relating to indigenous peoples are not marginal to other questions of power, race, and status. Moreover, questions of Native sovereignty have become topics of mainstream

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political discussions, no longer relegated to specialized forums. Take, for instance, the amount of attention and money directed at ballot measures on Indian gaming in California in 2008, or the interrelated implications of the federal recognition of the Long Island Shinnecock Indian Tribe in 2010, plans for the establishment of a casino in or near New York City, and New York State's gaping budget deficit (Hakim 2010).

In this symposium, we hope to push the discussion of the multifaceted relationships among Native peoples and contemporary formal and informal legal institutions in productive directions. In sociolegal scholarship, discussion with respect to Native peoples and law has long focused on discourses of human rights and resistance to colonial/postcolonial legal orders. These discourses are obviously important in highlighting how Native groups engage with the law as well as illustrating the ongoing struggles of indigenous peoples. At the same time, we believe that their predominance can also be constraining in a number of ways.

First, we are concerned that discussions centered on resistance to dominant power structures place indigenous peoples in the role of respondent. By focusing primarily on resistance, scholars, on the one hand, empower indigenous peoples but, on the other hand, tend to underscore the ways that they react to changes effected from outside their sphere of direct control. In the process, we risk overlooking ways in which indigenous groups actively initiate and shape legal engagements and social and political change. In other words, even as they focus on the subversion of hegemonic orders, discourses of resistance can inadvertently reproduce the power relations and hierarchies that constitute and characterize those orders in the first place.

Second, discussions centered on human rights are profoundly important for articulating basic principles of recognition, the legitimacy of Native peoples as claimants, and the special legal status of indigenous peoples in colonial and postcolonial legal orders. At the same time, this can also imply that the primary way that Native peoples engage the law is through the deployment of Western legal tools—that is, the concept of human rights. By focusing on human rights—a discourse that largely originated, ironically, in the imperial and neoimperial nations that were most culpable in the colonial process in the first place—such discussions can unintentionally reinforce colonial hierarchies by suggesting that indigenous peoples must rely on Western law. While we believe in the profound importance of human rights, especially as these rights are increasingly circumscribed by the very nations that propound them, the concept of human rights is at its core a Western liberal discourse. As such, human rights are historically contingent upon certain understandings of social relations and can colonize non-Western conceptions of such relations. Employing human rights to frame the relationships between indigenous peoples and law risks eclipsing indigenous concepts of law and social relations.

Of course, no one is suggesting that analyses of resistance and the use and abuse of human rights are not extremely timely, important, and significant (see Larson 2007). However, this symposium seeks to foreground research on other ways in which indigenous peoples engage with, deploy, and conceive of the law. In particular, this symposium seeks to emphasize *the role of legality in shaping the very idea of what it means to be indigenous, from the perspectives of both Native and non-Native peoples*. By foregrounding the role of the legal in producing ideas of indigeness, we seek to promote inquiry into the multiple layers and understandings of what constitutes the category of “authentic indigenous person” in the first instance. In short, a central goal of this symposium is to explore a range of issues surrounding the relationships between law and indigeneity—as a political and cultural identity, a legal status, and a popular imaginary.

INDIGENOUS AUTHENTICITIES

By drawing on historical and contemporary cases and engaging with local, national, and international legal settings, the contributors to this symposium offer significant substantive and theoretical insight into the issue of *authenticities* as it plays out in legal contestation in the Anglo-American colonial world. What do we mean by “indigenous authenticities”? These terms are extremely complex, with deep historical roots. As Paige Raibmon (2005) notes in her book *Authentic Indians*, the term “authenticity” should not be used as “a stable yardstick against which to measure the ‘real thing.’” Rather, she argues, authenticity “is a powerful and shifting set of ideas that worked [and continue to work] in a variety of ways toward a variety of ends” (3). Similarly, Eva Garrouette (2003), in *Real Indians*, shows that multiple calculi—legal, scientific, cultural, and psychological—converge in the assessment of whether or not someone can be considered American Indian. Different measures of authenticity employed by different groups of people serve to differentially include and exclude people from membership.

