Article

ALTER AN INTERNATIONAL JOURNAL OF INDIGENOUS PEOPLES NATIVE

When is indigeneity: closing a legal and sociocultural gap in a contested domestic/international term

AlterNative
1–10

DOI: 10.1177/1177180119828380
journals.sagepub.com/home/aln
SAGE

Julia Bello-Bravo

Abstract

Indigeneity is a much contested term, complicated by formal definitions under domestic and international law, the unlimited right to self-identification by indigenous people, conflicts and/or contradictions between these legal principles, and the political inequalities that result from variations in access to the processes and legal actions that invoke these terms. In particular, this generates a gap between legal definitions of indigeneity (framed, then and now, by hegemonic powers) and sociocultural practices of indigeneity (expressed and experienced, then as now, by cultures themselves). Reviewing the conceptual framing(s) of indigeneity both internationally and in a domestic (US) context, this article explores and offers a more flexible, resilient, and just understanding of indigeneity capable of closing the legal/sociocultural gap currently affecting indigenous people worldwide. At root, this less means asking what (or where) is indigeneity, and more instead when is indigeneity.

Keywords

indigeneity, legal discourse, self-determination, discretion, discretionary power

"What" is indigeneity: defining a term

While the meaning of indigeneity is contested across different legal and scholarly contexts, three elements typically recur: a legal and moral right of unlimited self-identification by peoples as indigenous (cf. Anaya, 2004; Barsh, 1996; Xanthaki, 2007), an association of indigeneity with both ongoing or historical trauma (colonial or globalizing), and efforts to seek protection from, or redress of, those wrongs, and that indigenous people "are *inextricably linked* to the lands on which they live and the natural resources on which they depend" (The World Bank, 2005, p. 2, emphasis added).

These recurring themes are importantly qualified in several ways. The unlimited right of self-identification, for instance, is sometimes subject to internal community validation (Corntassel, 2003); that is, while anyone might claim an indigenous status, such claims may not be deemed valid by that indigenous community.

Second, not all indigenous people have necessarily experienced colonial or globalizing trauma; some have not yet been contacted at all or did not suffer direct trauma by contract, while other peoples lived in an era long prior to colonization and globalization. Were the Inca or pharaonic Egyptians, for instance, indigenous or only the peoples they conquered? As Thornberry (2002) admits, a "colonial context is not, after all, necessary to the recognition of all indigenous groups" (p. 48). Moreover, while many constructivist and some indigenous views of indigeneity, as Corntassel (2003) notes, frame the category of indigeneity itself as a specific historical response to relatively recent and/or ongoing wrongs experienced by indigenes, the World Council of Indigenous Peoples did not invoke this frame:

> [I]ndigenous peoples are such population groups as we are, who from old-age time have inhabited the lands where we live, who are aware of having a character of our own, with social traditions and means of expression that are linked to the country inherited from our ancestors, with a language of our own, and having certain essential and unique characteristics which confer upon us the strong conviction of belonging to a people, who have an identity in ourselves and should thus be regarded by others. (Martinez-Cobo, 1982, p. 5)

Similarly, Robert Coulter simply declared "Indigenous people are Indians and people like them" (Alfred & Wilmer, 1997, p. 27).

Critically, the specifically inextricable association of indigeneity with land ultimately generates problematic consequences for indigeneity. To be sure, formal studies and

Department of Food Science and Human Nutrition, Michigan State University, USA

Corresponding author:
Julia Bello-Bravo, Department of Food Science and Human Nutrition, Michigan State University, Anthony Hall, 474 South Shaw Lane, Rm. 3370, East Lansing, MI 48824, USA.
Email: bellobra@msu.edu

indigenous people alike have expressly asserted a fundamental place attachment to ancestral lands (Caplan, 1970, 1990; Low, 1992; Martinez-Cobo, 1982; Tuan, 1974); similarly, the forced relocations of indigenous peoples by the USA from their lands tacitly acknowledge this place attachment as well (Whitbeck, Adams, Hoyt, & Chen, 2004).

The World Bank (2005) has declared, as a matter of policy, that "Indigenous Peoples are *inextricably linked* to the lands on which they live and the natural resources on which they depend" (p. 2, emphasis added)—including any territories traversed by transhumant or nomadic peoples (fn7). While this policy affords indigenous groups "self-identification, [they] are ultimately subject to verification by Task Managers for indigenous status" (p. 86). More strikingly, and echoing Downing and Moles (2001), Corntassel (2003) paraphrases this definition of indigeneity as useable for withdrawing or annulling indigenous status for any people "who (a) have left their communities of origin and (b) move to urban areas and/or migrated to obtain wage labor" (p. 87).

