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Jurisdiction and Settler Colonialism: Where Do Laws Meet?

Shiri Pasternak

Abstract

To engage in the question of what it means to decolonize law, we must ask by what authority a law has the authority to be invoked and to govern. In this paper, I describe the conditions necessary for the exercise of Canadian law as being the work of jurisdiction, and I call into question Canada's legality and legitimacy in making jurisdictional claims. Decolonizing law means deconstructing the state's grounds to inaugurate law on lands acquired through colonial settlement. By critically examining law's geography and scope I call into question the modern definition of territory itself. Further, I draw attention to jurisdiction as a conceptual framework for understanding the specificities of settler colonialism; illustrate jurisdiction as a historical concept, distinct from territory and sovereignty; and show some of the ways in which jurisdiction is enacted to govern across multiple scales and issues.

Keywords: jurisdiction, settler colonialism, Indigenous, authority, space

Résumé

Si l'on se penche sur la question de ce que signifie la décolonisation du droit, on doit se questionner sur l'autorité d'une loi d'être invoquée et de gouverner. Dans cet article, je décris comment le travail des juridictions amorce l'exercice du pouvoir législatif au Canada, et je remets en cause la légalité et la légitimité du Canada à l'égard des revendications juridictionnelles. L'acte de décoloniser le droit signifie que l'on doit déconstruire les motifs de l'État afin d'introduire des lois sur les terres acquises par le peuplement colonial. En examinant de manière critique la géographie ainsi que la portée de la juridiction, je remets en cause la définition moderne du « territoire ». Dans cet article, j'attire l'attention sur comment la juridiction représente un cadre conceptuel permettant de comprendre les spécificités du colonialisme de peuplement ; d'illustrer la juridiction en tant que concept historique distinct du territoire ou de la souveraineté ; et de démontrer certaines formes à travers lesquelles la juridiction est adoptée pour gouverner les diverses échelles et pour régir les diverses questions.

Mots clés : juridiction, colonialisme de peuplement, autochtone, autorité, espace

A scene from Boyce Richardson's 1990 film *Blockade*¹ frames the problematic of this paper: Richardson has gone to the Algonquin community of Barriere Lake to capture the community's moose hunt, but instead, he finds his documentary subjects lined up along the highway in protest of clear-cut logging on their territory. At one blockade, he films a confrontation between customary chief Jean Maurice Matchewan and an unidentified Sûreté du Québec (SQ) officer. The SQ officer asks Matchewan to explain his community's intentions in staging the blockade that day, and Matchewan responds that the blockade is intended to stop the logging. The SQ officer asks him what gives them the right to stop the logging. Matchewan responds: "A right to live. To have food on the table." Still unsure, the SQ officer persists: "Do you have some paper about that?" Matchewan responds again, trying to make clear that he is not interested in engaging in empty abstractions. He says: "We're not talking about dealing with rights to the land. We're talking about food on the table and protecting the natural habitat. The wildlife. We're just trying to bring to the Canadian attention that this is a wildlife reserve that they're raping." Undeterred, the SQ officer once again misrecognizes Matchewan's grounds for the blockade and tries one last time to confirm, within the framework of the state's authority, Matchewan's right to be there: "Do you have some documents to *prove* that you have the right to live here, something like that?" In response, Matchewan affixes their dispute into the deep time and place of the Algonquins' relationship to the land: "We've been around here for thousands of years. That gives us the right to live off this land."

To ascertain Algonquin authority on the territory, the SQ officer demands to see the chief's "papers." Matchewan's response aligns authority not with "paper" title to the land, but with belonging formed by respect for the life-giving nature of the forest; a responsibility to protect the land; and the Algonquins' knowledge of the territory, which derives from thousands of years of occupying its waterways and forests. This exchange has stayed with me since I first watched Richardson's film. But only after years spent with the Algonquin community did I gradually come to see that, at the heart of this encounter, is a conflict over the inauguration of law—or the authority to have authority—and the specific forms of struggle that arise when competing forms of law are asserted over a common space. I understand this to be a problem of *jurisdiction*. The interpretive framework of jurisdiction allows for the examination of overlapping authority claims between Indigenous, state, regional, and private interests, and it can help to parse the ways in which these jurisdictional encounters produce colonial space.

To engage in the question of what it means to decolonize law, we must ask by what authority a law has the authority to be invoked and to govern. In this paper, I describe the conditions necessary for the exercise of Canadian law as the work of jurisdiction, and I call into question Canada's legality and legitimacy in making jurisdictional claims. Decolonizing law means deconstructing the state's grounds to inaugurate law on lands acquired through colonial settlement. By critically examining law's geography and scope, I also call into question the modern definition of territory itself.

¹ Boyce Richardson, *Blockade: Algonquins Defend the Forest* (Ottawa: National Film Board of Canada, 1990).

In this paper, I draw attention to jurisdiction as a conceptual framework for understanding the specificities of settler colonialism; illustrate jurisdiction as a historical concept, distinct from territory and sovereignty; and show some of the ways in which jurisdiction is enacted to govern across multiple scales and issues. I situate this work within the emerging field of settler colonial studies and the field of critical legal geography. Settler colonial studies is a field of inquiry that examines a specific type of European colonialism premised on land acquisition and population *replacement*, in contrast to a colonialism premised on resource exploitation and surplus labour markets.² Unlike colonials in South Asia and Africa, settlers in Canada did not “return” to the metropole. Rather, they stayed, seeking eventually to replace Indigenous societies with their own. Replacement is embedded in the institutional logic of settler colonialism and in the structure of jurisdiction.³ But to render jurisdiction visible, we must place it in the context of geographical studies, otherwise we risk “the presentation of *law* and *space* as pre-political categories.”⁴ A critical legal, geographic perspective secures an interdisciplinary approach to jurisdiction as a spatial category, while allowing for the examination of the production of colonial space through the work of jurisdiction. By *production of space*, I mean, here, the ways in which place is socially, politically, and legally produced by the political status gained through spatial divisions of the world into nation states, or by the imperial drawing and re-drawing of regional boundaries.

