Law, Literature, Postcoloniality

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Notes from the Editor  
Pamela McCallum

During the summer of 2001 an exhibition of art, *Museopathy*, held at different sites in Kingston, Ontario, explored the interaction between the global gestures of contemporary art and specific local sites. One of the most striking pieces in the exhibition was an installation sculpture, *Isolated Depiction of the Passage of Time*, by the Canadian artist Brian Jungen, exhibited at the Correctional Services of Canada Museum in the Kingston Penitentiary. Onto the shape of an industrial shipping palette, beautifully constructed in red cedar, Jungen stacked twelve columns of plastic trays, normally unregarded objects encountered day to day in cafeterias and fast food restaurants. The bright colours—orange, yellow, mauve, red—combine and recombine to produce ribbons of colour, a fanciful play of shadings and contrast, much like the minimalist art of the 1960s which stressed the “objecthood” of art, often condensing sculpture to basic geometric shapes and tones. At the same time that Jungen situates *Isolated Depiction of the Passage of Time* within the minimalist tradition, inviting viewers to marvel at the complex patterning of the columns of trays, he constructs a compelling narrative about law, race, imprisonment and the continuing effects of colonization. The number of trays is not simply a playful mixture of structure and colour. Instead, it represents the disproportionately large number of First Nations men who are in Canadian prisons, men with whom he shares indigenous ancestry. The colours are coded to the categories of sentences they are serving. In raising the issue of the many indigenous men incarcerated within the prison system of a former settler colony, Jungen politicizes minimalist aesthetics and challenges viewers to think through the reasons why so many indigenous men are imprisoned. Such a process of questioning might elicit a reconsideration of the title: while *Isolated Depiction of the Passage of Time* unquestionably evokes the monotonous existence of the prisoner, it also opens up into a consideration
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of the “passage of time” in the five centuries since the settlement of the Americas. But this is not all. The hollow interior of the sculpture evokes an imaginative bid for freedom by a Canadian inmate who hid inside stacked dining hall trays to escape when they were taken outside the prison walls. In the interior of the sculpture a television set, visible only by the dim glow of its screen, plays and replays the popular 1963 film *The Great Escape*, a paradigmatic narrative about longings that circulate within prisons, and other social institutions.

Jungen’s extraordinary artwork is a remarkable reflection on the intersection of postcolonial existence and structures of the law; it is an exceptional representative of the range of creative works that engage these pressing questions. *ARIEL* is honoured to publish this special issue on “Law, Literature, Postcoloniality” edited by Cheryl Suzack and Gary Boire. One of the key issues in postcolonial studies has always been an intervention into the master narratives of the colonizer, and law is undoubtedly one of the crucial discourses that circulate around histories of colonization. Suzack and Boire have brought together a series of articles that explore significant issues in constitutional law, identity politics, human rights, narrative representations, the construction of the colonial subject and more. Even at the time when interdisciplinary conversations have long been recognized as a cornerstone of postcolonial studies, the scope of disciplinary perspectives included here cannot fail to be impressive: law, discourse theory, international studies, communications, literary studies, anthropology, philosophy—to offer only a partial list.

The editorial board of *ARIEL* is grateful for the efforts of the guest editors and contributors who have produced “Law, Literature, Postcoloniality.” We hope that this special issue will spark spirited discussions and further research on these crucial issues for postcolonial studies.
There are no easy conventions for the creation of meaning.
Robert Cover, “Nomos and Narrative” (25)

In writing this introduction to “Law, Literature, Postcoloniality” I borrow the term “essentially contested” from W.B. Gallie’s *Philosophy and the Historical Understanding* as a resonant concept with which to mark the interlocking terrain addressed by these ten essays. Gallie’s analysis of essentially contested meanings privileges concepts emergent within a field of social engagement that give rise to conflicted sets of social values and divergent practices of interpretation which fail to achieve resolution through imposed principles of universal judgement. His examples of such terms include “art,” “democracy,” “religion,” and “social justice” (157), but the broader reach of his argument extends to the practical realm of human social activity in which these disputes vary according to their contested meanings. As he states, “concepts which are essentially contested [are] concepts the proper use of which inevitably involves endless disputes about their proper uses on the part of their users” (158). For Gallie, the apposite role of social criticism is to distinguish these terms as sites of communal interaction that by their very nature are irreducibly different from each other and cannot be resolved through the application of universal principles. As he explains, “if the notion of logical justification can be applied only to such theses and arguments as can be presumed capable of gaining universal agreement in the long run, the disputes to which the uses of any essentially contested concept give rise are not genuine or rational disputes at all” (183). What resonates as the force of the social in essentially contested terms is their ability to articulate the “essential contestedness [of] our basic moral notions and principles,” which matter to us, as Gallie claims, insofar as
they designate conflicts that gain their oppositional force in their “wide bearings upon human life” (190).

To consider the terms law, literature, postcoloniality as essentially contested according to Gallie’s definition necessitates a reassessment of these concepts in their broader engagements with social sites of discrepant meaning-making. Given the array of cultural and political issues addressed here, these essays signal the urgency and significance of such an undertaking. On the one hand, these papers challenge the interrelationships between law, literature, and postcolonial analysis through their engagements with contemporary issues that represent formative sites of contemporary cultural conflict. They examine issues generated in the encounter of law with indigenous cultural practices (Bracken, Cheyfitz, Karno), law in its manifestations through colonial governance (Mawani, Reichman), and law at the intersection of postcoloniality, violence, and legal ethics (Findlay, Gottlieb, Fitzpatrick). Their attention to law’s generative capacities signals the inescapability of law’s continuance at the “forefront of that very relation” in which the “West’s relation to its ‘other’” gets constituted and critically explored through the terrain of the postcolonial (Fitzpatrick and Darian-Smith 4). Yet, these essays also examine the inescapable violence of colonial conflicts by asking what form postcolonial legality might take in generating fundamental human rights and social justice. They address the uneasy relationship between human rights violations and colonial-imperial legacies to articulate the “becoming-time” of a postcolonial future that has yet to take shape (Patton, Ratti).

On the other hand, these essays also participate in a broader critical practice that may be characterized according to the “world building” capacity that Robert Cover identifies with law’s social and normative functions. For Cover, the legal system’s “professional paraphernalia of social control” represents but a small part of the wider legal habitus that articulates the “prescriptions,” “narratives,” “meanings,” “constitutions,” “epics,” and “scriptures” of the “world in which we live” (4–5). Cover argues that this normative universe, which is so often taken up by the “formal institutions of law,” is also established through a generative “system of tension or a bridge linking a concept of reality to an imagined alternative” that extends beyond and challenges law’s seamless associa-
tions with “justificatory enterprises” (9). He claims for the world-building competencies of law a more utopian project of “alternity” which “entails the application of human will to an extant state of affairs as well as toward our visions of alternative futures” (9). An essential task in creating this future resides for Cover in our ability to formulate “legal meaning” in a two-fold initiative that not only provides the source for “a challenging enrichment of social life,” but also represents “a potential restraint on arbitrary power and violence” (68).

The contradictions inherent in reformulating colonial laws to construct an alternative site of justice and moral obligation are explored in several papers in this issue, which probes the capacity of imposed legal frameworks to realize postcolonial ends. As many of the essays show, the colonial past with its “jurisgenerative” narrativization of events continues to represent our inherited order or “normative world,” a world that Cover defines as staging the habitations of our “nomos,” in which “[w]e constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void” (47, 4). Colonial legal inheritances persist in shaping and hierarchically ordering our social and legal world as essays by Christopher Bracken, Renisa Mawani, Eric Cheyfitz, Ravit Reichmann, Isobel Findlay, and Jason Gottlieb demonstrate. These scholars reveal that the project of conceptualizing justice in the interests of the powerless rather than the powerful remains urgent, even as we have been forced to recognize our implication in global legal realities in which “the paradigm of universal human rights” are giving way to “the paradigm of trade-related, market-friendly human rights” (Baxi 552). In linking law, literature, and postcoloniality, contributors articulate a conceptual shift that situates the postcolonial as a site of social positioning, one that varies across a spectrum of contiguous and uneven emplacements that need to confront the “globalization of law” in its new forms of “legal imperialism” (552). In this regard, Peter Fitzpatrick’s engagement with the challenges of articulating a form of postcoloniality legality is highly suggestive.

The active reworkings of the law and literature paradigm, in which several of these essays take part, are also enabling new understandings from which to assess the social embeddedness of both disciplines and
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their contributions to the cause of social and legal redress. Essays by Paul Patton, Valerie Karno, and Manav Ratti examine how literature provides a means for investigating epistemological and hermeneutical questions, questions that are not only imperative to our postcolonial politics, but also add to the enrichment of our current theories about the relationships between colonizing and colonized peoples. Their contributions focus on the capacities of literature to render visible the “unhistorical lives” (Ondaatje 59) that postcolonial writers have long been summoning to “reflect on the meaning and achievement of justice” (Morawetz 451). The creative and interpretive dimensions of their contributions shape and inform the transformational capacities that all of these essays propose in thinking together law, literature, postcoloniality. Collectively, the essays in this special issue participate in a continuing project that foregrounds the contested yet interrelated terrain of these terms while offering a necessary beginning point for further reflection and analysis.

Note
1 I would like to thank my co-editor, Gary Boire, for the pleasure of working with him on this project. Our collaboration was always rewarding and enjoyable. I am also grateful to the energy, critical insight, and intellectual support of Nancy Van Styvendale whose assistance was invaluable to the completion of this work. Lastly, I would like to thank Pamela McCallum for her excellent editorial advice and for the opportunity to work with the ARIEL team.

Works Cited
“Sovereign is he who decides on the state of exception.”

In a study of the “solidarity” between democracy and totalitarianism, Giorgio Agamben observes that there are two canonical approaches to the interpretation of power today. The “traditional approach” balances juridical models, which examine the legitimation of power, with institutional ones, which examine the organization of the state. The “biopolitical” approach assumes that power is exercised not at the level not of law, nor that of the state, but at the level of life itself. Biopolitical power—biopower—takes administrative charge of life by means of two technologies: the disciplines, which tend to grow the body's forces, and regulatory controls, which tend to foster the life of “the species.” Agamben seeks the “point of intersection” between the two approaches (6). What hinge joins the juridico-institutional apparatus with the proliferation and regulation of life? Agamben points out that the sovereign seizes hold of life by making an exception. Such is “the paradox” of sovereignty (15). The sovereign stands inside and outside the law simultaneously. He, or, in the present case, she defines the sphere of the law's validity by deciding what can be lawfully cast beyond it, inscribing within the body of the law an “exteriority” that “animates it and gives it meaning” (18 and 26). This exteriority is life itself. It is what in the law undoes the law, for life itself—bare life—is what can be killed without therefore being murdered (28).

The state of exception, according to Agamben, is the fundamental political structure of “our age” (20). When he says “our” age, though, he assumes we know who “we” are. Hence to understand what age is ours we must first determine our genre. We have to decide what kind “we” are. There can be neither kind nor class, however, neither genus nor
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genre, without the exception. A genre includes its exception in the form of an exclusion, a trait that belongs without belonging (18). Inclusive exclusion is therefore the very law of genre. Agamben says it is law in its “originary” state (26). “Law is made of nothing,” he explains, “but what it manages to capture inside itself through the inclusive exclusion of the exceptio” (27). To consolidate itself, the law suspends itself, addressing its performative violence to an “exteriority” that it includes. Hence the exceptional, sui generis, nature of the exception endows the law with its “particular,” sui generis, “force” (18). What it captures, and what sets it in action, is what it bans.

The space of exception is “unlocalizable,” but Agamben claims that “our age” nevertheless grants it “a permanent and visible location” in the concentration camp. The camp is a modern paradigm, not just a space of confinement, but “the absolute space of exception” (20). The exception, however, is what every paradigm excludes. It should hardly come as a surprise, then, that an exception inevitably emerges to the paradigmatic exception. The European powers used to project “a free and juridically empty space”—the phrase is Carl Schmitt’s—onto the surface of “the New World” (36). For centuries the Americas—and among them the Canadas—belonged without belonging to the European sovereigns. In Canada today the state of exception is distributed across “the land itself.” The crown enjoys paramount title, but the crown’s title includes, in the form of a “burden” that it simultaneously excludes, the prior title of aboriginal societies to the same land.

The title question first came before the Canadian courts in May, 1885. The province of Ontario asked the Chancery Division of the High Court of Ontario to stop the St. Catharine’s Milling and Lumber Company from cutting and removing timber from an area northwest of Lake Superior. The province argued that it had not granted the company permission to log (R v. St. Catharine’s Milling and Lumber Company, OR Vol. 10, at 196–7). The company responded that it had received permission from the government of Canada. The court had to decide whether the disputed lands fell under provincial or federal jurisdiction. The decision hinged on the question of aboriginal title. The company argued that the lands had “until recently” been claimed by bands of the Saulteaux First Nations.
A delegation of Saulteaux chiefs, however, had ceded aboriginal title to the Dominion of Canada in the Northwest Angle Treaty of 1873 (Treaty Three). The company argued that title now vested in the federal crown (198–9). The Attorney General for Ontario responded that aboriginal people had no title to cede. They had only a right to occupy the land. The treaty, moreover, had extinguished that right and did not transfer it (199). Aboriginal title—indeed aboriginality itself—emerged onto the surface of Canadian legal discourse in a conflict between two determinations—the dominion and the province—of one sovereign.

The case was appealed twice before it went before the Judicial Committee of the Privy Council of Great Britain. Lord Watson delivered the Committee’s verdict in 1888. He found that the disputed area came under the Royal Proclamation of 1763, issued by George the Third shortly after the Treaty of Paris. The Proclamation, wrote Watson, grants aboriginal people “a personal and usufructuary right” to their traditional “hunting grounds” but makes that right dependent on the sovereign’s “Will and Pleasure” (St. Catharine’s Milling and Luber Company v. The Queen 14 AC, at 53–4; The Royal Proclamation, Act 7, 1763, 4–5). It is a “personal” right because lands reserved for aboriginal people can be surrendered only to the crown. It is “usufructuary” because it entitles aboriginal people to harvest the fruits of the lands and waters. It is the sovereign’s to give, though, and the sovereign’s to take away. According to the Proclamation, the lands set aside for aboriginal people are “parts of Our dominions and territories” (4–5). Watson took this to mean that the sovereign has “a substantial and paramount estate, underlying the Indian title.” The sovereign’s underlying title becomes a “plenum dominium,” he added, as soon as “the Indian title” is “surrendered or otherwise extinguished.” He declined to outline “the precise quality” of the “Indian right” (55), but he remarked three pages later that “the Indian title” is “a mere burden” on the sovereign’s title (58). Indeed the law conceives of aboriginal title as a white man’s burden in the classic sense: the sovereign has a chivalric duty to protect aboriginal societies from exploitation by third parties. It is a burden that survives to this day.

So in 1763, the crown, at its pleasure, created a state of exception. It gave aboriginal people a title that belongs without belonging to the
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genre of “title,” a right that belongs without belonging to the genre of “right.” The inclusive exclusion of one title both inside and outside another is not an anomaly of Canadian law. Sovereign power, according to Agamben, “is this very impossibility of distinguishing between outside and inside” (Homo Sacer 37). The sovereign occupies the threshold between the rule and the exception and so can consolidate its own title only by inclusively excluding another, more original title.

Yet the Proclamation theory was to become the exception rather than the rule in Canadian law. By 1997 the courts had decided that aboriginal title has its source instead in the common law. In fact, as Kent McNeil points out, they had found not one common-law source, but two, and were cautiously “vacillating” between them. McNeil surveys both sources in his 1989 book, Common Law Aboriginal Title. The first is occupation. The common law has long acknowledged that the occupation of land constitutes prima facie proof of possession (Common Law Aboriginal Title 73–4, 197). Occupation, moreover, is a matter of fact. You are assumed to be in occupation if you have exclusive control of a parcel of land and intend “to hold or use it” for some purpose (201). Nobody disputes that aboriginal societies have been on the land in Canada since time immemorial. Possession, however, is matter of law. Hence it can only be established within a legal system (197). Aboriginal societies could not have had possession of the land until the common law was extended to Canada. So here is the question: does an occupation that predates the law constitute proof of possession under the law?

The acquisition of territory is the concern of international law (the law between states). Historically, though, while English municipal law (the law within the state) conceded that it the crown’s right to acquire foreign territories, the English courts nevertheless reserved their right to decide exactly how a territory was acquired (131). By the end of the eighteenth century, they had recognized three modes of acquisition: conquest, cession and settlement. How did the sovereign acquire those territories that now comprise Canada? The Supreme Court of Canada ruled in 2004 that the First Nations were never conquered. Many, however, signed treaties with the crown, which is a form of cession. Others, such as Nisa’a and Tsimshian First Nations, tried to negotiate treaties in
the nineteenth century, but until the end of the twentieth century the crown declined to negotiate treaties with them. What then is the legal status of an inhabited territory that was never conquered, nor ceded, but was settled nonetheless?

McNeil argues that English law applied to foreign territories as soon as the crown acquired them. The law assumed, moreover, that the people who were then in occupation had possession of the land (206). They enjoyed the legal status of “mere possessors,” and “a mere possessor whose possession is not known to be wrongful,” according to McNeil, “has a presumptive title which enables him [or presumably her] both to defend and recover possession” (207 and 75). He calls this the doctrine of common law aboriginal title. It is a genre that extends to all of the lands occupied by aboriginal people when the crown asserted sovereignty and includes the subsurface and whatever minerals it contains. Furthermore it entitles the possessors to fee simple estates. No member of an indigenous society, though, would have a “severable,” that is, “individual,” estate; title would instead vest in “all members” and would include not only reserve lands, but lands traditionally used for resource extraction (213).

The common law, however, is just one source of aboriginal title. The second is customary law. Today the courts acknowledge that when Europeans first arrived in Canada, aboriginal people were already here, using the land, living in organized societies, and following their own traditions, rules and customs. But were the rights they enjoyed under customary law carried forward into the common law post-contact? According to the doctrine of recognition, the residents of an acquired territory lose what rights they had under customary law unless the crown expressly acknowledges those rights, for example in legislation (166). According to the doctrine of continuity, the common law recognizes customary laws governing civil matters, such as property rights, provided there is nothing repugnant in those laws (181). McNeil argues that the courts have historically tended to favor continuity over recognition. In 1918, in *R v Southern Rhodesia*, Lord Sumner ruled that private property rights survive the act of conquest unless the crown explicitly states its intention to diminish or modify them. In 1921, in *Amodu
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*Tijani v Secretary, Southern Nigeria,* Viscount Haldane found that communal private property rights survive the act of cession even though the underlying title to the land passes to the crown.⁷

The acquisition of territory does not replace one law with another, but rather opens up a place for one law within the other, establishing the sovereign’s authority where the sovereign has no authority. Customary law belongs without belonging to the common law. It folds into it and flows out of it simultaneously. It is that which in the law suspends the law (Derrida “Force of Law” 991). Hence the state of exception conjures up the specter of a law that is both inside and outside the law: a law that both obeys and breaks the law. What kind of law does violence to the law in the form of the law? Walter Benjamin identifies two great genres of violence. There is a violence that makes and preserves the law, and there is a “hostile counterviolence” that destroys the law (241, 249, 251). Law-making violence is “mythic” and tends to preserve the law from the inside; law-destroying violence is “divine” and tends to undo the law from the “outside” (249, 251). There is, however, another genre of violence. Benjamin mentions it, but he does not name it, perhaps because it escapes the opposition between the mythic and the divine altogether. This other, nameless violence erupts inside and outside the law simultaneously. Benjamin finds its traces in the deeds of the criminal mastermind: “In the great criminal this violence confronts the law with the threat of declaring a new law” (241). The “public” is horrified by it. The state, in contrast, fears it, not because it breaks the law, but because it sets up “a new law” within the law. What is frightful is the “lawmaking character” of the lawbreaking act (241). Jacques Derrida, in his commentary on Benjamin, calls it “mystical” violence and observes that it is neither legal nor illegal in the moment when it sets into action (“Force of Law” 943). But it is no longer a criminal violence. It is instead fully legitimate “What the state fears,” Derrida confirms, “is not so much crime or brigandage, even on the scale of the mafia or heavy drug traffic . . . The State is afraid of fundamental, founding violence, that is, violence able to justify, to legitimate (begründen, ‘to found’) or to transform relations of law . . . so to present itself as having a right to law . . . a violence that is not an ac-
incident arriving from outside the law” (989). What Canada fears today is not the drug lord, but the aboriginal fisher, for only the subject of aboriginal rights has the authority to set up a new law within the law. In May of 1984 Ronald Edward Sparrow was fined for fishing with a net that exceeded the maximum length allowed under the Musqueam band’s food fishing license. He responded that his aboriginal right to fish outweighed the sovereign’s right to regulate the fishery. He was neither convicted nor acquitted (R v Sparrow 1 SCR, at 1083 and 1121). Instead, the Supreme Court of Canada used his case to outline a test for deciding in what circumstances the sovereign can justifiably infringe an aboriginal right, a test for balancing the rule against the exception. Sparrow enjoyed the kind of right that falls both inside and outside the law.

McNeil agrees that “local law, whether customary or otherwise” might well prove to be “a good source of indigenous rights, including land rights,” (Common Law 193) but he warns that it is difficult to establish the principles of customary law in court, in part because “the past of indigenous groups,” as he puts it, is “obscured in legend and myth” (214). The Supreme Court of British Columbia shared his ethnocentrism and so, in 1991, it confirmed his fears. The hereditary chiefs of the Gitxsan and Wet’suwet’en nations had filed suit in 1984 against the province of British Columbia, claiming ownership of, and the right to govern, traditional Gitxsan territories bordering the Skeena, Nass and Babine Rivers, and traditional Wet’suwet’en territories bordering the Bulkley and Fraser-Nechako Rivers. The Gitxsan proposed to recite oral histories called adaakw in order to establish their pre-contact occupation of the land; the Wet’suwet’en proposed to perform traditional songs called kungax for the same purpose (Culhane 120). The trial judge allowed the evidence to be heard under an exception to the hearsay rule but found in his final, 1991 decision that adaakw and kungax were of “dubious value” in proving the use and occupation of land (Delgamuukw v. British Columbia 79 DLR 4th at 260). The Supreme Court of Canada would later find that the problem lay not in the supposed “obscurity” of aboriginal legend and myth but in the trial judge’s treatment of evidence (Delagmuukw v. British Columbia 153 DLR 4th at 230).
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McNeil remarks that the courts could relieve the plaintiffs of the burden of proof by displacing aboriginal title from customary law to the common law (304). Juridical utterances, he notes, have substantial performative force, but “judges” have so far declined to mobilize it in the defense of aboriginal rights: “the fact is that judges have not performed the law-making function which on this view should be assumed by them” (304). He nevertheless warns them to handle it with caution. The aim is not to overturn the law, but to preserve it from that nameless violence which threatens to declare a new law from inside the law. The result is a benevolent and scrupulously well-intentioned assimilationism.

The law-making function, however, is not without its dangers. The fact that judges have the power to make a law that goes against the law does not necessarily mean that they will deploy their power in favor of aboriginal people and interests. McNeil is aware of the danger. Indeed he finds an example of it in the United States Supreme Court’s 1823 decision in Johnson v McIntosh. English law says there are three ways of acquiring territory. Chief Justice Marshall, however, added a fourth: discovery. The First Nations of North America were the rightful occupants of the soil, he wrote, and occupation gave them a just claim to possession. Discovery nevertheless gave the discovering nation ultimate title and the “exclusive right” to acquire the land from its occupants. But its occupants were not prepared to give it up (Johnson v. McIntosh, 8 Wheat. 543 at 572–3 and 587). The discovering nation therefore had two choices: it could either abandon the country altogether or enforce its claims by the sword (590). The British crown elected to conquer territories that already belonged to its dominions. It waged war on its own subjects (McNeil Common law 246). Marshall conceded that it is “extravagant” to convert a title won by discovery into a title won by conquest, but he observed that it had become “the law of the land” (591). McNeil accuses him of making a law that is doubly against the law: “what Marshall did was invent a body of law which was virtually without precedent” (301). The example indicates that there is no way to determine, in advance, what kind of law the law-making function will make. Hence there is no solid ground for asserting that common law is better suited than customary law to defend aboriginal title.
McNeil nevertheless goes on to conclude that Canadian courts have had “ample opportunity” to break with a tradition of law that breaks the law and to return instead to the “fundamental principles of the common law,” for if the land’s “indigenous occupiers” did have “a right to fee simple estates” when the British crown asserted sovereignty over its North American territories, he argues, then “(statutory bars aside) no one can contend that it is too late to declare the law, and enforce the right” (304). But the courts have chosen instead to create rights that belong without belonging to the genre of rights: “They have purported to accord land rights of some sort to indigenous people, but have not felt constrained to equate the interest held by them with any precise English law interest” (303). In Canada, these rights that are not quite rights have come to be known as *sui generis* aboriginal rights.

Ironically, the Supreme Court of Canada brought aboriginal title into the common law in the 1970s—but only to chase it out again. The Nisa’a tribal council asked the Supreme Court of British Columbia in 1967 to declare that the aboriginal title to the Nass River valley had never been extinguished. The trial judge found in 1969 that even if an aboriginal title had existed at common law, it had been “totally extinguished” prior to 1871, the year British Columbia entered confederation, by thirteen colonial acts of legislation, proclamation and ordinance—the so-called “Calder thirteen” (*Calder et al. v. Attorney-General of British Columbia*, 8 DLR 3rd at 82) The British Columbia Court of Appeal decided in 1970 that aboriginal title has no basis in customary law because the Nisa’a had no concept of private property until after they came into contact with settler society (*Calder et al. v. Attorney-General of British Columbia*, 13 DLR 3rd at 66). The Supreme Court of Canada dismissed the action on a technicality in 1973: the plaintiffs, it turned out, had neglected to ask the province for permission to sue it, as the law then required them to do. On the title question, though, the Court was evenly split.

Justice Judson wrote for the three judges who favored dismissing the appeal. He found that British Columbia is not included in the lands set aside for first nations in the Royal Proclamation. Hence the Nisa’a could not hold up the Proclamation as a source of aboriginal title. But they did not have to. For aboriginal title is a matter of common law: “the fact is,”
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said Judson, “that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefather had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it [as Lord Watson had in St Catherine’s Milling] a ‘personal and usufructuary right’” (Calder et al. v. Attorney-General of British Columbia 34 DLR 3rd at 156). Since occupation is proof of possession, and since presumptive title comes with possession, Judson concluded that the Nisga’a did have title to their land “when the settlers came.” And then he took it away again: “this right was ‘dependent on the goodwill of the sovereign’” and could be extinguished at the sovereign’s will and pleasure. Paradoxically, though Judson affirmed that the Nisga’a territory fell outside the scope of the Proclamation, he nevertheless decided, like Lord Watson before him, that Nisga’a title hinged on a phrase from the Proclamation—“Our Will and Pleasure.” Hence he argued in two directions at once: 1) aboriginal title exists at common law and is not the sovereign’s to grant; 2) aboriginal title depends on the sovereign’s will and can be extinguished at its pleasure. Nisa’a title belongs without belonging to the Proclamation; the Proclamation applies without applying to Nisa’a title. Judson concluded that the trial judge was correct when he rule that aboriginal title, “if it ever existed,” had been extinguished by the performative violence of nine proclamations issued by the colonial governor and four ordinances passed by the colonial legislative council from 1858 to 1870: “All thirteen reveal a unity of intention to exercise, and the legislative exercising, of absolute sovereignty over all the lands of British Columbia, a sovereignty inconsistent with any conflicting interest, including one as to ‘aboriginal title, otherwise known as Indian title.’” Aboriginal title was a burden on the crown’s title, and the crown had discharged that burden by setting aside reserves for the exclusive use of the colony’s first nations.

Justice Hall wrote for the three judges who favored allowing the appeal. He found that the trial judge was so preoccupied with the three conventional indicia of ownership—specific delineation, exclusive possession, and right of alienation—that he “overlooked” the fact “that possession is of itself proof of ownership” at common law (Calder et al. v. Attorney-General of British Columbia 34 DLR 3rd at 187). The Nisa’a had been
in possession since time immemorial. They did not have to prove their title. It was up to the crown to prove that their title had been extinguished. But Hall went further. He reviewed the evidence and concluded that aboriginal title has a second, parallel source in aboriginal customary law. The Nisa’a “are and were,” he wrote, “a distinct cultural entity with concepts of ownership indigenous to their culture,” and the Nisa’a law of property, he stressed, was fully “capable of articulation under the common law” (190). He set up “Nisa’a law” inside the common law even as he located its source outside the common law. “The aboriginal Indian title,” he was careful to note, “does not depend on treaty, executive order or legislative enactment” (200), but is rather an independent legal right which, though recognized by the Royal Proclamation, nevertheless predates it.10 Since it was not created by a sovereign performative, it does not depend on the sovereign’s will and cannot be extinguished at the sovereign’s pleasure. The only way to extinguish it is to pass legislation that clearly and plainly states the sovereign’s intention to extinguish, and in Canada the crown has historically made that intention clear and plain by striking treaties with first nations, which means consulting them and securing their consent (199, 202–3). Hall’s opinion draws Nisa’a customary law into the common law as a state of exception.

The Supreme Court of Canada consolidated the state of exception more than two decades later in R v. Van der Peet. Dorothy Marie Van der Peet was charged in 1987 with the crime of selling ten salmon. Her band, the Upper Sto:lo, had a license to catch fish for food, but not for sale. She argued, however, that in selling them she was exercising an aboriginal right (R v. Van Der Peet 23 BCLR 3rd at para 6). The Supreme Court found in 1996 that her right lay both inside and outside the law. Chief Justice Lamer cited the High Court of Australia’s finding in Mabo v. Queensland that an aboriginal right has its origin in and acquires its content from the traditional laws acknowledged and traditional customs observed by the indigenous inhabitants of a given territory (para. 40). Mabo confirmed that the common law captures customary law within an internal-external space of exception, incorporating it without assimilating it. The challenge for the Supreme Court of Canada was to preserve the common law from customary law’s legitimate, law-making force.
What the state feared in Van der Peet’s case, as in Sparrow’s, was neither the criminal nor the crime, but a performativity capable of founding a new law from within the law. Van der Peet argued that her right to sell the fish was protected by Part Two, Section Thirty-Five, paragraph one, of the *Constitution Act, 1982*, which states “the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” Lamer decided that the constitution includes aboriginal customs only insofar as it excludes them: “what s.35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures is acknowledged and reconciled with the sovereignty of the Crown” (para. 31). The constitution seeks the “reconciliation” of two legal systems while affirming that one system has “sovereignty” over the other. Reconciliation requires judges to weigh “the aboriginal perspective” against “the perspective of the common law.” True reconciliation “will equally, place weight on each” (para. 50). Lamer did not say that it will place *equal* weight on each. For the aboriginal perspective belongs to the common law perspective only in the mode of not belonging: “aboriginal rights exist within the general legal system of Canada,” he reasoned, and have to be defined “in terms that are cognizable to the non-aboriginal legal system” (para. 49). He defined an “aboriginal right” as what remains today of a practice, custom, or tradition that used to be “integral” to the “distinctive culture” of a distinctively aboriginal group in the past: it *is* something that “truly made” a society what it “was” (paras. 46 and 55). Such a right is like a ghost: it is the living presence of an era that came an end the moment aboriginal people came into contact with European adventurers (para. 60). The rights that the law recognizes now protect only those practices that existed before the law arrived. Aboriginal traditions, customs, and practices are included in the law now on the condition that they were excluded from the law then. They are inside it and outside it at one and the same time, and that time, moreover, is the past present: “the rights recognized and affirmed by s. 35(1) must be temporally rooted in the historical presence—the ancestry—of aboriginal peoples in North America” (para 32): a presence that dates from “the period prior to contact” (para. 60). Aboriginal societies
have a right to whatever is “integral” to them, and integrality is a past that happens now only. The court found that Van der Peet had an aboriginal right to fish, but not to exchange fish for money, for commercial fishing was an incidental rather than an integral part of pre-contact Upper Sto:lo culture.

