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subversive identities: indigenous cultural politics and canadian legal frameworks, or, indigenous orphans of the state

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Resumen
Ahora que diversas naciones a lo largo de las Américas desarrollan leyes que afectarán los derechos de grupos indígenas, resulta constructivo considerar los complejos y a veces ocultos impactos que dichas leyes han tenido sobre poblaciones indígenas en el pasado. A fines de siglo XIX, en Norteamérica británica y Canadá, el estado empezó a asumir la inscripción legal de una forma de identidad indígena a través de legislaciones como el Acto de Civilización de 1858 y el Acto Indígena de 1876. Con el tiempo, estos actos vinieron a articular una serie de políticas gubernamentales represivas; sin embargo, es posible leer en sus huellas los lineamientos de una resistencia indígena. Mientras que el estado empezó a interpelar, aclamar, o posicionar a los indígenas como sujetos y ciudadanos, el concepto del 'estatus' indígena empezó a nacer, dándole subversivamente connotaciones positivas y deseables a una designación legal no deseable. Lo que fue planeado por el régimen totalizador como un

mecanismo de absorción de lo indígena dentro del cuerpo político fue subvertido y usado, por los mismos indígenas, como un mecanismo para afirmar legalmente sus peculiaridades y su separación del cuerpo político.

in the last half of the 19th century in british north america and what became canada, an event of far-reaching impact and compelling significance, unnoticed at the time and still barely appreciated in our own time, slowly unfolded. the event involved the legal inscription of a form of indigenous identity, the movement of indigenous bodies in response to that inscription, and the inscriptions and movements that followed in response to each other: a kind of tango of bodies and laws. in canada this story now is 'known' in a certain form, commonly as a story of state-structured colonialism and its disastrous impacts on indigenous peoples. rethinking and retelling this story 'here' and 'now' is important: as various nations through the americas enact legislation that may in part be inspired by the united nations declaration of the rights of indigenous peoples, passed on september 13, 2007,[1] anything that points to the complex and hidden impacts of such legislation deserves attention. but even more compellingly, the story of a resistance that takes place without leaders, without program, traced only through the obscure fog of legal inscription, demands the attention of those who today carry the candle of constructive refusal. what follows is a retelling of a story[2] sandwiched between a theoretical introduction and a theoretical conclusion.

the state and subjectivity

fredric jameson's *the political unconscious*, a key text in the contemporary enunciation of the dialectical materialist critical tradition, has a good deal of resonance for understanding the story to come. this is not least because the very notion of a political unconscious, of a politics of oppression and resistance or in jameson's terms of ideology and utopia, is a useful opening to a political engagement that does not struggle on the terrain of political programs, leaders, parties and institutions. the notion of political unconscious directs attention to the political engagements submerged below the surface of the enunciated and the announced and the denounced, the explicit.

however, there is another issue of critical relevance toward which jameson's analysis points. in the essay "on interpretation" he suggests "that Althusser's program for a structural Marxism must be understood as a modification with the dialectical tradition, rather than a complete break with it" (1981:49). in effect, jameson outlines the protocols for reading the stronger versions of structural analysis — embodied particularly through louis althusser — as a tendency within rather than a break with dialectical materialism, even though althusser himself and most who would associate with his insights sometimes sharply dismissed a dialectical approach.

the issue becomes somewhat more than academic when we take the protocols of jameson's reading and bring them to bear on althusser's understanding of the way in which a central feature of ideology is the manner in which the state interpellates or hails or positions subjects.

although somewhat well-trod theoretical ground, althusser's essay on ideology and the state remains a central text for articulating a materialist approach to subject formation. one of althusser's theses on ideology is that "all ideology hails or interpellates individuals as concrete subjects" (althusser 1971:173). althusser illustrates and elaborates his point by describing a 'theoretical scene,' writing:

ideology 'acts' or 'functions' in such a way that it 'recruits subjects among the individuals' (it recruits them all), or 'transforms' the individuals into subjects (it transforms them all) by the very precise operation which I have called interpellation or hailing, and which can be imagined along the lines of the most commonplace everyday police (or other) hailing: 'Hey, you there!" Assuming that the theoretical scene I have imagined takes place in the street, the hailed individual will turn round. By this mere one-hundred-and-eighty-degree physical conversion, he becomes a subject…(1971:174)

althusser goes on to discuss how and why the subject tends to recognize that she is being hailed. the emphasis in althusser is clearly on the operation of state power: the state produces laws, rules, policies, orders that point to subjects who are thereby hailed by the state. by acknowledging the fact of being hailed, they assume the position of state-sanctioned subject. the dialectical moment submerged in the 'theoretical scene' but of critical importance is that the subject may respond to being hailed in a variety of ways on a spectrum of recognition and misrecognition. she might respond in calculated innocence: "who, me?" she might throw her stash to the pavement and fearfully yell out "i surrender!" she might deliberately walk on, not having heard the call or in a pretense of not having heard the call. she might be more confrontational, returning a belligerent "are you talking to me?" she might walk on in the comfortable surety of knowing that "he can't be calling to *me.*"