Decolonizing law requires both recognition and repudiation. Identifying and respecting Indigenous peoples’ jurisdiction over their lands decolonizes Canadian law, in the important sense that it challenges Canadian law’s claim to being the only legal order and foregrounds the multiplicity of forms of governance across the country that are embodied in Indigenous culture, language, and politics. Decolonizing law also means repudiating the doctrine of discovery and other racist narratives that drive the assertion of European legal orders and render their competing local forms irrelevant. As McNeil puts it, it is one thing to accept the reality of governmental power “but quite another to hold . . . that acquisition of that sovereignty virtually obliterated indigenous governance authority as a matter of law.”⁵ Canadian assertions of sovereignty did not obliterate Indigenous governance authority, and as such, encounters between settler and Indigenous law reveal the unfinished project of perfecting settler colonial sovereignty claims.

The Work of Jurisdiction

As a concept, jurisdiction has much to contribute to discussions of law and colonialism and the ways in which the state’s legal authority is ordered. Emile Benevise’s

² Lorenzo Veracini, *Settler Colonialism: A Theoretical Overview* (New York: Palgrave Macmillan, 2010), 1–15.

³ Patrick Wolfe, *Settler Colonialism and the Transformation of Anthropology* (London, New York: Cassell, 1999), 163.

⁴ Nicholas Blomley and Joel Bakan, “Spacing Out: Towards a Critical Geography of Law,” *Osgoode Hall L.J.* 661 (1992): 662.

⁵ Kent McNeil, “Indigenous Land Rights and Self-Government: Inseparable Entitlements,” in *Between Indigenous and Settler Governance*, eds. Lisa Ford and Tim Rowse (New York: Routledge, 2013), 145–46.

etymology of jurisdiction links the Latin noun *ius* (law), in its performative and adverbial form, with the verb *dictio* (the saying or speech of law).⁶ First and foremost, jurisdiction is the power to speak the law. As Shaunnagh Dorsett and Shaun McVeigh write, “In some formulations jurisdiction inaugurates law itself. Thus to exercise jurisdiction is to bring law into existence,” and in so doing, to draw law’s boundaries and its subjects.⁷

Canada’s assertion of jurisdiction over all lands and resources within its national borders presumes the forms that law will take, despite the multiplicity of Indigenous governance systems embedded within their own ecologies of law. Tensions between settler and Indigenous regimes arise from these overlapping claims. The concept of jurisdiction offers a coherent vocabulary with which to express these encounters and where sovereignty discourses fall short. As Benton writes: “Empires did not cover space evenly but composed a fabric that was full of holes, stitched together out of pieces, a tangle of strings.”⁸ These “imperfect geographies” were a fundamental aspect of imperialism; full (or perfected) territorial control has never been realized as a straight chronological progress towards absolute sovereignty, as many claim.⁹ Rather, new kinds of differentiated legal zones have emerged where Indigenous territorial jurisdiction forms lumps that betray patterns of partial and uneven state sovereignty.

Just as the technical production of maps has the potential to erase contestation over lands, so too jurisdictions are masked when a plurality of legal systems are mapped as a single sovereign space.¹⁰ Yet simultaneous operations of law may take place in a single area, across distinctive epistemological and ontological frameworks. To visualize the dense jurisdictional overlap of legal pluralities, readers may recall the image of a human body tucked into the back of old encyclopedias. Bodies are comprised of a dozen transparent pages, each page printed with a singular set of parts such as organs, the circulatory system, bones, and skin.¹¹ As each transparent page is laid atop the other, the overlap of components form the whole organism. Jurisdiction can be said to function in much the same way, except that each component part represents one kind of governing authority. Those living within the territorial boundaries of Canada are already presumed to exist within a particular body of law. But this picture of legal authority that holds us captive, repeated to us inexorably in the language of modern territorial

⁶ Shaunnagh Dorsett and Shaun McVeigh, “Questions of Jurisdiction,” in *Jurisprudence of Jurisdiction*, ed. Shaun McVeigh (Oxford: Routledge-Cavendish, 2007), 4.

⁷ *Ibid.*, 4. However, as Jennifer Nedelsky has pointed out to me, while jurisdiction does not wholly precede law in all cases—for example, in cases where the province creates municipal authority and jurisdiction—the foundation for these latter forms of establishing jurisdiction are premised on the initial inauguration of jurisdiction in what is now called Canada, and which ushered in the reception of the common law in Canada.

⁸ Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires 1400–1900* (Cambridge: Cambridge University Press, 2010), 2.

⁹ Benton, *A Search for Sovereignty*, 21.

¹⁰ Boaventura de Sousa Santos, “Law: A Map of Misreading. Toward a Postmodern Conception of Law,” *Journal of Law and Society* 14, no. 3 (1987): 279–302, cited in Mariana Valverde, “Jurisdiction as Scale: Legal ‘Technicalities’ as Resources for Theory,” *Social Legal Studies* 18 (2009): 140.

¹¹ I owe credit to Dr. Kim Stanton for this image.

sovereignty, erases the multiplicity of Indigenous legal orders exercised daily across the land.¹²

As with any metaphor, a surplus of meaning spills out. To avoid misconstruing layers of jurisdiction as detached from one another, where no layer disturbs the other, we need to be attentive to the nodes of connection where authorities meet and where conflict may or may not be reconciled. Layers of authority become thicker or thinner as peoples' movements through space produce new arrangements and negotiations of power.¹³

Thus, jurisdiction raises important conceptual issues about the geography and scope of the law.¹⁴ With the establishment of settler colonies, the space of law was expanded from imperial European centers to geographies far from the localized context and authority from which it arose. By asking *where* and *to what* or *to whom* distinct bodies of law apply, we are also inquiring into the definition of territory itself.¹⁵ We can see this in the common phenomena of criminal extradition. The deportation of alleged criminals across national borders poses questions concerning the authority of law over individual bodies as well as the meaning and scope of citizenship relative to one's location. As law moves, the boundaries of national sovereignty and, therefore, the sources of authority to govern in particular places, shifts, too.¹⁶

Jurisdiction's relationship to territory is a crucial one, since the idea of jurisdiction is a historical concept whose political and legal content has accumulated over a long period of time and through a significant transversal of space. Approaching jurisdiction from a historical perspective allows us to make key distinctions between the oft-conflated concepts of sovereignty and jurisdiction. Within a settler colonial context, this conflation is itself a political expression of authority, because it fuses multiple forms of life into one "empire of uniformity."¹⁷ "Perfect settler sovereignty" is the legal obliteration of Indigenous customary laws through the collapse of distinctions between these terms.¹⁸

To begin, jurisdiction predates modern state sovereignty in the common law.¹⁹ As Dorsett writes: "Bodies of law self-authorized and regulated their relations with each other long before the emergence of the modern nation state. Even after the development of notions of national sovereignty, non-common law

¹² This commentary on how a picture holds us captive is a paraphrase of Ludwig Wittgenstein, *Philosophical Investigations* (New York: Macmillan Company, 1965), at 115.