The Federal Court had already settled on a formula for inclusive exclusion in *Baker Lake v. Canada*. In 1979 a coalition of Inuit individuals and organizations asked for a declaration that they had an unextinguished aboriginal right to hunt and fish on lands adjacent to the Hamlet of Baker Lake (Hamlet of Baker Lake v. The Minister of Indian Affairs, 107 DLR 3rd at 513). Justice Mahoney noted that the Supreme Court had already found in *Calder* that aboriginal title exists at common law, so he devised a four-part test to decide whether the present plaintiffs had a title to the Baker lake area. He required them to prove:

1. That they and their ancestors were members of an organized society.
2. That the organized society occupied the specific territory over which they assert aboriginal title.
3. That the occupation was to the exclusion of other organized societies.
4. That the occupation was an established fact at the time sovereignty was asserted by England. (542)

The Baker Lake test affirms that aboriginal title is one part “organization” and three parts “occupation.” What determines whether a society is “organized” or not? (And is there such a thing as an *un*organized society?) Mahoney decided that a society is organized if it observes the rules and customs of its ancestors (McNeil *Common Law* 284). Since being organized makes a society eligible for title, the existence of customary law is a necessary condition for recognition under common law. An aboriginal right is protected by the law only if, at one time, it fell outside the law. Such a right exists in the mode of inclusive exclusion.

Mahoney defined common law Inuit title as a right to hunt and fish: in the language of *St. Catherine’s Milling*, he decided that it is a usufructuary right (560). Four years later, in *Guerin v. The Queen*, the Supreme Court of Canada proposed another definition, indeed a unique one.
The Musqueam band had agreed to surrender certain reserve lands to the Crown for lease to a Vancouver golf club. The members of the band approved the terms of surrender at a public meeting. But the Indian Affairs Branch afterwards changed the terms without notice, and, predictably, the new terms were less favorable than those the band had approved (Guerin v. The Queen 2 SCR at 335). The court found that the crown had a fiduciary obligation to deal with the land for the band’s benefit and was thus liable for damages. Justices Wilson and Dickson located the source of the crown’s obligation in the band’s aboriginal title (McNeil Common Law 285). Dickson wrote that aboriginal title is “an independent legal right” based on aboriginal people’s “historic occupation and possession” of the land (376, and 378). The fact that it is “independent” means it has a source in customary law. The fact that it is based on occupation and possession means it has a second, parallel source in common law. A pre-contact, customary “right” had been carried forward into the common law under the doctrine of continuity (McNeil Common Law 286). “The principle that a change in sovereignty over a particular territory does not in general affect the presumptive title of the inhabitants,” Dickson observed, “was approved by the [Judicial Committee of] the Privy Council in Amodu Tijani v. Southern Nigeria (Secretary)” in 1921 (378). But that is just what the state fears: the declaration of customary law within the borders of the common law. Dickson made it clear, however, that in his view this independent aboriginal right was nevertheless dependent on the sovereign’s paramount right. “Indians have a legal right to occupy and possess certain lands,” he explained, “the ultimate title to which is in the Crown” (382). But there is no term in general property law for a right that belongs without belonging to the genre of rights. Indeed Viscount Haldane had warned of the problem years earlier in Amodu Tijani v. Secretary, Southern Nigeria: “There is a tendency, operating at times unconsciously, to render [the native] title conceptually in terms of [legal] systems which have grown up under English law. But this tendency has to be held in check closely.”11 Scholars of rhetoric have long called this “tendency” catachresis. It is what happens when you borrow a term that already has a meaning in one context and graft it to a context where a term is needed but none
is available, for example when you say that a chair has legs. Dickson noted that in the past judges have considered giving bands “beneficial ownership” of reserve lands and have entertained the possibility that bands have “a beneficial interest” in their reserves (381). There is “a core of truth” in both catachreses, he conceded, but still neither was “quite accurate” (382). So he introduced a third term, which was no less catachrestic than the others. Aboriginal people, he wrote, have a “sui generis” interest in the land. A *sui generis* interest in one that belongs to a kind, a class—that is, a genus—of its own. What sets it apart from other interests? Dickson endowed it with two characteristic traits. First, it is personal, which means it can be surrendered only to the crown. Second, it burdens the crown with “a distinctive fiduciary obligation,” which binds the crown to manage the surrender of title for the benefit of aboriginal people, not golf courses. “Any description of Indian title which goes beyond these two features,” he warned, “is both unnecessary and potentially misleading” (382).

Dickson’s definition of this *sui generis* interest does nothing more than repeat the law of genre in general. The law requires every genre to be of its own kind: “genres,” it says, “are not to be mixed” (Derrida “The Law of Genre” 223). Every genus is therefore bound to be *sui generis*. “As soon the word *genre* is sounded,” according to Derrida, “as soon as it is heard, as soon as one attempts to conceive it, a limit is drawn. And when a limit is established,” he adds, “norms and interdictions are not far behind . . . one must not cross a line of demarcation, one must not risk impurity, anomaly, monstrosity” (224–5). When Dickson declared aboriginal title to be of its own kind, he inscribed this kind of line around it, and the line’s purpose, furthermore, is to protect it from contamination. He set aboriginal title apart to protect aboriginal people from being exploited by unscrupulous land purchasers and lessees. Its *sui generis* nature, he said, requires aboriginal people to surrender it only to the crown and obliges the crown to conduct the surrender in their best interest. The risk today, however, is not that aboriginal title might be treated like other property interests, but that other property interests might be compromised by a declaration of aboriginal title. And the doctrine of reconciliation is now the first line of defense.
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The Supreme Court of Canada’s put it work for the first time in late 2004 in *Haida Nation v. British Columbia (Minister of Forests)*. There is a “need,” wrote Chief Justice McLachlin, “to reconcile prior Aboriginal occupation of the land with the reality of Crown sovereignty” (*Haida nation v. British Columbia Minister of Forests* 2004 SCC 73 at para 26). The term “reconciliation,” however, is a catachresis for the state of exception. “This process of reconciliation,” McLachlin explained, “flows from the Crown’s duty of honorable dealing towards Aboriginal peoples, which arises in turn from the Crown’s assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people” (para. 32). The fact that aboriginal societies used to “control” the land in the past obliges the crown to exercise self-control when dealing with aboriginal interests in the present. The crown controls itself because aboriginal people no longer control the “land and resources.” The doctrine of reconciliation, like the law of genre, is performative and normative at once: it subordinates aboriginal law to Canadian law and at the same time binds the crown to honor what it subordinates. The sovereign is not subject to restraint, but is called to exercise self-restraint. It is not ruled; it rules itself.

But what happens to the law when the law of genre fails? What if it were impossible not to mix genres? This is the question that Derrida puts to the law: “What if there were, lodged within the heart of the law itself, a law of impurity or a principle of contamination” (“The Law of Genre” 225)? Every genus is defined by its difference from other genera. Every genus must therefore by definition have some characteristic trait that distinguishes it from all others: “if a genre exists,” says Derrida, whether it is a genre of literature or genre of law, “then a code should provide an identifiable trait and one which is identical to itself, authorizing us to adjudicate whether a given text belongs to this genre or perhaps to that genre” (229). Every genre makes itself remarkable its own way. The “mark of belonging,” however, belongs to genre in general without belonging to any genre in particular (230). It marks the limits between one genre and another, and yet it exceeds every limit that it marks. “This can occur,” Derrida stresses, even “in texts that do not, at a given moment, assert themselves to be literary or poetic” (229).
There is a unique genre of case law that distinguishes itself by affirming the uniqueness of aboriginal title, and the mark that indicates whether or not a case belongs to this genre is the phrase "sui generis." Yet as recently as 1997 Canadian courts had failed to specify what distinguishes a "sui generis" title from other property interests. It is true that Dickson had singled out two "features," inalienability and fiduciary obligation, but according to McNeil, the mark of belonging, in order to be effective, has to grow out of the source, not the definition, of aboriginal title. Otherwise there is a risk of generic contamination. By 1989 judges agreed that first nations hold "some sort of communal legal title," but they had "variously" located its source in "customary law, occupation and use of traditional lands, and the Royal Proclamation of 1763, as though these possible sources can be lumped together to arrive at a uniform result." (McNeil Common Law 289). How can a sui generis right arise from different genres? Aboriginal title was supposed to be of its own kind, but the only unique thing about it was that it lacked that mark of belonging which distinguishes one kind from another: "No wonder they have had so much difficulty in defining aboriginal title, and describing what the interest held thereby amounts to" (289).

The Supreme Court of Canada supplied the missing mark when it ruled on the appeal of Delgamuukw v British Columbia in 1997. The trial judge had answered the joint Gitxsan and Wet’suwet’en claim with an echo of Judson’s ruling in Calder. He identified two sources of title—the Royal Proclamation and prior occupation—and then he decided that the Proclamation did not extend to British Columbia and that any title that could be based on occupation had been extinguished by the performative violence of the Calder thirteen (Delgamuukw v. British Columbia 79 DLR 4th at 194 and 197). The plaintiffs had only the right to live in their villages and a non-exclusive right to use the surrounding lands for “sustenance” (462). The British Columbia Court of Appeal agreed in 1993 that the action should be dismissed but found that the Calder thirteen had not extinguished all of the plaintiffs’s aboriginal rights (Delgamuukw v. British Columbia 79 DLR 4th at 471). Justice Macfarlane concluded that the plaintiffs continued to have “unextinguished non-exclusive aboriginal rights” but stressed that these rights do
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not amount to a right of ownership or a right of property. “Such rights,” he explained wrote, “are of *sui generis* nature” (547) because they have their source in aboriginality itself. “What the law protects is not bare presence or all activities,” he wrote, “but those which were an integral part of and recognized by an aboriginal society prior to the assertion of sovereignty,” (512, 543) which he dated at the signing of the Oregon Boundary Treaty in 1846 (McNeil “Meaning of Aboriginal Title” 138). What makes an aboriginal society distinctively, legibly aboriginal, moreover, is its pre-existing system of customary law: “I have said there is no question the Gitksan and Wet’suwet’en people had an organized society. It is pointless,” he added, “to argue that such a society was without traditions, rules and regulations” (545). Customary law is an integral part of aboriginality, and aboriginality is a source of common law aboriginal rights. “But those traditions, rules, and regulations cannot operate,” he warned, “if they are in conflict with the laws of the province or of Canada” (545). Laws belonging to the customary law genre of aboriginality do not necessarily belong to the common law genre of aboriginal rights. Or rather they belong without belonging.

Justice Wallace warned that to set up an aboriginal legal system within the Canadian legal system would result in a kind of monstrosity. “The assertion of an all-encompassing aboriginal right to an exclusive social and legal system—under the so-called ‘doctrine of continuity’ [this is a dig at McNeil]—would result,” he predicted, “in the common law affording protection to a system which is both outside and independent of the common law” (569). Customary law and common law are two discrete legal genres, and genres, according to Wallace, are not to be mixed. Any effort to do so would result in contamination. Customary law would take root in common law from a position beyond the law. A parasite would work within the law to suspend the law. No longer would the sovereign have the power to decide on the state of exception; rather the exception would circumscribe the exercise of sovereign power. The only safe way to protect customary aboriginal practices, therefore, is to convert them into common law aboriginal rights: “customary practices,” according to Wallace, have “the protection of the common law” but “any system of aboriginal customary law” does not (577). Practices
are impurities: they bear traces of customary law, which threatens to contaminate the common law. Rights, however, are purified practices: they “take their force” not from customary law, but “from the common law” (570). Wallace’s judgment has the paradoxical effect of excluding aboriginal people from a genre that includes only them. Aboriginal customs must be distinctively aboriginal in order to receive the protection of the common law, but only aboriginal law has the authority to determine which customs are distinctively aboriginal and which are not: “the post-sovereignty creation or alteration of aboriginal customs do not, and cannot have the force of law,” but neither, according to Wallace, can pre-sovereignty customs (577). Practices can be converted into rights on the condition that aboriginal people cease to be aboriginal. Wallace invented a genre that is truly of its own kind: a *sui generis* interest that nobody can claim.12

Chief Justice Lamer opened the Supreme Court of Canada’s decision by recalling that he had already ruled, in *R v Coté*, that aboriginal title is “a distinct species of aboriginal right” (*Delgamuukw v. British Columbia* 153 DLR 4th at 201). By “species,” however, he meant “genus.” The court’s task in *Delgamuukw* was to define “the specific content” of this distinct kind of right. The genus was finally about to receive its unique mark of belonging. Lamer decided that aboriginal title is a *sui generis* interest in the land itself. One of the things that make this interest unique is that it participates, without full membership, in two genres of law. “Aboriginal title has been described as *sui generis* in order to distinguish it from ‘normal’ proprietary interests, such as fee simple. However,” he added, “it is also *sui generis* in the sense that its characteristics cannot be completely explained by reference either to the common law rules of real property or to the rules of property found in aboriginal legal systems” (241). The correct interpretation has to consider “both common law and aboriginal perspectives” while endorsing neither. Lamer could not *not* mix genres even though the law demanded that genres are not to be mixed.

He ruled, first, that this *sui generis* interest can be surrendered only to the crown. Second, he traced its source to the prior occupation of the land by aboriginal societies. That means that it belongs to the common
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law precisely because it pre-dates it: “What makes aboriginal title *sui generis* is that it arises from possession *before* the assertion of British sovereignty, whereas normal estates, like fee simple, arise afterward” (242). Because it pre-dates it, moreover, it has a parallel source in “aboriginal systems of law” (246). The assertion of sovereignty simultaneously extended the jurisdiction of the common law and opened up a pocket inside it for the inclusive exclusion of customary law. Aboriginality is the sovereign’s outer limit, but it is traced within rather than around the sovereign’s domains. The outside of the law has from the outset of Canadian history resided on the inside of the law, in the form of a title that burdens the crown’s underlying title (254). Finally, Lamer reaffirmed that this burdensome title is a communal rather than individual right.

Since the courts had “never” defined “the content of aboriginal title,” he ventured a definition of his own (242). It consists of two propositions. First, aboriginal title is “the right to exclusive use and occupation of the land” for “purposes” that may or may not be “integral” to “distinctive aboriginal cultures” (243). Second, however, aboriginal title extends only to those uses that can be reconciled “with the nature of the group’s attachment to that land” (243). What the first proposition excludes, the second includes. The first annuls the genre of aboriginality: title-holders can use and occupy the land in “non-aboriginal” ways. The second reinstates it: there is an “inherent limit” on non-aboriginal uses of aboriginal lands (246). The law protects aboriginal title in order to protect the aboriginality of aboriginal people, and the characteristic trait of aboriginality, according to Lamer, is the aboriginal person’s “special bond”—indeed species bond—with the land itself. “That relationship,” he found, “should not be prevented from continuing into the future. As a result, uses of the lands that would threaten that future relationship are, by their very nature, excluded from the content of aboriginal title” (247). Formerly the courts protected aboriginal people from third parties; henceforth they will protect aboriginal people from themselves.

How can a court tell aboriginal from non-aboriginal uses? George Copway affirmed in 1850 that the only way to hunt in a distinctively aboriginal way is to obey the distinctively aboriginal laws of property. “The hunting grounds of the Indians were secured by right,” he recalls
in his autobiography, “a law and custom among themselves. No one was allowed to hunt on another’s land, without invitation or permission” (74). Aboriginal title is distinguished from other proprietary interest by its aboriginality, but what constitutes aboriginality can only be decided by aboriginal law. When Lamer affirmed that “aboriginality” must not be mixed with other genres, then, he acknowledged the principle of aboriginal self-government (McNeil “Defining Aboriginal Rights in the 90s” 13–14).

Yet he went on to assert that aboriginal title can be infringed whenever the infringement serves a “compelling and substantial” legislative objective, though he cautioned that any infringement has to honor the “fiduciary relationship” between settler governments and first nations (260–2). What genre of objective meets the infringement test? In *Haida Nation v B.C.*, McLachlin decided that the test can be applied in cases where aboriginal title has been claimed but not yet proven (paras. 6 and 10–11). Hence there can be infringement even before there is a title to infringe. Aboriginal title is the kind of right that can be excepted from the law before it has been included in the law. McLachlin found that the government of British Columbia had failed in its honorable duty “to consult with and reasonably accommodate” Haida interests when renewing a timber license in a traditional Haida territory (para. 27). In a simultaneous ruling, however, she found that the province had “thoroughly” fulfilled its duty to consult with the members of the Taku River Tlingit First Nation while planning the construction of a mining road on their territory. She accordingly let their title be infringed before it had been established it either by negotiation or in court (*Taku River Tlingit First Nation v. British Columbia Project Assessment Director* 2004 SCC 74 at paras 41 and 44).

McNeil points out that the infringement test ignores that English law has protected property rights for more than eight hundred years and forgets that s.35 (1) was intended to defend aboriginal rights from government interference (“Defining Aboriginal Rights in the 90s” 26). What he forgets in turn is that the sovereign cannot abide a law that resides at once inside and outside the law. The common law takes hold of customary law by way of inclusive exclusion, for the capture forestalls that
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performative violence which not only is not alien to the law, but is that which in the law suspends the law for legitimate ends: “a pure performative that would not have to answer to or before anyone” (Derrida “The Force of the Law” 992–3). Only by such a performative can an exception emerge within the state of exception.

Legal dictionaries typically put the phrase *sui generis* in a class of its own. *West’s Encyclopedia of American Law* is among the most concise: “SUI GENERIS” [Latin, Of its own kind or class.] That which is the only one of its kind.” Though it belongs to its own kind, though, it nevertheless includes more than one kind of right. *Black’s Law Dictionary* is among the most expansive: “sui generis (s[y]oo-I or soo-ee jen- -ris). [Latin “of its own kind”]. Of its own kind or class; unique or peculiar. The term is used in intellectual-property law to describe a regime designed to protect rights that fall outside the traditional patent, trademark, copyright, and trade-secret doctrines.” Still it is *The Dictionary of Canadian Law* that best captures the uniqueness of the unique interest that is aboriginal title: “SUI GENERIS. [L.] Of one’s own class or kind.” Whatever is *sui generis* is of “one’s” own kind. A *sui generis* right therefore amounts to the right of the one. Or is it one’s right to be included in a law that excludes one? For there is only one law, and it is closed to the possibility of a law that would undo it from inside its own limits. Aboriginal title: it is our kind of right.

Notes
3 In 1984 the Supreme Court of Canada reiterated that the crown has an obligation “to prevent the Indians from being exploited” by land purchasers and lessees; in November 2004 the Court reaffirmed that the crown has an honourable duty to protect aboriginal peoples’ rights and interests in the management of resources. See *Guerin v. The Queen* 2 SCR, at 336; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, at para. 20 and 27.
5 This is currently the opinion of the Supreme Court of Canada. See *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, at para. 25.

6 See *McNeil, Common Law Aboriginal Title*, 171; *Re Southern Rhodesia* AC 211, at 233.

7 See *McNeil, Common Law Aboriginal Title*, 172; *Amodu Tijani v. Secretary, Southern Nigeria* 2 AC, at 407.

8 See *St. Catharines Milling and Lumber Company v. The Queen*, 14 AC 1889, at 54; *Calder v. Attorney-General of British Columbia* 34 DLR 3rd at 156; *Delgamuukw v. British Columbia*, 79 DLR 4th at 197, 417, 453–4 and 478.

9 This is Judson citing the trial judge, Justice Gould. *Calder et al. v. Attorney General of British Columbia* 34 DLR 3rd at 81–2, and 34 DLR 3rd at 160.

10 This is Dickson’s 1984 interpretation of “the assumption implicit in *Calder*”; *Guerin v. The Queen*, 2 SCR at 378.

11 *Amodu Tijani v. Secretary, Southern Nigeria* 2 AC at 403; see also *Calder v. Attorney-General of British Columbia* 34 DLR 3rd at 187.

12 *McNeil* tells us, in “The Meaning of Aboriginal Rights,” that, “this places the Aboriginal peoples in an untenable position. To retain their aboriginal rights, they must maintain their societies in a precolonial state . . . If they try to adapt to meet the changes in circumstances caused by European colonization . . . their activities are no longer ‘Aboriginal’ and so are not encompassed by their Aboriginal rights” (152).

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**Statutes**


From Colonialism to Multiculturalism?  
Totem Poles, Tourism and National Identity in Vancouver’s Stanley Park  
Renisa Mawani

The totem is an indication of an old and wide culture. It points to the past. (Goodfellow 15)

The Stanley Park totem poles are a bona fi de photo opportunity. (Grant and Dickson 48)

Tourism and culture now plainly overlap and there is no clear frontier between the two. (Rojek and Urry 3)

The totem poles in Stanley Park are the most frequented and photographed tourist site in British Columbia (Grant and Dickson 48). Since the first pole was erected in 1903, the colourful display has become an important Vancouver landmark, one that currently draws 3.3 million people annually (Jensen 29). Over the years, the totem poles have come to signify Stanley Park itself. In amateur and professional photographs, tourist brochures, books, postcards, and on government websites, the poles are spectacularized as the symbol of Vancouver’s most cherished “urban playground.” What is ironic, however, is that the totem poles represent the Kwakwaka’wakw and Haida Nations who reside in Northern BC, and not the Coast Salish who have ancestral and ongoing legal claims to what is now Stanley Park. Several scholars have detailed how this (mis)placement of the poles erases both the presence and the territorial ownership of local Coast Salish communities (Hawker 34–45; Jensen 62–74; Mawani “Imperial” 125–132). Others have told us about the stories and histories of the Kwakwaka’wakw and Haida that are recorded in the carvings on the poles themselves (Jensen 30–47). However, few scholars have explored how the Stanley Park totem poles as a tourist site have figured in the making of Canadian national culture. In the
epigraph above, Chris Rojek and John Urry observe that “[t]ourism and culture plainly overlap,” but how? Whose culture is (re)presented, displayed, and consumed at the totem poles site in Stanley Park?

This paper aims to address the place of Aboriginality in Canadian national culture by approaching the totem poles as an iconic yet shifting symbol of colonial alterity. By Aboriginality, I am referring here not to the changing cultural, legal, and/or political identities of First Nations that have been documented by legal historians and socio-legal scholars alike (Backhouse 21; Mawani “Genealogies” 323–331), but to the discursive construction of specific Native images and motifs that have problematically come to represent all Aboriginal peoples.3 To elaborate, the Kwakwaka’wakw, Haida, and several other Northwest Coast communities have traditionally carved freestanding poles. Yet in the popular Canadian imaginary totem poles have come to symbolize “authentic” Native art that is desired and consumed by tourists and visitors. Although totem poles and other Northwest Coast designs and images signify an authentic Native Otherness in mainstream Canada, it is important to recognize that this perceived authenticity is premised on an inauthenticity: on a singular, homogenized, and fixed Aboriginal identity that does not adequately capture the complicated and diverse histories and experiences of First Nations communities in the province of British Columbia (BC).

While totem poles are symbolic of a commodified Aboriginality they have also been incorporated into the nation as a signifier of Canadian heritage. From the early twentieth century onwards, these vast cedar carvings were becoming increasingly scarce and were thus perceived by the federal government as holding significant economic and cultural value. While Canada’s First Peoples were forced onto reserves and placed outside of public view, totem poles were fast becoming important national commodities that were taken from Native communities and placed in public spaces including museums and city parks (Townsend-Gault 189). The ongoing and contemporary popularity of totem poles—(evident in the number of visitors to Stanley Park and in the commercialization of images and replicas sold as Canadian souvenirs)—suggests a continued tourist preoccupation. Art historian, Ruth Phillips,
argues that Native art has long been popular with visitors to Canada and the USA. Importantly, she explains that tourist consumption of Native imagery has been central to emerging nationalisms in both countries (111). Writing about the circulation of First Nations art in BC, Charlotte Townsend-Gault observes that for many tourists, totem poles are particularly resonant of “something Canadian” (185–186).

“National identities,” as Edward Said reminds us, “always involve narratives—of the nation’s past, its founding fathers and documents, seminal events, and so on” (243). Mass spectacle has been (and is) a key site in which nations construct their collective selves. In his important book, Colonising Egypt, Timothy Mitchell documents how the world exhibition figured in both the making of Egypt and in Europe’s colonial project (xiii). In the Canadian context, Eva Mackey has similarly argued that museums, festivals, and holidays are times of national performance (13). Like exhibitions and celebrations, tourist attractions are also places in which the nation is constituted. And, as tourism expands, explains Nezar Alsayyad, more countries are “resorting to heritage preservation, the invention of tradition, and the rewriting of history as forms of self-definition” (2). If tourist locales are indeed places of national formation, how does Native imagery figure in touristic representations and in the making of Canadian culture? Specifically, how have the Stanley Park totem poles as symbols of Aboriginality figured in the tourist gaze? What do these signifiers tell us about the Canadian nation? And perhaps, more importantly, what do they obscure about the nation’s colonial past?

This paper focuses on two interrelated moments in the twentieth and twenty-first centuries, both concerned with colonialism, totem poles, tourism, and national identity. The first moment briefly explores the government-initiated campaign aimed at totem pole preservation in northern BC during the 1920s. It was at this historical juncture of “museum mania” (Francis 31) that totem poles and other cultural artifacts were being appropriated from Northwest Coast communities to be “saved” and displayed in urban locales, including Stanley Park. The second moment entails the first major renovation of the existing totem poles site at Brockton Point. In 2001, a new Visitors Centre and interpretive site was added to the landscape, which intended to provide
tourists and onlookers with relevant First Nations history and cultural context through which to interpret the poles. At both of these historical moments, as I explain below, the totem poles have come to represent specific colonial and postcolonial (post) colonial meanings and have been inserted, albeit differently, into Canada’s past, present, and future.

In his discussion of national identity, Said cautions that national narratives “are never undisputed or merely a matter of the neutral recital of facts” (243). Nor are they static and unchanging. What these two episodes illustrate is the shifting way in which Aboriginality and the Canadian nation have been constituted through the figure of the totem pole. In the early twentieth century, totem poles were consumed as “primitive relics,” symbols of a “vanishing race” and evidence of a triumphant colonial settler society. During this period, government officials and famous artists actively campaigned to “save” Native material culture including poles, the former through cultural appropriation and the latter by recording the heritage of Native peoples before it “disappeared” (Cole 276; Francis 31). From the twentieth-century onwards, First Nations’ political resistance along with changing conceptions of the Canadian nation have generated new meanings. With the new Visitors Centre, the Coast Salish—who long resisted the City’s encroachment on their ancestral territories, including Stanley Park—have gained an unprecedented visibility at the totem poles site. However, this perceptibility is double-edged. Despite the ongoing legacies of colonialism, the Visitors Centre problematically incorporates Aboriginality into the Canadian national imaginary as evidence of a new nation that claims to be both (post)colonial and multicultural. I argue that the site tells a very selective story of our national culture, one that emphasizes Canada’s mythical characteristics of “lawfulness,” “innocence,” and “generosity,” towards Aboriginal peoples (Mackey 26). Notwithstanding the shifting historical meanings of the totem poles and their place in the Canadian imaginary, there is one element that remains constant—the partial erasure of law and colonialism.

Over the past decade, many scholars have rightly criticized the ubiquity of the “postcolonial” (Jacobs 22–29; McClintock 9–14). As Jacobs explains, this term is especially problematic in colonial settler societies
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like Australia where Indigenous peoples continue to experience a colonial relationship with the state (23). In Canada, unresolved land claims, particularly in BC—where Aboriginal peoples living on the mainland and in parts of Vancouver Island never relinquished their land through treaty or otherwise—combined with ongoing legal disputes over resource rights and cultural property, make it increasingly difficult to talk in terms of the “postcolonial.” Throughout, I prefer to approach colonialism as what Ann Laura Stoler describes as “a living history that informs and shapes the present rather than as a finished past” (89). Where I use the term (post) colonial my usage is deliberately bracketed to suggest that despite recent shifts in Canada’s identity, which imply a more inclusive nation, the “post” in the (post) colonial continues to be elusive for many Aboriginal peoples.

In the first part of the paper, I discuss the historical circumstances around the placement of the totem poles in Stanley Park as well as their multiple meanings. Here, I detail the totem pole preservation movement to show more generally how colonial practices underpinned the making of the exhibit. In part two, I discuss the construction of the new Visitors Centre at Brockton Point. In this section I examine the more recent national discourses of (post) colonialism and multiculturalism and how they have influenced what the totem poles represent. In the conclusion, I make some brief remarks about law and the postcolonial.

I. Colonialism, Cultural Property, and Totem Pole “Preservation”

The Art, Historical, and Scientific Association of Vancouver (AHSAV) initiated the totem pole display in Stanley Park as the first permanent exhibit outside of either museum and/or Indian reserve (Hawker 34). The AHSAV was at the forefront of the totem pole preservation movement that emerged in the 1920s, which I discuss below, and was particularly instrumental in acquiring poles from communities along the BC coast. The first pole, a “gift” from a BC politician, had been brought from Alert Bay in 1903 (Mawani “Imperial” 129). However, the idea of collecting poles for a public exhibition was not formally realized until 1919, when the AHSAV proposed the building of an “Indian village” modeled on the Kwakwaka’wakw of Northern Vancouver Island. According to one
source, the village was intended “to give to the present and succeeding generations an adequate conception of the work and social life of the aborigines before the advent of the white man” (Goodfellow 13). In other words, the Indian village in Stanley Park would be a testament to the progress of settler colonialism over the disorder, barbarity, and incivility that were thought to be characteristic of Aboriginal peoples and the western frontier.