This is not an overstatement; the World Bank acknowledges that forced severance of indigenous people from ancestral land—due to "conflict, government resettlement programs, dispossession from their lands, natural calamities, or incorporation of such territories into an urban area" (p. 6, fn8)—does not annul indigenous status vis-à-vis policy—partly from a recognition that many indigenous people have already been displaced (Harvey & Thompson, 2005; Kopnina, 2009), whether currently or imminently by dams (Aiken & Leigh, 2015; Fearnside, 2006) or through historical migrations or conflicts (Akinjogbin, 1967; Wightman, 1990).

This acknowledgment of indigeneity under involuntary or forced severance, however, raises (or, more precisely, has been used to raise) questions about indigeneity under voluntary or nonforced severance. Does leaving one's ancestral lands for work in the city actually negate indigeneity? (Does indigeneity return if one returns?) Similarly, acknowledging that dislocation due to natural calamities does not annul indigenous status, what about "unnatural" ("man-made") calamities due to climate change, unequal international trade agreements, or international implementations of modernization that have been locally environmentally more harmful than helpful (Gabor & Rosenquest, 2006; Harris, 1993; McAdam, 2009)?

We wish to be clear in the following that we do not accept that indigeneity somehow evaporates by moving (individually or as a group) from a place. In general, these questions imply a temporal aspect of indigeneity—particularly a "when" of indigeneity that arises when it becomes mobile—that generally receives less attention than efforts to define "what" indigeneity is. I propose that this distinction of when rather than what parallels the distinction between legal and sociocultural definitions of indigeneity and thus poses a gap that needs closing. The article explores this more below.

At the outset, however, we recognize the questions above principally as artifacts and residues of colonial settler desires to contain or annul indigenous people generally (Evans, Grimshaw, Phillips, & Swain, 2010). For the World Bank (2005), such questions involve its attempts to determine whether someone (or a people) warrants whatever aid, resource, or good they have on offer. As such, if the World Bank exercises a discretion and arbitrarily declares a given area X an indigenous territory, and *only* the people living there indigenous, then an indigenous person who removes to a nearby city for temporary work might no longer meet this arbitrary eligibility criteria, during that period, for whatever benefits the World Bank offers. The fairness or injustice of this withdrawn eligibility notwithstanding, we reject the framework of such administrative situations as pertinent for framing indigeneity itself and discard the questions (and the answers) that arise from these administrative premises as irrelevant, if not misleading, for understanding indigeneity.

"Who" is indigeneity: problematizing a category

Asking "who is indigenous," Corntassel (2003) engages a persistent tension around indigeneity as both (a) a necessarily delimited term under national and international law and (b) an effectively unlimited right of self-identification by people to declare themselves indigenous. In his analysis, he notes how these legal definitions at times fail to compass some indigenous people, thereby formally and legally excluding them from the very process of protections that such legal frameworks are intended to afford.

Central to this dilemma is how an unlimited right of self-identification as indigenous represents a fundamental part of the progress of indigenous rights recognition generally (Anaya, 2004; Barsh, 1996; Xanthaki, 2007), which can be opposed by nation-states worried that this implies a right to an independent statehood that would "disrupt the territorial integrity of countries" (Corntassel, 2003, p. 96, fn6). While indigenous groups have tended to insist that independent statehood per se can be disambiguated from self-government (Corntassel, 2003), nation-states have remained either skeptical about, or have simply used this legal question as a pretext for avoiding, the consequences of fully recognizing the rights of indigenous people to land, resources, genetic property, self-determination, and self-rule (Parisi & Corntassel, 2007; Rimmer, 2018; Stephenson & Morse, 2015; Thomas, 1998).

Similarly, as a strictly delimited legal definition of indigeneity can inadvertently exclude certain otherwise indigenous peoples, unlimited self-identification can also sometimes allow otherwise nonindigenous people to claim indigenous status (Corntassel, 2003). One may detect a cart before the horse here. That it seems reasonable to refer to *inadvertently excluded indigenous people* and *inadvertently included nonindigenous people* seems to beg the definition of indigeneity. The seeming reasonableness of this recalls the famous remark by US Supreme Court (1964) Justice Stewart Potter that "I know it when I see it."

Specifically, when ruling in *Jacobellis v. Ohio* whether Louis Malle's *The Lovers* was "hard-core pornography" or not, Justice Potter wrote,

> I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [of "hard-core pornography"], and perhaps I could never

> succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that. (US Supreme Court, 1964)

Importantly, this formula of "I know it when I see it" also implies an "I know when I don't see it" as well. Crucially, it must be noted that precisely the object in question—in this case, "hard-core pornography"—is being passed judgment on even though it is not defined and is acknowledged as perhaps being beyond definability. Without such a definition, it becomes unclear what exactly is being ruled on but, as Justice Potter assured us, one can know it when one sees it.