¹³ Benton, *A Search for Sovereignty*, 32.

¹⁴ Lindsay Farmer, "Territorial Jurisdiction and Criminalization," *University of Toronto Law Journal* 63 (2013): 225–46.

¹⁵ I first encountered this idea in Lindsay Farmer's article, "Territorial Jurisdiction and Criminalization," *ibid.*

¹⁶ This idea of the "authority to have authority" comes from an insightful comment on this work by Dr. Deborah Cowen.

¹⁷ For a discussion of what he calls the "victorious modern language of constitutional uniformity," see James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press), 58–98.

¹⁸ Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia 1788–1835* (Cambridge, MA and London: Harvard University Press, 2010), 3.

¹⁹ Shaunnaugh Dorsett, "Thinking Jurisdictionally: A Genealogy of Native Title" (dissertation, University of New South Wales, 2005), 254.

jurisdictions continued to function alongside the common law, both in England and the colonies.²⁰ Lisa Ford describes how sovereignty came to universalize jurisdiction. Whereas jurisdiction was understood for centuries as claiming authority over people in particular places or over those engaged in particular activities, through settler colonialism, it claimed authority over territorial space.

Citing case law from America and Australia, Ford traces the transition from a settler legality that claimed jurisdiction over Indigenous bodies to the period when territorial jurisdiction became a necessary exercise of sovereignty at the turn of the nineteenth century. Until this later period, an uneasy legal pluralism had existed between overlapping Indigenous and settler social orders. Ford's research shows that the emergence of territorial state sovereignty was introduced in colonial courts through a generalization of the common law as the singular national law.²¹ Likewise, Dorsett notes how intolerant Australia's High Court has been towards parallel law-making systems, regarding "any attempt to argue multiple jurisdictions" as "an attack on singular sovereignty."²²

Sovereignty has been defined by its claims to "final and absolute political authority"²³ and has dominated modern society as the "key ordering principle of political organizing since the collapse of ecclesiastical forms of authority."²⁴ But authority is not pre-given to sovereignty. Sovereignty, we must appreciate, "depends on authority, and authority is something more than physical control over territory."²⁵ It must be matched with a conviction that the exercise of sovereignty is legitimate.²⁶ Forming national law is one way in which legitimacy is sought.

Though the common law comes to take the shape of the state, the fit is never total or complete. For the common law has no mystical or transcendental authority that connects it to territory in the "New World." When the common law of England became the national law in the colonies, its content and jurisdiction were deliberately confused. The common law's universalist principles of equality were and have been intentionally articulated against the local and particular formations of Indigenous legalities.²⁷ Peter Fitzpatrick comments on Brennan J's reasoning in *Mabo*, where the Justice rejects the common law doctrine of *terra nullius* only to rehabilitate the common law to "recognize" native title: "In such a miasma, not to say vacuity, is the settler's law accorded the impenetrable solidity that would secure its completeness and exclusiveness and utterly subordinate any competing indigenous legality."²⁸ The common law's universalism is further comprised of its reliance on

²⁰ Ibid.

²¹ I would argue that the same principle applies to civil law and other European legal traditions more broadly.

²² Dorsett, "Thinking Jurisdictionally," 242–43.

²³ F. H. Hinsley, *Sovereignty* (New York: Basic Books, 1966), 26, cited in Nicholas Onuf, "Sovereignty: An Outline of a Critique," *Alternatives* 16, no. 4 (Fall 1999): 430.

²⁴ Karena Shaw, *Indigeneity and Political Theory: Sovereignty and the Limits of the Political* (New York: Routledge, 2008), 3.

²⁵ Onuf, "Sovereignty," 430.

²⁶ Ibid.

²⁷ Peter Fitzpatrick, "'No Higher Duty': *Mabo* and the Failure of Legal Foundation," *Law and Critique* 13 (2002): 239.

²⁸ Ibid., 247.

precedent—those serial decisions that embody the force of changing social relations from which it takes its content.²⁹

Territorial sovereignty, modern sovereignty, state sovereignty—all synonymous terms—arose in the context of late European imperialism, re-spatializing the exercise of jurisdiction into a colonial context over national territories.³⁰ This new spatial form required the inauguration of new forms of law (or new applications of old forms of law), as jurisdiction was transferred repeatedly between European powers and exercised over the colonies. The “territorial imperative” of sovereignty emerged specifically in the nineteenth century. As Ford writes, before the War of 1812 in America, “[a]ny attempt to define state sovereignty as a territorial measure effected through the exercise of jurisdiction foundered on the plurality of indigenous legal status.”³¹ But this legal status became threatening to a settler sovereignty increasingly marked by territorial rights.³² Imperialism created the definitive boundaries of sovereignty: it raised the questions that persist in its name, such as who could exercise what kinds of power over land, and what constitutes a political community. What remains to be examined are the “internal arrangements for organising [*sic*] and exercising authority,” arrangements that are the work of jurisdiction.³³

One way we can examine how authority is organized and exercised is to analyze the specific issues over which jurisdictional powers are exercised in Canada through legislation such as the *Constitution Act* of 1867 and 1982 as well as through the more quotidian distribution of authority to a proliferation of institutional bodies, subordinate to federal and provincial powers, such as municipalities and counties. The division of jurisdictional powers between federal and provincial orders of government in Canada is laid out in sections 91, 92, and 93 of the *Constitution Act, 1867*. Provincial jurisdiction, according to section 92, includes control over natural resources, and this control is further distributed across a range of oversight bodies such as park management authorities (e.g., Société des établissements de plein air du Québec), mining and forestry extraction (e.g., *Manitoba Provincial Parks Act*), and land management bureaucracies and zoning (e.g., Peel Land Use Planning Commission).