From the time the first Kwakwaka’wakw pole was erected at Lumberman’s Arch—at the former village of Whoi Whoi—the poles became a spectacle of Otherness that was highly visible to city residents and travelers. Because the poles were situated in an urban setting on the edge of Burrard Inlet, they lost their cultural and historical meanings and took on a significance that had much more to do with settler colonialism that with Native peoples. To elaborate, totem poles in villages told important stories of family accomplishments and histories. But for one to understand the significance of specific poles, one needed to know about the people who carved and commissioned them and the circumstances around their making (Jensen 17). The removal of totem poles from First Nations villages and their relocation to an urban environment meant that the family stories embodied in the intricately carved cedar would not be readily apparent to visitors. Instead, the naturalized setting of Stanley Park, albeit manufactured, was in keeping with colonial tropes about Native peoples as one with the wilderness (Moore, Pandian and Kosek 12). Inserted into the landscape now known as Lumberman’s Arch, the totem poles could be consumed by onlookers as an “authentic” representation of Aboriginal culture that was also illustrative of a “vanishing” race.

Ronald Hawker elaborates that the collection of poles in Stanley Park took on an important symbolic function in the young but rapidly growing city of Vancouver. He argues that totem poles located “in a city setting suggested how life on the Coast had ‘progressed’ from primitive village to urban modernity” (34). Placed in a “natural” park setting, the poles were projected into what Ann McClintock has called “anachronistic space,” where Aboriginal peoples are located beyond history and “as the living embodiment of the archaic ‘primitive’” (30). Drawing from
Walter Benjamin, McClintock argues that, “[i]n the mapping of progress, images of ‘archaic’ time—that is non-European time—were systematically evoked to identify what was historically new about industrial modernity” (40). In the emerging city of Vancouver, the totem poles in Stanley Park could be read as images of “archaic time” which illustrated a progressive shift from prehistory to modernity.

The totem poles in Stanley Park were placed at an important historical moment. To begin with, the initial poles were erected at precisely the same time that the federal government and the City of Vancouver were reterritorializing local First Nations inhabitants from the land now known as Stanley Park. Second, the display was commissioned during a period when government authorities were becoming increasingly concerned with protecting and preserving Northwest Coast Art, especially totem poles. However, the emplacement of the cedar poles tells us little about the City’s encroachment on Coast Salish territory and the government’s appropriation of cultural property, and instead erases these colonial practices from the landscape and from history. I have documented the displacement of First Nations from Stanley Park at length elsewhere (Mawani “Genealogies” 325–331; see also Barman; Mather) and thus only mention it in passing here. Alternatively, I discuss how the totem poles exhibit in Stanley Park was part of a broader colonial movement to preserve freestanding poles as national art forms that were signifiers of both a Native Otherness and of Canada’s national heritage.

While the AHSAV and the City of Vancouver were eager to display an Aboriginal presence in Stanley Park, the creation of Lumberman’s Arch and Brockton Point—locales which housed the totem poles at different times—required the displacement and dispossession of the Coast Salish. Briefly, First Nations inhabitants in the park were being forcefully moved off the land and placed onto reserves on the North Shore and up Howe Sound at the same time that City officials and the AHSAV were collecting and exhibiting totem poles carved by the Kwakwaka’wakw and Haida. Although the process of forced removal had been in effect long before the park was opened in 1888, by the 1920s, the City had prompted a lawsuit aimed at removing eight mixed-race families of (European and Coast Salish ancestry) from what is now Brockton Point.
By the 1930s, despite resistance from the mixed-race inhabitants of Brockton Point and from city residents, the families were successfully relocated from Stanley Park into the city and their homes burnt down. Ironically, while city authorities were “sanitizing” the landscape by using the law to construct the region’s original inhabitants as “squatters” and thus legitimizing their eviction, the AHSAV and the Park Commissioners were adorning Stanley Park with specific and selective visual reminders of Aboriginality—totem poles and an Indian Village—that were commercialized and commodified for the “tourist gaze” (Urry).

Initially, the city celebrated the totem poles and proposed Indian village in Stanley Park as a reflection on the nation’s past. Writing about Egypt, Timothy Mitchell explains that, the “preservation of the past required its destruction so that the past could be rebuilt” (Rule 192). In the case of Stanley Park, the erasure of the past was partially endorsed through law—through the removal of the Coast Salish who resided there. The rebuilding or remaking of history was then commissioned through the placement of the totem poles and the proposed Indian village, that as one source explained, was to symbolize “a record of a primitive art; as a symbol of a culture that is almost forgotten, and nearly past” (Goodfellow MS 1175). The poles and anticipated village were deemed to be an invaluable addition to Stanley Park. As markers of a commodified Aboriginality, these signifiers would tell tourists and visitors little about how Canadian settler colonialism was implicated in the making of both the nation and the park, but instead would showcase the talents of Northwest Coast communities whose cultural objects and artifacts were, by the early twentieth century, firmly incorporated as the origins and heritage of Canada. Thus, while the totem poles display could be read as a presence—a symbol of Aboriginality—the poles could also and perhaps more accurately be seen as an absence; one which tells us nothing about the local Coast Salish, their histories, culture, and most importantly, their struggles against the state’s colonial legal practices of displacement and dispossession (Hawker 41; Mawani “Imperial” 126).

The exhibit at Stanley Park was part of a broader national preoccupation with the preservation of Aboriginal artistic and cultural arti-
facts, particularly totem poles (Darling and Cole 29). Specifically, it was through the mandate of “preservation” that government authorities and interest groups exported poles to public landscapes including Stanley Park (Jonaitis 243). The movement to protect totem poles illustrates that Canadian authorities perceived these vast cedar carvings as both economically and culturally valuable. As further evidence, the impetus for totem pole preservation came from Canadian authorities rather than Aboriginal communities (Cole 277). Notwithstanding the intentions of government officials, it seems that colonial epistemologies often underpinned and were expressed through concerns about protecting culture, environments, and material objects.

Across the globe, conservation, in its various forms, became critical sites of colonial knowledge and power. Mary Louise Pratt explains that like Christianity which “set in motion a global labor of religious conversion,” natural history “set in motion a secular global labor that . . . made contact zones a site of intellectual as well as manual labor” (27). Natural history provided the impetus for colonists to extract the planet’s life forms out of their organic and ecological surroundings only to be reordered into European patterns of global unity (Pratt 31). In North America, natural history and other knowledges also enabled colonial agents to legitimize and justify the appropriation of Indigenous material culture through newly articulated discourses of protection.

By the early twentieth century, colonial officials in both Canada and the US were actively campaigning to “save” Northwest Coast Art from extinction. Totem poles were especially important objects of conservation (Darling and Cole 30; Jonaitis 237). While authorities expressed anxieties about the natural deterioration of cedar poles due to weather, many insisted that these valuable wood sculptures also needed protection from private capitalists and from Aboriginal peoples themselves.5 By the turn of the century, totem poles were regarded as “endangered specimens,” largely due to the appropriation of Native artifacts by individuals and museums (Darling and Cole 30). Collectors had long been pilfering First Nations coastal villages for cultural objects, which were then sold to museums around the world (Cole). Although the (il)legal appropriation of totem poles received considerable public attention in
Canada during the 1920s (Darling and Cole 30), few authorities questioned how Canada’s own colonial policies contributed to the notable demise in the practice of carving and erecting poles.

Importantly, the federal government’s contradictory Indian policies of assimilation and segregation directly contributed to the depleted supply of totem poles along the Northwest Coast. The appropriation of land and resources, the introduction of wage labor, combined with the reserve and residential school system, and the criminalization of ceremonial practices, had a devastating impact upon the individual and collective lives of First Nations (Miller; Tennant). These colonial practices and their legacies undoubtedly also transformed artistic and cultural productions (Cole 244). For example, under the 1884 amendment to the Indian Act, which outlawed potlatching, ceremonial masks and other cultural property were readily confiscated from First Nations communities (Cole and Chaikin). Although some groups continued to potlatch despite the threat of law, many master carvers stopped training apprentices, as there were fewer demands for their work (Jensen 9). At the same time that the federal government was destroying Aboriginal culture through assimilation and regulation, they were actively embarking upon a preservation campaign to protect Northwest Coast material culture from extinction (Francis 103).

In his discussion of cultural artifacts, James Clifford explains that rarity and worth are often guaranteed by a “vanishing” cultural status (223). This was certainly the case for totem poles, as fears about the increasing scarcity of carved poles and “good examples of Indian work” more generally, figured prominently in the perceived urgency for conservation (Goodfellow 13). From the 1920s onward, the federal government alongside the Canadian National Railway took a more proactive stance in totem pole preservation. In Canada, protecting Native cultural production was partly motivated by the growing national significance of Northwest Coast art, and importantly, by its increasing popularity and touristic appeal. In Northern BC for example, tourism had become a budding industry, and colonial authorities argued that totem poles would only increase the numbers of travelers to these remote regions. Concerned especially with promoting travel on the Canadian National
Railway, government officials and entrepreneurs began marketing the scenic wilderness of western Canada through images of “wild Indians” and totem poles (Braun 183–84; Francis 181).

In 1924, in response to the growth in tourism and the decline in totem poles, the federal government established the “Totem Pole Committee.” The Committee’s mandate was to protect the limited supply of poles in British Columbia, especially from export to the US (Gibson 507, 787-2). In the 1920s, there was a growing hysteria about US imperialist expansion and its effects on the Canadian nation. While authorities had previously expressed concerns about the possible American annexation of BC—which led to the creation of a military reserve on what is now Stanley Park—in the early twentieth century, a new threat emerged as rumors about Americans buying totem poles and “depleting” Canada’s precious and limited supply began to circulate. The Historic Sites and Monuments Board, along with the Royal Society of Canada, and other organizations, insisted that the government take immediate action on this matter. Many urged that the federal government must now protect Canada’s national heritage by passing legislation to prohibit the sale of poles outside the country (Darling and Cole 30).

Most members of the Totem Pole Committee agreed that an amendment to the Indian Act was “an excellent one.” Other agencies including the Canadian National Railway also endorsed legislation that would prevent the exportation of totem poles and other carvings (NAC 507, 787-2A). Despite this widespread enthusiasm, however, two issues were raised for deliberation. First, observers explained that the law was somewhat limited, as it would only cover Indian reserves and not the entire geography of BC. Second, others raised concerns about how the Indians—many of whom were uncooperative in conservation efforts to begin with—would react to such legislation. For example, Diamond Jenness, a famous anthropologist who was appointed Chief of the Anthropological Division for the National Museum of Canada, was among those who questioned the reaction of local communities and how their resistance may negatively impact preservation efforts. The “Indians may consider that they are being deprived of their ownership
of the objects which the act desires only to protect,” he warned, “and in their resentment they may embarrass the work of repairing and preserving the totem poles along the Skeena River” (Jenness 507, 787-2).

Given their experiences with the federal government’s colonial policies, particularly those governing land rights, many Aboriginal peoples living in northern and coastal regions of the province were deeply suspicious of the state’s new interest in totem pole conservation. To avoid possible conflicts, Harlan Smith, from the Anthropological Division of the Geological Survey, proposed that the Committee involve Aboriginal peoples in preservation initiatives by educating “the Indians to police [their] own poles” (Smith 507, 787-2A). Other Committee members, however, were far more supportive of passing a law that would “prohibit the exportation of totem poles, [and other] historical relics” across the border (Lett 507, 787-2A). Although the impetus for a law was to keep totem poles and other cultural artifacts in BC and in Canada, the new legislation could potentially alleviate the “Indian problem” by circumventing the question of permission and cooperation altogether.

Despite hesitation, the Indian Act was eventually amended in 1927. Under this new provision, it was now an offence to purchase, acquire, deface, or destroy any Indian grave house, carved grave pole, totem pole, carved house post, or rock embellished with paintings or carvings without the written consent of the Superintendent General of Indian Affairs. Any person who violated this provision would be punishable by a two hundred dollar fine with costs of prosecution, or a term of imprisonment for three months. While the law was intended to assist the Canadian government in its conservation of Native cultural artifacts, it is unclear as to whether this latest amendment was aimed at protecting or appropriating First Nations’ cultural property.

Although the federal government insisted that their interest was in conserving and not removing Native cultural artifacts from their rightful owners, under the newly amended Indian Act, authorities were now able to express greater ownership over totem poles and other cultural objects. In 1926, just as the new provision was being debated, Chief Seamadeaka from Kitwanga was offered $350.00 for a pole on his re-
serve. The purchaser, the North-west Biscuit Company, was intent on acquiring a pole for their office in Edmonton. Even though company officials promised to place the pole on their factory lands where it could be monitored and preserved if need be, Duncan Scott, the Deputy Superintendent of Indian Affairs, intervened in the negotiations. He informed the company of the impending changes to the Indian Act, and cautioned as follows; “I am sure you will appreciate the policy of the Department [of Indian Affairs] in endeavoring to preserve these poles in their original position of the Indian reserves as they are of considerable value to Anthropologists and to the traveling public” (Scott 507, 787-2B). In light of this stern warning, the sale never materialized.

In spite of the government’s desire to protect and prevent the removal of totem poles from reserves, the Department of Indian Affairs employed a loose and discretionary policy, allowing the sale and removal of some poles but not of others. For example, while Duncan Scott refused to sell a pole to the Royal Scottish Museum, however he did allow the Royal Swedish Consul in British Columbia to purchase a totem pole for the Royal Museum in Stockholm. The pole was originally located on the Kitlope reserve in Bella Coola. Iver Foungner, the local Indian Agent, supported the transaction, explaining that the reserve was “uninhabited and very isolated.” Although the Indian Act had already been amended, the sale and export of the pole was allowed under the pretext of preservation. Foungner urged that the pole should be sold as, “if [it is] not removed, after some time [it] will fall down and be destroyed.” Scott agreed to send the pole to Sweden as long as “the Indian owners” were agreeable and “willing to dispose of it.” Apparently, Aboriginal communities were consulted about the sale. Notwithstanding their response, the Indian Act ensured that the Canadian state had the final say.

The totem pole preservation movement of the 1920s was intended to prevent the demise of an increasingly valuable cultural commodity by placing these objects in museums and highly visible tourist spaces, including Stanley Park. While First Nations were being displaced from the land and discursively and materially placed outside the parameters of the nation, their cultural productions were fast being incorporated as a vital part of Canadian national heritage. Timothy Mitchell explains that:
One of the odd things about the arrival of the era of the modern nation-state was that for a state to prove it was modern, it helped if it could also prove that it was ancient. A nation that wanted to show it was up to date and deserved a place among the company of modern states needed, among other things, to produce a past. (Rule 179)

An initiation rite facing the young Canadian nation then was to locate Aboriginal peoples in premodernity while preserving their culture for display and consumption. In other words, visible markers of Otherness were a necessary reminder to tourists and travelers that while Canada no longer had an “Indian problem” it did indeed have an “ancient past.”

In the early twentieth century, First Nations had to be brought into the nation only to be excluded as “uncivilized savages” who, among other things, could not protect their cultural property. Colonial authorities needed to “save” and “preserve” totem poles and other artifacts as evidence of a “lost civilization.” By the late twentieth century, however, Aboriginal poles resistance and shifting narratives of Canadian-ness both challenged and changed these meanings significantly. Today, the totem poles in Stanley Park signify a new Canada, one that now partially recognizes colonial histories and the contributions of its Aboriginal peoples. As I discuss below, the poles in Stanley Park no longer signify an ancient past but a tolerant present and a promising future, one characterized by national narratives of multiculturalism and (post)colonialism.

II. Struggles over Aboriginality and Visibility in Stanley Park

From the time Stanley Park was first set aside as a military reserve in 1863 (Mather 38), the Coast Salish have actively resisted the state’s encroachment on their territories. While First Nations inhabitants continued to use the land despite the City of Vancouver’s park-making efforts, the Squamish, Musqueam and Tsleil-Waututh have since initiated a legal land claim that centers on Stanley Park and is yet to be resolved. Since the park was first opened in 1888, the Coast Salish have also repeatedly expressed their vocal opposition to various development projects. To begin with, the Squamish fiercely opposed the Indian village
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proposed by the AHSAV. Although official accounts suggest that plans for a model village were abandoned due to lack of funding, the proposal was partly rejected on account of Squamish resistance. The Squamish Nation insisted that such a spectacle, which featured a Kwakwaka’wakw village, would further obscure the visibility and rights of the Coast Salish (Hawker 44, Mawani 130). Although they had no objections to a mixed village or to the placement of freestanding poles, the Squamish demanded that if the proposed village was carried through, the Coast Salish must also be recognized and commemorated (Hawker 130).

While many opposed the making of an Indian village, some members of the Squamish Nation viewed the totem poles as an opportunity to increase their visibility on their territories. Several scholars have reminded us that resistance to colonialism often takes multiple forms. As Homi Bhabha explains, resistance “is not necessarily an oppositional act of political intention” but is often the effect of an ambivalence produced within colonial power itself (110). During the late nineteenth and early twentieth centuries, there was a widespread belief among colonial authorities that an authentic Aboriginal culture existed and could be captured in representations including museum displays and performances (Raibmon 158). In the minds of Canadian authorities and tourists, as I discussed earlier, totem poles were perceived as a signifier of authentic Native Art. Thus, on several occasions, Squamish Chief Joe Mathias, did try and exploit the poles as an ambivalent marker of Aboriginality. Since government officials and tourists recognized totem poles as an authentic, or perhaps more accurately, a commercialized and valuable Native art form, Mathias tried to appropriate the totem poles site as a way to insert a Coast Salish presence.

Writing about intellectual property and the law, Rosemary Coombe explains this contradiction as follows: “Ironically, the most successful way for Indigenous peoples to challenge these stereotypical representations of themselves may be to claim them” (199). Even though the poles were misplaced markers of Aboriginality, Chief Mathias did attempt to claim them as his own. In 1933, he approached the Parks Board seeking permission to set up a booth adjacent to the totem poles exhibit where he could sell “Indian curios.” For whatever reason, the
Parks Board refused his request. Although the AHSAV and the Parks Board had long been trying to create an authentic display of Aboriginal culture in Stanley Park, the presence of a real Aboriginal person was unpredictable. Chief Mathias could either enhance the tourist experience or unsettle it.

In 1936, when Vancouver was celebrating its Golden Jubilee, the totem pole display at Stanley Park became a site of major improvements. It was at this time that the City reconsidered Chief Mathias’ request. The Vancouver Golden Jubilee Committee and the Department of Indian Affairs acquired several additional poles for this occasion. Furthermore, the physical landscape was upgraded to enhance the viewing experience for visitors (Gunn 21–23, Jensen 69). To prepare for the celebrations, the City agreed to erect a temporary “Indian village” as part of the totem poles exhibition. The modest village included one building and a teepee. Interestingly, the teepee, which was not typical of the Coast Salish but instead was a dwelling commonly used by Plains Indians, was also thought to increase the authenticity of the display. To further enhance their display of Aboriginality, and perhaps to avoid any resistance to the village exhibit, the City agreed to allow Chief Mathias to sell curios and model poles and to tell tourists and visitors “Indian stories” (Jensen 69). Although the Squamish did not traditionally carve poles, the City also requested that Chief Mathias carve a pole to mark his people’s meeting with Captain George Vancouver in 1792 (Gunn 23). The pole—which Mathias carved and dedicated to the City of Vancouver—was erected at Prospect Point, across from the Squamish reserve.

Importantly, the City’s commodified exhibit of Aboriginality did in fact create a space for some First Nations artists. From the time of Vancouver’s Golden Jubilee celebration, Native art and cultural objects became increasingly valuable tourist attractions. Thus, a real Aboriginal (but not Coast Salish) presence in Stanley Park became more palatable for City officials and park authorities. Several well-known Kwakwaka’wakw and Haida artists were commissioned to refurbish and/or rebuild decayed totem poles. Doug Cranmer, Ellen Neel, and Bill Reid were among the new generation of artists who were involved in restoring and replacing the poles in Stanley Park (Jensen; see also Nuytten). In fact,
Neel, one of the few women carvers in British Columbia, began selling small poles at Brockton Point and then Lumberman's Arch before setting up a permanent studio at Ferguson Point. She carved there with her family until 1951 (Jensen 71).

In 1962, all of the totem poles were moved from Lumberman’s Arch to their current location at Brockton Point. By 1987, given their growing popularity, City authorities proposed a major renovation at the new site. The impetus was to update tourist experiences by building a new Visitors Centre. The rationale was that a refreshment stand and souvenir shop would offer some necessary services to tour bus passengers and other visitors while simultaneously promoting sightseeing. In a memorandum, City officials explained that a new Visitors Centre would “improve the level of service at the Totem Poles,” providing “interpretation, washroom facilities, and an improved selection of food and gift items” (Jensen 71). Although the Squamish had long contested various developments in Stanley Park, including the expansion of the Aquarium and whale pool, this time, it was non-Aboriginal interests who strongly opposed the City’s plans for a new Visitors Centre.

Local opposition to the new facility centered on questions of cultural authenticity and environmental conservation. It seems that many Vancouverites still held onto the belief that an authentic and unchanging Aboriginal culture existed. For example, several residents feared that new additions to the totem poles exhibit would in fact destroy the visitor experience. Renee Jensen, of the West End Seniors Network argued that, “the introduction of a fake Indian structure alongside the hand carved totems of the Haida and Kwakiutl [Kwakwaka’wakw] would be sacrilege” (Parfitt A3). Others added that further development and commercialization would be detrimental to the natural landscape and that the park should be left as is. In March 1990, a public forum was held on the matter. Again, the majority of the speakers, who were non-Aboriginal, rejected the new facility. Once more, the two central issues were the environment and the cultural meanings of the current site. Elizabeth Anderson, the Green Party Spokesperson dismissed the plan as being “pro-development,” while another Vancouver resident criticized the City’s plans to change the landscape explaining that we “must
resist the temptation to civilize everything so Coke and a washroom are always at hand” (Easton 18). The fear for many non-Aboriginal opponents was that a new Visitors Centre—especially a modern looking glass and cedar structure—would diminish the authentic and “primitive” display of Aboriginality in Stanley Park.

City authorities had their own concerns, however. In 1997, when an agreement was finally reached on the Visitors Centre, the Parks Board suggested that local Coast Salish communities must be consulted on the construction and content of the interpretive site. While the site would contain information about the poles and their carvers, it would also tell visitors about Coast Salish history. The “present focus of the site is the Totem Poles, which are representative of the North and Central coast Nations,” explained City authorities. They urged that the new display should tell of a Coast Salish presence and would “reflect the Coast Salish Nations’ use of Stanley Park” (Brockton 336, 20367). To further enhance the display of Aboriginality, the Parks Board and City agreed to model the anticipated gift shop on a “First Nations theme.” While the operator of the nearby shop at Prospect Point was concerned about financial competition and thus did not want any golf shirts or generic souvenirs to be sold at Brockton Point, he and others agreed that the shop should indeed sell Native arts and crafts and Native snacks including Indian candy and salmon jerky (Brockton 336). The final justification to support the new Visitors Centre was the lack of sanitary facilities. Mr. Fetherstonhaugh, Chair of the Planning and Environment Committee explained that, “there are 1.7 million people visiting that area each year, and some of them are going behind totem poles and urinating” (Fong A11). Ultimately, development was deemed necessary to ensure that the poles would be protected and preserved.

Despite their opposition to other expansion plans, the Squamish, Musqueam, and Tsleil-Waututh supported the idea of a new interpretive site. Given that the totem poles display represented the Kwakwaka’wakw and Haida and thus told visitors little about local Coast Salish communities, their alignment with the City is hardly surprising. With input into a new Visitors Centre, the Coast Salish would finally have some discursive visibility in Stanley Park. “We’re not pro-development,” ex-
plained Leah George of the Tsleil-Waututh, “But we’d like to see something representing Coast Salish people there . . . we’d like to have a place where First Nations people could gather for conferences.” She added, in “Stanley Park there was such a strong First Nations presence that the city needs to acknowledge that” (Anderson B5).

In 2001, the City of Vancouver, Kodak Canada, and the Parks Board collaborated to build the new Visitors Centre. The end product was a modern but west-coast styled glass and cedar building, washrooms, and a snack/gift shop called “Legends of the Moon.” In addition, several new commemorative inscriptions were placed at the site. While most of these plaques explain the meanings of each totem pole and provide brief histories of their carver, the new signs also perform a pedagogical function, educating visitors, albeit selectively, about Canadian colonialism and its effects on the preservation of First Nations culture, including totem poles. “In the early years of the Twentieth Century,” one of the bronze plaques explains, the Canadian government “outlawed important native ceremonies. Aboriginal peoples were compelled to abandon their traditional villages, languages, and ways of life . . . many native communities lost their totem poles.” The commemoration concludes that, “the sculptures at Stanley Park reflect not only the survival of First Nations culture but the continuing vitality of First Nations Art.”

Public recognition of colonialism raises important questions about how Aboriginality and its many signifiers, including totem poles, now figure in the Canadian nation. The work of Australian scholars is particularly useful in this regard. Haydie Gooder and Jane Jacobs argue that reconciliation in Australia “is a self-evident nation-building project” (203). They explain that the “pedagogical arm of reconciliation takes the heroic story of colonial settlement, and reveals the various acts of dispossession and injustice that underscored it” (203–204). Also writing about Australia, Elizabeth Povinelli argues that recognizing the brutality of colonialism is now a “necessary condition of nation-building in late modern liberal democratic societies” (161). In Canada, this historical narrative presents a very limited story of Canadian law and colonialism. Recognition of colonial endeavors to criminalize the potlatch, for example, can thus be read as a step towards redemption. The Visitors Centre
briefly reflects on the past, but telling us very little about Canada’s colonial history. For example, there is no mention of the various other colonial injustices including efforts to displace the Coast Salish off their land and onto reserves, for example. Instead, the Centre focuses on Canada’s promising future.

An exploration of the other commemorative displays reaffirms that the new Visitors Centre is indeed about a new national performance; the emergence of a changed Canada that not only seeks forgiveness for its shameful colonial past, but which now recognizes the vital contributions of First Nations, the Coast Salish in particular, and celebrates their inclusion in the nation through postcoloniality and multiculturalism. The Visitors Centre is adorned with three commemorative boards which display the following headings: “Traditional Technology: Celebrating Coast Salish Traditions,” “First Nations of Stanley Park,” and finally “Our Communities Today.” Keeping in mind that vision and visuality are multiple and unstable, placed together, the display suggests a teleological reading of history. The first sign, describing “traditional” languages, cultures, and (fishing) technologies, locates the Coast Salish in premodernity. The second, tells of their use of Stanley Park, that the land was once the site of a village, that “there were several settlements in the Brockton Point area,” and that First Nations “used the park seasonally to harvest plants, gather their shellfish and crabs, [and] hunt in nearby waters.” Interestingly, there is no reference to their forced removal or to the City’s lawsuit against the eight mixed-race families. Nor is there mention of the ongoing land claims to what is now Stanley Park. As Chief Bill Williams of the Squamish explained to the Vancouver Province, the “Squamish people have a very strong attachment to that land. It was never ceded, or given away. It is, and always has been viewed by the Squamish people as part of our territory” (Anderson B5). Interestingly, this attachment is not fully articulated in the interpretive site.

Finally, the last plaque that reads “Our Communities Today,” brings the Coast Salish into modernity and into the Canadian multicultural nation. A quote from Chief Joe Mathias tells of the Coast Salish and their repeated assertions of sovereignty:
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Throughout the period of colonization and the evolution of Canada as a nation-state, we maintained ourselves as a distinct society, as a nation. We continued to possess and exercise our right of self-government, a right recognized in both international and domestic law. We have never relinquished our right of self-determination.

But the commemorative sign also tells of how the Coast Salish have evolved. Although “traditional fishing and hunting remain important activities,” the plaque explains, “First Nations own fisheries, land development businesses, and ecotourism ventures, and participate in the larger metropolitan economy.” Other narratives tell of the blending of traditional and “modern techniques” in artistic endeavors as well as “sustainable” partnerships between the Coast Salish and the Canadian government.

While keeping in mind that the new Visitors Centre provides a much needed historical and political context to the totem poles site and now visually represents the Coast Salish, I would like to offer a reading that questions the disciplinary forms of power embedded within these representations. Once again, Elizabeth Povinelli’s work is useful. Povinelli encourages us to critically examine the disciplinary dimensions of liberalism, not when liberalism is failing, but when it appears to be working (13). The totem poles site with its new Visitors Centre celebrates a new Canadian nation—one that is constituted as more reflexive, tolerant, and multicultural. A nation that now fully recognizes that First Nations are “our Communities” who, notwithstanding the effects of Canadian colonialism, now enjoy the full benefits of multicultural citizenship. Importantly, the “Our Communities” plaque also displays a “Millennium Coin” that reads, “Family 2000 We Canada.” The coin is inscribed with a First Nations motif that according to the Royal Canadian Mint, honors “our country’s vibrant character and expresses Canadians’ celebration of life . . . It sends a signal from east to west that Canada is a nation looking forward to a future filled with promise.”

Although the Coast Salish have now finally been formally recognized at the totem poles site, the effects of recognition can be read as contra-
dictory. One the one hand, the site tells us about the Coast Salish and their use of the land now known as Stanley Park. On the other hand, the City’s acknowledgement of the Squamish, Musqueam, and Tsleil-Waututh has been problematically framed through liberal notions of multiculturalism, a condition captured in the title of Povinelli’s book, *The Cunning of Recognition*. Povinelli explains that:

The hopes and optimisms of [multiculturalism] and the individual and national telos they describe seduce critical thinking away from an analysis of how dominant social relations of power rely on a multicultural imaginary and discourse in order to adjust core state conditions, not to transform them. (183)

I would slightly revise Povinelli’s arguments by adding another layer. These representations can be read and consumed by tourists and travelers as signs of recognition and redistribution—further evidence of Canada’s mythical characteristics of pluralism, lawfulness, and tolerance (Mackey 26). The national telos described here seems to suggest that we have moved from colonialism to multiculturalism. This reading not only absolves the City and the Nation of its colonial past, suggesting that we have transcended it, but also facilitates new resentments about Aboriginal peoples as “wanting too much” and as having “too many rights,” a situation that Ken Gelder and Jane Jacobs have aptly named “postcolonial racism” (65).

III. Conclusions

In this paper, I have traced the changing meanings of Aboriginality and its place in Canadian national culture through a critical reading of the Stanley Park totem poles. Freestanding poles have long been perceived as important national art forms in Canada. From the early twentieth century onwards, totem poles became a vital tourist attraction and came to symbolize Canadian heritage. While First Nations were being displaced onto reserves and outside of the emerging settler society, Aboriginal culture—particularly the figure of the totem pole—was constituted as having some national value and was thus in need of gov-
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ermmental protection. But as I show throughout, the meanings of these cedar monuments and their place in the nation were never static, nor fixed, but rather shifted in response to changing national narratives. In the twenty-first century, the new Visitors Centre has provided a much-needed context to the totem poles site and has brought with it fresh meanings. While the totem poles at Stanley Park were once evidence of a “primitive,” “uncivilized,” and “vanishing” race, this colonial narrative is now disrupted by a (post)colonial one that partially and cautiously recognizes how law and colonialism have historically figured in the making of Canada. Despite these national confessions however, the totem poles are now understood through liberal narratives of multiculturalism, as a testament to the nation’s past, present, and future, a present and future that now appears to include and celebrate the contributions of Aboriginal peoples.

