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***305** COLONIALISM, CULTURE, AND THE LAW: A FOREWORD

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The essence of the new way of looking is multiplicity. Multiplicity of eyes and multiplicity of aspects seen. . . . What I want is to look with all those eyes at once.

-- Aldous Huxley, Point Counter Point It is striking quite how quickly the literature on law and colonialism has grown in bandwidth, in thickness, in imaginative reach over the past 15 years; all the more so, since the discipline that might ordinarily have been expected to open up the topic to comparative interrogation, anthropology, was famously slow in paying any real attention to it. [FN1] In its first fluorescence, that literature evinced a rather crude topos. Its primary concern was to demonstrate the importance of legalities, broadly defined, in the imposition of control by Europe over its various 'others': how law was 'the cutting edge of colonialism, an instrument of the power of an alien state and part of the process of coercion' (Chanock 1985, 4), how it became a 'tool for pacifying and governing . . . colonized peoples' (Stamp 1991, 810). Note the iconography: a cutting edge, an instrument, a tool; all material means of manufacture these, all signs of the mettle of empire. Nor is this iconography a matter of mere scholastic fancy. In nineteenth-century South Africa, ***306** Tswana-speaking peoples, famous for their imagery of overrule, referred to the appurtenances of the law--courts, papers, contracts, agents--as 'the English mode of warfare' (Mackenzie 1887, 1, 77-78). The poetics of the phrase might have been poignantly original. But the perception was widely shared by those who, as Sartre (1955, 215) once put it, were made by colonialism to recognize themselves as 'natives.'

That 'mode of warfare'--or rather lawfare, the effort to conquer and control indigenous peoples by the coercive use of legal means--had many theaters, many dramatis personae, many scripts. Most commonly noted among them was the creation of so-called customary law, a particular subspecies of the genus of historical practice that has come to be known, after Hobsbawm and Ranger (1983), as 'the invention of tradition.' [FN2] The colonial rationale, went the argument, was straightforward enough: To the degree that non-Western cultures were mired in what Max Gluckman was fond of calling 'the kingdom of custom' (Comaroff 1995), they obviously lacked a corpis juris, a modern sense of right-bearing selfhood (cf. Taylor 1989), and most seriously of all, anything approaching 'civilized' judicial procedures. It was appropriate, therefore, that in the name of universal 'progress,' they be subordinated to a superior European legal order. As a result, vernacular dispute-settlement institutions, their jurisdictions and mandates severely restricted, were everywhere formally, sometimes forcibly, incorporated into the colonial state at the lowest levels of its hierarchy of courts and tribunals; furthermore, local cultural practices deemed 'primitive' or 'dangerous' were statutorily criminalized (Snyder 1981; Moore 1986). But this was not the only mode of lawfare inflicted on colonized peoples. Another, somewhat less well documented, came in the form of commissions of inquiry instituted to investigate, document, and legislate such things as 'traditional' authority, land-holding patterns, property relations, marriage practices, rituals, and beliefs. Wherever they were established, these commissions, which often had an elaborate ethnological aspect to them (see, e.g., Shamir and Hacker 2001), laid the ground for 'native administration' and, with it, the terms on which indigenous life-worlds were to be transformed under the sign of modernity (Ashforth 1990).

If the first flush of work on law and colonialism foregrounded the brute logic of European domination, it soon produced its own antithesis: studies that set out to show, typically in exquisite historical and/or ethnographic detail, that subordinated peoples 'frequently mobilize[d] aspects of the introduced legal system to challenge both old and new hierarchies of power' (Merry 1994, 40); that the counter-hegemonic can and does arise from deep within colonial legalities (Shamir 2000:27); that 'when they begin to find a voice, peoples who see themselves as disadvantaged often do so either by ***307** speaking back in the language of the law or by disrupting its means and ends' (Comaroff 1994, xii). At times this has taken the form of direct appeal to colonial justice, which in some contexts--although by no means all and certainly not always--has shown itself willing, or found itself compelled, to protect the rights of the colonized against the power of colonizers. At times it has involved a counterdeployment of parliamentary language, and of the culture of constitutionality in which it is embedded, in an effort to reverse legally entrenched forms of discrimination. At times it has manifested itself in the dramatic use of the dock-as-platform, by otherwise silenced political prisoners, from which to make impassioned calls to public action, even to enact their own martyrdom before a watching world.