These micro-powers, enacted under federal and provincial jurisdictions, have carved out spatial patterns of land use and population control that defy easy mapping. This is because jurisdiction is not just an abstract or descriptive concept, but a practice that “actively works to produce something.”³⁴ Jurisdiction as a “technology” speaks to technique, but it also signifies the Greek *têchné* or “craft.” It works, as Dorsett and McVeigh explain, by “institut[ing] a relation to life, place, and event through processes of codification or marking.”³⁵ While the

²⁹ Ibid., 239.

³⁰ There are, of course, competing genealogies of sovereignty. See, for example, Onuf, “Sovereignty,” 425–46.

³¹ Ford, *Settler Sovereignty*, 129.

³² Ibid., 56.

³³ Shaunnagh Dorsett and Shaun McVeigh, *Jurisdiction* (New York: Routledge, 2012), 39.

³⁴ Ibid., 4.

³⁵ Dorsett and McVeigh, “Questions of Jurisdiction,” 5.

micro-governing authorities named above may not hang their power on the mantle of sovereignty, they mark and codify relationships on the ground. For example, they make visible conflicts over land and resources between Indigenous and settler groups, while in their singularity as regulatory bodies, they hide the total effect of accretion and layering that governs place.

We find “Indians, and lands reserved for the Indians,” allocated under federal jurisdiction, directly designed to govern Indigenous peoples, in section 91(24) of the *Constitution Act, 1867*. Unlike all other Canadian citizens (and besides federal prison populations and, in cases involving health, refugees), Indigenous peoples have their education, healthcare, and a wide range of programs and services delivered to them by the federal government. Indigenous peoples are governed from “cradle to grave” under the *Indian Act, 1876*, which, as Arthur Manuel recalls his father, George, explaining: “This means [that for] all decisions about your life the Minister has the ultimate authority.”³⁶ Indigenous peoples—much like firearms and motor vehicle registrations—have been gradually transformed into objects of jurisdiction rather than subjects in nation-to-nation relationships.

Taking a closer look at differentiated space allows us to define with further precision the overlapping jurisdiction between Indigenous and Canadian legal orders. It therefore helps us to think spatially about the work that jurisdiction does and the forms of decolonization rooted in place that mapping jurisdiction can take.

Jurisdiction and Differentiated Space

Though I have been using the term *overlap* to describe conflicts between Indigenous and settler jurisdictional orders, the term connotes a somewhat inchoate sense of layering. What is needed is some perspicuity on the nature of this production of political space.

First, a note on terms. *Jurisdiction* is both a spatial and a legal concept: it is a claim to governance that refers to the legal relationship between a politically organized community and the space it inhabits.³⁷ The openness of such a definition creates a supple vocabulary that can operate across cultural and ontological divides. The term *territory* is trickier to use cross-culturally, but while the political technologies associated with state management of space may differ from those of Indigenous territorial control, the term is used here to signal a common register of governance between settler and Indigenous governments that is centred on the authority to speak the law on particular ranges of land.

Though jurisdiction has been primarily understood through scale, Valverde argues that this has been a limitation in understanding, because jurisdiction *exceeds* scale.³⁸ In fact, as Sousa Santos points out, scale has hidden political realities,

³⁶ Arthur Manuel, “Who is Dependent on Whom?,” *Defenders of the Land*, December 5, 2011, accessed May 22, 2013, <http://www.defendersoftheland.org/story/297>.

³⁷ Jean Gottman, *The Significance of Territory* (Charlottesville: University Press of Virginia, 1973), 123.

³⁸ Valverde, “Jurisdiction as Scale,” 141.

appearing as “a politically neutral technical choice” on a map.³⁹ These hidden aspects of scale also hide the work of jurisdiction. As Valverde explains: “A fundamental insight from de Sousa Santos’s article but not explicitly articulated by him is that legal powers and legal knowledges appear to us as already distinguished by scale. Legal governance, in other words, is always already itself governed: and the governance of legal governance is the work of jurisdiction.”⁴⁰ Scale is no more fixed than hierarchy, Valverde explains, yet it is every bit as implicated in power relations. State claims to jurisdiction seek to naturalize its spatial differentiation, representing scale as impartial rankings whose inauguration is safely located outside the frame.⁴¹

In Canada, territorial, sovereign space is projected as a discrete, non-overlapping, absolute domain of space, despite how interpenetrated by capital and by competing jurisdictional claims its boundaries may be.⁴² Scalar hierarchies are produced through constitutional law but also through an active struggle between interests at different scales that seek to determine their spheres of power and interconnections.⁴³ For instance, the *Natural Resources Transfer Agreements Constitution Act, 1930*, transferred jurisdiction over natural resources from the Dominion of Canada to prairie provincial governments (Manitoba, Saskatchewan, and Alberta) and was the result of a protracted struggle over the division of powers between these scales of government. The shifting and political nature of scalar representation reveals the important work of jurisdiction in terms of organizing authority over land.

Under provincial and federal jurisdiction, land is parceled into departmental, ministerial, and third party oversight bodies. This neat scalar nesting of bureaucratic control was ostensibly disrupted in 1982 when the Constitution was patriated. Section 35(1) of the *Constitution Act* recognized and affirmed “the existing aboriginal and treaty rights of the aboriginal peoples of Canada.” Some argue that the inclusion of Aboriginal rights in the Constitution shifted the jurisdictional scales so that Indigenous peoples now occupy a place in the hierarchy. This interpretation is based on conventional representations of jurisdiction, such as the triangle, the ladder, or the pie. According to the Royal Commission on Aboriginal People, section 35(1) should have reconfigured the status of Indigenous peoples in Canada as a slice of the pie, equally dividing powers between federal, provincial, and First Nations orders of government.⁴⁴ However, the pie analogy—and the

³⁹ Ibid..Here, Valverde is offering her interpretation of de Sousa Santos.