subject formation is often thought of purely on the terrain of the social/cultural and psychological/individual level. so, for example, kaja silverman's *the threshold of the visible world* offers a strong, psychoanalytically engaged description and theorization of the manner in which socially valorized bodies are positioned in visual culture. but the state and state-related processes have no place in her account. leo bersani, in *homos*, similarly offers a literary reflection on the contested socialities of gay male identity with little or no reference to the manner in which these processes are buttressed or even framed by the state. bersani begins his last chapter on "gay outlaws," paraphrasing gide's "how can a man like Michel serve the state," by asking "should a homosexual be a good citizen" (bersani 1995:113); but the question is effectively dropped in a chapter that focuses on important questions of gay community-building in their psycho-social dimensions, leaving out any discussion of the 'laws' that constitute 'outlaws.' i suggest these two texts deliberately from a rich field of potential candidates out of fondness for them and because of the enormous degree i have learned from and been inspired by them. but it is worth remembering, indeed insisting, that processes of subject formation also take place on the political-institutional level, at least as much as the political-social. a failure to take cognizance of this issue leads towards a tendency to

individualist, voluntarist politics, as in silverman's "passionate appeal to those now working in such areas: help us see differently" (1996:227). although changing the manner in which certain bodies are valorized in the visual field of course involves daring work by individual artists, reconfiguring the social field to make such work acceptable, to bring it into the very field of language, requires a relation to structural change that cannot be brought into being without an engagement with the hegemonic institutions. the state is itself engaged in the most intimate spheres of contemporary individual and social existence, from the names carried by bodies to the certifications of our labouring and professional skill sets to the recognition of marriage partnerships to the acknowledgement of deaths. any analysis of identity and cultural political struggles would do well to hold this insight close. the point can be demonstrated by reference to the set of historical events towards which our attention may now be turned.

a funny thing happened on the way to a fully modern settler colony

in british north america and canada, the term indian[3] came to be deployed by the state from quite early in the establishment of a colonial apparatus for the settler colony. apart from treaty documents and the royal proclamation of 1763, the term started to be used with some frequency from the 1830s, with laws designed to protect indian lands in the region of what would come to be called southern ontario. no definition of the term appeared to have been necessary until 1850, when a very broad definition was established, encompassing anyone who was a member of a band, lived with an indian band, or wanted to be thought of as an indian. this changed in 1858, when a law called 'an act to encourage the gradual civilization of the Indians in this province' was passed by the united canada legislatures for the areas then known as upper and lower canada, now ontario and quebec.

the civilization act defined indians much more narrowly, excluding for example people who lived with indians. it established a process whereby people defined as indians could become canadian citizens. this process became central to the canadian legislation, called 'an act for the gradual enfranchisement of indians,' and adopted after confederation in 1869. basically, to become 'canadians,' people defined as indians had to speak or write english or french, practice agriculture for a period of at least three years, and be 'of good moral character.' the central idea was that people would be defined as indians and would be presented with a clear set of criteria by which they could attain citizenship or the franchise. until they had that citizenship they were excluded from basic citizen rights such as the right to vote and were governed by increasingly draconian provisions of the legislation, consolidated in 1876 as the indian act, which in modified form is still in force.[4]

the historian john tobias called the civilization act paradoxical because "the legislation to remove all legal distinctions between indians and euro-canadians actually established them" (1983:42). it is important to understand how what seemed clear in the lawmakers' minds — defining a group and providing a mechanism for them to attain full citizenship, or separation in order to assimilate — became in practice something entirely less than clear, something in fact

quite deeply paradoxical.

the writers of the civilization and enfranchisement acts operated from a presumption that being a canadian citizen was the highest good and that being an indian was self-evidently undesirable. indians so defined would clearly want to become citizens. in order that they not gain citizenship before they were ready, criteria had to be established and high standards had to be set. many ordinary canadians at the time would not have met these standards, which already presupposed a variety of gender, age and property exclusions: literacy rates were not high, many laboured at non-agricultural work, and the moral character of even elite canadians is a topic upon which it is best not to dwell.