Despite these dynamic intricacies, certain ideas of what constitutes indigenous “authenticity” more generally exhibit considerable cultural momentum. Historically, images of authenticity imposed by colonial societies have reinforced the idea that Native peoples were “Noble Savages,” autochthonous and not of the contemporary world (Krech 1999). In the nineteenth- and early twentieth-century United States, American Indians were considered to be anti- or premodern foils living in stark contrast to the overwhelming modernism of the industrial age. As such, they were both praised, as proud and defiant, and dismissed, as inevitable casualties of modernity. The question of how American Indians would survive in the modern age assumed that authentic American Indians were by definition



Figure 1.
Buffalo coin (2008)

The mint reused the original design of the buffalo nickel (1913-38) on the commemorative buffalo dollar and the gold bullion series, which began in 2006. Here the individual is depicted with feathers and braided hair, and on the reverse side of the coin is the image of a buffalo. Both images evoke nostalgia for an era that witnessed the near-annihilation of humans and animals.

not modern. “Ishi,”¹ for example, was seen as heroic, timeless, and non-threatening but also as a tragic museum piece (Scheper-Hughes 2001; Starn 2005). These various images continue to haunt Native peoples to this day (see Figure 1).

In contemporary popular discourse, indigenous peoples continue to be romanticized as having roots to a past that make them by definition original and authentic. Just as important, the law often relies upon these conceptualizations of authenticity as a source of authority and legitimacy in disputes involving indigenous peoples. According to one Native critic,

Government programs and definitions of Indians take their lead from the legacy of anthropological interpretations of Indian authenticity. Government policies demand that communities seeking recognition through the Office of Federal Acknowledgment must prove with

1. “Ishi” was so named by Alfred Kroeber, and was widely known as the last of the Yahi people. Ishi spent the last years of his life until his death in 1916 as a “salaried assistant janitor, key informant, and ‘living specimen’” (Scheper-Hughes 2001, 14) at the University of California Museum of Anthropology in San Francisco.

documentary evidence that they are a distinct Indian community and can trace their history through time. Similarly . . . tribal groups who petition for federal recognition by way of the mixed blood community clause in the Indian Reorganization Act must show that the surviving mixed bloods continue to live in the style of Indians. These views do not allow that the world has changed considerably over the past 200 years, and that Indians today do not, and cannot, live like their ancestors. Americans expect authentic Indians to remain unchanging, although no one expects Americans to look and behave like pilgrims. (Indian Country Today 2008)

In both formal and informal legal interactions, decisions are often justified based on imaginaries of indigenous peoples, their histories, and their cultures. In the process, law portrays the quality of authentic indigeness as existing prior to legal engagements, as an authoritative basis for decision making with its foundation outside the legal process. In this symposium, the contributors argue that concepts of authenticity and origin are not preexisting; rather they are emergent. They grow out of comparisons with preconceptions about what is inauthentic and out of widely held beliefs about what constitute indigenous cultures, activities, and identities. Additionally, what precisely constitutes authentic Native traditions, histories, and present-day activities at any given moment is far from static or stable. This is especially clear when indigenous authenticity is directly contested in legal interactions. In a wide variety of disputes, imaginaries of indigenous authenticities are actively produced and contested by legislators, witnesses, experts, lawyers and judges, administrators, and the public. What results are legal decisions that articulate and validate certain perceptions of authenticity and origin over others. In other words, while rhetorically portraying authenticity as preexisting, and while this preexisting authenticity is deployed as a source of legal authority, law in fact helps to fashion the very category of the authentically “indigenous.”

Questions of authenticity are further complicated by the fact that indigenous communities (both historically and today) often do not mesh easily with stereotypical images of Native activities. Contemporary indigenous groups often represent themselves through sophisticated political organizations; engage in lucrative commercial enterprises such as casinos (Darian-Smith 2003; Cattellino 2008); and savvily employ media, science, and technology to further their legal, political, economic, and cultural goals (Buchanan 2010). These activities can create surprising juxtapositions with widely held beliefs about indigenous traditions. In many cases, law is called upon to adjudicate this perceived disconnect and to reconcile the realities of life in Native communities with preconceptions of it.