Recently, several scholars have problematized the relationship between colonialism and multiculturalism (Gunew, Povinelli). In Australia, as Elizabeth Povinelli points out, multiculturalism “is represented as the externalized political testament to the nation’s aversion to its past misdeeds, and to its recovered good intentions” (18). Like Australia, Canadian multiculturalism also implies redemption for settler colonialism. Although multicultural discourses in Canada suggest that there is indeed a break between the colonial past and multicultural present, several scholars have told us that colonialism continues to shadow multiculturalism in significant ways (Anderson 180, Gunew 37). Accordingly, narratives that uncritically celebrate Aboriginality, as evident in Stanley Park, are deeply problematic for several reasons. To begin with, such displays run the risk of diminishing the nation’s violent origins, its’ histories, and legacies. In other words, the Visitors Centre may tell us something about Canadian colonialism, but it obscures the law’s role as a violent force of colonial power. For example, the interpretive site tells us nothing about the legal displacement that the Coast Salish faced during the park-making process. Nor are we told about the ways in which the government used law to appropriate cultural property, including totem poles. Instead, the Visitors Centre conveys the impression that in multicultural Canada, First Nations are now accepted as full citizens who
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enjoy successful social, political, and economic partnerships with the state.

Contrary to the national display at the totem poles site, conflicts between Aboriginal peoples and the Canadian government persist. Given that First Nations in BC have never relinquished their territorial ownership through treaties or otherwise, these tensions are particularly acute in Canada’s most westerly province. As Nick Blomley explains;

land in British Columbia remains profoundly unsettled. For over a century, First Nations in British Columbia have sought recognition of their rights to land through delegations, legal petitions, and direct action. It was not until 1991 that the province of British Columbia gave partial acknowledgement of aboriginal title, and began treaty negotiations with native peoples, that continue, often proving fractious and controversial. (107)

Given these ongoing contestations around legal recognition and land and resource rights, the Visitors Centre does not adequately capture the contemporary political situation in BC and Canada. Inclusion in the nation does not simply hinge on the discursive acknowledgement and appreciation of Aboriginal peoples, but requires a redistribution of material resources, and economic, social, and political power. Although the display at the totem poles site maintains that we have now transcended colonialism, the material realities facing First Nations in Canada suggests otherwise—that legal dispossession and dislocation continue to unsettle the nation in old and new ways.

Notes
1 A version of this paper was presented at the Race and Empire Conference at York University in April 2004. I would like to thank the participants as well as Cheryl Suzak, David Sealy, and the anonymous reviewers for their insightful comments on earlier drafts.
2 The Coast Salish include the Squamish, Musqueam, and Tsleil-Waututh.
3 Throughout, I use the terms Native, Aboriginal, and First Nations interchangeably, unless I am referring to a specific Nation.
4 I am using scare quotes initially to suggest that authenticity is a contested category, but I do not use them throughout the paper.
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This is a theme that repeatedly emerges in discussions about totem pole preservation. See National Archives of Canada (NAC) volume 4086, file 507–782, 507-782-2A.

See, for example, “Preserve Totem Poles: Americans are Depleting Supply,” Edmonton Journal circa 1925. NAC RG Volume 4086 file 507, 787-2.

See 17 George V. Chapter 32. Assented to March 31, 1927.

For the transcripts of this conversation see Scott to Fougner. January 11, 1928. NAC RG 10 Volume 4086 File 507, 787-2A.


Records of the Boards refusal can be found in the Parks Board Minutes. 11 May, 1933. 48-A-4 File 2. City of Vancouver Archives (CVA).

This scene is captured in a photograph. Vancouver Public Library (VPL) Special Collections, VPL 4941.


For complete transcripts see “Totem Pole Interpretive Station.” CVA, PD2344, p.1.


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Call for Papers

A special Essays on Canadian Writing issue on Citizenship and Cultural Belonging in Canadian Literature
A TransCanada Project
Guest Editors: David Chariandy and Sophie McCall

Essays on Canadian Writing invites submissions for a forthcoming special issue on citizenship, one of the key topics of the conference entitled ‘TransCanada: Literature, Institutions, Citizenship,’ held June 23–26, 2005, in Vancouver. Recently, the term citizenship has migrated from its traditional home in political and legal discourses, and emerged as a highly conspicuous and powerful concept-metaphor in global debates on cultural belonging. We suggest that citizenship is supplementing or even replacing nationality or the nation as the dominant critical keyword in Canada’s latest era of social change and security concerns. We are inviting papers that explore what is at stake in this turn to citizenship, particularly in light of shifting political and institutional structures informing the study of Canadian literature. Besides engaging with the challenges of reading citizenship in different periods of Canadian history, our issue aims to explore emergent claims and challenges to citizenship from First Nations, feminist, postcolonial, and queer studies scholarship. The special issue will be especially timely since 2007 will mark the 60th anniversary of the Canadian citizenship act.

For more information or to submit a contribution, please contact the co-editors.
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Full-length papers (@ 5000–9000 words) should follow the submissions guidelines as posted on the ECW website <http://www.ecw.ca>. Information is also available in the first pages of published copies of the journal.
“What is an Indian?: Identity Politics in United States Federal Indian Law and American Indian Literatures*  
Eric Cheyfitz

The emergence of the idea of race as a scientific category in the first half of the nineteenth century in the United States was simultaneous with the emergence of biology as a category of knowledge and scientific racism as a mode of justifying both the enslavement of African Americans and the genocide of American Indians.¹ This racial bio-logic formed a new discourse of identity in the West, which claimed an autonomous and original realm of analysis for itself, though we can read it today as a particular form of cultural logic. This emergent bio-logic, however ambiguously, enters the discourse of federal Indian law in the landmark case of U.S. v. Rogers in 1846.

The Lumbee legal scholar David E. Wilkins gives us this summary of the facts of the case:

[William S.] Rogers, a yeoman, got into a deadly scuffle in September 1844 with Jacob Nicholson, who, like Rogers, was Euro-American by race, had married into the Cherokee Nation, and was, by Cherokee law, a citizen of their nation. Rogers killed Nicholson by stabbing him in the side with a five-dollar knife. Rogers was arrested, then indicted by the grand jury in the district court of Arkansas in April 1845. When he was brought into federal court to hear the indictment, Rogers, representing himself, argued that the district court lacked jurisdiction to try him because both he and the deceased were regarded legally as Indians by the Cherokee Nation and under

* This essay is excerpted from “The (Post)Colonial Construction of Indian Country: U.S. American Indian Literatures and Federal Indian Law,” which is Part I of the Columbia Guide to American Indian Literatures of the United States since 1945 (forthcoming in 2006 from Columbia UP). Research for this essay was enabled by a fellowship from the Society for the Humanities at Cornell University, and by a grant from the University of Pennsylvania Research Foundation.
the 1834 trade and intercourse act the United States lacked jurisdiction in such cases [of Indian on Indian crime]. (39)

The case came to the Supreme Court in 1846 “on a certificate of division” (45 U.S. at 567), the two circuit court judges not being able to decide the matter (ironically, as Wilkins points out, when the case did reach the Supreme Court, Rogers, unbeknownst to the Court, had died by drowning during a prison break [40]). Somewhat contrary to Wilkins’ summary, Rogers, in his plea, did not assert that “he and the deceased were regarded legally as Indians by the Cherokee Nation” but that he and Nicholson were Cherokee Indians (45 U.S. at 568; my emphasis). This may seem to put too fine a point on the matter but I think not. For what Rogers’ identification of himself as a “Cherokee Indian” suggests is an important tension between the cultural-political identity: Cherokee and what was at this moment emerging as the racial designation Indian. That is, the identity of “Cherokee Indian” articulates a coupling of cultural logic with a bio-logic. A longer quote from Rogers’ plea can help us understand this coupling, which represents the historic shift in emphasis from Cherokee Indian to Cherokee Indian, that is, from cultural logic to bio-logic:

And the defendant further says, that, from the time he removed, as aforesaid, he incorporated himself with the said tribe of Indians as one of them, and was and is so treated, recognized, and adopted by said tribe and the proper authorities thereof, and exercised and exercises all the rights and privileges of a Cherokee Indian in said tribe, and was and is domiciled in the country aforesaid; that, before ______ and at the time of the commission of the supposed crime, if any such was committed, to wit, in the Indian country aforesaid, he, the defendant, by the acts aforesaid, became, and was, and still is, a citizen of the Cherokee nation, and became, and was, and still is, a Cherokee Indian, within the true intent and meaning of the act of Congress in that behalf provided. (568)

The syntax of the plea suggests that to be a “citizen of the Cherokee nation,” which is to “exercise . . . all the rights and privileges” thereof,
is to be a Cherokee Indian. On the one hand, we can say that Cherokee thinking incorporates a biological term of race, “Indian” (coined by Columbus and acquiring its biological meaning in the nineteenth-century discourses of law and anthropology), into a cultural-political term, “Cherokee,” representing a particular post-invasion national formation that took shape in the eighteenth and nineteenth centuries in response to Anglo-American imperialism. The anthropologist James Mooney notes: “Cherokee, the name by which they are commonly known, has no meaning in their own language, and seems to be of foreign origin” (15). Following Mooney’s work, we might speculate that before any national names took hold, clan and town names were the principal names of self-ascription for the peoples known now as the Cherokee.

On the other hand, in contradistinction to the incorporation of biologic by cultural logic, Cherokee Indian can represent the invasion and displacement of cultural by bio-logic, as Chief Justice Taney suggests in his decision:

   And we think it very clear, that a white man who at mature age is adopted in an Indian tribe does not thereby become an Indian, and was not intended to be embraced in the exception [to the 1834 trade and intercourse act, which exempted Indian-on-Indian crime from federal jurisdiction] above mentioned. He may by such adoption become entitled to certain privileges in the tribe, and make himself amenable to their laws and usages. Yet he is not an Indian; and the exception is confined to those who by the usages and customs of the Indians are regarded as belonging to their race. It does not speak of members of a tribe, but of the race generally, of the family of Indians; and it intended to leave them both [Rogers and Nicholson presumably], as regarded their own tribe, and other tribes also, to be governed by Indian usages and customs. (45 U.S. at 572–73)

The preceding passage suggests that for Taney the issue is not whether or not Rogers and Nicholson are Cherokee Indians but whether or
not they are Indians. The former designation would mean simply that they are “members of a [particular] tribe,” which Taney seems willing to concede; the latter designation, however, means not inclusion in a tribe but “in the race generally, of the family of Indians.” Taney’s decision, in other words, gives us the generic “Indian,” invented by Columbus and here refurbished in the language of bio-logic. By 1850, four years after the Court’s decision in *Rogers*, “[f]ormal racial classification . . . [became] operative on the census . . . and it was then left to white census enumerators to decide whether or not to accept the classification offered by those who were counted” (Krupat 78).

Yet the passage also implies that Taney’s bio-logical Indian is still operating under cultural logic, suggesting that we are witnessing here is the historical moment when the bio-logical Indian was still emerging from the cultural logic of local community, or tribal, logic. Note, for example, that Taney’s implicit bio-logical formulation—a white man cannot be an Indian—is contained within a cultural parameter: “a white man who at a mature age is adopted in an Indian tribe does not thereby become an Indian” suggests that white youths and white females can become Indians through the cultural logic of adoption. This apparently strange proviso may be prompted by the anxiety expressed in the opinion that the Indian tribes will become a refuge for adult white male criminals seeking to escape U.S. jurisdiction (45 U.S. at 573). Whatever its cause, its effect is to circumscribe a certain bio-logic by a certain cultural logic. Further, the definition of “Indian” that the opinion offers “is confined to those who by the usages and customs of the Indians are regarded as belonging to their race.” Thus, it would appear, the emergent bio-logical category of Indians-as-a-race is determined by “the usages and customs of the Indians” themselves. The logic here seems circular: the race of Indians will determine who is an Indian, but the universal situation it invokes, being entirely abstract (there are in fact no generic Indians beyond various jargons, both legal and scientific, only members of particular communities: clans, tribes, and nations), returns us to the local situation (*Rogers* is a *Cherokee*), which Taney’s opinion, accepted unanimously by the Court, is trying to transcend with its incipient bio-logic. Prior to *Rogers*, Indian communities under certain circumstances adopt-
ed Europeans, whether or not these communities referred to themselves as “tribes” or “nations” or with clan or kinship terms. But, it should be emphasized, adoption by the community did not make an “Indian,” a Western racial/political category, but a community member, a person belonging to a Native cultural category.

The bio-logic beginning to emerge in Rogers would not reach its full force in federal Indian affairs until the early twentieth century, when it would become a distinct component, first, of government determinations of degrees of “Indianness” and, after 1934, of tribal determinations of their own enrollments as well. In the former case, the bio-logic of blood had its first major impact in 1906 through policy that stemmed from amendments to the 1887 Dawes, or General Allotment Act.

The ostensible rationale for allotment was “progressive,” the assimilation of the Indians into the American dream of property-holding individualism. At first allottees “born within the territorial limits of the United States” were automatically granted citizenship by the act (Prucha, no. 104, sec.6), which in its original form placed their land “in trust” with the U.S. government “for the period of twenty-five years . . . for the sole use and benefit of the Indian to whom such allotment shall have been made,” at the end of which time the allotment was delivered in fee to the allottee (Prucha, no 104, sec 5). The citizenship provision was amended by the Burke Act of 1906, by which “the Indian became a citizen after the patent in fee simple was granted instead of upon the completion of his allotment and the issuance of a trust patent” (Cohen 154).

Among policies implemented in the wake of the Burke Act were authorizations for “competency commissions” to determine whether the newly compelled individual Indians should receive the patent to their land in fee or in trust. Government policy often, though not uniformly, deemed the individual “competent” if he or she were of one-half or less Indian blood (Getches 174; Cohen 169). Just how autonomous the bio-logic of blood had become since its emergence in federal Indian discourses in the first half of the nineteenth century can be read in federal Indian discourses of the first quarter of the twentieth century. For example, United States v. Shock (187 Fed. 862 [1911]) finds: “The varying degrees of blood most naturally become the lines of demarcation
between the different classes, because experience shows that generally speaking the greater percentage of Indian blood a given allottee has, the less capable he is by natural qualification and experience to manage his property” (Cohen 169). Similarly the Annual Report of the Commissioner of Indian Affairs for 1917 states: “While ethnologically a preponderance of white blood has not heretofore been a criterion of competency, nor even now is it always a safe standard, it is almost an axiom that an Indian who has a larger proportion of white blood than Indian partakes more of the characteristics of the former than of the latter” (qtd in Cohen 169). Pronouncements like these reveal the cultural logic of identity formation through the social act of intermarriage being translated into the bio-logic of blood; we can read, that is, the naturalization, or biologization, of the social construction of race.

From the time of U.S. v. Rogers to the present moment, the bio-logic of Indian identity politics has achieved increasing autonomy, which has generated a new configuration of racism. Between the institution of the Indian Reorganization Act (IRA) in 1934, which ended allotment, and 1940, the BIA began to issue Certificates of Degree of Indian Blood (CDIB), though without any written regulations for such issuance. Written rules were first proposed in 1986 and a draft was composed in 1992. The proposed rules were finally published in the Federal Register in 2000 (65 FR 20775) and, as of this writing, as far as I know, are still currently under consideration by the BIA.³ The following is language taken from the proposal:

A Certificate of Degree of Indian or Alaska Native Blood (CDIB) certifies that an individual possesses a specific degree of Indian blood of a federally recognized Indian tribe(s). A deciding Bureau [BIA] official issues the CDIB. We issue CDIBs so that individuals may establish their eligibility for those programs and services based upon their status as American Indians and/or Alaska Natives. A CDIB does not establish membership in a federally recognized Indian tribe, and does not prevent an Indian tribe from making a separate and independent determination of blood degree for tribal purposes. . . . The rolls of
federally recognized Indian tribes may be used as the basis for issuing CDIBs. The base rolls of some tribes are deemed to be correct by statute, even if errors exist. . . . All portions of the Request for Certificate of Degree of Indian or Alaska Native Blood (CDIB) must be completed. You must show your relationship to an enrolled member(s) of a federally recognized Indian tribe, whether it is through your birth mother or birth father, or both. (65 FR at 20776, 20778)

The bureaucratic language of Indian identity in the year 2000 is markedly different from that of the explicit language of naturalized racial hierarchies, which rationalized competency commissions in the Dawes era. We immediately recognize the latter, with its claims of innate white superiority, as racist, while the language of identity in the federal regulations proposed for the issuance of a CDIB appears in the bureaucratic rhetoric of neutrality. But in both cases the same colonial bureaucracy, albeit at different historical moments, dictates the legitimate forms of Indian identity for the purpose of resource distribution. Whereas the language of the Dawes era expresses unselfconsciously the racial ideology that rationalizes the maldistribution of resources inherent in the colonial system of Indian country, the language of identity in the era of Indian “Self Determination” (the typical title for the post-1970 phase of U.S. colonialism in Indian country) represses or disavows this ideology both in the very form of its expression (the “value-free” language of bureaucracy) and in the source of its promulgation: the contemporary BIA staffed by “about 87 per cent” Indians, including the Commissioner of Indian Affairs and “[m]ost of the high level Indian policy positions within the Interior Department” (Getches 239). An Indian-run BIA is the result of a provision in the IRA, which dictates Indian preference in hiring within the agency. This policy was challenged in 1972 by a group of white workers in the BIA, who claimed it violated the Equal Employment Opportunity Act of 1972, which prohibited racial discrimination in hiring. But the practice was upheld by the Supreme Court in a 1974 decision that found: “The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as mem-
bers of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion” (Morton v. Mancari at 554). In this case, it appears, the Court used cultural logic to trump bio-logic. Yet, the regulation in the BIA manual, dictating the hiring preference, and cited in the opinion, was itself contingent on the bio-logic of blood: “To be eligible for preference in appointment, promotion, and training, an individual must be one-fourth or more degree Indian blood and be a member of a Federally-recognized tribe” (554).

Contemporary regulations of blood, couched in a vocabulary that promises scientific objectivity and generated by an Indian-run bureaucracy, give the bio-logic of blood quantum legitimacy at a moment in which we are witnessing the biologization of a whole range of cultural logics organized around a naturalization and universalization of “the body” both as a material object of knowledge and as a metaphor for “human nature.”

Even given the official respectability (both federal and tribal) of blood quantum regulations at the present moment, the language of the BIA on CDIBs suggests that the bio-logic of blood quantum cannot escape its ground in the cultural logic of the political history from which it emerges. For this language suggests the relative non-identity of federally identified and tribally identified Indians: “A CDIB does not establish membership in a federally recognized Indian tribe, and does not prevent an Indian tribe from making a separate and independent determination of blood degree for tribal purposes” (my emphasis). The Rights of Indians and Tribes puts it succinctly: “Indian tribes have the authority to determine who is an Indian for tribal purposes but not for state or federal purposes” (Pevar 19) That is, there is no stable answer to the scandalous question that frames the U.S. legal history of Native identity from Rogers forward: What or who is an Indian? In 1979, in its opinion in the case of U.S. v. Broncheau, the United States Court of Appeals for the Ninth Circuit pointed to the legal instability of Indian identity: “Unlike the term ‘Indian Country,’ which has been defined in 18 U.S.C. §1151, the term ‘Indian’ has not been statutorily defined but instead has been judicially explicat ed over the years. The test, first suggested in United States v. Rogers and generally followed by the courts, considers (1) the degree
of Indian blood; and (2) tribal or governmental recognition as an Indian” (597 F.2d at 1263; internal references omitted). What Broncheau points to is not only the legal instability of the term Indian, which changes its shape from ruling to ruling, from federal to tribal regulations, but also the way federal Indian law has rationalized the historical ambiguities of bio- and cultural logic found in Rogers into the apparent clarity of a two-pronged identity standard, of which, ironically, Rogers becomes the ground. However, the cultural prong of the standard is itself grounded in the bio-logical prong. For tribal membership, as noted, is itself widely dependent on some degree of Indian blood.

The question, “What is an Indian?,” formulated as such in the wake of Rogers and the Dawes Act, appears officially, perhaps for the first time as such, in the Sixty-First Annual Report of the Commissioner of Indian Affairs for 1892: “In close connection with the subject of Government control over the Indians and methods of administration, an interesting question has recently arisen, What is an Indian?” (31). Fifty years later, referring to historic shifts in the legal articulation of the term “Indian,” Felix Cohen’s classic Handbook of Federal Indian Law (1942) begins by noting “[t]he lack of unanimity which exists among those who would attempt a definition of Indians” (2). “Who is an Indian?” is the first question under the heading “Frequently Asked Questions” on the BIA web site, which was closed by court order in December of 2001; and its answer is useful not so much for the information it gives, which in view of the legal history of Indian identity is necessarily problematic, but for the way it condenses and displaces the colonial history it represents:

No single Federal or tribal criterion establishes a person’s identity as an Indian. Government agencies use differing criteria to determine who is an Indian eligible to participate in their programs. Tribes also have varying eligibility criteria for membership. To determine what the criteria might be for agencies or Tribes, you must contact each entity directly.

To be eligible for Bureau of Indian Affairs services, an Indian must (1) be a member of a Tribe recognized by the Federal
Government, (2) [be] one-half or more Indian blood of tribes indigenous to the United States (25 USC 479); or (3) must, for some purposes, be of one-fourth or more Indian ancestry:

The Bureau of the Census counts anyone an Indian who declares himself or herself to be an Indian. In 1990 the Census figures showed there were 1,959,234 American Indians and Alaska Natives living in the United States (1,878,285 American Indians, 57,152 Eskimos, and 23,797 Aleuts). This is a 37.9 percent increase over the 1980 recorded total of 1,420,000. The increase is attributed to improved census taking and more self-identification during the 1990 count. (Bureau of Indian Affairs)

The bureau’s deceptively simple answer raises questions that suggest the way that Indian identity is bureaucratized, composed of legal and administrative contradictions or ambiguities and thus dispersed or deferred until tribunals of various kinds (courts, administrative panels, tribal councils) can come to decisions, which are at best only provisional. For example, in answering the crucial question of eligibility for services implied in “Who is an Indian?”, the BIA lists three criteria (with the third being a modification of the second), as cited above: “(1) . . . a member of a Tribe recognized by the Federal Government, (2) one-half or more Indian blood of tribes indigenous to the United States (25 USC 479); or (3). . . for some purposes . . . of one-fourth or more Indian ancestry.” This language is a modification of the answer previously given by the Bureau to the same question in the third edition (1991) of the pamphlet American Indians Today: Answers to Your Questions: “To be eligible for Bureau of Indian Affairs services, an Indian must (1) be a member of a tribe recognized by the federal government and (2) must, for some purposes, be of one-fourth or more Indian ancestry” (13).

The addition of one-half blood quantum to the more recent rule cites as its authority section 479 of the 25th title of the U.S. Code, which in fact is the codification of section 19 of the IRA. Why, then, has the bureau only recently added this proviso to its definition of Indian? Section 479 of title 25 gives a definition of “[t]he term ‘Indian’” limited by the phrase “as used in this Act” (my emphasis). Thus, the BIA appears
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to be taking the definition of Indian out of context in order to generalize it. After limiting its definition to specific sections of the code, section 479 defines Indians as “all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood” (my emphasis). Whereas the latest available BIA definition of Indian specifies tribal membership and one-half blood quantum, except in certain circumstances where one-quarter will suffice, section 479 appears to say that a person is an Indian if she or he is either a tribal member or is descended from a tribal member and had reservation residency status on June 1, 1934 or is “of one-half or more Indian blood.” The qualifying phrase “all persons of Indian descent” seems redundant on the one hand; but on the other, if taken at face value, raises troublesome questions, no doubt unintentionally, about how one determines such descent outside of the definitional boundaries of tribal enrollment and/or blood quantum. That is, how is “Indian descent” determined in the first instance?

Thus, the highly restrictive current BIA definition, which combines a high blood quantum with tribal membership, cites as its authority a more inclusive, if still restrictive, definition, in which one-half blood quantum is an alternative to either tribal membership or conditional descent from a tribal member. Whether the BIA’s citation of the IRA out of context is legitimate rests on individual challenges to the administrative rules governing Indian identity. But, in elaborating a history of the continual federal amending of Indian identity from U.S. v. Rogers to the present, I want to emphasize the kind of structural contradictions to which I have been pointing. These result in the fundamental incoherence of Indian identity based in the colonial system of federal Indian law, an incoherence founded on an historical proliferation of laws, legal cases, and regulations that cannot possibly be comprehended in any systematic way.

II.
From its beginnings in the 1970s the criticism of Native American literatures has made the question what is an Indian? central to its project.
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The problem is that this criticism does not recognize the political history of this question, which Rogers and its progeny represent. In the first book-length study of the American Indian novel, published in 1978, Charles R. Larson begins by noting: “The concept of Indian identity . . . is a difficult one” (2). And after musing on the blood quantum and phenotype of several Native authors including N. Scott Momaday and John Joseph Matthews (both now securely in the Native American literary canon), Larson asks: “In short, how can we determine that the writers discussed in this study are American Indians? How can we be certain, even, that they wrote the works attributed to them? I ask these questions because the two primary qualifications for inclusion of an author in this study are, first, the establishment that he or she is genuinely a Native American, and, second, that he wrote the novel himself without the aid of a collaborator or an amanuensis” (4).

Larson is clearly preoccupied with who is “genuinely Native American” without at the same time being able to supply a precise definition of “genuine.” Larson’s rejection of fiction written in collaboration with a non-Indian appears to be based on a desire not to dilute or compromise the “Indianness” (2) of the works he includes. Thus, he marginalizes what is now considered to be a major Indian novel, indeed the first major Indian novel published in the twentieth century and I would argue the first major Indian novel published, Cogewea, The Half-Blood (1927) by Mourning Dove, because she collaborated with Lucullus Virgil McWhorter (5). As for his working definition of “Indianness” in the first place, Larson turns to the tribal rolls:

The inclusion of a writer’s name on the rolls of his specific tribe (compiled by tribal leaders and kept in the tribal headquarters as well as in the Bureau of Indian Affairs) implies a kind of kinship with his fellow tribesman. . . . What is of especial interest for my study here is the “degree” of Indian blood suggested by the tribal rolls. . . . my concern with these [enrollment] figures has only been to suggest that although a significant test of a writer’s Indian origins falls back on the rolls themselves, compiled by the tribal councils, the “Indianness” of the writing may have
Known acceptance by one’s peers, then, is probably a more meaningful test of Indianness. Along these lines, it should be pointed out that many of the writers discussed in this volume have had their work included in anthologies of American Indian writing, edited by American Indians—a further test of this acceptance. (6–8)

Such community-centered criteria are certainly used today to determine the “Indianness” of Indian writing. But Larson’s presentation of them is circular: how do those Indians who edit Indian anthologies come to be recognized as Indians themselves, if not by the identical processes (tribal enrollment and/or appearance in Indian anthologies) Larson is using to establish his notion of “Indianness” in the first place. Hence, the way he presents his criteria does not answer the question who is an Indian but begs it in an endless regress because he fails to query the politics of the question itself. That is, he invokes the tribal rolls initially but does not historicize them by connecting them to the colonial history of federal Indian law from which they arose. Outside the legal fence that Rogers and its progeny, as practical applications of the European imaginary, have constructed around Native identities by homogenizing them as Indian identity, we might imagine that there are no Indian writers, only Cherokee or Navajo or Lakota writers and even more locally defined, only writers with particular clan/kinship names to identify them. Such identities, which certainly depend on community recognition, nevertheless conform not to a single bio-logic but to multiple cultural logics, the kind that obtained in Native communities, and still persist in important ways (however “unofficially”) before the onset of federal Indian law, what Gerald Vizenor terms “word wars of the whiteman” (Bearheart 14). Within these “word wars,” which generate the history of the question Who or what is an Indian?, the question itself is nothing but a scandal of European colonialism. At the same time, however, it is crucial to emphasize that across Native communities, particularly in the twentieth century, the term “Indian” has been adopted not simply out of necessity but as a sign of both personal pride and trans-tribal organization to deal in various ways with federal policy, as noted in the
titles of such organizations, past and present, as the Society of America Indians (SAI), the National Congress of American Indians (NCAI) and the American Indian Movement (AIM).

Nevertheless, to repeat the question without emphasizing its political history perpetuates the scandal by naturalizing it. Fifteen years after Larson raises the question in the literary realm, Louis Owens begins his influential study of the American Indian novel <i>Other Destinies</i> (1992) with the same question: “To begin to write about something called ‘the American Indian novel’ is to enter a slippery and uncertain terrain. Take one step into this region and we are confronted with difficult questions of authority and ethnicity: What is an Indian?” (3). For Owens the central theme of the contemporary American Indian novel is the “question of identity” (5): “For the contemporary Indian novelist—in every case a mixedblood who must come to terms in one form or another with peripherality as well as both European and Indian ethnicity—identity is the central issue and theme. . .” (5).