indians, however, did not share these ethnocentric assumptions. the numbers who were enfranchised remained relatively poor. writing about 1918 amendments to the indian act which 'loosened' the criteria for enfranchisement, robin jarvis brownlie notes that "by 1920, 227 persons had become enfranchised under its provisions, 212 of them from the six nations reserve. this was more than twice the total number from confederation to 1918. thereafter, a steady trickle of individuals chose to undergo the procedure" (2003:136).[5] for the vast majority of indians, to be recognized by the state as indians was itself desirable, a good thing, an affirmation of an identity that was valued or prized. when the government at the time proposed 'enfranchising' f.o. loft, founder of the then-active league of indians, he wrote that "to foreswear his status" as an indian would be a "stigma on his kith and kin" (see kulchyski 1988). even though the indian act came to articulate a whole host of repressive policies, indians determined to bear the weight of those rather than to surrender their legally enshrined recognition. they saw themselves as having a legally recognized 'status' (notably, the term so endemic in colloquial speech in canada – do you have status? is not an uncommon question today – is nowhere actually used in the legislation). what had been constructed as an undesirable legal designation was invested with positive, desirable, connotations by most of the people so designated. the state hailed indians and invited them to become citizens; the indians responded by acknowledging the hail and refusing the offer.

in this, as in other elements of the application of a colonial regime, it is possible to read in the traces of policy and lawmaking the lineaments of resistance. when the indian act banned two indian ceremonies by name, then a few years later amended the legislation to ban them by description, one needs little other evidence to know that the former legislative problem was overcome by practitioners simply using a different name for the same ceremony.[6] here, too, reading the changes in the enfranchisement provisions against the grain, as it were, traces a message regarding how totalizing power shifted its approach because, clearly, earlier approaches were unsuccessful. while carlo ginzburg methodologically reads the inquisitorial archive as a source of information about popular cultural practice and resistance, here we read law, at the heart of totalizing power, for bearing the traces of a resistance it cannot overcome.

the law, in effect, marched boldly and firmly on a written track of linear, phonetic notation

moving in one direction, while in another form of inscription the bodies of the people calmly and coolly turned on their heels and went in the other direction, dragging the trail of written words — their own (nearly) secret trace — behind them.

gendering indians: some unfunny consequences

it would be pleasant if the story ended there, with this notation of an unremarked moment of resistance. but it does not. after the 1858 civilization act the settler colonial bureaucracy waited for the masses of indians who would apply for citizenship. no doubt it was determined to scrutinize such applications with care, selecting the very best and encouraging the rest to try harder. but, in fact, very few indians applied to become citizens. after 1867, when canada gained its position as a dominion within the british commonwealth, the federal government revisited legislation pertaining to indians and adopted the same measures as the previous, upper and lower canadas governments, had seen appropriate. it updated the civilization act, keeping most of the provisions intact, in the 1869 enfranchisement act. but there was one particularly significant difference. so-called 'involuntary enfranchisement' was added to the arsenal of state-sanctioned tactics, and it was applied to those it defined as most vulnerable: indian women.

from 1869 onwards, until 1985, actually, indian women in canada who married non indian men were no longer considered indians within the meaning of the indian act. they were removed, sometimes forcibly, from reserves and eventually from any of the benefits that derived from 'status' as indians. these provisions were not applied to indian men who married non indian women, very likely because such marriages were inconceivable within the terms of the social milieu of the time. by 1869 the state was aware that 'indians' did not, by and large, want to become 'canadians' if that meant losing their legal recognition as indians. but it clung to the tool that had been so fully subverted and applied it in an increasingly cynical fashion. involuntary enfranchisement was eventually applied, or was attempted, for indians with education, indians who wanted to own private agricultural property, and indians who enlisted as soldiers. most of the people who were so assaulted resisted in a variety of ways. one modest example: in the province of british columbia, in the interior areas, there were women who deliberately stayed unmarried if their partners were not indians of legal status.

in 1951 the indian act was revised and the most repressive elements of it were dropped, but involuntary enfranchisement for women who had non indian partners remained. in 1959, indians gained the vote and in theory had all the rights of other canadians with additional, aboriginal rights. the phrase 'citizens plus' was used to reflect this legal status, though since the seventies the notion of 'aboriginal rights' as an articulation of the 'plus' has gained common currency. but the sexual discrimination around out marrying remained in force until 1985. indian 'status' became a positive legal benefit after 1959 without concomitant negative consequences, in part because indians used a tool that was meant by totalizing power as a mechanism of absorption into the body politic as a mechanism that legally affirmed their

distinctiveness and separation from the body politic.

the consequences of this legislation are still being carried by the bodies of everyday indigenous peoples in canada. community divisions developed over whether women who regained status were to be welcomed back or turned away. the status of children of mixed marriages has become legally complex with the indian act now establishing that children of two generations of mixed marriage lose ‘status’ as indians. an organization, the native women’s association of canada, has grown up alongside the mainstream, status based assembly of first nations, in order to specifically fight for the equality rights of indian women, a fight it must carry on against many of the male leadership of indian political organizations. however, there would be none of this, indeed, no ground for struggle, had not the whole idea of indian ‘status,’ a term nowhere used in the actual relevant laws, been created through a subversion of legislation designed to assimilate indians.