It is vital to note that the legal contestation of authenticity takes place not only between Native and non-Native peoples, but also among indigenous peoples themselves (see Deloria 1994). Indigenous peoples have been participants, albeit unequally, in engaging and shaping past and present

imaginings. “Non-Aboriginal people employed definitions of Indian culture that limited Aboriginal claims to resources, land, and sovereignty, at the same time as Aboriginal people utilized those same definitions to access the social, political and economic means necessary for survival under colonialism” (Raibmon 2005, 3; see also Clifton 1990). Indeed, the very “Nobel Savage” discourses mentioned previously—reworded as the mythology of the ecological Indian and of the American Indian as environmental steward—can be redeployed by American Indian tribes in powerful ways. These discourses, although imposed, provide considerable cultural capital with which to critique the colonial society. Additionally, authenticities are actively debated in tribal court proceedings, for instance, and can lead to disputes over the minutia of traditions that are offered as legal precedent (Richland 2008).

Among academics, there is a significant amount at stake in better understanding the place of law in the formation of ideas of authenticity and the category of “indigenous.” Questions about origins and authenticities inform everyday relations within indigenous communities and between Native and non-Native peoples and come into play in almost all disputes involving indigenous people as well as the underlying motivations behind these disputes. And because images of authenticity that emerge from legal disputes have legal standing, the ramifications of conforming or not conforming to “authorized” ideas about what constitutes authenticity can be substantial and, in some cases, devastating.

In the present symposium we attempt to be particularly conscious of our role as academics in the very processes of producing and reproducing the imaginaries of authenticity that we seek to analyze. This is especially important given the central role that scholars have played in the contestation and establishment of who is, and who is not, an indigenous person. Take, for example, the role of anthropologists as expert witnesses in Indian claims litigation in the United States and Canada (see American Society for Ethnohistory 1955; Rosen 1977; Clifford 1988; Rosenthal 1990; Miller 1992). Our goal in this symposium is to analyze the place of law in the formation and contestation of indigenous authenticity. Our purpose is not to pass judgment on what does or does not constitute authenticity. However, we are acutely aware that it is impossible to do the former without at least a bit of the latter unintentionally interjecting itself.

COMMON THEMES

There are a number of related themes that bring the four articles in this symposium together. Perhaps the most obvious among them is the struggle of indigenous peoples to prove their authenticity in the legal system. In efforts to establish proof of an authentic claim, costs to tribes can be great. According to Robert van Krieken (2011, in this symposium) with respect to the

Australian context, Aboriginal peoples have at times been forced into a position whereby they must reveal sacred knowledge in order to show long-standing affiliation with land or objects. Such knowledge is typically held very secretly, passed down orally by women to women and men to men, and is integral to complex intergenerational social relations. However, once oral knowledge is given as evidence, it becomes written text, available to be read by Native peoples and non-Native peoples alike. In short, Aboriginal peoples, in order to comply with Western legal procedures and to produce claims that are considered authentic and legitimate in Western courts, may be forced to compromise elements of their cultural identity and religious beliefs. These compromised elements are the very things that signal the legitimacy and authenticity of their beliefs in Aboriginal terms.

A second major theme that all the contributors engage with to varying degrees, and one very much related to the first, is the role law plays in essentializing cultural difference. The process of setting legal criteria, whereby Aboriginal people must prove that their long-standing hunting, fishing, and spiritual practices create ties to the land, essentializes these acts as being necessarily traditional and timeless. Change over time, and cultural variegation at any given moment, is occluded as law creates and invokes flattened images of what Native people do and do not do. Often this legal essentialization takes the form of Native peoples being marked as opposite to non-Natives—spatially, temporally, and perceptually removed from the majority of the population living in cities and urban centers.