Informed by both postmodern and postcolonial studies, Owens quotes Vizenor to the effect that all “Indians” are “invented”; and he pointedly notes: “For American Indians, the problem of identity comprehends centuries of colonial and postcolonial displacement. . .” (4). But while he remarks that in addition to “some basic knowledge of the tribal histories and mythologies of the Indian cultures at the heart of these novels, readers should be aware of crucial moments in Native American history of the last two centuries [because] [s]uch moments figure prominently in writing by Indian authors” (30), Owens devotes only the last two pages of this thirty-one page introduction to those moments in the history of federal Indian law, and then, he conflates two key cases in this history, <i>Cherokee Nation v. Georgia</i> (1831) and <i>Worcester v. Georgia</i> (1832). Thus, while pointing toward the importance of colonial history in understanding American Indian literatures, Owens does not specify the historic legal forces that give crucial definition to the notion of “invented Indians,” charging the phrase with its particular colonial valence; nor does he query the cultural and biologies that both conflict in and construct the term “mixedblood.” The history of these logics makes Owens’ assertion that “every” contempo-
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A common problematic among contemporary Indian novelists is the term “mixedblood.” For, depending on the context, a mixedblood might be a fullblood and vice versa. In the Cherokee Keetoowah society—“a secret religious organization that had been revived and strengthened between 1858–59” (Sturm 71)—Circe Sturm gives us an example of such a context:

Though the Keetoowah Society was open to Christian Cherokees, it did not admit members of mixed racial ancestry, and even educated full-bloods were suspect. . . . Keetoowah meetings were conducted in Cherokee and the proceedings recorded in the syllabary, which provided a modicum of protection from curious outsiders. However, this “anti-mixed blood sentiment among Keetoowahs was strange, because several important leaders had mixed racial ancestry. . . . The categories of full and mixed were much more complex than mixed biological parentage. . . ” (72; internal references omitted)

Owens’s ahistorical, or under-theorized, use of the term mixedblood allows him to stabilize it by assuming the word’s transparency and thus to make the claim that “the dominant theme in novels by Indian authors [is] the dilemma of the mixedblood, the liminal ‘breed’ seemingly trapped between Indian and white worlds” (40). In Cherokee novelist Thomas King’s postmodern trickster narrative Green Grass, Running Water, one of the Indian characters catches the schematic banality of the mixedblood theme:

It was a common enough theme in novels and movies. Indian leaves the traditional world of the reserve, goes to the city, and is destroyed. Indian leaves the traditional world of the reserve, is exposed to white culture, and becomes trapped between two worlds. Indian leaves the traditional world of the reserve, gets an education, and is shunned by his tribe. (317)
As King’s character points out the *mixedblood between two worlds* has been a standard trope in the literary history of twentieth-century Native writing; though the passage cited locates the trope in cultural texts *per se*, while I want to locate it in standard interpretations of those texts. The project of *Other Destinies* is to revive this exhausted topos by ringing some changes on it. In this vein, Owens remarks of “Leslie Silko, in *Ceremony* (1977), [that she] writes again of a mixedblood protagonist lost between cultures and identities. In the character of Tayo, however, Silko turns the conventionally painful predicament of the mixedblood around, making the mixedblood a metaphor for the dynamic, syncretic, adaptive qualities of Indian cultures that will ensure survival” (26).

And of Vizenor, Owens comments that he “rejects entirely the conventional posture of mourning for the hapless mixedblood trapped between worlds, identifying the mixedblood with the shape-shifting visage of trickster, who requires that we reexamine, moment by moment, all definition and discourse” (27). These remarks usefully complicate the figure of the mixedblood within a literary tradition where the figure always teeters on and often falls over the brink of sentimentality. But once we place the term “mixedblood” back within the colonial history of cultural and bio-logic, then, I think, the “two-worlds” paradigm with the mixedblood as mediating term requires revision as an interpretive model, precisely because the terms “mixedblood” and “fullblood” are not dialectical opposites but ambiguous, overlapping signs, overdetermined by their simultaneous positions in a range of contexts (legal, social, cultural, Native, and non-Native).

For example, who says Tayo is a mixedblood? Certainly, the narrative informs us that his mother is Laguna and his father, a nameless white man. But in a world of intermarriage, Tayo is hardly alone or anomalous as a representative figure, however solitary in certain ways he may be because of the alienation of his war experience. As his aunt remarks: “Girls around here have babies by white men all the time now, and nobody says anything. Men run around with Mexicans and even worse, and nothing is ever said” (33). The Laguna Constitution, as ratified in 1958, makes tribal membership contingent on having two tribally-enrolled parents and some degree of Indian blood, unless one is at least a half-
blood Indian (born before 1958 with one enrolled parent) or half-blood Laguna (born in wedlock with one enrolled parent). In making tribal membership very flexible (in terms of blood quantum) for the children of two Laguna parents, the rule suggests the Pueblo’s desire to try to limit a reasonably widespread practice of intermarriage, even as it is prepared to admit the children of intermarriage to tribal membership, though the gateway narrows considerably. Because Silko never makes it an issue in Ceremonies, we can assume that Tayo is a tribally enrolled member of Laguna Pueblo; and a member of a clan, the latter because Laguna is a matrilineal society, clan membership being determined through the mother (Ortiz 443). So, in these terms, readers can assume Tayo is not a mixedblood; he is a Laguna Indian, not positioned between two worlds but ceremonially searching for his balance within Laguna society, after the trauma of World War II coupled with the colonialist thrust of his secondary school education, which denigrated Laguna epistemologies, has imbalanced him.

Within the novel, the first reference to Tayo as a mixedblood comes from his aunt, who thinks of him as a “half-breed child” (30). But Auntie, it is clear, is the character in the novel who is the most alienated from traditional Laguna practices. Silko stresses not only her Christianity, which “separated the people from themselves . . . tr[ying] to crush the single clan name” (68) but her upbringing of her son, Tayo’s cousin, Rocky, who, a fullblood in terms of bio-logic, is virtually a white man in terms of cultural logic. The only other character in the novel who uses the language of racism about Tayo, referring to him as “white trash” (63), is the violent Laguna veteran Emo, who has nothing but contempt for anything Indian and a murderous envy of everything white. Besides Auntie, the Laguna elders who figure importantly in Tayo’s life (his grandmother, his uncle Josiah, his uncle Robert, and the Laguna medicine man Ku’oosh) never refer to him in blood-quantum terms but accept him matter of factly as a full-fledged member of the community, who needs their help. Thus, Tayo is only a mixedblood from the most alienated of perspectives. As Owens along with others notices in Ceremonies, Silko certainly is fascinated with mixture as a positive force—Josiah’s cattle are hybrid Hereford/Mexican and Betonie, the
Navajo chanter who provides the ceremony for Tayo's cure is Navajo/Mexican—but Silko never refers to these combinations in the language of blood quantum. So Betonie is not a mixedblood; the cattle are not mixedbloods; and Tayo is not a mixedblood, except in a bio-logical language that Silko marks as alienated.

Owens's insight, previously noted, that “Silko turns the conventionally painful predicament of the mixedblood around, making the mixedblood a metaphor for the dynamic, syncretic, adaptive qualities of Indian cultures that will ensure survival” makes sense. But within the colonial history of federal Indian law it still leaves us asking in what sense or senses Owens uses “mixedblood.” For what the sentence says is that all Indians are mixedbloods or virtually so, insofar as mixedbloods are merely metaphors for the dynamism inherent in all Indian cultures.

Owens, then, invokes the importance of history in interpreting American Indian writing; but in interpreting Silko's *Ceremony*, he also bypasses its importance by situating the term “mixedblood” outside the colonial history of cultural and bio-logic, of appearance and behavior, which gives Tayo’s “quest for identity” (20) its particular historical weight. Similarly in his reading of Vizenor’s *Bearheart*, Owens omits the fact that the narrative of Vizenor’s first novel, published in 1978, a year after *Ceremony*, locates his mixedblood tricksters in a flight from the bureaucratic strictures of the BIA and its allied tribal councils created under the Indian Reorganization Act (IRA) of 1934:

The women continued to govern the circus in the traditions of tribal families, the values of shared consciousness until the patriarchal whitemen rewarded the tribal men as chiefs and rulers. Meanwhile reservation governments were gaining new powers and new generations of evil politicians were seeking control of the sacred cedar. The Indian Reorganization Act created constitutional governments on reservations. The constitutions were designed by white anthropologists and the elections of tribal people were manipulated by colonial federal administrators. Men of evil and tribal fools were propped up in reser-
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viation offices to authorize the exploitation of native lands and natural resources. (12)

When Vizenor introduces the notion of “invented Indians” into the narrative, it is a response that emerges from the history of federal Indian law: “What does Indian mean?” (195) asks a member of a vicious community of “hunters and breeders,” “proud people,” who in the post-apocalyptic world of Bearheart live in a walled community restricted to people of their “own breed” (189), fullbloods, we might say, though apparently non-Native fullbloods in this case. Ironically, the mixedblood answer is a paraphrase of the BIA regulations governing Indian identity: “An Indian is a member of a recognized tribe and a person who has Indian blood.” Doubling the irony, the immediate fullblood response is: “But what is Indian blood?” And the immediate mixedblood rejoinder is: “Indian blood is not white blood” (195; my emphasis).

The force of this exchange is to deconstruct the very notion of blood by making it no more than the absence of its hypothetical opposite in a continually circular logic that will never yield a signified. Thus, the logic of Bearheart insists that the terms of blood quantum have no meaning whatsoever outside the colonial discourses that enforce them. This insistence results in the irony, intentional or not, produced by Vizenor’s substitution of the term “mixedblood” for the term “Indian.” For both terms are produced by the same legal discourse.

Notes
1 For a history of these developments, see Stanton.
2 For a discussion of the varying criteria for competency, see McDonnell, Chapter 7; and Cohen 167–69.
3 I arrived at this date from information supplied to me in a telephone conversation with Karen Ketcher, Branch of Tribal Operations, Eastern Oklahoma region, department of the Interior, Bureau of Indian Affairs, 101 North 5th Street, Muskogee, OK 74401. “In reviewing the Bureau’s practices, the Interior Board of Indian Appeals (IBIA) ruled that the degree of Indian blood of an individual Indian cannot be changed by the Bureau on the basis of ‘the evidentiary standards set forth in unwritten policy statements’ and advised the Bureau to develop and issue regulations, Underwood v. Deputy Assistant Secretary—Indian Affairs, 93 I.D. 13, 14 IBIA 3, January 31, 1986. In the absence of regulations,
the Bureau has been without the authority to invalidate or amend CDIBs issued in error. As a result, there are individuals who do not receive services for which they may qualify and individuals who receive services for which they do not qualify” (65 FR at 20776). For a history of the proposal see 65 FR at 20776–78.

4 Title 25 of the Code of Federal Regulations, section 5.1 (25 CFRs 5.1) currently uses the criteria of 25 USC § 479, which does not require minimum blood quantum of any kind if one is tribally enrolled or descended from a specific category of tribal member, though, once again, we ought to remember that the tribal enrollment itself typically requires, among other criteria, a certain blood quantum. The ACLU’s handbook, *The Rights of Indians and Tribes*, notes: “Many tribes require that a person have at least one-fourth tribal blood to be enrolled” (Pevar 19).

5 In fact the Wheeler-Howard Act does define “Indian” for its purposes (25 USC 479) and so the Court in *Broncheau* is strictly speaking wrong when it says that “the term ‘Indian’ has not been statutorily defined.” But the definition refers to the use of the term in the Act alone and so appears to be contextually limited, that is, not generally applicable, though the BIA, as I discuss below, has nevertheless tried to generalize from the Act.

6 These questions were accessible on the BIA website <http://www.doi.gov/bureau-indian-affairs.html> before Federal Judge Royce Lambert ordered the site closed in December of 2001 in relation to the Indian trust fund litigation, pending assurances that trust fund accounts were not vulnerable to hacking through the site. These criteria for “Who is an Indian?” can currently be found at <http://lycos.factmonster.com/ipka/A0192524.html>. On request the BIA sent me in November of 2003 a pamphlet titled *American Indians and Alaska Natives*, which contains “Answers to Some Frequently Asked questions.” Among these is “Who is an American Indian or Alaska Native?” The answer is: “As a general principle an Indian is a person who is of some degree Indian blood and is recognized as an Indian tribe and/or the United States. No single federal or tribal criterion establishes a person’s identity as an Indian. Government agencies use differing criteria to determine eligibility for different programs and services. Tribes also have varying eligibility criteria for membership” (“Who is an Indian?”).

It is important to understand the difference between the etymological term “Indian” and the political/legal term “Indian.” The protections and services provided by the United States for tribal members flow not from an individual’s status as an American Indian in an ethnological sense, but because the person is a member of a tribe recognized by the United States, and with which the United States has a special trust relationship. This special trust relationship entails certain legally enforceable obligations and responsibilities.

There is nothing in this pamphlet about criteria for eligibility for BIA services; and the pamphlet does not define “ethnological.” But as we will see in the fol-
following discussion, section 479 of the 25th title of the US code suggests that one does not have to be a tribally enrolled Indian to be recognized as an Indian by the federal government if one can prove that one’s blood quantum is one-half or more. And the above citation as well points to “some degree of Indian blood” and federal recognition is as sufficient, independent of tribal recognition, to establish one’s legal status as an Indian. In any event, this BIA publication is only one more piece of evidence in the case that can be made for the utter incoherence of the way federal Indian law had historically defined Indian identity.

7 The Cherokee writer John Rollin Ridge published his novel *The Life and Adventures of Joaquin Murieta the Celebrated California Bandit* in 1854. But the book, as the title suggests, is not about Indians, but about Mexicans fighting for their land in Anglo-occupied California. In his study of the U.S. Native novel *Other Destinies*, Louis Owens reads Ridge’s championing of Mexican resistance to U.S. land theft as a displacement of the novelist’s criticism of the U.S. theft of Native lands, while noting that the brief portraits of California Indians in the novel are scurrilously stereotypical. Owens finds this simultaneous embrace of Mexican/Indian land rights and “racist” view of California Indians “paradoxical” (39). I find, on the other hand, that Ridge’s racist portraits of the only literal Indians in the novels make it difficult to read the novel as an indirect defense of Native land rights. Ridge himself, born in 1827, was the son of one of the leaders of the Treaty Party, which in the 1830s supported removal and signed the infamous Treaty of New Echota (1835). This treaty violated the will of the majority of the Cherokees against removal, as expressed in the elected government of John Ross, and in the Cherokee Constitution, which, as noted, forbid sales of Cherokee land by persons acting without the authority of the Cherokee council. In 1839, after their arrival in what would become the state of Oklahoma, the leaders of the Treaty Party, including Ridge’s father, grandfather, and cousin (Elias Boudinot) were assassinated for their subversion of the Cherokee polity. After the assassinations, Ridge and his mother left Oklahoma for Fayetteville, Arkansas. In 1850, after killing David Kell, a Cherokee whom he suspected of being one of his father’s assassins, Ridge left for California (Hoxie 550–52). S. Alice Callahan’s novel *Wynema* (1891), the first novel we know to have been published by a U.S. American Indian woman, remains to be critically assessed, though A. Lavonne Brown Ruoff’s introduction to her University of Nebraska Press edition marks an important beginning to this process.

8 The Laguna Constitution, with membership requirements, as ratified in 1958 can be found at <http://thorpe.ou.edu/IRA/1958nmpuebcon.html>. While Tayo was born in a fictional time which lies outside the purview of the Laguna Constitution (the time of the novel is immediately following WWII, presumably placing Tayo’s birth date somewhere in the 1920s), he would appear to be a half-blood Indian with an enrolled mother, which would afford him membership in the tribe if the Constitution was applicable.
Eric Cheyfitz

Works Cited


A legal world is built only to the extent that there are commitments that place bodies on the line . . . the interpretive commitments of officials are realized, indeed, in the flesh.

Robert Cover “Violence and the Word” (208)

At the end of Chinua Achebe’s novel, *Things Fall Apart*, readers find the narrative abandoned and replaced with another story. The novel tells the story of Okonkwo, a man from the Nigerian tribe of Umuofia who, despite a destitute upbringing, becomes one of the most powerful leaders of his clan. Achebe’s protagonist, however, is anything but an endearing hero. Haunted by the memory of his poor and hapless father, Okonkwo becomes a proud, short-tempered man, who beats his wives and treats those around him with a hard-edged lack of sympathy. The novel concludes with the arrival of Christian missionaries from England, who convert members of Okonkwo’s clan, establish a church, and eventually set up a court. Following an altercation with the priest and some of the church’s converts, Okonkwo and five other men are arrested and beaten. After their release, the clan calls a meeting, which is interrupted by the guards who had earlier imprisoned and beaten the men. This intrusion proves more than Okonkwo can bear: overcome with humiliation and rage, he confronts one of the guards and kills him.

The chapter that follows this episode shifts from Okonkwo’s point of view to that of the unnamed District Commissioner, who comes to the village in search of the guard’s murderer and is led by the clansmen to a tree from which Okonkwo’s body hangs. The tragedy of his suicide would seem to be a natural place for Achebe’s novel to end. Instead, *Things Fall Apart* concludes with the beginning of another story, which announces itself in the omniscient narrator’s shift in focus from Okonkwo to the
District Commissioner. Reframing Okonkwo’s narrative from within the Commissioner’s perspective, the narrator concludes the story from the subject position of a man who knows nothing of Okonkwo save the scant facts of the messenger’s murder and the murderer’s suicide. As the newly anointed protagonist leaves deep in thought about how the dead man’s story might enter the wider colonial picture, Achebe’s title and the novel’s epigraph from Yeats’ poem “The Second Coming”—“things fall apart, the center cannot hold”—acquires new force, inflected with the strained power relations of colonialism. In these moments, the man we had taken to be the novel’s central figure is undone, and becomes little more than a small, anonymous part in a very different story:

The Commissioner went away, taking three or four of the soldiers with him. In the many years in which he had toiled to bring civilization to different parts of Africa he had learned a number of things. One of them was that a District Commissioner must never attend to such undignified details as cutting a hanged man from the tree. Such attention would give the natives a poor opinion of him. In the book which he planned to write he would stress that point. As he walked back to the court he thought about that book. Every day brought him some new material. The story of this man who had killed a messenger and hanged himself would make interesting reading. One could almost write a whole chapter on him. Perhaps not a whole chapter but a reasonable paragraph, at any rate. There was so much else to include, and one must be firm in cutting details. He had already chosen the title of the book, after much thought: *The Pacification of the Primitive Tribes of the Lower Niger.* (208–208)

The heart of Achebe’s novel—Okonkwo’s story—turns out to be a minor narrative within a larger one, reduced to a footnote in the master colonial narrative represented by *The Pacification of the Primitive Tribes of the Lower Niger.* The tragedy that Achebe’s novel records, then, is the process by which Okonkwo’s narrative recedes into the background of another, becoming an “undignified detail” that those in power would
do best to ignore. Okonkwo’s suicide is reduced to “material” for the Commissioner’s story, the scale of his life cut down to the size of a “chapter,” even “a reasonable paragraph.”

I begin with Achebe’s novel not to make a claim about its place within the larger context of African literature. I invoke it, rather, to introduce and animate the terms of this essay’s consideration of British colonial law as it was practiced in Nigeria. Viewed from the positions of both legal and literary scholarship, Things Fall Apart provides us with an occasion to reflect on the relationship between native and colonial law, and to do so in narratological terms. As Achebe’s novel suggests, this relationship unfolds through a double-edged process of shortening and lengthening: the condensing and shrinking of one story and the simultaneous expansion of another, more epic narrative. The combined force of these transformations, I will argue, is accompanied by a dramatic shift in register, one that renders the colonized subject anonymous. Moreover, I will go on to argue that this effacement of identity lays the foundation for individual stories to do the work of documentation. In this essay, I examine the means through which colonial law transformed the stories of singular subjects within the legal framework, enlisting them, through an editorial process, in the project of documentation and the related task of elaborating a narrative of colonial justice.

Achebe’s ending, to be sure, opens up a range of interpretive possibilities, positing—among other things—the indelibility of native stories, which persist in spite of colonial attempts to quash them. Along such lines, Okonkwo’s suicide might be grasped as an act of defiance—an emphatic refusal to be co-opted by the Commissioner and his soldiers. My own focus here, however, begins by approaching the novel’s conclusion as a depiction of how colonial texts, written by more powerful authors, replaced native stories. To suggest as much, however, is to offer only a partial view of the grounds that make possible such a replacement. For the novel’s closing paragraphs relate not only what happens to Okonkwo’s story, but also where this transformation occurs: “As he walked back to the court he thought about that book.” The place where things fall apart turns out to be a location between two positions, between Okonkwo’s hanged body in the village of Iguedo and the British
colonial court. It is here, in the movement from one to the other—on subtle but unmistakably legal terrain—that the book that promises to incorporate Okonkwo’s life in the form of “a reasonable paragraph” takes shape in the District Commissioner’s imagination. There is something in the transition from village to court—a movement towards the law—that makes it possible for the District Commissioner to conceive of his book. In presenting *The Pacification of the Primitive Tribes of the Lower Niger* as the last word on Okonkwo’s life, *Things Fall Apart* gestures towards the force that textualization exerts in a colonial framework, projecting its as-yet-unwritten coda not simply as narrative, but as written text. Crucially, however, this shift to writing occurs not simply through the act of inscription, but through the editorial work that precedes it.

“One must be firm in cutting details,” editing out minutiae that detract from the larger issues in the study of pacification.

The seemingly ethical terms in which the Commissioner justifies cutting the details of his volume are exposed as pretense when we consider a different kind of cutting that he refuses to do: namely, the act of cutting down Okonkwo’s body from the tree: “a District Commissioner must never attend to such undignified details as cutting a hanged man from the tree.” This literal body may well have offered an occasion for compassion, a chance for British administration to demonstrate its humane treatment of its colonized subjects. The Commissioner rejects this possibility, however, in favor of a more pedagogical aim: “Such attention would give the natives a poor opinion of him. In the book which he planned to write he would stress that point.” The radically different objects of this cutting underscore the injustice in their being related at all. Simply stated, it is morally repugnant to equate the task of cutting down a hanged body with the labor of cutting the details of a life from a story that would purport to explain it. These cuttings may indeed strike an important contrast, but they are treated with equal steadfastness by the Commissioner in his determination to “stress that point” of not cutting down the dead man, as well as in his reflection that “one must be firm in cutting details.”

The Commissioner’s stiff resolve confirms Walter Benjamin famous assertion in “Theses on the Philosophy of History” that there is “no
document of civilization which is not at the same time a document of barbarism” (256). What emerges as especially salient here is not simply the relationship between barbarism and writing but more specifically, the brutality of documentation, the process through which a body of work, a story, an individual life must pass in order to be recognized—and recorded—as a document. It is not just the text that produces violence, in other words, but a specific kind of text: one that testifies to, documents, and establishes facts. The trajectory by which this violence exerts itself—the element that makes it violent, in other words—is another matter. It is violent, ultimately, because it effaces. The story of an individual becomes an example, a detail in a larger story of administrative success in colonial Africa.

It is important, moreover, that this transition is not one of outright elimination but of compression: the reduction of a life, and the narrative depicting that life, into a chapter or a paragraph. This process suggests the subtle complexity with which law, history and narrative were woven together in colonial Africa—a subtlety often overlooked when colonialism is imagined primarily as a system that ruled out competing indigenous legal practices. I am not suggesting here that British colonial policies did not eradicate native forms of justice; they did. I am proposing, rather, that a critical evaluation of colonialism’s development demands more specificity than general descriptions of political power dynamics admit. In particular, it is this work of compression, and the redaction it enables—the ability to lift a compact story from one context and embed it in another—that is a central mechanism by which colonial law literally overwrites native law. I would like to suggest how this happens through an analysis of an exemplary opinion from colonial Nigeria, Lewis v. Bankole. Momentarily, I will be examining this highly significant case, which was among the first to consider the question of property rights within the context of British colonial Africa. I want first, however, to situate this case in its colonial context by setting out some basic features of the British treatment of African customary law. As I will explain, colonial law reduced and recast existing indigenous narratives and practices of law with a view to creating a more just society, one modeled upon British jurisprudence.
I.
The application of British law in Africa was heralded as one of England’s most valuable contributions to its colonies, promising to institute a legacy of reason and tolerance in a context that the British saw as utterly chaotic. Even as the colonial era waned and its critics became more numerous, the sentiment persisted that common law’s influence in the colonies had been, on the whole, a positive one. As one legal scholar noted in the *Journal of African Law* at the dawn of many African nations’ independence, “British administration in overseas countries has conferred no greater benefit than English law and justice” (Roberts-Wray 66). Underwriting this conviction was the long-held view of the British judge and, by extension, the system he represented, as a preserver and protector of African society. A colonial judge in Nigeria viewed his court’s particular duty in this way:

> I regard this court in its equity jurisdiction as in some measure by virtue of the jurisdiction sections of the Supreme Court Ordinance ‘the keeper of the conscience’ of native communities in regard to the absolute enforcement of alleged native customs. (Ajayi 104)

The salutary appraisal of western jurisprudence in colonial Africa reflected the law’s purported pluralism in integrating native custom with imported English law. Such integration, however, was idealistic at best: in reality, legal issues were addressed through parallel legal systems, that of English-administered courts and of the Native Courts, which were presided over by local chiefs. If a case could not be settled in a Native Court of Appeal, it was brought before a superior (Magistrates’ or Supreme) Court. British officials in these courts were instructed to apply native or customary law to colonial subjects, provided that this law met the requirements of the Repugnancy Clause, which excluded practices that were anathema to “justice, equity, and good conscience” (Roberts-Wray 77). In theory, this integration was meant to tolerate and preserve existing African traditions by applying law in its local context. In practice, the confluence of these two legal systems often resulted in misreading and fragmentation, as magistrates and judges frequently misunderstood,
and consequently misapplied, native law. The result was a system choked with confusion, in which British officials tended to construe indigenous practices according to their own assumptions and priorities. Not surprisingly, African customs often did not meet the repugnancy test, and those that did were frequently misunderstood by magistrates and judges, who interpreted exceptional customs as legal practices.

Ironically, the repugnancy doctrine formalized a haphazard editorial process, embedding the acceptable elements of native custom into colonial law through an irregular method of incongruent decisions. In their new imperial context, these traditions acquired a textual and political stability that reinforced the aims of empire rather than sustaining a local past. Legal scholar Peter Fitzpatrick argues:

"The potent implication of the repugnancy clause is that the native does not have a distinct and integral project since, with the repugnancy clause, a part of the resident culture can be denied here and a part there without any harm to a significant fabric of existence. Such an ultimate negation by imperialism was profoundly identified by Fanon as the fragmentation of a life once lived and the consequent rigidification of the fragments, the dynamic of which is now external to them." (110)

The difficulty of determining customary law, moreover, was compounded by the fact that this law was rooted in oral tradition; it was, quite literally, unreadable. It is with this illegibility in mind, perhaps, that British administrators instituted the practice of having native expert witnesses testify to the existence of their own laws—testimonies which subsequently would be recorded and integrated into the common law doctrine of stare decisis, the practice of relying on past precedents. Since stare decisis was not part of native law, the assumption that precedents existed and could be woven handily into the fabric of customary law changed this law beyond recognition, often turning a misinformed interpretation of custom into a binding decision. By recording decisions in this way, British legal administrators established "a body of precedent, turning local law into something akin to English case law. Precedents were invoked and debated not only in British courts, but also in indig-
enous ones, where actors sometimes framed their arguments against the backdrop of their understanding of how matters would be handled in colonial courts” (Mann and Roberts 14). The insistence also created, in legal practice and legal writing, a history—a juridical lineage through which the past could be traced and followed. Confounded by this complex network of intentions and circumstances—the ambiguous interface between the two legal regimes—administrators, judges, plaintiffs and defendants often missed each other in the dim light at the intersection of English and customary law.

As a way of mastering the potential uncertainty that could arise, colonial administrators drew heavily on the work of anthropologists. I will argue that the court in *Lewis v. Bankole*, in calling expert witnesses to testify to native practices, conducted itself in the manner of an investigative anthropologist. It is a well-documented fact that anthropologists were anything but foreign bodies in colonial legal policies, an involvement that resonates throughout *Things Fall Apart* in the omniscient narrator’s voice, which often sounds curiously like that of a lay anthropologist. British administration of Africa had a history of drawing upon anthropological research, which was seen as objective, thorough, and unhindered by ideology. It thus became a critical and fitting ally in jurists’ efforts to export British law to Africa. As one writer wistfully put it, “it is here that the work of the anthropologist is of such great value; he has the time to observe, he has no work which has to be done in a stated time, in fact he has no axe to grind except to obtain the information he desires” (Roberts 50). Such sentiment was not uncommon in the development of colonial law and administration, lending its architects an even-handed tone that was the benchmark of effective lawmaking and offering a studious, scrupulous promise of impartiality stripped of ideological underpinnings.

For their part, anthropologists were in no hurry to dismiss such praise. Even those critical of colonial practices were quick to defend their merits and overall good intentions—as did Edwin Smith, President in 1937 of the Royal Anthropological Institute. Smith writes apologetically in his introduction to a slim volume entitled *Tangled Justice*, “In throwing doubt upon the wisdom of some of the laws which have been put in force
in Africa one is not impugning the motive, nor questioning the ability, of the men responsible. The ideal of justice and good government is the guiding star of British administration” (Roberts 2). Presumably part of the justice and good government to which Smith refers is not unrelated to its reliance on the findings of his own discipline, which delivered critical evaluations with the reassurance of their objectivity, lending intellectual and cultural substance to colonial legal policies.

II.
The landmark case of Lewis v. Bankole was decided in the Colony of Lagos in 1909. The plaintiffs in Lewis claimed joint ownership rights to the property in question, an area of land referred to as Mabinuori’s Compound; in order to establish these rights, they sought a declaration that the land was family property—which cannot be sold according to customary law—rather than private property, which, in accordance with English common law, can be transferred through the sale of land. With this indigenous concept of inheritance at stake, the case goes back not to the onset of the family’s troubles, but to the beginning of the family itself:

Chief Mabinuori died in 1874, leaving a family of twelve children, the eldest of whom was a daughter . . . In 1905 an action was brought by certain of Mabinuori’s grandchildren . . . against certain of the occupants of the family compound who were daughters of Mabinuori and children of a deceased younger son. The claim was for a declaration (1) that the plaintiffs were entitled, as grandchildren of Mabinuori, in conjunction with the defendants, to the family compound, and (2) that the family compound was the family property of Mabinuori deceased. (Lewis v. Bankole 81)

In the years leading up to the decision, Mabinuori’s Compound had become a source of tension between the children of Mabinuori’s oldest son, Fagbemi, and Mabinuori’s surviving daughters. After Fagbemi’s death in 1881, his son Benjamin Dawodu took over the management of the property; after his death in 1900, his brother James Dawodu, one of the plaintiffs, succeeded as head of the family. During this time,
the management of the land—and specifically, the two shops that had been built on that land—was taken over by the defendants, Mabinuori’s daughters, who assumed responsibility for leasing the shops and collecting the rents. The daughters’ relations with James Dawodu deteriorated, however, following his objection to his aunts’ dealings with a European firm. Asserting his position as head of the family by patrilineal descent, Dawodu and several other grandchildren of Mabinuori initiated proceedings to establish legal entitlement, together with the daughters of Mabinuori, to the family compound, a block of land on the north side of Bishop Street between the Marina and Broad Street in Lagos.

*Lewis v. Bankole* was one of the first cases in which native law, and specifically the notion of family property, was the governing principle. Acting Chief Justice Speed declared in the initial proceedings in 1908 that “perhaps for the first time the Court is asked to make a definite pronouncement on the vexed question of the tenure of what is known as family property by native customary law, and the principles upon which that law should be enforced” (*Lewis v. Bankole* 82). Speed ultimately ruled for the defendants, arguing that the plaintiffs had received enough inheritance from Mabinuori to disqualify them from further rights over the family’s land. Six months later, however, his decision was overturned by the Full Court, which remitted the case to the Divisional Court with two instructions: the Court was to determine which native law or custom applied in the situation, and was to reconsider the case in light of that finding.