The dialectical point of rest between these two poles--between (1) the early emphasis on the lawfare of domination and (2) the revisionist focus on the counterinsurgent, contestatory possibilities inherent in even the most oppressive colonial legal regimes--is overdetermined, almost too easy: it sees law as a vehicle simultaneously of governmentality and of its subversion, of

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subjection and emancipation, of dispossession and reappropriation (Lazarus- Black and Hirsch 1994). Elsewhere (1995), I have argued that this bipolarity, this doubling, grew out of an ontological contradiction at the very core of nineteenth-century colonialism sui generis, [FN3] and of colonial law in particular: On one hand, colonization was rationalized (in both senses of that term) by imperial Europe in the name of a humane, enlightened universalism that promised, under the sign of its civilizing mission, to usher 'non-Europeans' into the 'body of corporate nations,' into citizenship of the modern world (see, e.g., Merry 1991, 896; Shamir and Hacker 2001). On the other, it justified itself by sustaining the premodernity of 'overseas subjects,' whom it tribalized, ethnicized, and racialized, constantly deferring the erasure of precisely those differences that were held to make the difference between colonizer and colonized, white and black (cf. Mamdani 1996). Indeed, if any post- characterized the long, ambiguous duree before the age of postcoloniality, it was postponement.

To the extent that a point of rest has been reached--to the extent that colonial law is regarded, convergently and ever more consensually, both as an instrument of domination and as a site of resistance, [FN4] refusal, struggle--we are left with a very basic question: Is there anything more to say on the topic, other than to offer further historical and/or ethnographic illustration?

***308** The answer, of course, is yes. For a start, it is one thing to insist that lawfare was critical to colonial overrule, quite another to explain exactly why, when, and how; one thing to show that most colonial regimes relied on legal instruments to effect their will, quite another to explain why many of those regimes, not least those which enjoyed far more military and economic power than they needed to subdue 'native' populations, put in place judicial institutions which were expensive, expansive, and far in excess of functional requirement; one thing to say that colonial law was both an instrument of domination and a weapon of the weak, quite another to explain when it was the former, when the latter, and in what proportions. But these are just a few very general, somewhat random observations. The essays to follow offer many more, most of them fairly specific, all of them important. By way of introduction to those essays, let me note four.

The first is all too obvious, and yet it is rarely remarked. It concerns the term 'colonial law' itself. Or, more precisely, its analytic, semantic, and discursive terms of reference.

Much of the time, 'colonial law' is invoked in scholarly discourse as if it denoted a well-defined genus of phenomenon; something about which--about whose character, determinations, and historical implications--general and generalizing statements may be formulated, debated, tested, proved. And yet, if we compare the following subject matter covered, respectively, by Tomlins (2001), Benton (2001), Espeland (2001), and Shamir and Hacker (2001), it is clear that the term subsumes a profoundly polythetic ensemble of things. Apart from all else, colonial legal regimes, assuming that we can isolate and define them to begin with, have varied enormously over the long run in their institutional, jurisdictional, and cultural elaboration; in their reach; and in their workings as systems of regulation. Indeed, in some early instances, especially where formal overrule occurred long after territories were colonized, 'law and order' were not the concern of the state at all, falling rather under the aegis of the private sector (see, e.g., Worger 1987). But even if the scope and complexity of these regimes were not so variable, the range of issues addressed in scholarly work on them remains extraordinarily diverse and disarticulated. Thus, for example, in the essays here, Tomlins deals with the establishment of imported legal cultures and their impact on the cartography of colonization in seventeenth-century America; Benton, with competing court jurisdictions and struggles between church and state in a Spanish borderland during the same period; Shamir and Hacker, with a commission of inquiry into the cultivation, preparation, and consumption of a popular drug in India in the 1890s; Espeland, with a recent struggle against a 'development' initiative mounted by Indians in Arizona, a struggle, justified by appeal to environmental legislation, that opened up deep ideological and political fissures in the U.S. administrative bureaucracy. Each of these obviously falls securely within the horizons of '***309** colonial law.' But they touch upon it in vastly different ways. Nor, patently, do they exhaust the topic. Indeed, none of them even mentions customary law or 'native' courts, that ur-theme of legal anthropology in many parts of the world. The conclusion? In the first instance, that we ought to desist from speaking of 'colonial law' as if 'it' were a monothetic species of phenomenon about which easy generalizations, easy theoretical statements, might be made; in the second, more positively, that we are challenged to arrive at a comparative topography of the institutions and processes, the signs and practices, embraced within its terms of reference. In order to do that, however, several prior steps demand to be taken. The remaining points cover some of those steps.