⁴⁰ Valverde, “Jurisdiction as Scale,” 141.

⁴¹ Nicholas Blomley makes a similar point in “Law, Property, and the Spaces of Violence,” where he writes that liberalism tends to locate violence outside the law (“Law, Property, and the Spaces of Violence: The Frontier, the Survey, and the Grid,” *Annals of the Association of American Geographers* 93, no. 1 (March 2003): 121–41.

⁴² Neil Brenner, “A Thousand Leaves: Notes on the Geographies of Uneven Spatial Development,” *The new political economy of scale*, Roger Keil and Rianne Mahon, eds. (Vancouver, B.C.: University of British Columbia Press, 2009), 38.

⁴³ Ibid., 45.

⁴⁴ The authoritative text on this matter is the Royal Commission on Aboriginal Peoples (RCAP), which recommends that Aboriginal nations be seen and treated as a third order of government (Canada, Royal Commission on Aboriginal Peoples, *People to People, Nation to Nation: Highlights from the Report of the Royal Commission on Aboriginal Peoples* (1996), accessed online April 8, 2013, <http://www.aadnc-aandc.gc.ca/eng/1100100014597/1100100014637#chp7>.

power-sharing ideal it represents as a scalar reconfiguration—is undermined by other forms of spatial differentiation. Like the sheaf of transparencies that comprise the human body, a more complicated analysis of spatial differentiation is necessary to visualize the operations of power concerning jurisdiction. The internal parcelization of territorial space, the state's claims to absolute space, and the on-the-ground jurisdictional practices that codify and mark struggles over natural resources, all work to undermine representations of jurisdiction that neatly lay settler and Indigenous jurisdiction side by side, whether in scalar or other formations.

Though the space of state territory is projected as an undifferentiated, absolute, and bounded space, it is in fact nothing of the sort. Its feigned appearance of homogeneity effaces actual difference—for example, bodies of Indigenous law—in order to impose its own abstracting order.⁴⁵ The consequences of this abstraction for jurisdictional power are significant. Abstract space forecloses the need for a more concise categorization of territory, obscuring social relations and the distribution of resources.⁴⁶ Without a concise categorization of territory, a categorization of jurisdiction is also lacking, which results in a general uncertainty in society regarding the precise nature of governance and the question of who is responsible for the various operations of governance.⁴⁷ This obscurity further depersonalizes jurisdiction so that its abstract administration is mistaken for a kind of uniform equality. Richard Ford concludes that jurisdictional space is “conceptually empty” because it “tends to reduce space to an empty vessel for governmental power.”⁴⁸ The goal of this obfuscation is gapless maps of contiguous abstract space as far as the eye can see.

The stakes of this indeterminacy are the ways in which jurisdiction orders Indigenous peoples in space. But there is also another side to this equation. I work with the Algonquins of Barriere Lake, whose legal system is embodied in the Mitchikanibikok Anishnabe Onakinakewin, a sacred constitution that binds them to their territory in a relationship of care. The Barriere Lake provide just one example of how Indigenous peoples assert jurisdiction and interrupt the socio-spatial production of state territory and scale in two important ways. First, by invoking the Onakinakewin in opposition to destructive forestry operations on their lands, the Barriere Lake disrupt the notion of non-overlapping, absolute domains of space. The so-called Westphalian state system may have created new jurisdictional and administrative arrangements in which modern forms of authority could be rendered meaningful, but it did not necessarily create a new world

⁴⁵ Neil Brenner and Stuart Elden, “Henri Lefebvre on State, Space, Territory,” *International Political Sociology* 3 (2009): 358.

⁴⁶ Ford, “Law’s Territory,” 853.

⁴⁷ *Ibid.*, 854.

⁴⁸ *Ibid.* But Ford’s use of the term is restricted to its meanings within political liberalism. For example, his statement, “No particular set of rights and responsibilities naturally comes with residence in a given territory, and the boundaries of the territory itself are not natural,” excludes the criteria of Indigenous territorial jurisdiction from consideration (“Law’s Territory,” 900).

order from its imperial antecedents,⁴⁹ nor did it destroy the Indigenous legal and political orders that were already in place on these lands. Second, nation-to-nation relationships between Indigenous peoples and the state are embodied in oral agreements, treaties, and covenants, and in the exchange of wampum belts. For example, Barriere Lake's three-figure wampum, exchanged with British and French colonial governments, continues to model relations of coexistence that foreground Algonquin authority when the community enters into negotiations concerning their lands today. On the one hand, these inter-national agreements disrupt the representation of territorial space as non-overlapping and challenge the absolute domain of the state. On the other hand, these agreements can be seen as bolstering the state and creating its legal possibility, for they legitimize the state's existence and the settlers' presence on the land.

The Doctrine of Discovery and Jurisdiction in Canada

We have surveyed relationships between jurisdiction, sovereignty, and territory, but not the grounds on which colonial jurisdictional foundations were laid in Canada. By the time the British landed on what came to be Canada, the doctrine of discovery was already embedded in their common law. It was articulated in a memorandum for the Privy Council of Great Britain, which defined two doctrines for the establishment of British sovereignty in the colonies: the doctrine of discovery for uninhabited lands, and the doctrine of conquest for inhabited lands.⁵⁰ Obviously, Britain never colonized empty land, however, the term of discovery came to mean something different: "already inhabited nations were simply legally *deemed to be uninhabited* if the people were not Christian, not agricultural, not commercial, not 'sufficiently evolved' or simply in the way."⁵¹ In England, agriculture and enclosure emerged as central rationales for dispossession, most succinctly articulated by John Locke in 1689 and appropriated by a range of actors, including Emeric de Vattel (1714-67) who ridiculed the Papal Bull, 1494, which divided the world between Spain and Portugal. Vattel defended the right of all European nations to settle on land barely occupied by nomadic bands and to lawfully possess them by virtue of their use and need.⁵²

⁴⁹ James Tully describes how "the so-called 'Westphalian' system is actually an imperial system of hegemonic and subaltern states constructed in the course of 'interactions' between imperial actors and imperialised collaborators and resisters. It is the foundation of contemporary imperialism, laid in the colonial period and strengthened during decolonisation. Informal imperialism would scarcely work at all if these colonial foundations did not provide a historically sedimented background structure of institutions and relations of domination within which the more flexible relations of informal imperialism are exercised in the foreground" (*Public Philosophy in a New Key*, vol. 2, *Imperialism and Civic Freedom* (Cambridge: Cambridge University Press, 2009), 140-41).