The task of responding to the Divisional Court’s request amounted to more than simply identifying the guiding principles of native property law, since colonial legal doctrine considered native law to be a question of evidence rather than law. As one judge put it in a later case, reversing the decision of a lower court: “The learned Judge appears to have referred to it as though it were a legal textbook of such authority as would warrant its citation in Court, which it certainly is not, for *native law and custom is a matter of evidence and not of law*” (*Belio Adedibu v. Gbadamosi and Sanusi* 192). To attain legal status within a colonial court, in other words, native law had to be proven, not merely presented. As I have already mentioned, the business of establishing this proof often involved
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authorities, such as local chiefs or individuals with expertise in native traditions, who were called as witnesses to establish the law. In keeping with this practice, the Court in *Lewis* decided to conduct a trial within a trial, consulting experts of indigenous law in order to reconstruct the case along customary lines. The story of this performance, which comes at the conclusion of several lengthy and often convoluted explanations of the case, ultimately functions as the turning point in the legal proceeding, and was viewed by the Court as the key to the legal riddle that had been troubling Mabinuori’s family for years.

To establish which native law applied in *Lewis*, the Divisional Court summoned a group of Lagos chiefs to simulate a series of decisions relating to the case. The chiefs, as expert witnesses, were placed under oath and presented with a number of situations involving the vital elements of the case before the Court. The Court, in other words, did not present its expert witnesses with the case itself, but rather with a hypothetical range of scenarios, designed to extract the appropriate rule without divulging the case’s actual details. For each scenario, the chiefs gave their rulings; some concurred, others differed from each other. In the end, the Court seemed to weigh only those rulings backed by consensus; the differences among the chiefs were elided, and the Court ruled that the land should be divided among the family members.

The procedure appeared reasonable enough. In order to ascertain the relevant customary law, British judges turned to native judges to see what their decision would look like in a native court, thereby gaining a sense of which precedent would operate in the case’s particular circumstances. What they created, however, was an illusion of precedent, in which the Lagos chiefs delivered opinions without binding power, performing—rather than handing down—a series of decisions without force on their own terms. Their rulings could only acquire judicial power within the Divisional Court’s articulation and interpretation, which proceeded as though it had uncovered the underlying precedent rather than a range of possible approaches to the case.

Given the legal reasons for relying upon expert witnesses, it is striking that what the Court in *Lewis v. Bankole* found especially praiseworthy in the chiefs’ testimonies was not their impartiality or judiciousness,
but their polished presentation. Writing for the Court, Chief Justice Osborne expressed his approval of the witnesses not only because their high social status promised accuracy and truth, but also because they conducted themselves appropriately. “I have no reason to doubt the correctness of the chief’s [sic] pronouncement of the customs which exist in Lagos at the present day,” he notes. “Moreover, I was much impressed with the fair and business-like methods which they said they would have adopted if the case had been before them for decision” (Lewis v. Bankole 101). Osborne responds, in other words, not only to the content, but also to the form of their testimonies, a form that suggests something other than anthropological or legal objectivity and reasserts the court’s dramatic—and thus subjective—production of precedent and law. Unlike an anthropologist, what he notes is not the chiefs’ cultural or legal differences, but rather a presentation that he recognizes as his own: a similarity so striking and impressive that it confers legitimacy upon the chiefs’ pronouncements. Osborne’s account of the chiefs’ conduct leaves one with little sense of how a court in Africa looked, or of how awkward and chaotic it often was. But given how deeply he is struck by the chiefs’ “fair and business-like methods,” one might well imagine that something considerably different was often the case. Along such lines, one might entertain a far less orderly scenario, in which two legal worlds with little in common were forced into jarring collision, making any judge relieved to discover the unexpected similarity rather than stumbling over differences. One observer in 1937 noted the surreal nature of the performance that was colonial justice:

The newcomer to Africa visiting the Courts of Law in different parts of the country for the first time views with astonishment the scene before him. The presiding magistrate or Judge. On special occasions in his official robes of scarlet, seated with native assessors—counsel in their robes and the prisoner in the dock—the crowd of spectators kept back by native police in uniform. A repetition of an English scene in African surroundings, often of a primitive nature. The whole atmosphere is obviously unsuited to the African mentality. As he listens to the
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proceedings he realises that no primitive or even partly educated native can hope to understand the workings of British justice. The Court procedure is not understood by the prisoner. If he is guilty and wished to admit it, he is often told to plead not guilty. If he desires to explain he is told he must remain silent. (Roberts 65–66)

The scene comes closer to a performance—one that appears either as drama, comedy, even mystery—than it does to a straightforward legal proceeding. The chiefs’ speech acts have none of the power associated with the performative utterances of speech-act theory. In this particular colonial context, then, the seemingly performative becomes merely performance. The apparently juridical language of the chiefs is drained of its productive capacity to bring a legal world into being: their legal pronouncements exert no force in and of themselves, but instead are wholly dependent upon the larger power structures of colonial administration. By depicting the colonial courtroom as a play of costumes, stage directions, and lines spoken without knowledge or conviction, the relationship between performance and law becomes descriptive rather than normative, and estranging rather than illuminating.

The strangeness is amplified, too, by the fact that not only the presence, but also the words of those on the stand were often placed in a different context. Thus we find that the chiefs’ judgments, which elsewhere would have been the law itself, become part of a story that the colonial court tells about native law—a story that is reduced and subjected to interpretation, and finally to the decision of another court. The two worlds seem out of joint with each other—an awkwardness to which the court responds by noting the chiefs’ exemplary, English-like conduct.

The judge in Lewis v. Bankole adds a procedural concern to his impressions, however, by calling attention to a more directly legal matter in the case: the question of whether Mabinuori’s land can be transferred to non-family members. Even as he accepts the chiefs’ conclusion that the land can be partitioned and that power over it can reside with the family matriarch, Justice Osborne takes issue with the opinion that the land can never be sold:
There is one other point to which I must allude, and that is whether by native customary law the family house can be let or sold. According to the Lagos chiefs, the present custom is that it can be let with the consent of all the branches of the family, but cannot be sold. The idea of alienation of land was undoubtedly foreign to native ideas in olden days, but has crept in as a result of the contact with European notions, and deeds in English form are now in common use. There is no proposal for a sale before me, so it is not necessary for me now to decide whether or no a native custom which prevents alienation is contrary to section 19 [containing the repugnancy clause] of the Supreme Court Ordinance. But I am clearly of opinion that despite the custom, this Court has power to order the sale of the family property, including the family house, in any cause where it considers that such a sale would be advantageous to the family, or the property is incapable of partition. (Lewis v. Bankole 104–105)

In deferring to the expert witnesses while simultaneously asserting the court’s power over them, Osborne gestures towards the limits of customary law. The Lagos chiefs may be familiar with current local practices regarding land tenure, but the ultimate authority on the issue remains the colonial judge. His statement, ironically, bears a hypothetical or conditional inflection—*if* a sale were proposed, *then* the Court would order a sale—similar to that in the chiefs’ testimonies. There is, however, one crucial difference: while it may not be possible for Osborne to rule on the sale of property in this particular instance, he underscores his court’s binding authority to determine such issues in the future. In harnessing the power of this hypothetical mode, Osborne turns his gaze towards the future: to the court’s expanded jurisdiction and with it, to the prospect of British ownership along British lines. The status of the past in Lewis v. Bankole is another matter, and I turn now to the Court’s iteration of law and history—a relationship that I will suggest has as much to do with historical time as it does with the time it takes for the opinion to tell its litigants’ stories.
III.
The story of Mabinuori’s Compound begins with the initial proceedings in 1905 and ends with the 1909 verdict. The opinion is unusually long, owing to the fact that the case was heard by a number of different courts. My citations in this essay have been drawn from the final phase of this lengthy proceeding, which embeds the opinions of lower courts in framing its decision. To be sure, the genealogy of *Lewis v. Bankole* is a complicated one, spanning several generations and a vast number of children and grandchildren. As if enacting the family repetition of successive generations, each court records its own version of events and presents them at the next appellate level, creating a confusing narrative that proceeds in fits and starts, repeating itself in spite of the fact that the story might well have been summarized more succinctly. *Lewis v. Bankole* rehearses these details a perplexing number of times and in exhaustive detail, summarizing the issues at stake and tracing their evolution again and again, as if the court suffered from a kind of narrative repetition compulsion. Enacting the very repetition that writing enables, the opinion’s reiterative prose often seems to be a desperate attempt to gain mastery over a story, the complexity of which threatens to overwhelm even the steadiest hand.

The length and repetition of the story, its appeal to the distant past, lends the opinion a resonant literariness, imbued with echoes of another endless trial: Jarndyce and Jarndyce of *Bleak House* (1853). Dickens’s “scarecrow of a suit” (14), without origin or endpoint, has grown to such labyrinthine proportions in the novel that “no man alive knows what it means” (14). But the resonance of this famous literary trial, in all its humor, futility, and absurdity, is framed in *Lewis v. Bankole* by a drastically different context than that of Victorian London. To read it historically is thus to politicize its rhetoric, and to understand that its length, unlike Jarndyce and Jarndyce, bespeaks not only law’s futility. It also underlines the struggle to establish the legitimacy of British rule.

The process of legitimization set in motion by *Lewis v. Bankole* marks the opinion’s critical difference from the twists and turns of Dickens. Rather than extending eternally into both past and future, the case worked to incorporate a pre-colonial past into the fabric of colonial
law, lending the latter an appearance of having evolved naturally from the laws of the land that preceded it. Colonial legal administrators were thus able to write into existence a long-standing relationship with native law, creating a history in which British presence was an integral part. For even as colonialism’s supporters often justified its law through the British integration of native customs, this justification did not make the practice legitimate. Rather, it in fact risked underscoring just how constructed and potentially illegitimate such strategies in fact were. The repetition in *Lewis v. Bankole*, like that of written opinions and printed pages more generally, thus becomes a way to create legitimacy where none had existed before. As Hannah Arendt reminds us:

> Power needs no justification, being inherent in the very existence of political communities; what it does need is legitimacy . . . Legitimacy, when challenged, bases itself on an appeal to the past, while justification relates to an end that lies in the future. (52)

The ideologies behind colonialism and colonial law had already laid the justification for the colonial legal enterprise. This justification was part of the process of imagining a future, one that would realize the Commissioner’s book in *Things Fall Apart*, and that would posit a narrative—and with it, a world—in which colony and metropole balanced each other in a civilized, fruitful coexistence. What remained to be provided, however, was the legitimacy for this work, by which I mean—following Arendt’s reasoning—the creation of a connection between the colonial present and the pre-colonial past.

The narrative structure of British colonial law, which offered occasions for telling old stories in their present colonial context, afforded just such an opportunity for legitimacy. It did so by suggesting, through a process that wove together colonial weft and native warp, that colonial law was part of the story from the beginning, and thus that the legal narrative had evolved through its wheels and cogs. Pierre Bourdieu, in “The Force of Law,” suggests that this historical effect issues from legal language at its most fundamental. “Juridical language,” he observes, “reveals with complete clarity the appropriation effect inscribed in the logic of the juridical field’s operation. Such language combines elements
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taken directly from the common language and elements foreign to its system” (819).

In colonial Africa, juridical language joined forces with the particularities of English common law—most notably, its doctrine of *stare decisis*—to appropriate not only a normative universe, but also to create a sense of historical inevitability. Piyel Haldar thus remarks that by incorporating local practices into a system of precedent, colonial jurists posited English history as the regnant paradigm:

The *legis non scripta* that forms the basis of the doctrine of *stare decisis* marks the common law system as being specifically and peculiarly English. It is for the English and, above all, it derives directly from the English since an immemorial time. . . . It is a law which, since before the beginning of legal memory, has developed with the slow accretions of ‘wisdom’ that evolve from the spirit of English existence. (450)

The act of asserting English history as African history, moreover, reinforced the sense that colonialism did not simply redeem native subjects, but actively constituted them. As Peter Fitzpatrick concludes, the development of colonial law meant that “[t]he colonized are relegated to a timeless past without a dynamic, to a ‘stage’ of progression from which they are at best remotely redeemable and only if they are brought into History by the active principle embodied in the European. It was in the application of this principle that the European created the native and the native law and custom against which its own identity and law continue to be created” (110).

Furthermore, the act of repetition itself had the effect of making something real: a story repeated often enough eventually becomes the story, the official version of events. The fact that legal decisions were no longer left to an oral tradition, but were printed and published, only accelerated this process of repetition: a decision disseminated as text generates an infinite possibility of repetition. Martin Chanock aptly notes, “Writing is the tool of administration” (303). Yet the potential mastery that a text’s circulation makes possible also illuminates the possibility that this official version is, at best, precarious—and at worst, illegitimate. Writing
and repetition, I am suggesting, do not “make something real,” but rather produce the effect of this real—an illusion of permanence and with it, a sense (rather than a guarantee) that justice has been done. Each repetition thus creates the possibility—and the desire—for administrative mastery, and simultaneously subverts it with the prospect of mastery’s impossibility, and of the tenuous hold of British administration.

IV.
Robert Cover imagines law as at once structural and temporal: for him, law was a way to imagine how things might be different in the future, but not necessarily how they might have been different in the past. Cover writes,

Law may be viewed as a system of tension or a bridge linking a concept of a reality to an imagined alternative—that is, a connective between two states of affairs, both of which can be represented in their significance only through the device of narrative. (“Nomos and Narrative” 101)

In the context of colonial practice, however, Cover’s bridge takes on a different form, one threatening to buckle under the weight of politics and history. Incolonies, law became more than a bridge to the future: it became a way to the past; it not only reduced stories to a manageable size, but tore them out of context and recast them in new, more politically and legally convenient terms. It extended this new context into a narrative that extended the reaches of colonialism well into history—and thus, into legitimacy. Seen in this light, the gaps that colonial officials perceived went beyond those questions for which, in their eyes, customary law had no answers. The gaps they perceived, and those that were filled by repetition and publication, were those of their own absence.

Colonial legal practice gave both a history to the metropole and a language: through the work of reduction and lengthy repetition, it translated customary law into the language of English law. And in the process, it ushered in a legacy, a claim to ownership, that was more creative labor than it was historical—or, for that matter, anthropological—fact. In making sense of colonial jurisprudence, then, to speak of “the story of law” would be to offer a thin description of legal practices in Africa.
To describe it as such is to distort the way in which the practice of colonial law turned native law into stories precisely in order to dissolve their status as law—to interpret these stories in order to transform them into something else: to recast the disparate voices of the Lagos chiefs into a uniform body of law; or the novel Things Fall Apart, into the book The Pacification of the Primitive Tribes of the Lower Niger. To be sure, Okonkwo and the Lagos chiefs still form part of the colonial narrative—“perhaps not a whole chapter but a reasonable paragraph, at any rate.” When these paragraphs were spun out into narratives, subjects of colonialism could be imagined as such not simply because they were under a British rule of law, but because this law made them subjects of much larger stories—and thus, subject to stories.

Works Cited


Becoming-Animal and Pure Life in Coetzee’s Disgrace
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Gilles Deleuze is rightly regarded as a vitalist thinker in the sense that a concept of impersonal life is central to his philosophy. The ontology of events in The Logic of Sense, the ontology of pure transcendental ideas in Difference and Repetition and the machinic ontology of Anti-Oedipus and A Thousand Plateaus each reproduces in its own terms the concept of an indeterminate, abstract, non-organic and intensive life that is prior to its incarnation in fixed and organized forms. These forms may be biological, technological, cultural or intellectual, but in all cases they are secondary determinations of an ontologically primary flux of becoming: “If everything is alive, it is not because everything is organic or organized but, on the contrary, because the organism is a diversion of life. In short, the life in question is non-organic, germinal and intensive, a powerful life without organs . . .” (Deleuze and Guattari A Thousand Plateaus 499).

Giorgio Agamben distinguishes Deleuze’s concept of life from Aristotle’s concept of the bare biological life common to all living things. For Aristotle, the condition or ground on which a thing is said to be living is what he calls the “nutritive faculty”: “the movement implied in nutrition and decay or growth. This is why all plants seem to us to live. It is clear that they have in themselves a principle and a capacity by means of which they grow and decay in opposite directions . . .” (Aristotle De anima qtd. in Agamben “Absolute Immanence” 231). This is not so much a definition of life as a characterization of its most basic, vegetative form that serves as the principle on the basis of which other things can be called living. By contrast, Deleuze’s concept of life functions in precisely the opposite way. It is not the lowest common form of life shared by all living things but rather “a principle of virtual indetermination, in which the vegetative and the animal, the inside and the
Deleuze and Guattari’s complex concept of absolute and relative de-territorialization involves yet another expression of this concept of an abstract and impersonal life that unfolds only in particular cases. Relative deterritorialization takes place on the actual plane of organizations of real people, things and historical processes. Absolute deterritorialization takes place on the virtual plane of abstract machines, pure events and various kinds of becoming. It is because this is not a transcendent plane of existence but a more profound dimension of the actual world that Deleuzian ontology is rightly regarded as a philosophy of immanence. Absolute deterritorialization is another name for the abstract life that is expressed in all things. For this reason, Deleuze and Guattari write: “The deeper movement for conjugating matter and function—absolute deterritorialization, identical to the earth itself—appears only in the form of respective territorialities, negative or relative deterritorializations, and complementary reterritorializations” (A Thousand Plateaus 143).

Throughout his career, Deleuze engages with literary works in order to elaborate and exemplify his philosophical concept of life. In a chapter of Dialogues, he justifies his preference for the English and American literature of Thomas Hardy, D.H. Lawrence, Herman Melville, F. Scott Fitzgerald, Virginia Woolf, Henry Miller and others by reference to the manner in which it invents new possibilities for life. These writers portray life as a process of self-transformation or escape from established identities in favour of flight towards another world. For them, writing is a matter of tracing lines of flight or processes of becoming which have the potential to lead to the creation of new forms of life. Such creation only occurs when existing forms of life break down and the individual in question gains access to the primary and transformative power of pure life: “writing does not have its end in itself precisely because life is not something personal. Or rather, the aim of writing is to carry life to the state of a non-personal power (Deleuze and Parnet 50).”

Although he does not propose any systematic philosophy of literature, much of Deleuze’s writing from Proust and Signs to Essays Critical and Clinical is, as Ronald Bogue suggests, “a thinking alongside liter-
ary works, an engagement of philosophical issues generated from and developed through encounters with literary texts” (2). It is in the spirit of these encounters that I propose to read J. M. Coetzee’s 1999 Booker Prize winning novel *Disgrace* through the lens of Deleuze’s vitalist philosophy. My aim is not only to outline a Deleuzian reading of *Disgrace* but also to use the novel to explore the personal and political dimensions of this concept of life and related concepts such as becoming-minor and becoming-animal. I suggest that Coetzee deserves to be added to the Deleuzian literary canon for the way in which *Disgrace* presents a conception of pure life as immanent in the everyday existence of humans and animals alike, for the manner in which the central protagonist embarks on a line of flight or deterritorialization which transforms his sense of who he is and his understanding of life, and finally for the process through which this transformation takes place by means of becoming-animal.

**Becoming-minor and Becoming-animal**

In *A Thousand Plateaus*, Deleuze and Guattari develop a version of the ontology of life as a process of becoming in the form of a theory of multiplicities or machinic assemblages. Ultimately, these assemblages or abstract machines are a kind of open or evolving multiplicity which is itself a process of becoming other: “becoming and multiplicity are the same thing” (249). The ontological priority of becoming in this machinic metaphysics is reflected in the fact that assemblages are defined not by their forms of conservation but by their forms of modification or metamorphosis, by their “cutting edges of deterritorialization” (88). In these terms, Deleuze and Guattari argue that individuals no less than societies are defined by their lines of flight or deterritorialization, by which they mean that there is no person and no society that is not conserving or maintaining itself on one level, while simultaneously being transformed into something else on another level. In other words, fundamental shifts in personal and social identity happen all the time. Sometimes these happen by degrees, but sometimes, fundamental changes occur through the sudden eruption of events, which inaugurate a new field of personal, social or affective possibilities. These are turning points in individual
lives or in history after which some things will never be the same as before. They are examples, Deleuze suggests, of “a becoming breaking through into history” (Negotiations 153).

In general terms, Deleuze and Guattari understand by “becoming” more or less what Jacques Derrida understands by the process of iteration, namely “the action by which something or someone continues to become other (while continuing to be what it is)” (What is Philosophy? 177, translation modified). However, whereas Derrida tends to confine himself to analyses of the structure of iterability in various fields, or to analyses of the “to-come” which remains an immanent condition of the possibility and impossibility of change, Deleuze and Guattari describe a series of more specific ways in which individuals and groups become other. A Thousand Plateaus is a work of political philosophy and, in this context, they are interested not simply in processes of becoming-other in general but in the social dynamic by means of which majoritarian social and political identities are transformed. They rely upon a concept of minority to define a specific kind of becoming which is intimately connected to the processes of deterritorialization which define a given assemblage or multiplicity. They distinguish between minorities, conceived as subsystems or determinate elements within a given majority, and the process of becoming-minor, which refers to the potential of every element to deviate from the standard or norm, which defines that majority. In these terms, to become-minor is to embark upon a process of deterritorialization or divergence from the standard or norm in terms of which the majoritarian identity is defined. There is no such thing as becoming-majoritarian: “all becoming is minoritarian” (A Thousand Plateaus 106).

In so far as the subject of modern European society and political community, the subject of rights, duties and moral obligations, is human, adult, male and overwhelmingly white, then animals, children, women and people of colour are minorities. Moreover, it follows that becoming-animal, becoming-child, becoming-woman and becoming-coloured are potential paths of deterritorialization of the “majority” in this non-quantitative sense of the term. For this reason, A Thousand Plateaus devotes pages to the description of these distinct types of becoming and the dif-
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Different cultural, social and political forms they assume. Taken together, becoming-woman, becoming-animal, becoming-imperceptible and so on, amount to a series of possible paths which lead beyond existing forms of human sociality towards what they call in What is Philosophy? new earths and peoples “to come” (108–10).

Consider the case of becoming-animal: Deleuze and Guattari point out that anthropology, myth and folk-tales provide evidence of a widespread human propensity for a variety of becomings-animal. From a historical point of view, these processes of becoming-animal are often related to marginal social groups or movements, so that there is “an entire politics of becomings-animal, as well as a politics of sorcery, which is elaborated in assemblages that are neither those of the family nor of religion nor of the State. Instead they express minoritarian groups, or groups that are oppressed, prohibited, in revolt, or always on the fringe of recognised institutions” (A Thousand Plateaus 247). In literature, too, we find many different forms of becoming-animal. These typically involve the one undergoing a becoming standing in a relation to a pack or multiplicity of some kind, but also to an anomalous figure located on the border of the multiplicity who represents a limit beyond which everything changes. The white whale in Melville’s Moby Dick provides an example of one of these figures with whom an individual enters into a pact in order to pass beyond a given state of life or being. He is anomalous in the sense that he represents “the unequal, the coarse, the rough, the cutting edge of deterritorialization” (A Thousand Plateaus 244). Deleuze and Guattari specify that becoming only occurs when there is a certain kind of relationship between two terms or when something passes between them such that both are transformed. Through his relentless pursuit of Moby Dick, Ahab enters into a becoming-whale while at the same time the object of his pursuit becomes the white wall of human weakness and finitude through which he desires to pass: “How can the prisoner reach outside except by thrusting through the wall? To me, the white whale is that wall, shoved near to me. Sometimes I think there’s naught beyond. But ‘tis enough” (167). Ahab’s becoming is a line of flight or deterritorialization that both expresses the extraordinary singularity that he is and takes him beyond the limits of his own individual life.
Becoming-animal are not a matter of imitating the animal, nor do they always imply actual transformation into the animal concerned. When they do, as in “The Transformation [Metamorphosis],” Kafka’s story of Gregor Samsa’s transformation into a gigantic insect, the result is a strange hybrid of human and animal capacities. Becoming-animal is always a matter of enhancing or decreasing the powers one has, or acquiring new powers by entering into a “zone of proximity” with the animal. Moreover, since it is always a human that is the subject of becoming-animal, the metamorphosis can take place on a variety of levels, including the physiological powers of the animal as in the case of Gregor, or the powers that the animal is merely believed to possess as in cases of witchcraft and sorcery. These combinations point to the key element of becoming-animal, namely that it is always a matter of forming an inter-individual assemblage with the real or imagined powers of the animal in question.

Deleuze and Guattari use Spinoza’s concept of affect to refer to the different kinds and degrees of power that define an individual body. On this basis, they outline a Spinozist ethology that would define animals not by their species or genus but by the active and passive affects of which they animal is capable: “We know nothing about a body until we know what it can do, in other words, what its affects are, how they can or cannot enter into composition with other affects, with the affects of another body. . .” (A Thousand Plateaus 257). The Deleuzian idea of an immanent, non-organic life underwrites this definition of individuals in terms of their affects. For Deleuze, all things exist on this immanent plane of impersonal life before they are identified as natural kinds or persons, which in turn allows for the possibility of “unnatural participation” between assemblages as different as a man and a giant insect. Understood in this manner, individuals are assemblages defined by their capacities to affect and be affected and, in what amounts to the other side of the same coin, by the becoming of which they are capable.

South Africa, Becoming-animal and the People to Come

Coetzee’s Disgrace is set in post-Apartheid South Africa where the lives of the central characters are conditioned by the historical divide between
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colonizing and colonized peoples. The difficult process of dismantling the colonial regime is directly implicated in many of the events that befall them. It is unquestionably a novel about the painful transition to a new South Africa, but not only that. The central character, David Lurie, is an aging male professor of English literature who is increasingly as out of touch with himself as he is with the requirements of life in the new university, let alone the new social relations emerging between men and women, Europeans and other Africans. While he is conscious of his age, his life is also a self-centred denial of his mortality and his dependence on others. Lurie remains an unredeemed and in many ways unredeemable character, but he also enters into a becoming-animal, which opens up the possibility of transformation in his way of being in the world. The intimations of change in his character suggest that this is a novel about relations between the sexes, human finitude and the natural life we share with animals as much as the ongoing effects of colonial social relations.

Lurie possesses an extraordinary capacity for self-serving interpretations of his own actions and those of others. The novel opens with an account of his weekly assignation with a prostitute, which ends after they accidentally meet in a public place: the look in her eyes is enough to shatter his illusions about their relationship. His efforts to maintain a Romantic idea of his virile self lead him into a predatory sexual relationship with a female student, Melanie Isaacs, for which he is subsequently charged and found guilty of sexual harassment. He refuses any form of contrition or apology and is eventually forced to resign from his position. This loss of position sets him off on a line of flight that eventually leads to the deterriorialization of his personal, social, professional and intellectual world. He goes to visit his daughter, Lucy, who lives on a small farm in the country where she makes a modest living growing produce and flowers and operating a boarding kennel for dogs. The presence of these dogs does not prevent an attack on the farm by a gang of young African men in which Lucy is subjected to a brutal sexual assault and Lurie is beaten and set alight with methylated spirits.

While at his daughter’s farm, Lurie helps out with the kennel and begins to care for the Dobermans, German Shepherds, Ridgebacks, Bull
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Terriers and Rottweilers that Lucy describes at one point as “Watchdogs, all of them” (Coetzee 61). His sympathy for these abandoned former guard dogs is nourished by the sentiment that they, like him, are part of the debris of history: animals out of place in the new South Africa. He later works at an animal refuge where he helps another woman, Bev Shaw, to kill and dispose of unwanted strays. He has a brief and joyless but also victimless affair with Bev; it is the experience of putting down the dogs, however, which has a profound effect upon him:

He had thought he would get used to it. But that is not what happens. The more killings he assists in, the more jittery he gets. One Sunday evening, driving home in Lucy's kombi, he actually has to stop at the roadside to recover himself. Tears flow down his face that he cannot stop; his hands shake. He does not understand what is happening to him. Until now, he has been more or less indifferent to animals . . .

His whole being is gripped by what happens in the theatre. He is convinced the dogs know their time has come . . . they flatten their ears, they droop their tails, as if they too feel the disgrace of dying . . . (142–3).

When his daughter reveals that she is pregnant as a result of her rape, he decides to stay on and help where he can. At the refuge, he develops a particular fondness for one young partly crippled dog that befriends him during the brief period of grace before it must be put down. The novel ends with him “giving up” this animal to its inevitable end and disgrace.

It is easy to see Lurie as an allegorical figure representing, if not the habits and attitudes of the ruling class of the old colonial regime, then at least the Eurocentric and cultured cast of mind that sustained the possibility of colonial relations. He is initially disdainful of his daughter's peasant life in the country. He aspires to a higher and more cultured plane of existence. Much of his time is spent preparing to write an opera based on the last days of the life of Byron. Like the rest of his professional life, this project goes nowhere. On this level, his story is one of disempowerment and disgrace: first at the university, then at the hands of the
gang who attack him and sexually assault his daughter, then once again, voluntarily this time, before the family of his young victim. Despite his apology to the student and her parents, he remains unwilling to change, unrepentant about his rape of the student and uncomprehending of the social changes taking place around him. He often fails to comprehend the motives of others, especially those of his student, his daughter and her African neighbor Petrus. At one point, he says to Lucy: “I am not prepared to be reformed. I want to go on being myself” (77).³

Many commentators have been disturbed by “the bleak image of the ‘new South Africa’” presented in Disgrace (Attridge “Age of Bronze” 99). There is much in the novel besides the character of David Lurie to suggest a gloomy outlook on the possibility of transforming relations between the races. The always tense and sometimes violent interactions between white and black show how deeply the social, linguistic and psychic structures of the old colonial system are embedded in social life. Coetzee points to the enormous difficulty of transforming the inherited structures of temperament and language. At one point, Lurie is represented as becoming more and more “convinced that English is an unfit medium for the truth of South Africa” (117). The sexual violence inflicted on Lucy during the attack on her farm, the apparent immunity of the perpetrators, along with the transformation of her African neighbor Petrus from gardener and “dog-man” to farmer and landowner, suggest a post-Apartheid political process in which a rearrangement of positions rather than a genuine transformation of social relations takes place. In these terms, the roles of white and black, oppressor and oppressed, would be simply reversed. While some regard the novel as accurate reportage of attitudes and social relations, others have criticized the novel for its apparent pessimism about the possibility of progress toward a non-racist and non-sexist society.⁴ For example, Salman Rushdie, in a widely circulated review, takes the mutual incomprehension of the characters in the novel to encapsulate its bleak vision of post-Apartheid politics: “The whites don’t understand the blacks and the blacks aren’t interested in understanding the whites . . . Petrus comes closest, but his motives remain enigmatic and his presence grows more menacing as the novel proceeds” (297–98). On this reading, there is no transformation
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in either the individual characters or the social relations in which their lives unfold.