The second emerges most cogently from Tomlins's essay, but it is implicit in all the others as well. Received wisdom, as we have seen, has tended to regard law as an instrument of imperial domination; this even when its counterinsurgent potentialities are recognized. But it may be argued, much more fundamentally, that almost everywhere, cultures of legality were constitutive of colonialism, tout court. First, it was by appeal to a specifically legal sensibility that the geography of colonies was mapped, transforming the landscapes of others--typically seen by Europeans as wilderness before it was invested with their gaze--into territory and real estate; a process that made spaces into places to be possessed, ruled, improved, protected (cf. Comaroff and Comaroff 1991, 89-90, 172). Second, it was by means of legal instruments, as Benton notes, that economic rights, entitlements, and proprieties were established, that labor relations and contracts were promulgated and policed, that material interests were negotiated. Third, it was in legal terms, as Tomlins and Shamir and Hacker intimate, that colonial power/knowledge, a taken-for-granted gestalt of seeing and being in the world, was constructed and valorized. Fourth, it was under legal provisions that the 'nature' of colonial subjects was construed, ethnicized, and racialized, their

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relations to other human beings, to the earth, and to their own cultural practices delineated. Fifth, it was in the legal arena that state authority was most elaborately ritualized, often in efforts on the part of overseas administrations to conceal their weaknesses, to invest themselves with an aura of power, and to draw their citizenry into a community of consenting clientage (cf. Comaroff 1998). To be sure, the language of the law was the language that Europeans tended most avidly to try to teach 'natives,' thus to provide an argot in which the latter might understand the terms in which they were being dispossessed, displaced, disenfranchised--or less brutishly (less Britishly?), the terms of trade in which they were being engaged. As all this implies, with due respect to those who treat colonialism primarily as a cultural encounter (see, e.g., Dirks 1992), colonial law, however polyvalent may have been its manifestations, was irreducibly material in its workings, its purposes, its effects. As Espeland shows for the Yavapai, ***310** and Shamir and Hacker make plain for Bengal, the legal processes in which autochthonous peoples were caught up had irretrievably concrete implications; for Yavapai, in fact, this extended to their very survival. In sum, colonial legal cultures, precisely because they were constitutive of entire colonial worlds, were simultaneously languages of practice; symbolic and ritual systems; abstract principles for the production of social order, citizenship, and subjection; and immanent material realities. And a lot more besides.