This formulation, then, does not represent a reasoned and deductive conclusion from criteria or evidence but, rather, an exercise of discretionary power—one of the key powers under a disciplinary or surveillance state, which similarly conflates knowing and seeing (Foucault, 1977, 1986). Such discretion is not an aberrant use of disciplinary power but an entirely licensed and integral one (Sanya, 2017). In this case, a judge in a criminal courtroom may admit that he could never exactly define what a superpredator is (Miller, Potter, & Kappeler, 2006), but he can know one when he sees it and therefore sentences him to prison. Or a diversity visa officer might never be able to intelligibly define "aliens of exceptional abilities" for the purpose of issuing visas to this class of visa applicants (US Public Law 101-649, 1990, p. 11), but he knows when he doesn't see one and consequently denies someone entrance into the USA (Sanya, 2017).

This is the power given to discretion. Davis (1970) long ago spoke of a need to restrain and confine discretion for the sake of justice, but he may not have been imagining how discretion could operate for people who fall on the culturally disadvantaged side of power. That is, while one might not today attempt further to define the kinds of person or people we understand to be embraced within that shorthand description "indigenous," and perhaps we could never succeed in intelligibly doing so, nonetheless, *we know them when we see them*, and *they know themselves when they see themselves*. As such, when claims of indigeneity by "non-indigenous" people are rejected by indigenous people, this is simply a case of knowing when we don't see it. And while this may invoke cries about fairness, legal consistency, or possible abuses of power (by indigenous people), not to afford indigenous groups this selfsame discretionary power for such pronouncements, along with a proxy force to enforce them, is simply to deny them the same legal authority that has long been used to deny their rights as indigenous in the first place.

While it is beyond the scope of this article to adequately discuss the full range of issues depending upon discretion and discretionary power, a couple of pertinent general points require emphasis. First, discretion functions as, and may be a necessary adjunct to, the adversarial setting of modernist, property-based juridical processes. Without yet begging the premises of such an approach, we may still note that they represent simply one of countless possible imaginable legal forms otherwise often contrasted with indigenous legal traditions (Law Commission of Canada, 2008; Napoleon & Friedland, 2014). Here again, if we focus on modernist, property-based judicial conceptions of discretion, this is simply to engage the issue as it plays out in those contexts and not to reify or normalize it as the only universal, or even desirable, form. Any "necessity" discretion represented in this context is merely a consequence of the legal processes and traditions in play, and not an indispensable feature.

Second, we are particularly highlighting where *individuals* are invested with this power of discretion. Supreme Court Justice Potter's famous observation occurred in a context of multiple justices, requiring a majority to declare a decision. While this distribution of discretionary power makes it less subject to individual, idiosyncratic (or prejudiced) "seeing" in Justice Potter's sense, it does not perfectly guard against idiosyncrasies or precedents. In fact, the consensus of a precedent can interpose even greater obstacles to overcoming any prior determinations rooted in prejudice, given that only a later consensus can undo it as well. For instance, although the legal force of *Korematsu v. United States*—the US Supreme Court decision that declared constitutional the executive order and other laws permitting internment of US Japanese citizens during World War II—has long been without effect, it was only in 2018, nearly three quarters of a century later, that the decision was declared wrongly decided and no longer persuasive to the Court. In addition, while jury cases afford a consensus decision-making power to jury members to decide guilt or innocence, it remains the discretion of the judge what evidence is and is not presented to a jury and permissible to be considered by them. As such, while these factors of multiple (rather than only individual) discretion come into play at different points over judicial procedures, without the sort of idiosyncratic discretion of "seeing" highlighted by Supreme Court Justice Potter to begin with, such consensuses or group decisions could not arise in the first place. Finally, outside of formal courtrooms, the example of the World Bank (2005) also makes clear the kind of innumerable instances of pseudolegality where individuals, with discretionary power, can practice "seeing" or not.

With this notion of discretion as a background, then, we can review how Corntassel (2003) frames some of the most prominent and influential definitions of indigeneity. One dominant theme throughout the several frameworks, not named explicitly by Corntassel (2003) as such, is that indigenous people were, or still are, traumatized—for instance, by colonialism, globalization, evangelical Pentecostalism in Africa, or the strictures of assimilation. With an experience of trauma as a defining attribute, this necessarily means not only that indigenous people may not have existed ten thousand years ago—prior to colonialism, globalization, evangelical Pentecostalism in Africa, or the strictures of assimilation, and so on—but also that phenomena like the Mayan, Incan, Oyo, Dahomey, and Ashanti empires themselves were somehow not indigenous, though perhaps the people they conquered (traumatically) were.