⁵⁰ Dara Culhane, *The Pleasure of the Crown: Anthropology, Law and First Nations* (Vancouver: Talon Books, 1998), 47.

⁵¹ *Ibid.*, 48.

⁵² John Locke, *Two Treatises of Government* [1689], ed. Peter Laslett (Cambridge: Cambridge University Press, 1960). See also James Tully, *An Approach to Political Philosophy: Locke in Contexts* (Cambridge: Cambridge University Press, 1983); and, Emeric de Vattel, *The Law of Nations or Principle of the Law of Nature*, book 1, *Of Nations Considered in Themselves* [1758], eds. Baola Kapossy and Richard Whatmore (Indianapolis, IN: Liberty Fund, 2008).

I will not argue here that Canada was founded on the doctrine of discovery, since the history of treaty resists easy answers to its actual application. However, the doctrine is embedded in Canadian law through two central texts that I will focus on here: the *Royal Proclamation, 1763*⁵³ and Justice Marshall's decision in the United States case of *Johnson v M'Intosh*.⁵⁴

The imperial notion of discovery embedded in the *Royal Proclamation* is articulated through a double move of jurisdictional recognition and subordination. Issued in 1763 by King George III, the *Royal Proclamation* was designed to quell Pontiac's War, an Anishnaabek uprising comprised of the Three Fires Confederacy led by Obwondiaq, an Odawa warrior known by many historians as *Pontiac*. The war was triggered by the British assertion of jurisdiction over Indigenous lands upon their defeat of the French in the Seven Years War. The British gave every indication that their rule would disrupt the peaceable trade and social relations arranged with the Anishnaabe's former allies.⁵⁵ The *Royal Proclamation* contained language to assuage those fears; as Anishnaabe legal scholar John Borrows explains, "To alleviate conflict, the Royal Proclamation was declared to delineate boundaries and define jurisdiction between First Nations and the Crown."⁵⁶ But it also simultaneously consolidated British power over the New World in the face of Indigenous nations and competing European powers by burying the doctrine of discovery in its prepositional forms. By asserting that Indians live on "our Dominions, and Territories," (*emphasis mine*) the British attempted a jurisdictional transfer of Indigenous lands to European powers. While sovereignty had already been claimed through English "ceremonies of possession,"⁵⁷ this move placed Indigenous societies under the common law of the colonizing nation. Thus, a contradiction is present in the Canadian Constitution: while section 35(1) protects Aboriginal and treaty rights, section 25 enshrines the *Royal Proclamation* and, therefore, the colonial doctrine of discovery.

The *Royal Proclamation* cements an imperial property right: preemption, which is essentially the right of discovery. The royal prerogative lays out strict preemption rules making it illegal for Indigenous peoples to sell land to third parties unless they are first ceded to the Crown. Preemption is an exclusive, future right in discovered lands, or what is sometimes referred to as *European title*. Though preemption could be literally interpreted as a protection offered to Indigenous

⁵³ *Royal Proclamation, 1763* (UK), reprinted RSC 1985, App II, No 1 [hereafter *Royal Proclamation*].

⁵⁴ Walter Echo-Hawk, "Johnson v. M'Intosh & the Doctrine of Discovery in the United States: Impacts upon Federal Indian Law; and the Future of the Doctrine under the United Nations Declaration of the Rights of Indigenous Peoples" (presentation, International Seminar on the Doctrine of Discovery, Thompson Rivers University, Kamloops, BC, Secwepemcúlecw, September 20–21, 2012). Also, for a detailed discussion of the genealogy of the doctrine of discovery, see Robert J. Miller, Jacinta Ruru, Larissa Behrendt, and Tracey Lindberg, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford: Oxford University Press, 2010), 1–25.

⁵⁵ Olive P. Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times* (Toronto: McLelland & Stewart, 1994), 180–81.

⁵⁶ John Borrows, "Constitutional Law from a First Nation Perspective: Self-Government and the Royal Proclamation," *University of British Columbia Law Rev* 28 (1994): 27.

⁵⁷ Patricia Seed, *Ceremonies of Possession in Europe's Conquest of the New World, 1492–1640* (Cambridge: Cambridge University Press, 1995).

peoples against exploitation by settlers, Robert Williams argues that, more likely, preemption was sought by Whitehall as the most expedient way to protect its mercantilist interests.⁵⁸ Whatever the case, the exercise of preemption powers meant “the exercise of authority over the ‘owned’ Indian.”⁵⁹ The prepositional clause highlighted above makes this quite plausible.⁶⁰ From an Indigenous perspective, the *Royal Proclamation’s* more profound implications would unfold in the aftermath of King George III’s proclamation. In accordance with Indigenous laws and protocol, a meeting was held at Niagara between some 2,000 Indigenous chiefs and leaders and the British official William Johnson. The Treaty of Niagara (1764) reflects the deeper, mutual, and diplomatic commitments made between the Crown and Indigenous nations.⁶¹

In terms of the common law, the United States Supreme Court had the greatest impact on Canadian jurisprudence regarding Aboriginal rights.⁶² The US Supreme Court, in *Johnson v M’Intosh* (1823), stated that under the rights of the international law of the doctrine of discovery, the Christian discovering nation “automatically gained sovereign and property rights over the non-Christian, non-European peoples even though Indigenous nations were already occupying and using the lands.”⁶³ In *Johnson*, a case in which no Indigenous people ever appeared before the Court, Chief Justice Marshall decided that the doctrine of discovery was the originating source of Indian rights in the United States. Discovery gave title “to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.”⁶⁴ Though Marshall ultimately reversed his opinion in a later trial, his decision in *Johnson* attenuating Indian rights to occupancy and usufructuary rights became the most influential precedent for federal Indian law on the continent.⁶⁵

⁵⁸ Robert Williams Jr., *The American Indian in Western Legal Thought: The Discourses of Context* (New York: Oxford University Press, 1992), 237, cited in Culhane, *Pleasure of the Crown*, 56.