the state does not hail its subjects in a vacuum; in the responses and non-responses of the subjects and non-subjects can be traced the parameters of a frequently unremarked resistance.

orphans of the state

in an address to the 2009 encuentro of the hemispheric institute for performance and politics, guillermo gomez-peña self-identified as an ‘orphan of the state’, a phrase upon which it is useful to reflect. the notion of ‘homo sacer’ identified by giorgio agamben and deployed in a variety of contexts to think about ‘non citizens’ within a body politic is here not nuanced enough. the rightless body, the non-political, biologically rightless ‘man’ who can be killed with impunity is certainly at one pole of non-citizenship, but there are nuances within the range of non-citizens. and it is notable that the performative incorporation of state forms of recognition leave open interesting possibilities for subversion.

the notion of orphans seems particularly apposite here, in part because of the layers of cultural nuance it invokes. on the one hand, the status of orphans in traditional indigenous narrative is powerful and ambiguous. this relates in part to the frequency of custom adoption among, at least, the northern hunting peoples around whom my own work circulates. custom adoption refers to the still frequent practice of placing children, often the first child, with grandparents or other relations. biological parentage was rarely if ever hidden, and a complex web of social rights, obligations, connections and disconnections resulted. orphans of the state also calls to mind, in a broader canadian context, the infamous ‘sixties scoop’ whereby many aboriginal children were taken from loving but seemingly and sometimes actually impoverished families and passed on to non aboriginal families or institutional care. a whole generation of lost children, orphans, have been finding their way back to their cultural and familial and territorial homes, often at great emotional and material expense. this is a political and social problem that still continues: the agencies designated as ‘child and family services’ are not by and large welcome visitors to reserve homes to this day.

orphaned from the state by the state, indians decided a long time ago to embrace their state-sanctioned derogation. their embattled subjectivities were formed in a crucible where the settler colony made and applied the rules. the response was not planned. there were no leaders who said: “we must overturn this law and be proud of being indian!” there were no organizations or institutions that coordinated the actions of people, which were not noticed save by those whose job was to count how many indians converted to citizens in order to make improvements to the ruthless application of the totalizing regime. indians can be said to have voted with their feet. by doing so they established a new ground of struggle. indians were orphaned from the state, by the state, in order to, in the full fluorescence of totalizing power, establish paternal-like control over indians as a necessary part of the settler colonial and modernist projects. the orphans, though, with ingenuity, confrontation, persistence, subversion, have constructed an emancipatory agency in the marrow of this regime

perhaps bhabha has it right when he writes of a certain kind of hybridity that it “is the revaluation of the assumption of colonial identity through the repetition of discriminatory identity effects. It displays the necessary deformation and displacement of all sites of discrimination and domination. It unsettles the mimetic or narcissistic demands of colonial power but reimplicates its identifications in strategies of subversion that turn the gaze of the discriminated back upon the eye of power” (1994:112).

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notes

[1] the declaration was originally passed by 143 countries, excluding the u.s.a., canada, new zealand and australia. after a change in government australia signed on. i am particularly mindful that the passing of indigenous related constitutions and legislation owes as much to dynamics ‘on the ground’ as to the u.n. declaration.

[2] i have written previously of this event, in “primitive subversions: totalization and resistance in native canadian politics” though in what follows i extend the arguments made there. i have also told the story for a popular audience in *the red indians.*

[3] the term ‘indian’ is generally thought of as politically inappropriate as a descriptor of the many different first nations of canada, though there are those who also reject the designation ‘first nations’. in canada, the terms aboriginal, indigenous and native are used to describe inuit, metis, and first nations people, and i deploy those terms interchangeably in this essay. indian is used here because it is the term of legal art that was used by the legislation i am examining and because at the time of these struggles it was the term first nations citizens themselves identified with and struggled to maintain and assert.

[4] this story has been told in broad outline by a number of historians as well as tobias; recently by sebastien grammond in *identity captured by law* in a chapter called “membership criteria in the indian act, 1850-1985.” on the specific question of “sex discrimination in the indian act,” see the article of that name by kathleen jamieson in *arduous journey.*

[5]the historians all agree that the numbers of those who enfranchised were poor, though they cite different periods. see also shewell – “the failure of assimilation policy by the late 1950s was most evident in the enfranchisement statistics” (273) – miller (190), or milloy, who notes that “the department’s analysis of the failure of enfranchisement came quickly” (150).

[6]for more on the ban on the potlatch and sundance see kulchyski, 2007; miller; dickason; tobias.

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