Similarly, as Corntassel (2003) acutely observes, while the World Bank's (2005) operational policy on indigenous people "allows for self-identification, indigenous groups are ultimately subject to verification by Task Managers for

indigenous status" (p. 86). We see this as simply another moment of discretionary power by task managers to declare that they know indigenous people when they see them (or, conversely, do not see them and deny that status as such). Rather than identifying who is indigenous, this process simply emphasizes those who are recognized (by the World Bank) as conforming to some criteria of indigeneity. In principle, this may be simply a bureaucratic attempt to ensure that only those who "deserve" indigenous services are actually qualified to receive them—yet another question-begging scenario. In practice, however, these categories run together when no sufficient power exists to resist such mandated verification. As such, if the prevailing discourse around indigenous people frames them as necessarily in a political crosshairs of historical trauma (Corntassel, 2003), then here we see that those same kind of crosshairs can also be bureaucratic or administrative protocols that withhold recognition, with no less potentially lethal results when indigenous status is denied.

Moreover, the inextricable linking of indigenous identity to specific land results in a tacit requirement for *nonmobility* outside of any designated and delimited area. The question here is not what indigeneity itself claims for such land but, rather, what happens when hegemonic forces declare that indigeneity must remain on any given land allotted to it. Many indigenous cultures have expressed an intense link to their lands; the relationship of Kipat (a Nepali system of land tenure) to the Limbu people of Nepal is exemplary in this respect (Caplan, 1970, 1990). Rather, the question is what happens when colonial, globalizing, or traumatizing forces insist on nonmobility outside of designated lands. When an Mbundu tribesperson was transported during the transatlantic slave era to the Caribbean or to the early USA, was all indigeneity left behind by severing that person from his or her land or did indigeneity somehow travel? Less dramatically, can it actually be the case that an indigenous person who (temporarily) moves to an urban area for work also suspends his or her indigenous status?

In light of this, we should not construe any such linkage to land as comprising a sufficient characteristic to define indigeneity, not only because indigenous linkages to land around the world vary in intensity but also because many indigenous people have already been displaced from their ancestral land (Harvey & Thompson, 2005; Kopnina, 2009) by developmental forces (Aiken & Leigh, 2015; Fearnside, 2006) or historical migrations or conflicts (Akinjogbin, 1967; Wightman, 1990). Moreover, even where the World Bank (2005) framework acknowledges that involuntary or forced severance of indigenous people from ancestral land does not preclude access to indigenous benefits, questions around other forms of dispossession—for instance, official recognition of economic or climate change refugees (Gabor & Rosenquest, 2006; Harris, 1993; McAdam, 2009)—remain unresolved or ignored. Inasmuch as involuntary dislocation does not dissolve indigeneity per the World Bank (2005), this nonetheless frames indigeneity as visible—such that we know it when we see it—only under threat.

This results, in part, from the effort to use an international legal process to secure indigenous rights. Courts redress disputes and wrongs; without these, a legal framework of redress becomes gratuitous. Nonetheless, the United Nations (2014), citing Martinez-Cobo (1986), has emphasized that

> indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. (p. 2)

Here again, without diminishing the history and presently ongoing wrongs committed against indigenous people, to be wronged in itself cannot be a necessary criterion for indigeneity in general, as it leaves out any not-yet-contacted, or simply not-yet-wronged, indigenous peoples. Just as the World Bank (2005) may in principle strip or deny indigenous status to those who voluntarily move away from ancestral lands, so does embedding indigeneity in a legal prerequisite of harm also potentially (a) deny indigeneity to those not demonstrably harmed or (b) annul indigeneity if that harm is adequately (legally) redressed.

As the declaration by the World Council of Indigenous Peoples cited above from Martinez-Cobo (1982) makes clear, it invokes no explicit historical or ongoing wrongdoing as definitional. Thus, Thornberry (2002) can similarly acknowledge that a "colonial context is not, after all, necessary to the recognition of all indigenous groups" (p. 48). Widespread as such experiences are, it is not necessary to make victimization integral to indigenous identity in general. All the more so, given that if the World Bank (2005) can assert that indigenous status evaporates by decamping to an urban area for work, then what happens to indigeneity once its defining historical wound is adequately redressed in court? Does it evaporate too?