Larry Nesper (2011, in this symposium) discusses how the Mole Land band in Wisconsin sought from the Environmental Protection Agency “Treatment-as-State” status. To gain this status, the Mole Land Band had to demonstrate that water pollution had had an impact on culturally important land. To establish this cultural importance, the band turned to a group of anthropologists to document the connections between the land and the band’s culture in an effort to gain “culturally significant property” status for their reservation under the US National Historic Preservation Act. This involved, for instance, certain traditions being reframed as property for the purposes of registration under the act. As has occurred with Australian Aboriginal peoples, the band had to document its cultural authenticity to the US government but had to do so within the legal framing of culture as property. By doing so, however, the Mole Land Band achieved “Treatment-as-State” status from the Environmental Protection Agency and deliberately set their water standards at a much higher level than that of the state of Wisconsin, allowing them to “effectively regulate water quality upstream and off the reservation” (Nesper 2011, 155) and ultimately causing the mining company BHP to abandon its plan to dig a mine adjacent to the reservation (see also Darian-Smith 2010). Nesper vividly illustrates the give-and-take over cultural authenticity necessary in establishing legal authority for American Indians.

The third major theme running through the articles is that once Native people have been legally categorized as such, they then must necessarily engage with Western legal language, logics, procedures, and institutions. In short, while tribal laws can certainly feature in legal negotiations between Native and non-Native peoples, Western law prevails as the dominant legal frame and structure. Not only does this situation sustain asymmetrical power relations between Native and non-Native communities that echo a former colonial era, but in many cases the jurisprudence practiced by tribes within their own Native courts is forced to adapt to and adopt Western norms and procedures.

As L. Jane McMillan (2011, in this symposium) discusses with respect to efforts to establish an alternative tribal legal system for the Mi'kmaq people in Nova Scotia, Canada, she was surprised by the extent to which tribal members favored an adversarial and punitive legal process akin to Canadian law. McMillan notes, "In generating alternative justice programs . . . there emerge competing discourses reflecting questions of legitimacy, authenticity, and efficacy of practices identified as Mi'kmaq, both within Mi'kmaq communities and between Aboriginal communities and mainstream society, and ultimately revealed in the hegemony of Canadian law in Mi'kmaq consciousness" (182). In a similar vein, Justin Richland (2008) describes the extent to which Hopi jurisprudence has appropriated Western styles of argumentation and procedure—to a point. In his rich analysis of courtroom interactions in Hopi tribal courts, Richland argues that concepts of Hopi tradition allowed some court participants to present facts in ways that were framed in long-standing Hopi norms of familial and social relations. This had the subversive effect of disembodying "storytelling from the Anglo-American legal discourses employed by the participants up until then and forced [courtroom] interlocutors to renegotiate not just the content of the narrative interaction of the hearing, but also the distribution of rights to tell it" (139).

The ability to introduce and insert Native normative schema into Anglo-dominant legal proceedings underscores the dynamic and dialogic nature of what constitutes, at any one moment in time, authentic indigeneity. As Nesper (2011) notes, "Producing authentic indigeneity that is credible to the dominant settler society, then, is a dialogical, reflexive undertaking" (163). There is always push-back from the oppressed, even if marginal and perhaps unconscious. This underscores the fact that conceptualizations of authentic indigeneity are always emergent, taking definition through comparison and contrast across a range of temporalities and contexts. In a manner analogous to the recognition and termination of Native rights to reservation land, what becomes marked as tradition and authentic identity can be both found and lost.

It seems appropriate to end this brief introduction on a note of uncertainty and anxiety about the future. Though not directly addressed by the contributors, there is one more strand that ties the articles together. This is

the ambiguous role law plays in both affirming and undermining the place of Native peoples in long-standing nationalist imaginaries. Be it in Canada, the United States, Mexico, New Zealand, or elsewhere, First Nations have helped shaped dominant cultural values and racial hierarchies essential to the functioning of capitalist-based societies (Scheckel 1998; Huhndorf 2001; Mackey 2002). Native peoples have always been marginalized but never marginal in shaping and reshaping the myths of nationalism. And, as a result, a pervasive anxiety hovers over questions of indigenous authenticity precisely because such questions potentially challenge the very core of colonial-based nationalist identities. In short, law's authoritative implication in the constant reshaping and rearticulation of indigeneity is of concern, directly or indirectly, to us all.

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