By contrast, reading *Disgrace* in the light of the Deleuzean concepts of life, becoming-minor and becoming-animal enables us to appreciate a more affirmative side to the novel. Even if it is only indirectly related to the difficult social and political transitions that provide its historical context, evidence of a capacity for change is portrayed in the lives of the central characters. In Deleuzian terms, there is evidence of minoritarian becoming, both at the level of the micro-politics of social relations and even in the apparently unredeemable character of Lurie. Minoritarian-becoming in the Deleuzian sense occurs only if there is movement or transformation in the assemblage concerned. There must be some line of flight or deterritorialization along which this particular majoritarian subject begins to change. In the case of Lurie and his daughter, this transformation takes place by means of a becoming-animal.

Their different responses to the attack upon them by the young African men are symptomatic of the difficult choices confronting Europeans in this formerly colonial society. Whereas Lurie wants the perpetrators brought to account and his own and his daughter’s self-respect restored, Lucy is more concerned to be able to live alongside her African neighbors. She accepts the transformation in her relations to Petrus, her former helper and “dog man”, who now becomes her neighbor and owner of what was formerly her land. In the end, her response is to accept that she will have to rely on Petrus rather than the police or the armed white neighbors for protection against other African men. She even accepts that one of the attackers is a relative of Petrus and as such entitled to the same protection. She agrees to surrender her land in exchange for a place within his extended family and accepts what her father can only perceive as humiliation: “Perhaps that is what I must learn to accept. To start at ground level. With nothing. Not with nothing but. With nothing. No cards, no weapons, no property, no rights, no dignity.” “Like a dog.” “Yes, like a dog.” (205).

Lucy’s becoming-dog must be understood in its specific context. It does not imply her acceptance of all that associated with dogs in the human imagination. It is explicitly contrasted with the behavior of her
attackers who have marked her out as part of their territory and who she compares to “dogs in a pack” (158–9). It does represent an affiliation with the lack of property, rights and dignity often associated with dogs. Because it implies abandonment of any claim to precedence over her neighbor, it also represents a point of departure for the transformation of psychic and social relations associated with the old regime. While her father cannot see past the injustice done to one of his own by one of Petrus’s people, she is personally engaged in bringing into being a new people or a “people to come.” Throughout the novel, she is far more conscious of the historical changes under way than her father, and far more deliberate in her responses to them. It is significant that Petrus describes her as “forward looking” (136). Lucy’s willingness to embark upon a becoming-African by transferring her land to Petrus and accepting his protection points toward the possibility of what Deleuze and Guattari would describe as “positive” rather than “negative” deterritorialization of the social and affective structures of the apartheid era.5

What then are we to make of the fact that Coetzee chooses to represent the beginnings of the micropolitical dismantling of apartheid through Lucy’s story? As several critics have pointed out, the burden of white guilt in the novel is heavily inscribed upon the body of this white woman: “White dominance and the overcoming of white dominance are both figured as involving the subjection of the female body, as part of a long history of female exploitation of which the narrative itself takes note” (Boehmer 344).6 If indeed the novel may be supposed to suggest that the acceptance of rape is an inescapable cost of transition towards an effectively post-colonial society, then it is as Elleke Boehmer suggests “a disappointing assessment” (349). However, within the context of the narrative, it is also possible to read Lucy’s response to the appalling events over which she has little or no control as evidence of the extraordinary strength of her commitment to a new social order and a people to come. It is her choice not to speak to the police about her rape. She agrees that, in another time and place this might be a public matter, but chooses to regard it as her own private business “in this place, at this time,” this place being South Africa (Coetzee 112). She chooses to stay rather than to take up her father’s offer to help her leave the country and
rejoin her mother in Holland. She even chooses to keep the child that she bears as a result of the attack.

As we saw in the example of Melville’s Ahab, becomings typically take place in relation to some particular qualitative multiplicity and are often mediated by an anomalous figure at the border of the multiplicity who represents the threshold of absolute deterritorialization. In relation to Lucy’s becoming-African in *Disgrace* it is Petrus who plays this role. We are only given glimpses of Petrus’s own story and then largely through the eyes of his white interlocutors. From their perspective, African people and social relations are mysterious, sometimes threatening, but always other. It is in relation to Petrus’s story that Lurie expresses his doubts about the capacity of English to convey the truth of South Africa: “He would not mind hearing Petrus’s story one day. But preferably not reduced to English” (117). At the same time, Petrus is the sole point of ethical contact between Lucy and her father and the largely undifferentiated indigenous African population. Apart from him, there is only the violence of the young men. It is through her relationship to Petrus and her refusal to dictate the terms of this relation or to give it up after the attack on her that Lucy’s becoming-dog is bound up with her becoming-African. Hers is a painful but also a positive micropolitical story of the deterritorialization of the social relations which were both products and supports of the colonial regime. The kind of becoming-African portrayed here is not and cannot be the kind of new beginning that breaks suddenly and completely from the past, but is perhaps the only possible form of transition to a truly post-colonial society.

In Lurie’s case, too, the beginnings of a shift in his attitudes and sensibility take place by way of a becoming-animal that is also a form of minoritarian-becoming in Deleuze and Guattari’s sense of the term. According to their account of the concept, minoritarian-becoming is always complex and tends to occur in combination with other processes, which form a “bloc” of becoming. In Lucy’s case, her becoming-dog is bound up with her becoming-peasant and becoming-African. In her father’s case, his becoming-dog is bound up with a becoming woman as he develops an increasingly critical awareness of his masculinity. His identification with the unwanted dogs which are disposed of at the clinic is
expressed at one point in the thought that “we are too menny” (146). He later becomes aware of the connections between his own sexual behaviour and that of the rapists and male dogs. He can inhabit their world, but the question is, he or Coetzee asks, “does he have it in him to be the woman?” (160).

Lurie’s becoming-dog is of an altogether different kind to that of his daughter. In the course of the novel, he enters into a series of affective alliances with particular animals, including one of the dogs in his daughter’s kennel, two sheep destined for slaughter at the hands of Petrus, and the crippled dog at the shelter. Through these encounters and through the attack on himself and his daughter, he acquires new levels of sensitivity toward the feelings of others. He rediscovers within himself a capacity to love and care for others, including the daughter he does not understand. His work with the dogs enables him to cry in a way that he has not been able to before. In the end, despite his repeated protestations that he is too old to learn new tricks, Lurie does become a different person. He learns to accept his daughter’s independence and her right to make choices in relation to her own life in the new South Africa, choices of which he would be incapable. In some respects, it is true that he remains a figure of the old world, someone who has no place in the new society slowly and painfully emerging from the ruins of apartheid. Accordingly, at the end of the novel, he spends most of his time with the stray dogs while remaining a spectator to the changes in the lives of his daughter and others actively engaged in the coming to be of the new South Africa. In relation to the historical and political changes occurring around him, his story remains one of negative rather than positive deterritorialization.

Impersonal Life: The Life We Share with Animals
We saw above how Deleuze’s preference for Anglo-American literature has to do with the manner in which it traces lines of flight or processes of becoming through which characters, peoples and worlds are transformed. As Ronald Bogue reminds us, “The line of flight ultimately is the trajectory of a process of becoming-other, the course of a line that always “passes between” (6). The different kinds of becoming-dog in
Disgrace are lines of flight in this sense. They are all associated with a particular kind of disgrace. As well as Lucy’s disgrace at the hands of her African attackers and her becoming-dog in response to the danger of continuing to live alone in the country, there is her father’s social disgrace at the University and his subsequent apology, on his knees and touching his forehead to the floor, before the mother and sister of his former student (Coetzee 173). In normal usage, as Derek Attridge notes, disgrace is opposed to honour rather than grace (“Age of Bronze” 105). Lurie is disgraced in this sense of the word by his treatment of Melanie and his subsequent refusal to apologize. Finally, there is another kind of disgrace that is arguably more important for the central character in the novel: “the disgrace of dying” which Lurie is convinced is perceived by the dogs at the refuge and which causes them to “flatten their ears” and “droop their tails” as they are dragged over the threshold (143).

Lurie’s experience with the dying dogs transforms his attitude to life and death. It is the turning point in his own affective constitution and his relations to others. Through this experience, he comes to accept the mundane and transitory character of his own existence. When he first arrives at the farm, Lucy finds him disapproving of her chosen life and still committed to an intellectualist belief in higher forms of life. She defends her choice of a simple rural life by affirming that: “there is no higher life. This is the only life there is. Which we share with animals” (74). At the end of the novel, Lurie “gives up” his favoured dog to death, thereby signalling his own reconciliation to the absence of any higher life and to the finitude of the life that he shares with animals.

For Deleuze, the life that good literature affirms is not the personal life of the individual character but the impersonal and abstract life which is expressed in but irreducible to its particular incarnations. In his last, extraordinarily condensed text entitled “Immanence: A Life . . .” he outlines the manner in which, as absolute or pure immanence, life is at once impersonal, indeterminate and singular (4–5). To illustrate this concept, he invokes a passage from Our Mutual Friend, in which Dickens describes a near drowning. The character, Riderhood, was a rogue disliked by all who knew him. Nevertheless, when confronted with the sight of him hovering between life and death, those around
him cannot help but show a kind of respect and affection for the slightest signs of life: “No one has the least regard for the man: with them all, he has been an object of avoidance, suspicion and aversion; but the spark of life within him is curiously separable from himself now, and they have a deep interest in it, probably because it is life, and they are living and must die. . . .” (443–5).

Deleuze uses this passage from Dickens to illustrate his concept of an impersonal and indefinite life that is expressed in the lives of empirical individuals, but not only in these, and that is abstract but singular. This is what he calls “a life . . .” and it is this life which excites the interest of the onlookers: not the everyday life of the individual man but an impersonal and indefinite life that is visible only because it is on the point of withdrawing. Although it only becomes visible in such exceptional moments, this life is present not only at the moment when the individual confronts death but rather persists throughout all the moments that make up his life. It follows that this abstract, impersonal life is, for Deleuze, an instance of the virtual or inner realm of being that is actualized in real events and states of affairs: “What we call virtual is not something that lacks reality, but something that enters in to a process of actualization by following the plane that gives it its own reality. The immanent event actualizes itself in a state of things” (“Immanence: A Life . . .” 5).

The distinction between the actual and the virtual that governs this characterization of a life is one that Deleuze draws in other ways in contexts. For example, he distinguishes between machinic assemblages and the abstract machines, which govern their operation, or between actual everyday empirical or historical events and the virtual or pure event which is expressed or incarnated in them. At one point in “Immanence: A Life . . .”, Deleuze suggests that the concept of an indeterminate and impersonal but singular life which he finds in Dickens is a concept of life as a pure event. In this passage, he says, “The life of the individual has given way to a life that is impersonal but singular nevertheless, and which releases a pure event freed from the accidents of inner and outer life . . . The singularities or events constitutive of a life coexist with the accidents of the corresponding life, but neither come together nor divide
in the same way. They do not communicate with one another in the same way as do individuals” (5).

Coetzee also offers us a conception of pure indeterminate life that is expressed in the everyday existence of humans and animals alike. Despite his reliance upon theological terminology, this is a resolutely secular conception of an immanent life individuated in the form of particular lives. Early in the novel, David Lurie admits to believing that people have souls, but it is also clear that he has never thought of animals in this way. When he first arrives at his daughter’s farm, he is convinced that humans are “a different order of creation from the animals” (74). He invokes approvingly the doctrine of the Church Fathers that we are all souls even before we are born, whereas animals do not have proper souls: “Their souls are tied to their bodies and die with them” (78). By the end of the novel he is convinced that the room in which he and Bev administer death to the stray dogs is a place where “the soul is yanked out of the body” before it is “sucked away” (219). It is apparent that he no longer draws the same sharp distinction between different orders of creation.

At one point, soon after he has begun assisting Bev to ease the moment of death for the dogs, she says to him: “I don’t think we are ready to die, any of us, not without being escorted” (84). His role in the refuge of last resort is precisely that of escort and what he shares with the dogs is “the disgrace of dying” (143). This phrase may be read as an ironic expression of a post-Christian and secular conception of life. For if dying is a disgrace, then life must be a state of grace, a gift or a blessing from God. If animals had souls, it would be from this state that the animals at Bev’s shelter are forcibly evicted, as indeed we all are eventually. In effect, it is the perception of a disgrace in dying which forms the zone of indiscernibility in which he becomes-dog. At first encounter this is a disgrace more threatening than the one associated with his dismissal from the university and the social death associated with that event. It threatens his sense of himself as a person whose life and whose projects have meaning over and above the life he shares with the animals.

By the end of the novel, Lurie has learned to accept the inevitability of death and the finitude of the life he shares with animals. In his be-
Becoming-Animal and Pure Life in Coetzee’s *Disgrace*

coming-dog, something passes between the two terms such that both are transformed. He becomes-dog but the favoured dog becomes everything that he is now able to give up, including his honour, his intellectual pride and his attachment to life itself. He becomes capable of letting go of his social and personal identity. He gives up the state of grace for the disgrace of dying, but only once dying has been revalued to incorporate identification with an impersonal and indeterminate life, the cosmic life that he now sees as passes through himself, his daughter and her child: “a line of existences in which his share, his gift, will grow inexorably less and less, till it may as well be forgotten” (217). In the act of giving up his favoured dog, Lurie becomes reconciled with his own mortality. He affirms the impersonal life that is expressed in all finite lives, including his own. He is thereby redeemed from the ironically named “disgrace” of dying.

Notes

1 An earlier version of this paper was presented at the 1st International Literature and Science Conference on *The Future of Cyber, Virtual and Bio Literature*, The New Korean Association of English Language and Literature, Pusan National University, 29 May 2003, and at the Annual Conference of the Australasian Association for Continental Philosophy, The University of Queensland, 22 2003. I am grateful to participants on both occasions for their questions and comments, to Moira Gatens, Linnel Secomb, and to the anonymous readers for *ARIEL* for their generous and helpful comments on earlier drafts.

2 Deleuze wrote very little about the law. However, in the *Abécédaire* interviews recorded with Parnet during the late 1980s he describes the creativity of legal jurisprudence in similar terms, pointing to the way the law evolves through decisions in particular cases and to the role of jurisprudence in the invention of new rights. He argues against the rote application of an a-historical concept of human rights and in favour of the elaboration of new rights on a case-by-case basis. He defends a conception of the law analogous to his conception of philosophy as essentially open-ended and mobile, and argues that:

To act for freedom, becoming revolutionary, when one turns to the justice system, is to operate in jurisprudence . . . that’s what the invention of law is . . . its not a question of applying “the rights of man” but rather of inventing new forms of jurisprudence . . . I have always been fascinated by jurisprudence, by law . . . If I hadn’t studied philosophy, I would have studied law, but precisely not “the rights of man,” rather I’d have stud-
ied jurisprudence. That’s what life is. There are no “rights of man,” only rights of life, and so, life unfolds case by case. (“G as in Gauche”)

3 Grant Farred comments that, through Lurie’s intransigence, “Coetzee takes us away from the heart of the country to the hard core of the dilemmas. How does one reform the recalcitrant?” (17).

4 In April 2000, the ANC used Disgrace as evidence of persistent racism among white South Africans in a submission to a Human Rights Commission inquiry into racism in the media. For a discussion of this episode and its implied reading of the novel, see McDonald’s “Disgrace Effects” and Attwell “Race in Disgrace.”

5 Relative (as opposed to absolute) deterritorialization is negative when the de-territorialized element is immediately subjected to forms of reterritorialization, which enclose or obstruct its line of flight. It is positive when the line of flight prevails over secondary reterritorializations, even though it may still fail to connect with other deterritorialized elements or enter into a new assemblage (Deleuze and Guattari A Thousand Plateaus 508–510). See also Patton Deleuze and the Political 106–107.

6 Georgina Horrell argues that the conditions of white people remaining in the new South Africa are “negotiated through the body of the (white) woman in the text . . . an inscription of guilt is performed upon the gendered flesh. The implications of this observation demand interrogation” (31, 32). See also Louise Bethlehem “Pliant/compliant.”

7 Elleke Boehmer comments on the role of animals in Disgrace as “the essential third term in the reconciliation of the human self and the human other” (346). She also points to Lurie’s abjection in the course of the attack and suggests that it is “from this point on that Lurie begins to work out that breakthrough into feeling the self of another, rather than rationalizing its experiences in terms of his own needs” (348). She goes on to point out problematic aspects of this apparent “atonement” on Lurie’s part.

Works Cited


Becoming-Animal and Pure Life in Coetzee’s *Disgrace*


Conference Call for Papers

REROUTING THE POSTCOLONIAL

The University of Northampton, UK, 3–4 July 2007

This two-day conference marks the relaunch last year of the journal *World Literature Written in English* as the *Journal of Postcolonial Studies*. It will explore the rerouting and transformation of the field of postcolonial studies in response to new theories, texts and research questions, as well as the contemporary world situation. We live today in an increasingly mobile world of global forces, accelerated flows of migration, exile and transnational movement which, according to Homi Bhabha, cause those ‘genealogies of origin that lead to the claim for cultural supremacy and historical priority’ to be contested. Diaspora theory draws attention to the fact that the paths or ROUTES open to people through increased migration, dislocation and relocation, even the temporary inhabiting of new spaces offered by cosmopolitan travel and tourism, contribute to a critique of ROOTS, of fixed origins and traditional identificatory structures such as family, society and nation.

The following are some questions underpinning this conference:

What REROUTINGS of the postcolonial occur due to accelerated movements of peoples, the theorizing of diaspora, transformed modes of production through the impact of global technologies, new paradigms such as the “glocal,” the reshaping of culture by globalization?

What is the effect of the current shift away from resistant and counter discourses and the politics of liberation and representation?

How is ‘writing’ the postcolonial, in areas such as pedagogy, genre and the canon, aesthetic and textual practices, changing in response to these developments?

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Violence draws on people's capacity to serve a cause greater than themselves, to sacrifice for the common good, to put their individual welfare at the service of the nation and the people. And these are the noblest parts of the human soul. When exploited by these terrible people, when exploited by demagogues, they turn into a nightmare that can destroy society. But unless you understand that the appeal of violence is to that something deep and noble in the human heart that desires something bigger than yourself, you cannot understand violence at all.

Michael Ignatieff “Nationalism and Self-Determination”

I.
How can we not want human rights? The question may seem ethically intuitive, perhaps even prima facie naïve in a world where injustices and violations continue to expand with sobering, alarming inexorability. But the challenge to my opening question is that, perhaps unsurprisingly, the implementation of human rights legislation is no simple affair. The seeming universality of their ethical intuitiveness—the rights fought for through civil liberties movements and encoded in such treaties as the Declaration of Human Rights and the Geneva Conventions—strikes crudely against their judicial enforcement to particular, differing cultural and state contexts. Who makes decisions about intervention? How is intervention received? Words such as the Sri Lankan “ethnic war” or “interethnic conflict” have tremendous emotive resonances, urging ethically-motivated responses from those within and without Sri Lanka. For a novelist like Michael Ondaatje, who left Sri Lanka at age 19 and has been living in Canada now for four decades,

Anil’s “in-between” location facilitates the ethical problematic reflecting Ondaatje’s diasporic nationalist concerns: what is Sri Lanka, how can it be represented? It is precisely in that process of representation where there can be a rich convergence between human rights as a politico-legal discourse, the aesthetic space of the novel form, and the historical condition of postcolonial Sri Lanka. What, indeed, is the violence and terror that has been devastating Sri Lanka now for over twenty years? What is Sinhalese majoritarianism? And Tamil minoritarianism? I shall argue in this article that Ondaatje invokes the discourse of human rights in order not only to elicit political and ethical responses to Sri Lanka, but also to show how the discourse itself can break down and become frustrated by its application to a particular nation-state context. It is the constitutively polyphonic space of literature—one with which Ondaatje has continually experimented in his writing career—that allows Ondaatje to give dimension and voice to those affirmative aspects of human rights concern that may not always be able to be expressed through what Ranajit Guha has termed the “abstract univocality” of law. In his article “Chandra’s Death,” Guha meticulously describes the process by which in 1849, a young woman in a Bengali village, Chandra, dies from medicine administered by her sister to abort an unwanted pregnancy, a pregnancy that would have meant life expulsion from her village community due to the illegitimacy of the child, with her brother and two male relatives disposing of her body at night. When the “case” came before the colonial courts, however, Chandra’s death became a “murder,” with
Chandra’s mother, sister, and the local producer of the medicine all becoming arrested. Guha argues:

a matrix of real historical experience was transformed into a matrix of abstract legality, so that the will of the state could be made to penetrate, reorganize part by part and eventually control the will of a subject population in much the same way as Providence is brought to impose itself upon mere human destiny. (141)

He continues:

The outcome of this hypostasis is to assimilate the order of the depositions before us to another order, namely law and order, to select only one of all the possible relations that their content has to their expression and designate that relation—that particular connotation—as the truth of an event already classified as crime. It is that privileged connotation which kneads the plurality of these utterances recorded from concerned individuals—from a mother, a sister and a neighbour—into a set of judicial evidence, and allows thereby the stentorian voice of the state to subsume the humble peasant voices which speak here in sobs and whispers. To try and register the latter is to defy the pretensions of an abstract univocality which insists on naming this many-sided and complex tissue of human predicament as a ‘case’. (141)

It is the abstracting and monological voice of the state that Ondaatje challenges through the space of literature and in particular through the genre of the novel, one which—through a realist mode of narrative no less—promises the offer of the “real” and “particular.” With the thematization of human rights within literary space, the empire of the sign becomes coextensive with an empire of ethics, a twinning I shall express, and later elaborate upon, through the concept of the “semioethical.” The aestheticization and literarization of the letter of the law allows for a form of witnessing—characters universalize, particular identities become represented—that challenges the limits of the law’s abstract uni-
vocality. That witnessing is not simply, in Ondaatje’s *literary* case, spec-
ular detachment, or detached legal formulation, but rather a kind of
participation. The novel presents us with, and takes us along the path
of, a process. Ondaatje begins the novel with human rights on the scene
of the international, by referring to human rights abuses in Guatemala,
and moves to the increasingly particular: as Anil moves from the U.S. to
Sri Lanka, she moves toward greater understanding of the Sri Lankans
with whom she works closely, and she moves toward a deeper examina-
tion of her diasporic identity so that by the end of the novel she is able
to proclaim, “I think you murdered hundreds of us” (272). Such a move
allows Ondaatje to collapse the abstractness of the elsewhere and of the
national-ethnic other, a thematized collapsing of boundaries consonant
with the formal impulse of this novel to demonstrate the polyphonous
“sobs and whispers” that defy the univocality of legal discourses.

Before offering some background on the civil war in Sri Lanka, I’d
first like to offer a deconstructive moment to signal, as a political self-
conscious gesture, the fraught textual and political terrain, both literal
and metaphorical, one must negotiate when writing about the continu-
ing “crisis” in Sri Lanka. The “story” that I shall tell—in giving “back-
ground” to Sri Lanka will participate in the same problematics of ref-
ence to and representation of the “Sri Lankan civil war” with which
Ondaatje is faced. Val Daniel argues that “[e]very story in the press has
somewhere buried in it a key sentence, intended to provide a funda-
mental bit of information, without which, it would seem, the story as a
whole will not be adequately understood” (15). He then offers the fol-
lowing as a typical press sentence: “Ethnic Tamils speak the Tamil lan-
guage and are Hindus, and ethnic Sinhalas speak the Sinhala language
and are Buddhists” (15). Daniel then concludes that:

The worldly-wise in Sri Lanka too, when called upon to de-
scribe the current turmoil in their island nation, do so by call-
ing it an interethnic conflict. They may refine this bit of funda-
damental information by adding: Sinhala is a language that
belongs to the Indo-Aryan family of languages, its speakers,
mostly Buddhists, making up the island’s majority; Tamil is a
language belonging to the Dravidian family of languages and is spoken by the island’s most populous minority, who are most likely to be Hindus. One immediately senses the mighty hand of nineteenth-century Orientalist scholarship beginning to cast its long shadow of the classification of languages on the political and demographic landscape. (15)

Conventional descriptions reify the war as one between ethnicities (“Tamils,” “Sinhalese,” that thus constitute a country, “Sri Lanka”), whereas such “ethnicities” are not so stable, homogenous, and pure as some members of both ethnicities may wish to assert—and for which they are prepared to die. The story I shall thus tell about the “Sri Lankan war” will be a palimpsest of sorts. Though useful to those readers unfamiliar with some of the politics of the conflict, the terms that such descriptions usually invoke are themselves problematic for the very reasons that Daniel so cogently discusses.

Officially gaining independence from Britain in 1948, Sri Lanka found itself marked by a postcolonial condition with each of its two dominant ethnic groups, the minority Tamils and the majority Sinhalese, enforcing their own brands of ethnic nationalism. The Sinhalese used the Sinhala language and Buddhism as markers for amplifying “their” particular ethnicity. The Tamil communities, concentrated mainly in the north and east of the island, looked to the neighboring south Indian state of Tamil Nadu for cultural and social support. Indeed, Tamils had been brought from southern India by the British in order to provide labour for the tea plantations. Sri Lanka’s first Prime Minister, R. Bandaranaike, actively promoted Sinhalese nationalism. Perhaps his most aggressive move was the 1956 “Sinhala Language Act,” making Sinhala the official national language (Bandaranaike had promised to do so within 24 hours of election). The Tamils claimed systemic discrimination, not just linguistically, but also socio-economically, particularly through the introduction of university entrance quotas in the early 1970s which further limited opportunities for personal advancement. Although Sinhalese-Tamil violence in postcolonial Sri Lanka has occurred since at least 1956, the greatest eruption took place in July 1983, precipitated after
the Liberation Tigers of Tamil Eelam committed a suicide attack in the northern town of Jaffna, which killed thirteen Sinhalese soldiers. As a backlash, Sinhalese mobs stormed Colombo, burning and destroying Tamil homes. Three major actants continue to operate in the ongoing war: (1) the LTTE, concentrated in the north and the east; (2) the Government itself; and (3) the Janata Vimukti Peramuna (JVP, or People’s Liberation Front), an anti-State socialist group formed in the south to attack the government for its political and economic policies. Since September 2002, six international rounds of peace talks between the LTTE and the Sri Lankan government have been held in Thailand, Germany, and Japan, mediated throughout by Norway. In December 2002, a Canadian group formed the Forum of Federations to help both the government and LTTE establish a federal solution.

II. The Representational Dilemmas of Human Rights

How might a novelist such as Ondaatje represent the postcolonial complexity of ongoing violence, international demands for peace, and the need for human rights? A strong challenge to the hegemony and speciousness of homogenous, “pure” ethnic identities would be a turn to some “commonality”—some measure of sameness, let us say—that disrupts and subverts the differences-promulgating ideologies which produce violence in Sri Lanka. In his family memoir Running in the Family, written in 1982 after a long-due visit to Sri Lanka from Canada, Ondaatje is thoughtful about the constructed nature of ethnic identities in Sri Lanka. He states: “Everyone was vaguely related and had Sinhalese, Tamil, Dutch, British and Burgher blood in them going back many generations. . . . Emil Daniels summed up the situation for most of them when he was asked by one of the British governors what his nationality was—‘God alone knows, Your Excellency’” (41). Ondaatje’s emphasis on everyone’s being related and on hybrid ethnicities challenges myths of a “pure” national identity. In the same way that hybridized identities—resulting in people’s having the “same” blood in them—can disrupt polarized ethnic categories, so too can a concept of individual human rights stand as a challenge to the disjunctioning category of ethnicity (and the differences that category can fuel). Yet the constitutive
dilemma for a human rights discourse is that while it affirms the category of “human,” it emerges, and must function as, a legalistic response to cases so often fraught with problems and inequities because of “specific” categories—occurring “elsewhere” from the West. We may ask, then, are human rights ‘shorthand’ for representing the third world? Is violence the only western understanding of Sri Lanka?

Ondaatje’s female protagonist Anil functions as an emissary of human rights, but hers is no simple intervention. Returning to Sri Lanka, returning “home,” she undergoes a process of learning, of revising her beliefs, of developing humility. The abstract univocality that produces a signification such as “violence” becomes translated and aestheticized by Ondaatje within the polyphony of the novel form. It is the malleability of the aesthetic space of literature that will allow Ondaatje the opportunity to explore the ways in which human rights may both succeed and break down in differing nation-state contexts, a “literarization” that helps to address questions of law concerning precisely the application and enforcement of such rights.

The space of literature can contribute to knowledge. Literary appreciation becomes literary cognition: “representation” thus appears again. How do we know Sri Lanka? Because such ethically-charged phenomena as violence and catastrophe are particularly resistant to representation, any effort at representing them will always already be haunted by a heightened, if indeed not anxious, self-consciousness riven by both aesthetic and ethical concerns. I shall express this twin (and twinned) problem of representation and ethics as the “semioethical.” The problem becomes contiguous with its own solution: any representation will be an auto-representation, an auto-critique, launched from the domain of the semioethical itself.

In her forthcoming piece, “Aestheticizing Catastrophe,” Mieke Bal argues that it is the catastrophic nature of an event—and the resulting trauma—that creates a special interest in viewers toward the work of art and, ultimately, toward the artist. In contradistinction to Kant’s and Shaftesbury’s insistence on the “disinterestedness” necessary in forming aesthetic judgment, Bal argues for an “interestingness”: an interest in the suffering caused by the catastrophe, an interest that undermines the
public-private divide. Such commitment results in a form of witnessing, or sharing of the trauma, and it is precisely the catastrophic, overwhelming quality of the initial “event” that elicits and rivets such committed interest.

Thus we can think of the discourse of human rights as a form of “witnessing” the other, so often the third world. The challenge for Ondaatje, with a novel like Anil’s Ghost, is not simply to reproduce the asymmetries suggested by “witnessing,” thus reifying Sri Lanka as simply the other of the west. Instead, the challenge becomes how Ondaatje can work to enable some kind of insight and knowledge, so as to move away from impressionistic understandings that uncritically equate “violence” with “Sri Lanka.” It is precisely the dense complicity between the concept of “violence” and “Sri Lanka” that will serve as the starting point for theorizations by Sri Lankan intellectuals on the nature and deep problematics of what I shall term “nation-writing.”