Politically expedient as that might seem to nation-states, the fact that "many indigenous peoples had been forcibly removed from their lands or were now living in urban areas but had kept their indigenous identity" (Daes, 1996, p. 15) obviously counter-indicates this assertion. Nor is it always that an entire people are removed, forcibly or otherwise. Martinez-Cobo (1986) acknowledged, "On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group)" (Addendum 4, para. 381).

Importantly, we must recognize that this represents a qualification to the principle of unlimited self-identification for indigeneity; that is, indigeneity for the individual may be contingent not only on self-identification as indigenous but also on ratification by the group. Some international bodies have exclusively placed a paramount importance on individual self-identification vis-à-vis indigeneity, largely to offset tendencies by nation-states to deny indigeneity in the first place (Thornberry, 2002). As such, while "this prioritisation of the individual could also challenge the rights of [indigenous] groups to limit membership—a species of local restriction [that] could generate

international law consequences" (Thornberry, 2002, p. 207), this emphasis on individual self-identification operates, contra the World Bank (2005), to acknowledge that even voluntary relocation of indigenous individuals to urban areas, for whatever reason, would not annul their status as indigenous.

Corntassel (2003) advances a framework for indigeneity that deftly combines many of the strands of discourse previously adduced in the literature for it—particularly by acknowledging a dynamic and evolving character of indigeneity that is generally absent from most frameworks. Nonetheless, this still reflects the problematic quality of a definition itself; namely, that it affects a "continued subordination of difference to identity" (Barcham, 2000, p. 138). Thus, if attempts to define indigeneity in legal terms habitually and problematically sort and shoehorn a variety of peoples into its Procrustean bed, academia can commit a similar error, albeit more broadly and more generously.

Despite this welcome criticism by Barcham (2000), however, the framework Corntassel (2003) offers does not seem motivated only to better inform any proposed definition of indigeneity under national or international law, though it may also serve that purpose; rather, it seems motivated by the (reasonable) assumption that any disciplinary study of a phenomenon (such as indigeneity) would seem to require some framework for approaching that phenomenon.

By definition, of course, no such framework can be a definition in the legal sense but instead will comprise a heuristic for exploring the phenomenon in all of its concrete and contradictory peculiarities—a descriptive, rather than prescriptive, approach. It is precisely this ambiguity (between a prescriptive definition in contrast to a descriptive heuristic) that leads to the twin legal ironies of (a) obviously indigenous people being denied indigenous status (because they fail in some way to meet the legal criteria of indigeneity) and (b) obviously nonindigenous people claiming indigenous status (by in some way finessing a self-identification to meet the legal criteria of indigeneity).

Instead, the framework that Corntassel (2003) proposes allows for a cultural dynamism within indigeneity that legal definitions ill afford. Thus, while one could, under a formal legal definition, theoretically lose indigenous status by relocating to an urban area (The World Bank, 2005) or by having the historical wrong done to one's peoples adequately redressed in court (Thornberry, 2002), heuristically we can recognize an obvious continuity of indigeneity even in these changing and dynamic circumstances. Recognizing the differences between descriptive and prescriptive approaches also allows a critique of those discretionary (ab)uses of power (Foucault, 1977) that are fully deputized to unilaterally withdraw indigenous status from people or not to acknowledge it in the first place. The framework Corntassel (2003) offers also can detect the continuities of indigeneity (rather than a loss of it) even where a syncretism of traditional religious beliefs and foreign (Islamic or Pentecostal Christian) influences occurs (Adu-Gyamfi, 2011; Appiah-Opoku, 2007) or where "western" modernism has left its footprint on indigenous locales and practices (Horton, 2017; Radhakrishnan, 2000; Wielandt, 1981).

Finally, with regard to "who" is indigenous, the concept of self-determination arguably contains an implicit claim about who is empowered to invoke it as well. A general answer to "who claims" would be whoever has the standing to do so. Such standing may be that type formally recognized in legal proceedings—a standing denied to the former US slave Dred Scott when petitioning the US Supreme Court for recognition of his citizenship in 1857—or simply any other extralegal claim made by someone on an otherwise enforceable or agreed-upon basis with others. Discretion plays a key role in this as recognition of standing requires someone in authority to "see" that the petitioner has standing. In legal contexts, there are complex rules and precedents for arguing this and numerous *warrants* accepted for arguing and proving one's standing. Often such claims are completely perfunctory in legal proceedings, whereas in others, for example, *Dred Scott v. Sanderson*, standing represented a central (and unmet) requirement.