The third observation--which, again, recurs in all the essays, albeit in very different ways--echoes something that has been said about other aspects of colonial encounters (see, e.g., Cooper and Stoler 1997, 5; Stoler 1995), especially about colonial medicine. But it has seldom been noted of law. It is that European overseas 'possessions' were often laboratories for experimentation with, even for the production of, legal instruments, institutions, principles, procedures; also modes of regulation. One of the most persistent myths about the Age(s) of Empire, perhaps, is the idea that a well- formed Euromodernity exported itself to faraway places, there to introduce its already well-refined, highly developed ways and means to 'primitive' peoples--either, depending on ideological perspective, as a philanthropic, moral mission or as a callous, often violent, act of conquest. Increasingly, that view has had to be revised: It is clear that 'European civilization,' as it was transported abroad, was, in many respects, a somewhat tentative set of cultural, social, and material practices; that it was patently a work in progress, often more aspiration than achievement. This was no less true of law than it was, say, of medicine or agriculture. Thus, for example, Tomlins (after Greene 1993) suggests that America provided a space of experimentation for Europeans, a space for the fulfillment of hopes and schemes not easily realized back in the Old World; these included charter designs for commercial plantations, territorial lordships, and other requisites of a legal order of ownership, production, and labor relations. Similarly, at the eve of conquest, says Benton, imperial Spain was notable for its uneasy 'patchwork' of law and custom. Colonization, it appears, gave the Crown an opportunity to solidify and systematize that patchwork, to make a legal order. The other two papers, by contrast, demonstrate how administrative procedures, situated in the law, provided another species of laboratory--a laboratory for the production of new forms of rule, new kinds of ruler: in the case of India, by molding an indigenous elite and incorporating it into an imperial structure of governance then very much under construction; in that of the Yavapai, with the effort of a younger generation of bureaucrats to move away from older models of 'development' to ones based on rational decision-making and the logic of commensuration. It is a process that compelled them, as they went along, to reinvent their own roles, their jobs, their professional practice.

***311** In sum, to the degree that a culture of legalities constituted any colonial world, it did so, more often than not, by an ongoing process of trial and error, invention and reinvention. In this process, the terrain of the colonized became a testing ground from which emanated new lawfare, new technologies of order and regulation. These sometimes confined themselves to the colonial frontier itself. But sometimes they were taken back to the metropole, there to alter its social lineaments. Thus, to take a celebrated instance, Mayhew's (1851) ethnography of the London poor in the midnineteenth century, and the policy discourses that flowed from it, was based largely on an ethnological model drawn from colonial southern Africa. The implication? That, far from being a crushingly overdetermined, monolithic historical force, colonialism was often an underdetermined, chaotic business, less a matter of the sure hand of oppression--though colonialisms have often been highly oppressive, nakedly violent, unceasingly exploitative--than of the disarticulated, semicoherent, inefficient strivings for modes of rule that might work in unfamiliar, intermittently hostile places a long way from home. Witness, for example, Sir Charles Rey's (1988) frustrated, misanthropic diary of the life and times of a British ruling elite, whose Pythonesque absurdities were, by their own admission, frequently reminiscent of the Keystone Cops at play. Here as elsewhere, in the face of the threat of incoherence, hostility, and unfamiliarity, it was the language of the law that appeared to promise coherence, stability, and a sense of authority. Of course, appearances are misleading. But they have the power to move people and to make worlds in their image.

Fourth, and probably most significant for present purposes, is the stress placed by all the essays on the complexity of relations among colonizers, relations often negotiated in the space of law.

It has become commonplace to eschew the Manichean opposition between colonizer and colonized so strongly emphasized in early studies: to observe that it was everywhere breached and compromised; that, despite the tendency of Europeans to represent colonial societies as sharply divided, binary worlds--a representation itself often congealed in legislation governing segregation, miscegenation, labor arrangements, and the like--the political sociology of those societies tended to be much more complicated, less dichotomous, more labile. This, in turn, has led to lively scholarly discussion of relations across the lines of cleavage, of the middle ground or so-called third space that transected them, of the divisions and animosities among those, respectively, on each side. Cooper