⁵⁹ Miller et al., *Discovering Indigenous Lands*, 107.

⁶⁰ Culhane argues that this exercise of preemption power is actually rooted in the doctrine of conquest and not in the doctrine of discovery (*Pleasure of the Crown*, 48). This seems logical, given that the king could hardly make assurances to Indian nations if the land was uninhabited. But in 1763, given the strong military alliances with Indigenous nations so desperately sought by the colonizers, the doctrine of conquest was hardly likely. However, the doctrine of discovery could accommodate the paradox of an inhabited land and the concept of *terra nullius*—vacant lands—so long as the British discovered a land of non-Christian strangers, whose forms of landholding did not conform to the cultivated enclosures of the British motherland.

⁶¹ John Borrows, “Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government,” in *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: UBC Press, 1997).

⁶² *Johnson v M’Intosh*, 21 US (8 Wheat) 543 (1823) [hereafter *Johnson*]. *Johnson* is one of three cases decided by Chief Justice Marshall pertaining to federal Indian law in what is referred to as the “Marshall Trilogy.” The trilogy also includes *Cherokee Nation v Georgia*, 30 US (5 Peters) 1 (1831) and *Worcester v Georgia*, 31 US (6 Pet.) 515 (1832).

⁶³ Miller et al., *Discovering Indigenous Lands*, 3.

⁶⁴ *Johnson*. See also, Robert A. Williams Jr., *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America* (Minneapolis: University of Minnesota Press, 2005), 51.

⁶⁵ In *Worcester v Georgia*, 31 US (6 Pet) 515 (1832), Justice Marshall decides that the relationship between Indian tribes and the federal government is a nation-to-nation political relationship and, as such, that the Cherokee Nation deserved self-governing rights.

Discovery haunts jurisprudence on Aboriginal rights in Canada to this day. Each time discovery is invoked by the Crown to defend the violation of Indigenous jurisdiction over their lands, the racist foundations of Canadian sovereignty are reassembled within the structures of state power. In 1888, *St. Catherine's Milling Lumber Company v The Queen*⁶⁶ established in Canadian common law that Indigenous land holdings could not be considered proprietary in the sense of a fee simple interest in land. The decision rested on the judge's interpretation of the *Royal Proclamation*, which was understood to give natives only rights of occupation and use. The judge also referred directly to *Johnson*, concluding that the doctrine of discovery meant that Indigenous rights amounted to "a personal and usufructuary right dependent on the good will" of the Crown.⁶⁷ Until the majority decision in *Calder et al. v Attorney-General of British Columbia* (1973),⁶⁸ when Nisgaa title was seen to derive from pre-existing occupation and social organization, the doctrine of discovery had been successfully wielded innumerable times by the Crown to extinguish any Aboriginal title claim to the land.⁶⁹ In *Calder*, Justice Judson recognized pre-existing title, explicitly refuting the *Royal Proclamation*.⁷⁰ For the first time, the courts acknowledged that Indigenous rights were not extinguished when Canada claimed sovereignty over these lands.

In the dissenting decision for *Calder*, however, Justice Hall favourably cited the doctrine of discovery in his judgment.⁷¹ According to Hall, the tenets of Crown sovereignty and preemptive rights could still be upheld on the basis of the doctrine, as articulated in the *Royal Proclamation* and *Johnson*. The doctrine of discovery would in fact continue to be invoked by the Crown, irrespective of groundbreaking legal reasoning refuting its historical basis. In 1984, *Guerin v R*⁷² further defined title as a *sui generis* right based on pre-contact occupation predating the *Royal Proclamation*. The *Proclamation* was judged to be a document that merely recognized, but did not create, Aboriginal title. But although the *Proclamation* was rejected as the source of Aboriginal title, Justice Dickson maintained that underlying title to the land still belonged to the Crown by virtue of discovery.⁷³ Although recognized as having a "unique" source of rights in the land, Indigenous jurisdiction was still rendered subordinate to state property by virtue of discovery.

The *Delgamuukw* court rejected the doctrine as well, to limited effect. In *Delgamuukw v British Columbia* (1997),⁷⁴ the Supreme Court of Canada rejected the Crown's arguments of *terra nullius* and discovery and found that Aboriginal

⁶⁶ *St. Catherine's Milling and Lumber Co. v The Queen* (1888) 14 App Cas. 46 (JCPC).

⁶⁷ Jennifer Reid, "The Doctrine of Discovery and Canadian Law," *Canadian Journal of Native Studies* 30, no. 2 (2010): 345.

⁶⁸ *Calder et al v Attorney-General of British Columbia* [1973] SCR 313 ¶ 26 [hereafter *Calder*].

⁶⁹ See, for example, *White and Bob* (1964), 50 DLR (2d) 613 (BCCA), aff'd (1965), 52 DLR (2d) 481 (SCC).

⁷⁰ *Calder* at 26.

⁷¹ Justice Hall, citing *Regina v White and Bob*, [1964] BCJ No 212, 50 DLR (2d) 613, called the *Royal Proclamation* a "charter of Indian rights" (Ibid. at ¶ 138, Hall J, dissenting). As for *Johnson v McIntosh*, Justice Hall called the case "the locus classicus of the principles governing aboriginal title" (Ibid. at ¶ 121) (cited in Reid, "The Doctrine of Discovery" at 347).

⁷² *Guerin v R*, [1984] 2 SCR 335 [hereafter *Guerin*].

⁷³ *Guerin* at 93.

⁷⁴ *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 [hereafter *Delgamuukw*].

title was a broad right in land entrenched in section 35 of the Constitution. The Supreme Court decided that the province lacked the constitutional authority to extinguish Aboriginal title in 1871, when British Columbia joined Canada. British Columbia lacked this authority due, notably, to the machinery of jurisdiction: since Aboriginal title is within exclusive federal jurisdiction, the power to extinguish Aboriginal title is an exclusively federal power. A cynical grounds for recognition, as Louise Mandell points out, *Delgamuukw* also entrenched the subordination of Indigenous societies to Canadian law. The presumption of underlying Crown title shifts legislative authority over resources away from Indigenous peoples as well. In this sense, *Delgammukw* represents a loss, since it essentially maintains colonial preemption rights of discovery.