In formal court settings, the warrants invoked to justify and prove standing are highly formalized, but similar warrants (as recognized arguments of proof) operate outside of formal court settings as well. In fact, both inside and outside of courtrooms (indigenous and nonindigenous alike), individuals and whole peoples have made genetics-based claims to indigeneity (Hamilton, 2008; TallBear, 2007, 2013) or on blood-descent records, like the Dawes Rolls (Hamilton, 2012). Notwithstanding the vast, if not insuperable, difficulties of to link genetic sequences to ethnicities (Cavalli, Sforza, & Edwards, 1967), this trend points more fundamentally to the perpetual tension that persists around "who" claims (and *can* claim) self-identification as indigenous.

Somewhere between the demonstrably groundless (individual) claim of Senator Elizabeth Warren and the like to Cherokee heritage (Latour, 2012; Tuck & Yang, 2012) and the indisputable (collective) claim of living and as yet still uncontacted people to self-evident indigeneity (Wallace, 2011), this clarity begins to blur as the individual/collective poles of the self-determination axis draw closer and closer together into a tension. This tension already comes across even in the United Nations' (2007) *Declaration on the Rights of Indigenous People*. As a formal, legal document, the *Declaration* necessarily reflects the sorts of issues that formal, legal procedures illustrate above and thus also risks controversy and criticism from indigenous and nonindigenous peoples alike (Fowler, 2011).

Relevantly for this article, the USA specifically refused to sign the document at first, in part due to the *Declaration* "failing to include a precise definition of *who* Indigenous people are" (Faulwetter, n.d., emphasis added). But within the document itself, while Article 9 specifically excludes "discrimination of any kind" against the "right to belong to an indigenous community or nation" (United Nations, 2007, p. 6), Article 33 also recognizes that "Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures" (p. 12). This tension between rights of inclusion and membership comes to a head in the Cherokee Freedman controversy and the cultural vicissitudes of the

Lumbee people (both discussed below). Here, we simply highlight that these tangles of "who" (as also "what") vis-à-vis indigeneity may become somewhat unraveled and better illuminated by also asking "when" is indigeneity.

"When" is indigeneity: enacting a phenomenon

From Barcham (2000), the desire to speak of indigeneity as a disciplinary object or phenomenon of study itself will seem already discretionary. Human beingness itself being necessarily constituted socially (Hogue, 2017; Mkhize, 2008), therefore Corntassel (2003) must similarly of necessity propose his framework within a larger mesh of social contestations and dialogue around the term *indigeneity*—contestations that are never value-neutral (Bakhtin, 1981; Foucault, 1986; Leps, 1992; Rowe, Baldry, & Earles, 2015) and, in the present case, are typically implicated in world-scale negotiations through international law by those interested in the term (Todd, 2016). This makes the moving target of who is indigenous impossible to hold in place indefinitely (Barcham, 2000).

Rooted in an aspirational but naive realism epidemic across the whole of Western philosophy for twenty-five hundred years (Putnam, 2013), answering who is indigenous might more fruitfully shift to examining when is indigeneity (Richards, 2007; von Glasersfeld, 1991). While this shift may not yet preclude the discretionary abuses of power that distribute and deny the status of indigeneity as it "sees" (f)it, at a minimum, this requires us to take account of the fact that indigeneity is, in some sense, simply *when someone says so* (Leps, 1992), as Supreme Court Justice Potter's averment. As such, we suggest that the "when" of indigeneity happens in at least two instances: when someone "sees" it (and declares so) and when someone practices it. While one might admit that the former must be implicit in the latter, that the act of recognizing indigeneity a key "when" moment (especially in legal settings) cannot be lost sight of. Or, to fold this into our discussion above, if the moment "when someone practices it" reflects the "when" of indigenous self-determination, then the moment "when someone 'sees' it" reflects the "when" of another's discretionary recognition (particularly in legal contexts). Taking account of the "when" of this may cut through some of the Gordian entanglements facing the use of the term "indigeneity" in the actual world and in actual situations.

However, we must note here at the outset, that although we revert to examples from US contexts below—specifically, issues around the Cherokee Freedman controversy and the vicissitudes of the Lumbee people—this should not be taken as suggesting the only relevant, or even possible, context for such issues. Rather, we have chosen these examples simply for their illustrative value; similar examples and contexts may be found the world over, for example, the Calder case in Canada (Foster, Raven, & Webber, 2011), the Mabo case in Australia (Russell, 2005), and wherever questions of indigenous title generally are in contest (cf. Gilbert, 2007; Osherenko, 2000; Rowe et al., 2015; Stephenson & Morse, 2015).