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and Stoler (1997) refer to the dissonances within the ranks of colonizers as 'tensions of empire.' The legal aspect of these tensions emerges, perhaps more clearly than ever before, in the essays to follow. Indeed, all four are centrally about them. Thus the leitmotif of Espeland's insightful study of contemporary colonialism in the United States is, as I have already said, the confrontation ***312** between old and new guard bureaucrats working for the U.S. government; as they engaged in open contestation over the proposed building of a dam on Yavapai ground, under the terms of the National Environmental Protection Act (1969), each brought a quite different ideology of development into the triangular encounter with the Indians. Similarly, the central theme of Benton's historically sensitive account of Spanish colonialism is jurisidictional politics in New Mexico: the 'passionate and persistent' struggle among various secular and religious authorities to gain legal hegemony--and, with it, some measure of control over the colonization of this part of the New World. Shamir and Hacker, by turn, offer us an extraordinary analysis of the arguments between British and Indian members of the Indian Hemp Drug Commission (1893) about the way in which the production and consumption of the drug ought to be regarded by the state. The two parties held starkly antithetical views of, among other things, the essence of Indianness and the sociology of Indian society, the public health implications of hemp use, the role of law in ruling the colony, and reflexively, the procedures of the colonial commission of inquiry itself. But perhaps most fundamental of all, in respect of the general point, is Tomlins's cogently made case that colonizers from Britain came to America with quite distinct legal cultures drawn from different parts of England; a 'legal polyphony,' he calls it. This polyphony eventuated, at least over the short run, in the emergence of obviously discordant, even competing, regimes of legal control.

Of course, the historical fact that there were these 'tensions of empire' did not make imperialism any the less exploitative. Or coercive. Nor did it soften the inequalities that saturated colonial societies everywhere; if anything, it sharpened them. But, for the colonized, conflict among colonizers sometimes opened up fissures through which the contradictions inherent in colonialism became visible. In so doing, they gave the consciousness of 'natives' material to work on, material from which to fashion their own understandings of European overrule, their insights into its ways and means, their reactions to the challenge that it posed to vernacular cultural practices, even, at times, their strategies of resistance.

It is here that the four observations converge. These observations--that 'colonial law' refers to an irreducibly diverse ensemble of practices and institutions, that cultures of legality were constitutive of colonial society, that colonies were prime sites of sociolegal experimentation, that the 'tensions of empire' were regularly mediated by means of law--are very much of a piece. As our essays show, they are the foundational coordinates that frame the analysis of lawfare in all colonialism(s), past and present. To be sure, in the wake of this symposium, and the archaeology of intellectual labor congealed in it, it will be impossible to ignore the constitutive effect of law, in its various guises, on the historical production of colonial worlds everywhere; impossible to interrogate colonial legal processes without ***313** taking into account their experimental dimensions; imperative to look behind the tensions of empire, and their legal mediations, for explanations of vernacular understandings of, and reactions to, the imperial outreach of Europe. Such is the considerable achievement of the four papers. As they focus in on various colonial situations from contrasting angles of vision, Tomlins, Benton, Shamir and Hacker, and Espeland open up multiple perspectives on things both familiar and strange. They may not have succeeded in gazing upon history 'with all . . . eyes at once.' With due respect to Aldous Huxley ([1928] 1994,193), that is impossible. But they do offer us an eye-opening excursion into very different colonial theaters, each with its own cultures of legality.

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[FN1]. It is interesting, for example, that Sally Falk Moore's, Law as Process, an influential collection of her essays published in 1978, did not have an entry for colonialism in its index; by 1986, her Social Facts and Fabrications was centrally about the topic.

[FN2]. But see Roberts 1985 for a carefully argued contrary view, at least in respect of Tswana law.

[FN3]. Most recent theoretical and comparative writing in the social sciences on the topic focuses, either explicitly or implicitly, on "modern" colonialism (i.e., colonialism dating back to the late eighteenth century and after). Colonialisms of earlier vintage--like those addressed below by Tomlins and Benton--tend to get shorter shrift.

[FN4]. There are scholars in the Foucauldian tradition who are reluctant to situate the study of law and colonialsim in a discursive frame that includes "resistance" as one of its conceptual terms. The critical issues raised by debates surrounding the terms, however, are beyond the scope of the following essays and, hence, are left aside for the present.

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