All eyes are now on a recent ruling that weighs in on the constitutional issue that *Delgamuukw* left open, that of whether provincial land and resource laws were applicable on Indigenous lands. On behalf of the Xeni Gwet'in First Nations Government and the six bands that make up the Tsilhqot'in nation, Chief Roger William brought legal proceedings against British Columbia to challenge the authorization of logging on the Tsilhqot'in's traditional territories in the Cariboo-Chilcotin region of northern British Columbia. In *Tsilhqot'in Nation v British Columbia* (2007),⁷⁵ the province argued that even if Aboriginal title did exist, the province could still exercise legislative jurisdiction. Justice Vickers disagreed. He held that the *Forest Act* did not provide statutory authority for the province to grant licenses on Aboriginal title land, which would unjustifiably infringe on Tsilhqot'in jurisdiction over their lands. The British Columbia Court of Appeal overturned Vickers's findings on Aboriginal title, but the case was recently heard by the Supreme Court of Canada and a decision is pending this year.

There is the possibility that the courts could go further in recognizing Indigenous jurisdiction over their lands, and this potential risk to the Crown is mitigated in part by the federal land claims process. It was the *Calder* decision in 1973, after all, that blindsided the government and prompted it to make a statement of policy that re-opened the treaty process for the first time in fifty years. When the split decision came down, narrowly defeating a ruling (on a technicality) that recognized the Nisga'a Nation's pre-existing title to the creation of British Columbia, Prime Minister Pierre Trudeau infamously declared: "Perhaps you had more legal rights than we thought you had . . ." ⁷⁶ The fear of expanded jurisprudence on Aboriginal rights—as set out in landmark cases such as *Delgamuukw*, *Marshall*, and *Haida Gwaii*⁷⁷—have perversely played a hand in expediting

⁷⁵ *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 [hereafter *Tsilhqot'in*].

⁷⁶ Quoted in J. R. Miller, "Great White Father Knows Best: Oka and the Land Claims Process," *Native Studies Review* 7, no. 1 (1991): 38.

⁷⁷ In *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, the Supreme Court of Canada recognized Aboriginal title as the collective proprietary interests of Aboriginal peoples in their traditional territories.

R v Marshall; *R v Bernard* 2005 SCC 43 at first recognized, then reversed recognition of, Miq'mak treaty rights to pursue commercial fishing rights. *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511 set an important precedent around the "duty to consult and accommodate" First Nations on lands where Aboriginal title has been asserted though not necessarily recognized by the courts.

policies and legislation to resolve the problem of overlapping jurisdiction. The extinguishment clause of the Comprehensive Land Claims policy is a prime example of this expedition. As Asch and Zlotkin note: “Such a clause would counteract the possibility that the courts could interpret Aboriginal rights and title more broadly or differently than the rights set out in a comprehensive claims settlement.”⁷⁸ Currently, in exchange for settlement “rights,” Indigenous peoples must convert their lands into fee simple: one method of jurisdictional termination.

Conclusion

In Canada, the state’s claims to jurisdiction over Indigenous lands assume the authority to inaugurate law where law already exists and presume the new forms that law will take. These presumptions preclude the asking of pertinent questions about which laws should apply on these lands. Though a neglected question in legal theory,⁷⁹ scholars and thinkers have long commented from an Indigenous perspective on the matter of not *which* law but *whose* law applies to all living things on Indigenous territories. In *Two Families*, Nihiyow scholar Harold Johnson explains to non-Indigenous people the authority by which settlers were offered a place in Indigenous territory: “When your ancestors came to this territory, *Kiciwamanak* [cousin], our law applied. When your ancestors asked to share this territory, it was in accordance with our law that my ancestors entered into an agreement with them. It was by the law of the Creator that they had the authority to enter treaty.”⁸⁰ In this ontology of jurisdiction, it is the treaty relationship between Indigenous peoples and newcomers that governs the use and settlement of territory. For those bands and nations who have not settled treaties, that path may still lie ahead and the protocols for right relations should flip the colonial terms of recognition that currently condition settler sovereignty in Canada.

As I have stated, to engage in the question of what it means to decolonize law, we must ask by what authority a law has the authority to be invoked and to govern. Jurisdiction derives its power to allocate authority from many sources. A reconciliation of relations between Indigenous and settler societies requires the radical deconstruction of the authority by which Canada invokes its sovereignty and a re-examination of the jurisdictional orders that underpin Indigenous forms of entitlement to their lands. The source of jurisdiction within Indigenous legal orders is always rooted in place and in the ontologies of care (or, as Leanne Simpson calls the basis of Indigenous nationhood, “ecologies of intimacy”⁸¹) that renew this legal responsibility for place from one generation to the next. Colonialism was

⁷⁸ Michael Asch and Norman Zlotkin, “Affirming Aboriginal Title: A New Basis for Comprehensive Claims Negotiations,” in *Aboriginal and Treaty Rights in Canada*, ed. Michael Asch (Vancouver: University of British Columbia Press, 1997), 213.

⁷⁹ Some notable exceptions in the field include Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press; New York: Oxford University Press, 1989) and Peter Rush, “An Altered Jurisdiction: Corporeal Traces of Law,” *Griffith L Rev* 6 (1997): 144–68.

⁸⁰ Harold Johnson, *Two Families: Treaties and Government* (Saskatoon, SK: Purich Publishing, 2007), 27.

⁸¹ Leanne Simpson, “Anishnabe Nationhood,” *Nation to Nation Now: The Conversations* (symposium, Toronto, March 23, 2013).

legal in European law, and its principle of discovery remains imprinted on the legal systems of settler colonies today. The contestation of this doctrine and, the questions surrounding the state's authority to liberate itself from earlier law, can be called into question by struggles in the register of jurisdiction.⁸²

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⁸² For more on the key principles of modern sovereignty, see: Martin Loughlin, "Ten Tenets of Sovereignty," *Sovereignty in Transition*, Neil Walker, ed. (Oxford; Portland Oregon: Hart Publishing, 2003).