In general, the right of self-determination by indigenous people not only resists determination of indigeneity by others (for instance, the World Bank's qualifying definitions) but also unwarranted limitations of the legal definition as well. As such, prescriptive definitions of indigeneity that require a historical wrong having been done (or being done) or that require an inextricable linkage to a particular land to access resources (or simply to be recognized as indigenous) are unwarranted (and overly narrow) discretionary qualifiers on indigenous self-determination.

In contrast, intracommunity judgments about individual claims of indigeneity, contra Martinez-Cobo (1986), can suggest a more warranted basis for limitations—as US Senator Elizabeth Warren's unwarranted claims of Cherokee identity made clear (Nagle, 2017; Tuck & Yang, 2012). More broadly, however, the Cherokee Freedmen controversy, across its whole length, also shows painfully how entangled and complex it can become when legal precedents, definitions of indigenous citizenship, and national (Cherokee) sovereignty limited by US hegemonic power come into contestation with an entire people (the Cherokee Freedmen) petitioning for recognition as tribal citizens (Sturm, 2014). In this respect, the career of the Robeson County North Carolina (or Lumbee) people—currently recognized by North Carolina as a tribe after repeated rejections of membership (generally on good historical grounds) by the Cherokee, Cheraw, Sioux, Keyauwee, and Tuscarora tribes—is instructive for how it points up the tensioned overlapping of the terms "race" and "tribe" in a US context as well as the intersections "between the modernist impulse of white supremacy and the implementation of Indian policy" (Lowery, 2010, p. xvi).

Insofar as the "Robeson County's Indians are a 'nation of nations' for whom a formal name ultimately became necessary *primarily for negotiating with colonial, state, and federal authorities*" (Lowery, 2010, p. 5, emphasis added), this requisite act of naming (Driskill, 2011) has taken several contested forms. When Lumbee historical (oral) traditions around Cherokee (and other) indigenous tribal membership within the USA were shown to be false, later eugenic (genetic) discourses were invoked to allow a self-categorization of the Lumbee distinct from "Black," a category not only socially perilous in the formal era of Jim Crow but also one that imposed limitations on access to Federal resources (Lowery, 2010). This matters, of course, because conformance to some given identification criteria as indigenous is tied to access to Federal resources as a prerequisite. But these various resorts to establish a cultural identity, which were "necessary primarily for negotiating with colonial, state, and federal authorities" (Lowery, 2010, p. 5), would have been unnecessary if the "modernist impulse of white supremacy and [its] implementation of Indian policy" (Lowery, 2010, p. xvi) were not already in force.

At any given historical moment, the (shifting) definition and precedents of legal indigeneity will frame the rules of the game for that period, but this provides no argument that the definition is necessary, sufficient, or even desirable across all time. As of 2018, following the introduction of bills in the US House and Senate for Federal

recognition of the Lumbee tribe (US House, 2018; US Senate, 2018), which would access to all of the benefits accorded with that recognition, recognition was withheld (NA, 2018). The fact that Lumbee bona fides as a tribe can still be subject to question with respect to Federal recognition, despite evidence of the tribe's ethnopharmacology, cultural effects, and traditions (de Rus Jacquet et al., 2017; Maxwell, 2017; Nesper, 2018), shows how entangled these issues are. In particular, the lack of any (historical or still-living) native Lumbee language has been adduced as one of the more critically missing elements of Lumbee indigeneity, despite a long tradition of well-attested and continuous family names that establish the tribe's cultural continuity (Murray, 1997).

At its root, the notion of "mixed" has long been a category subject to US anxieties, whether with regard to "racial purity" itself in an age of eugenics and its subsequent proxy of IQ in later eras, as miscegenation proper in times prior or as nondiscrete contradictions of sexual/sexuality binaries currently (Hochschild & Powell, 2008; Sharfstein, 2002; Smith, 2010). As such, an indigenous tribe without, or dispossessed of, its indigenous language, but exhibiting an evolution and familial continuity of practices that resulted from displacement, intermarriage (or sexual assault), diaspora, and continuity amid surrounding "white," "black," and "red" local and Federal contexts will ill-fit any legal definition of indigeneity; Murray (1997) suggests that the Lumbee case in fact represents "a fundamental challenge to many of our assumptions not only about Indians but about ethnicity itself" (p. 96).

Conclusion

Insofar as Supreme Court Justice Stewart Potter's "I know it when I see it" underscores a key exercise of discretion with respect to the recognition or nonrecognition of something (or someone) conforming to a legally ambiguous category, this then points also to the (inequality of) power that warrants such recognition or the withholding of it in the first place. In cases where indigeneity becomes subject to determination by colonizing entities (e.g. national governments in confrontations with indigenous populations), the right to self-determination marks an essential assertion by indigenous people that counters or offsets such hegemonic, unequal discretionary power.

The right to self-determination also marks an important self-protective warrant for decolonizing entities (e.g. indigenous governments in confrontations with individuals or other groups) as well. Unmistakably, as in the case of the Cherokee Freedmen or the Lumbee in more than one instance, an established indigenous power exercised a discretionary power to disallow membership to other claimants. When these claims are individual—to say nothing of also culturally appropriative and merely for the sake of convenience or to gain access to certain resources, as in Senator Elizabeth Warren's case—one hears few objections to a denial of that claim; importantly, this kind of case also does not involve a legal, but only a sociocultural, mis-claim of indigeneity.

In contrast, when such discretionary power—characteristic of legal processes everywhere—grounds the denial of a claim on legal grounds, this can invoke a welter of seeming contradictions and ironies that problematize such discretion. We must resist the temptation, however, to conflate colonizing and decolonizing discretion; we can object to the ethnic bigotry evident in the petition to exclude (Black) Cherokee Freedman from membership in the Cherokee Nation without formally aligning or conflating that move with similar moves by White supremacy's racism over indigenous people generally. Power differs according to whomever wields it, and we should not lose sight of the fact that the pathway to citizenship for the Cherokee Freedman was fundamentally established by the same settler-colonial racism that had denied their Black non-Cherokee siblings their human rights for centuries.

Nonetheless, the tangles that result from making indigeneity subject to a formal legal definition at all may always already betray evidence of an unwarranted limitation on self-determination. Certainly, the work by Corntassel (2008) and Barcham (2000) argues for a less inflexible, and therefore a more accurate and capacious, understanding of indigeneity able to better identify and describe it as an as-lived phenomenon in the world, both domestically and internationally. As such, so long as supremacist/settler-colonialist powers continue to license themselves to determine *who* or *what* deserves or warrants recognition as indigenous—or to require that similar processes by indigenous nations must at least seem to conform to those supremacist/settler models—then this will continue to generate apparent ironies and ethnic bigotries, not only similar to those seen in the indigenous contestations around the Cherokee Freedmen, Lumbee, and other (still less well-known) peoples nationally and internationally, but also in academic attempts to counteract decolonizing efforts by construing decolonized indigenes as ultimately nothing more than exemplary neoliberal subjects.

More importantly, by instead examining "when" is indigeneity, this discloses two basic moments: when another "sees" it (and exercises the discretion to declare so) and when one practices it. To practice indigeneity in this sense means simply to experience the lived, everyday realities of indigenous personhood. This is not a tautology but literal—a recognition (speaking personally) of how I feel and experience my own Spanish heritage most viscerally and immediately when I am practicing it. Exactly "what" that heritage is may remain wholly obscure in such moments or may collapse indistinguishably into a complete identification with the acts of the person "who" is doing them. More importantly, this is an experience requiring no validation by others, even if discretionary recognition by others is sometimes a criterion for community membership.

In contrast, for legal and extralegal contexts alike, indigeneity is also when another "sees" it (in seeing's discretionary sense)—when it is recognized. For indigenous groups, this may be a moment when an individual's claims to community membership are granted or denied or may be a moment when noncommunity bodies, like Supreme Courts or the World Bank, grant or deny recognition of indigenous peoples' claims.

This roots the "when" of indigeneity not in any inextricable link to a land, in any specific history of settler-colonial violence (or its absence), or in administrative determinations of qualification to receive some institutional benefit, but rather in that face-to-face moment, which Arendt (1968) called political, of "people talking with one another" (p. 222) in mutual recognition and respect. As a dynamic process not rooted to one sense for all time but able to adapt and change to new circumstances (Barcham, 2000), if this threatens to make indigeneity subject to contest, discussion, and change when times change, then it is also the moment that prevents indigeneity from getting walled off in the static museum piece of heritage (Bendix, 2000) and allows people practicing it to continuously renew those practices as relevant both to the present and for the future.

While this obviously challenges and makes slippery the claimed "necessity" for hard, fast, and totalizing definitions of "what" and "who" claims indigeneity in legal contexts, it more deeply exposes "who" claims to assess such indigenous claims in the first place and "what" discretionary functions they are empowered with when wielding the what and who of indigeneity in those contexts. More broadly, it discloses the nonrational assumption that (only?) modernist, property-based adversarial legal senses, traditions, and practices of discretion and their warrants can adequately negotiate disputes over indigeneity—or, perhaps more bluntly, that those traditions are the only legal processes acknowledged as legitimate.

Declaration of conflicting interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) received no financial support for the research, authorship, and/or publication of this article.

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