For instance, Qadri Ismail argues for lending a certain “subjectivity” to Sri Lanka so as to avoid anthropological and anthropologizing descriptions which represent the country as such for largely western audiences. He writes, “thinking of Sri Lanka insists upon the (special) responsibility of postcolonial scholarship not to continue to address the west exclusively; to insist upon the distinction between addressing the west and interrogating eurocentrism; and in so doing to ‘finish’ (Mowitt 1992) the critique of anthropology” (“Speaking” 298). The semiotic implications of such anthropologizing rest on “representation” as both description and substitution, so that what may be seen as simply a representation of Sri Lanka becomes a de facto substitution, effectively “subalternizing” the nation:

while representation, whether in anthropology or elsewhere, might depict itself as engaged in the innocent activity of description, retransmission, or portrait, it often becomes proxy, a substitute for the other: who is then replaced, effectively suppressed, “cannot speak.” (300)

Such “speaking” stems from Gayatri Spivak’s questioning of whether the subaltern is able to “speak” (metaphorically), and the institutional
forms of power and misrepresentation that thwart both the subaltern’s ability to represent herself, and also the ability of those “outside” her context to “listen” to her. Whereas Spivak questions representability by framing her concerns through the terms of an individual, Ismail frames his concerns by figuring an entire “country”—Sri Lanka—as a sort of subaltern. Ismail’s admirable reminder of the “responsibility” of postcolonial scholarship may help us conceptualize Anil as a figure of the postcolonial intellectual or critic. As I mentioned earlier, Anil’s is a process of negotiation through learning, revision, understanding.

Ismail draws a subtle and potent distinction between Sri Lanka as “country” and Sri Lanka as “place.” When I stated above that my “story” about postcolonial Sri Lankan violence would be a palimpsest, it is (1) the idea of Sri Lanka as “country” and Tamil and Sinhala as uncontested “ethnicities” that becomes reified through press and conventional descriptions; but it is (2) a more critical reading of Sri Lanka, attendant to its historical complexities, that can palimpsestually re-signify “Sri Lanka,” “Tamil,” or “Sinhala” so as to restore some unhegemonic referentiality to those, and similar, signifiers. It is in this sense that conceptualizing Sri Lanka as place allows Ismail to apply to Sri Lanka the Barthesian concept of text as “productivity,” thus rescuing Sri Lanka from existing as passive, subalterned object subservient to any and all conventional, uncritical representations. Ismail’s distinction:

Sri Lanka, the country, is to be understood as this debate: between Tamil and Sinhala nationalism, liberalism and the left; and containing a multiplicity of other positions. To put this differently: as place, Sri Lanka is best understood as a text in the strict Barthesian sense. Indeed, the above might be clarified by turning to Barthes and his conceptualization of text as a ‘productivity,’ as the meeting place of reader and written. Sri Lanka, to the post-empiricist, is a reading; it emerges when the reader (Ismail) responds to written (De Silva, Kennanayake, Jeganathan, Scott, Tiruchelvam). From which it follows that, since De Silva and others are also readers, they too will pro-
duce the country; thus no single Sri Lanka can, by definition, succeed in capturing or encompassing the infinitude of its significance; thus no two Sri Lankas are likely to coincide, though some will overlap. This relation, between reader and writer, is in one sense reciprocal: to read textually is to deny the written authority, primacy or priority over the reader. This is why Sri Lanka, as productivity, can be thought of as subject. (304)

Positing such a “subjectivity”—the productivity of place—to Sri Lanka conceives of the island with an agency from within, an “internal” logic resistant to easy translations—misrepresentations, innocent descriptions—within the discourse of an orientalizing anthropology, or indeed any form of representation that seeks to fix one authoritative meaning for readers. Ismail argues that “culture” and “violence” are not categories central to the Sri Lankan debate. For him, the debate:

*does not turn around culture or violence, but the terms nation, majority, minority and democracy.* (Indeed, the debate could be summarily caricatured as pivoting around the significance—value—of one word: majority.) To speak to the question of peace in Sri Lanka in the current conjecture is to address their relation. (306; italics in original)

What may be configured from outside Sri Lanka as “culture” and “violence” can easily become, in Ismail’s view, inaccurate ways of understanding those phenomena that are manifest because of the specific categories of nation, democracy, majority, and minority. Pradeep Jeganathan succinctly notes that “[v]iolence is an analytical name for events of political incomprehensibility” (41). Jeganathan’s analysis of the historical rise of “violence” as a distinct category of Sri Lankan anthropology would mark Sri Lanka, in Ismail’s terms, as country:

[U]nlike ritual, violence is not a well worn, firmly canonized category in anthropology. In fact, the concern with violence in Sri Lankan anthropology is extremely recent, arising only after the massive anti-Tamil violence of July 1983. This event produces a profound rupture in the narration of Sri Lanka’s mo-
Ondaatje’s *Anil’s Ghost* and Human Rights

dernity. Even as it does that, it becomes the historical and con-
ceptual condition of possibility of an anthropology of violence.
In other words, 1983, taken as a totality, makes available the
category “violence” to the anthropology of Sri Lanka. (41)

Jeganathan’s concern is that the category of “violence” will *precede*
actual observations on and writings about Sri Lanka so that indeed “vi-
olence” becomes “a flippant gesture”—a conceptual and designative
shorthand for the incomprehensible—standing in place of more care-
ful, subtle understandings of Sri Lanka, ones that may in fact be able to
acknowledge an infinitude not just of significance but of phenomena,
away from anthropologically-authorized readings that not only delim-
it signification, but mask—and at times forget—their readerly status.
“Violence” thus commits its own violence, as a form of sealing off, at a
distance (usually western, usually orientalizing), the incomprehensibility
of the national and “Asian” other. Jeganathan is concerned with the tex-
tual productions of Sri Lanka, particularly anthropological ones. His de-
construction of the discursive and perceptive hegemony of “violence” is
guided by Arjun Appadurai’s notion of the “gatekeeping concepts” of an-
thropological theory which, according to Appadurai, “seem to limit an-
thropological theorizing about the place in question and that define the
quintessential and dominant questions of interest in that region” (357).

Ismail and Jeganathan urge a restoration to Sri Lanka of some self-
determination, some agency outside of the strictures and conventions of
western (anthropologizing) representations. Hence Ismail’s concept of a
“subjectivity” of Sri Lanka: can this subject speak? It is precisely the gen-
erativity of its sentences—texts—that gives Ismail’s Sri Lanka a presence
and identity that is not simplistically the “other” of the west (the vio-
ient, the horrific, the non-European). It is that malleability of produc-
tion that will connect with the literary “craft” of a writer like Ondaatje.
The aesthetic space of literature will allow Ondaatje to present a certain
subjectivity as opposed to a static objectivity—most obviously through
the phenomenon of “characters” so that individual voices can be placed
against one another. The emergence, along the temporal narrative axis,
of a human identity for the skeleton “Sailor” could be read as a meta-
phor for the emergence throughout the novel of gestures toward the humanistic, those values consonant with the values of human rights. If, according to subaltern studies scholars, the law (and in particular colonial law) is univocal, then in contrast to such univocality stands the polyvocality represented by literally numerous characters. Though the voice of the state, in Ranajit Guha’s example, could not record the “sobs and whispers” of those translated into “judicial evidence,” the aesthetic space of literature can surely encompass such a range of expression. So given the insistence of Sri Lankan intellectuals such as Daniel, Ismail, and Jeganathan on certain forms of representation, coupled with being faced with such a possible infinitude of significance of Sri Lanka, how can Ondaatje respond in ways that will permit the exploration of humanistic values?

I shall demonstrate that facets of *Anil’s Ghost*’s gestures toward humanistic values—learning, knowledge, regeneration—are enabled by the discourse of a universal human rights, which allows Ondaatje simultaneously to bring in—via Anil as emissary of human rights—the thematics of the east-west relationship (though here Ondaatje variously glosses “east” as “Asia” or “Sri Lanka”). Concomitant with this relation is the notion of the “true” as an epistemological issue, one that Ondaatje thematizes along the Sri Lanka/west divide by showing Anil’s and Sarath’s differing views on what constitutes truth. Within the world thus of *Anil’s Ghost*, the space of the aesthetic becomes inextricable from the space of the ethical: from human rights and from humanistic values, both of which emerge as responses to violence. The semioethical thus comes to be constituted by the aestheticization of human rights, a literarizing gesture that allows for a critique of the law of human rights, a critique launched within a polyphonic semiotic space quite different from the abstract univocality of an interpellating law that produces pre-inscribed “cases.”

III. “Universal” and “Personal” Human Rights

*The National Atlas of Sri Lanka has seventy-three versions of the island—each template revealing only one aspect, one obsession:*
rainfall, winds, surface waters of lakes, rare bodies of water locked deep within the earth.

... The old portraits show the produce and former kingdoms of the country. ... The geological map reveals peat in the Muthrajawela swamp. ... Another page reveals just bird life. ... There are pages of isobars and altitudes. There are no city names. ... There are no river names. No depiction of human life.

(40; italics in original)

For Ondaatje, the discourse of human rights also becomes a way of structuring violence in *Anil’s Ghost*. A paradigm of “universal” human rights enables the structuring of the novel’s plot in a form similar to that of a detective novel. The narrative motor driving the novel forward thus becomes an investigation, a search for the truth of the circumstances of Sailor’s death. Anil’s official intervention allows for multiple significations within the text: (1) comments on the “West” and how it may differ from “Asia” (Ondaatje tends to prefer the latter term to “Sri Lanka”); (2) reflections on what constitutes “truth” and the “true”; and (3) the various forms of epistemology that stem from there. These three facets of Anil’s intervention allow for the intersections between an international or “universal” value (or culture) of human rights and a “regional” ethnic culture, a space of intersections within which Ondaatje can explore and gesture toward affirmations of such humanistic values as regeneration and renewal from within the midst of crisis. Some of this affirmative sense is captured in the Preamble to the United Nations Declaration of Human Rights, which states that the recognition of the “inherent dignity” of all members of the “human family” is foundational to “freedom, justice and peace in the world” in the promotion of “social progress.” Upendra Baxi eloquently expresses the vision of such a discourse as it operates “elsewhere” than in Euro-America:

No phrase except a romantic one—*the revolution in human sensibility*—marks the passage from the politics of human rights to the politics for human rights. ... The struggles which [the voices of the tortured and tormented] name draw heavily on cultural and civilizational resources richer than those provided by the time and space of the Euro-enclosed
imagination of human rights, which they also seek to innovate. The historic achievement of the ‘contemporary’ human rights movements consists in positing peoples’ polity against state polity (41).

It is the positing of a people’s polity—Baxis’ visions of “human future”—over state polity that enables a western intervention via Anil. When Baxi describes the politics for human rights in “romantic” terms, it invokes an affirmational tone: “revolution” implies a total, sweeping change in social conditions; “human” captures a sense of the universal, that which inheres in everybody (and which everybody inheres in) beyond particular, local identities; “sensibility,” with its connotations of feeling, stirs people by invoking the register of affect.

A notion of a “people’s polity” would seem to beg—and problematize—the question of what constitutes “people” and, indeed, what constitutes the human. Ondaatje seems aware of this also, and once again employs the character of Anil as a site through which to enact differing notions of the human, almost always cultured along the east/west divide. Ondaatje develops and emphasizes such east-west tensions by pairing Anil’s forensic work in Sri Lanka with a “local” archaeologist, Sarath Diyasena. Anil and Sarath collaborate to discover the identity of the skeleton they come to name “Sailor.” They discover the skeleton in an ancient burial ground, but the condition of the bones indicates the remains are anything but ancient. By reconstructing the identity of the person—likely to have been murdered—Anil and Sarath may have evidence for a governmental crime. Consider the equation of Anil with “west” and “western humanism” and the subsequent exposing of that westernness by implicating it with the problem of epistemology:

Anil needed to comfort herself with old friends, sentences from books, voices she could trust. “This is the dead-room,” said Enjolras. Who was Enjolras? Someone in Les Misérables. A book so much a favourite, so thick with human nature she wished it to accompany her into the afterlife. She was working with a man [Sarath] who was efficient in his privacy, who would never unknot himself for anyone. . . . In her years abroad, during her European and North American education, Anil had courted for-
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... Information could always be clarified and acted upon. But here, on this island, she realized she was moving with only one arm of language among uncertain laws and a fear that was everywhere. There was less to hold onto with that one arm. Truth bounced between gossip and vengeance. (54)

Accoutrements of Anil’s westernness include a western literary classic, her education, and her methods of tackling information by “clarifying” it and “acting” upon it. In contrast, Ondaatje establishes the Asian other, through Sarath, as someone inscrutable, in a “knot,” in a land native to him that is accessible by Anil only through one arm of language, an overall climate in which truth is vexingly unascertainable. The notion of “truth” is divided along cultural lines even more in this exchange between Anil and Sarath, beginning with the latter:

“I don’t think clarity is necessarily truth. It’s simplicity, isn’t it?”

“I need to know what you think. I need to break things apart to know where someone came from. That’s also an acceptance of complexity. Secrets turn powerless in the open air.”

“Political secrets are not powerless, in any form,” he said.

“But the tension and danger around them, one can make them evaporate. You’re an archaeologist. Truth comes finally into the light. It’s in the bones and sediment.”

“It’s in character and nuance and mood.”

“That is what governs us in our lives, that’s not the truth.”

“For the living it is the truth,” he quietly said. (259)

The problem of epistemology is not solely a rarefied intellectual one. Rather, it has serious local repercussions: misrepresentations of Sri Lankans by the foreign media can add fuel to the persisting violence. Aesthetic space here is implicated as a sanctuary from such presentist violence. Indeed, the violence has become so familiar that there can be an easy shift for Sri Lankans between the present and the “timeless” presented by art, a shift which remains incomprehensible to Anil: “‘Let’s lock up,’ [Sarath] said. ‘I promised to take you to that temple. In an
hour it’s the best time to see it. We’ll catch the dusk drummer.’ Anil didn’t like the abrupt switch to something aesthetic” (52). Anil’s unfamiliarity with such a switch reflects her (western, diasporic) removal from the thickness of the location. It may even reflect her arrogance and naiveté: her positivist philosophical arguments fall short against character, nuance, and mood. In a later section, Palipana takes Sarath to see rock paintings, using rhododendron branches for light. And then this reflection:

Half the world, it felt, was being buried, the truth hidden by fear, while the past revealed itself in the light of a burning rhododendron bush. Anil would not understand this old and accepted balance. Sarath knew that for her the journey was in getting to the truth. But what would the truth bring them into?

It was a flame against a sleeping lake of petrol. Sarath had seen truth broken into suitable pieces and used by the foreign press alongside irrelevant photographs. A flippant gesture towards Asia that might lead, as a result of this information, to new vengeance and slaughter. (157)

Ondaatje develops his contrast between the aesthetic and the violent through the sense of a common image: burning. “Burning rhododendron bush” is set against a sleeping lake of petrol; the visual similarity of the morphemes in the former phrase (the symmetry of “b/r/b” creating an aesthetic nicety) and its alliteration establish it as a unit of signification against the petrol, itself established as a unit by metaphorization of it as sleeping. Whilst the former is a cause, the latter is an effect, reactive; whilst the former is static, the latter has agency. The space of the aesthetic is thus something “unchanging,” a sanctuary outside of history and materiality. The latter—violence—is a fantastic “other,” a sleeping agent of petrol that can be easily ignited into ferocity, like the unfolding of “vengeance and slaughter” whose causal flame can be a flippant photograph from abroad. Of course, Ondaatje is ethically saying here, “But my gesture is not flippant.” His wish is for Anil’s Ghost to be illuminating.
The horizon against which Ondaatje situates such thematics foregrounds the problem of “perspective” and “framing.” Ondaatje takes pain to show us he is aestheticizing “both ways”: toward Sri Lanka, and also toward the west, especially given his insertion of passages of “westerns” as a genre of film watched in the United States by Anil and her girlfriend Leaf. It is this distancing strategy that is consonant with his ethical subject-position: it is constitutively a semioethical gesture, with particular aestheticizations in the text becoming metafictional indications of this background generative and structuring paradigm. Human rights serves as a powerful trope for this ethico-structural relation, and its particular narrativization and thematization into the text allows Ondaatje just enough space to tell us so, or at least for criticism to illuminate it as such.

The attractiveness of the universal is, precisely, its universality—the revolutionary potential of affirmations of hope, the future, goodwill. Ondaatje’s ethical wish for Anil’s Ghost, of course, is for it not to be a flippant gesture to Sri Lanka. He thus attends fastidiously—a commitment heightened perhaps by his diasporic location—to aestheticizing the “lush” particularity of Sri Lanka, and he lets us know it. It is not only Anil who brings the human rights of the west to Sri Lanka: so does Ondaatje. Yet Ondaatje also brings Sri Lanka to the west, prompting some kind of relation (not necessarily dialogue) between the west and those states that are the “beneficiaries” of globalization, particularly when human rights problems can so often become ‘shorthand’ for representing “the third world.” And it is Ondaatje’s aestheticization of human rights—formal and also thematized [says Gamini: “those armchair rebels living abroad with their ideas of justice—nothing against their principles, but I wish they were here. They should come and visit me in surgery” (132)]—that precisely allows for the happening of, the revealing of “that” “particular” “system” of “rights,” whose autonomy from the “universal” (global) but also semantic and ontological interdependency on that system—the global may be able to illuminate the local, but the local can also contain the global—I resort to expressing through scare quotes.
IV. Conclusion
Sri Lanka involves not just the question of human rights, but also of minority rights and state sovereignty. It is an attentiveness to and concern for the particular that allows Ondaatje’s gaze in *Anil’s Ghost* to shift from the public/political to the private/personal, from such large, encompassing narratives as nationalism to such local, intimate narratives as those concerned with love between two people. Such movement would suggest a “humanization” of the political: to show that “big” phenomena can find their parallels, or even origins, in the “small”: the problems of unrest in the state in the problems of unrest in the family; the violent in the personal; the traumatization of a peoples paralleled in the traumatization of one girl, who has witnessed the murder of both her parents. Perhaps such humanization would suggest a humanism in Ondaatje’s gaze, to show (yes, to the western readership to whom he is mostly famous) that “they” are just like “us” (and that “we” are just like “them”) and, concomitantly, that “I” am just like “them.” In a discussion of *The English Patient*, Ondaatje states that he was working with “four characters in a very small corner of time and place” (Brown 17). It seems that in *Anil’s Ghost*, ironically, he wishes to work in a kind of timelessness: he visits a particular time, a particular place, but his craft—framed through the discourse of human rights—wishes to universalize identities embedded within this locus. A memory that Ondaatje donates to Anil: “Clyde Snow, her teacher in Oklahoma, speaking about human rights work in Kurdistan: One village can speak for many villages. One victim can speak for many victims” (176; italics in original). Such a humanistic affirmation is given a special urgency when framed by Ondaatje within the context of an ethnic civil war, that awakening—his, ours—to such catastrophic violence can have a catalytic effect on ethical response. The “semioethics” I advance in this article could thus apply particularly cogently to contexts that demand close, “witnessing” attention, that invoke within us the most noble of responses to the tropics of the Real.

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**Works Cited**


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Sovereignty and the Cinematic Image:
Gary Snyder, The Civil Rights Act of 1968,
and the Witnessing of Jurisdiction
Valerie Karno

Categorizing the purpose and methodology of the interdisciplinary subfield of “law and literature” with any consistency is a thorny venture. From Jane Baron’s early work on the topic, naming humanism, hermeneutics, and narrative, as the three strands around which law and literature studies were performed, to Julie Stone Peters’ more recent article revisiting these three “projects” of the law and literature “movement,” scholars continue to explore the way disciplinary edifices both respond to each other and resist interactive morphoses. Yet, despite the limits of the cultural studies methodology we have often employed to understand the field of law and literature—a method largely responsible for the prevailing mode of descriptive observation signaled by the way we now begin and litter many of our papers with “the way in which”—studying law and literature alongside one another enables us a glimpse at how discrete textual and discursive forms meet to contribute to our tacit embrace of seemingly fixed and unyielding concepts. Thus, examining legal doctrines alongside literary texts in a sociohistoric context provides us the opportunity to grasp a more coherent, albeit not necessarily uncomplicated look at the ways cultural notions are generated and disseminated within and across localities and nations.

This article will look particularly at three forms of text—literary, legal, and cinematic—to study the way the cultural idea of “sovereignty” has evolved through a mingling of disciplinary narrative images. Examining one particular decade, the 1960s, and one particular anchor, the United States, this essay will examine environmental writer Gary Snyder’s 1960’s literary work *Earth House Hold*, the legal text of the Civil Rights Act of 1968, and the cinema of the 1960s pertaining to the Vietnam War, to ponder how conceptions of sovereignty have been developed
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in the cultural imaginary. As this essay will discuss, when read together these discrete disciplinary forms provide an interpretive collage which illuminates how sovereignty became aestheticized as an interconnected process of constant activity—a dynamic subject to continual transformation rather than static being. This dynamic, continually transforming subject influenced not only the 1960s and the United States, but conceptions of sovereign systems, people, and nations across the globe for decades following.

The 1960s—a decade when national identification was so intimately linked with geographical deployment in and beyond the United States—offer us a snapshot of the ontology and operations of jurisdiction and sovereignty. The numerous permutations and rewritings of legality, counter-culture, and geographic identifications makes this decade ripe for exploring the ways texts unearth the complexities of personal and national sovereignty. Given the preoccupation with determining America’s geographic and ideological location—where it was and should be in the late 1960s, as well as how and where to find the idea of America and “its enemies”—it is less than accidental that texts that invoked geography became fundamental parts of counter-cultural production. They participated in an ongoing consideration of individual and state relationships to geographic and ideological American space. Both legal discourse, and literary narratives worked in the late 1960s to reformat American legal subjects’ relationships to their land, sense of nation, and racial affiliations domestically and globally. Particularly, Gary Snyder’s *Earth House Hold* and the Civil Rights Act of 1968 use geography to reveal the complexities of personal and national sovereignty, which still haunt us today.

There is perhaps no greater American impulse than that of the negotiation of the contradictory channels of sovereignty. From the construction of the classic liberal subject free to exercise his own volition over himself, to the American denial of “personhood” to slaves until the mid 1800s, to the exercising of First Amendment Rights to speak oneself, to the restrictions on speech designed to limit words designed to incite violence, the United States has been grappling with how to balance acknowledging the ideal “sovereign” individual body with the ideal national “sovereign” since its inception. Still in the contemporary climate,
we see the United States working out our often-untenable understandings of sovereignty on a daily basis. This essay will examine a microcosm of the ongoing negotiation of sovereignty’s contradictions, by examining the United States treatment of Native Americans in the 1960s. Pivotal in demonstrating and creating the issues that people, subject to Americanization, confront around personal and national sovereignty today, the 1960s help reveal the technologies of sovereignty still operating within America and throughout the globe in curious ways.

In a recent forum of PMLA, Peter Brooks and Julie Stone Peters comment on the impact legal and literary disciplines might have on each other. To improve the potential outcomes of the law and literature movement, Brooks calls for “setting law in something resembling a transferential relation . . . to other humanistic disciplines,” and Stone Peters, nodding to the form of transferential relation she has previously described, replies that this transference takes the form of “each discipline’s reenactment of a primal loss and projection of healing power onto the other discipline” (Brooks and Stone Peters 1646, 1647). If it can be said that the struggles for sovereignty take shape both in literary and legal discourse, then examining the ways literature and legality respond to each other’s senses of loss and potential healing is a potent mode for thinking both about the ways sovereignty has been shaped and re-shaped, and also how literature and law have been mutually constituted in the process.

I. The 1968 Civil Rights Act—Legal Sovereignty
The 1968 Civil Rights Act, particularly Titles II through VII, reconstrued the U.S. government’s jurisdiction over Indians, and Indian land, as part of the United States’ ongoing engagement with Indian autonomy. The Act both extended U.S. ideology to Indians, holding them accountable for and subject to the U.S. Bill of Rights, while it also limited U.S. jurisdiction subject to Indian consent. Title II of the Act, Section 202, declared, for instance, that “No Indian tribe in exercising powers of self-government shall make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or freedom of the press . . .” (Docs 250). Other freedoms designated by the Bill of Rights
were similarly reiterated there: the right to be secure against unreasonable search and seizures, the right not to be compelled to be a witness against oneself, the right to a speedy trial, equal protection of the laws, and due process. Section 203 of Title II also provided for the right of habeas corpus, for a U.S. court to test the legality of detention by an Indian tribe. This right of habeas corpus came on the heels of the previously decided 1965 case Colliflower v. Garland, where the U.S. Court of Appeals, 9th circuit, held that tribal courts were in effect a part of the federal system, and that the Federal court had jurisdiction to issue a writ of habeas corpus to determine the validity of detention of an Indian by a tribal court. The court there reasoned that “[i]n spite of the theory that for some purposes an Indian tribe is an independent sovereignty, we think that in the light of their history, it is pure fiction to say that the Indian courts functioning in the Fort Belknap Indian community, are not in part, at least, arms of the Federal government. Originally they were created by the Federal Executive and imposed upon the Indian community and to this day the Federal government still maintains a partial control over them” (Docs 247). The implications of the Colliflower case are significant. This case created precedent showing that the “name” of sovereignty and the “practice” of sovereignty are distinct, and would be treated differentially by the courts. Because the Federal government still maintained partial “control” over the Indian community, it would not consider the tribal courts at Fort Belknap “entirely” sovereign. Rather, they were neither “sovereign” nor “subservient.” They fell into an uneasy, uncategorizable space. In Colliflower, and beyond, sovereignty came to exist on the separate planes of theory and historical practice for the courts. As a category, or mode, sovereignty was not complete or totalizing. It was already divided and inconsistent in nature—and could be parsed into the separate components of idealized and practiced spaces. To be named a sovereign, then, is not necessarily to be treated as, or act, as one. The signifier does not delimit the assumed parameters of the signified. Sovereignty instead depends on an oscillatory space between name and performance.

The boundaries between the Federal Government and the sovereign Indian courts are similarly blurred in Title III of the 1968 Civil Rights
Sovereignty and the Cinematic Image

Act. This Act provided that there should be a Model Code developed by the Secretary of the Interior, to “govern the administration of justice by courts of Indian offenses on Indian reservations” (Docs 250). This model code included items like 1) Indians tried for similar offenses on reservations to those which might be tried in federal courts, shall have the same rights as they would in a federal court; and, 2) Indian judges shall have proper qualifications and be properly educated with classes for the training of judges. The American legal system here maps itself onto Indian land and thought.

Yet, even with this ideological umbrella of national rights placed atop Indian reservations, the Civil Rights Act nonetheless also limited jurisdiction by demanding Indian consent to the State assumption of jurisdiction over civil and criminal offenses. Under Title IV, States could assume jurisdiction over offenses committed by or against Indians in Indian country within that state, only with “[t]he consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by such assumption” (Docs 251); Section 406 of Title IV claims that state jurisdiction is applicable in Indian country “only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose” (Docs 252). The Secretary of the Interior was deemed to call that election when “requested to do so by the tribal council or other governing body, or by 20 per cent of such enrolled adults” (Docs 252). The complexities of jurisdiction—as an amalgam and evolution of the history of imperialism and expansion—are apparent from this Civil Rights Act. Abstracted systems of rights were applicable to all Indians, while explicit state assumption of rights, or physical jurisdiction over tribal land, was limited. The law, reworking the role of the reservation in the American imaginary, maintains a separation, albeit one which could be renounced, between the space of the autonomous reservation, and the jurisdiction over American rights which applied to all persons on that reservation. This distinction also followed closely on the heels of President Johnson’s message to Congress in 1968, which forged the path for this divide between geographic placement and abstracted citizenship rights. In that “special message to
Congress, in March of 1968 on the problems of the American Indian, the forgotten American” (Docs 248), Johnson claimed that “We must affirm the rights of the first Americans to remain Indians while exercising their rights as Americans” (Docs 249). Johnson thus reiterates an ontological foundation of “being” Indian, while also suggesting that the essence of Indian-ness can co-exist alongside the pragmatic action of performing the exercise of being American. “Underlying this program,” Johnson says, “is the assumption that the Federal government can best be a responsible partner in Indian progress by treating the Indian himself as a full citizen, responsible for the pace and direction of his development” (Docs 248). In Johnson’s emphasis on self-help and respect for Indian culture, he proposes a coordinated effort from several Secretaries including Interior, Agriculture, and Commerce, to work together in providing federal assistance programs for Indians. To create this united attempt, he divides the Indian into that citizen which is geographically locatable, but who can partake of expansive and diffuse American ideology. This thought process is also replicated in the Civil Rights Act, which further tears at the distinction between local living and national identification.

II. Gary Snyder, the Environmentalist Writer and Literary Sovereignty
In the case of sovereignty, the complexities of legal jurisdiction mapped onto Indians within national borders through legal codes also served as a site of struggle for literary artists grappling with aesthetic identification. Gary Snyder’s *Earth House Hold*, written in the same cultural moment as the Civil Rights Act of 1968, functioned to invoke not only the idea of the Indian but also the land of the reservation as a place for reformulating both the abstracted idea of the “American” and the materialized way Americans lived on the planet. Snyder’s counter-cultural narrative inures the reservation with a double power: it uses the land of the reservation to hypothesize a new sense of American identity and action, while it also calls into question the very formation of the legal space of the reservation evolving at the time. Snyder presents us with a jurisdictional paradox, which reverberates in the looming contradictions of the Civil Rights Act itself.
Snyder has been forthright in his foregrounding of the need to consider the role of geography in identity formation. He said, for instance, in a Road Apple Interview of 1969/70, that “[y]ou should really know what the complete natural world of your region is and know what all its interactions are and how you are interacting with it yourself. This is just part of the work of becoming who you are, where you are” (*Real Work* 16). *Earth House Hold* certainly follows this paradigm for living, as it uses the example of the reservation to examine the idea of America. Snyder uses the notion of the reservation to re-envision the way American’s local and national identities are constructed in relation to the land they live on. Yet, even looking to the particular locale of the reservation, Snyder also seeks to redefine the nature of “region” and arguably “identity” altogether. In his “On Earth Geography” interview, he claims that:

> establishing the criteria for defining a region . . . a set of criteria . . . in itself is very interesting . . . since, even though we know better, we are accustomed to accepting the political boundaries of counties and states, and then national boundaries, as being some kind of regional definition . . . and although, in some cases, there is some validity to those lines, I think in many cases . . . the lines are often quite arbitrary and serve only to confuse people’s sense of natural associations and relationships. (*Real Work* 24).

Working against the political creation of identity born of passive acceptance of nationally constructed borders, Snyder suggests we should break our minds out of “the molds of political boundaries or any kind of habituated or received notions of regional distinctions. . . . because political entities, and the boundaries drawn by national states and so forth don’t represent any sort of real entity” (*Real Work* 24).

To find an alternative to the sort of dangerously fictionalized nationalism Snyder alludes to, where citizens imagine unreal boundaries between nations, Snyder turns towards the Indian culture subsisting on the reservation. He looks at the formation of cultural units linked to particularities of land affiliations as old, yet importantly revisited sites
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for refashioning cultural identity. In “Passage from More to India” and
“Why Tribe,” from Earth House Hold, Snyder invokes the notion of
the tribal unit as a return to a regional core; this return, he suggests,
holds the promise of a reinvented relationship to political and geograph-
ic boundaries. When he ponders the 1967 San Francisco human be-in,
which he refers to as a “Gathering of the tribes” (Earth 103), he recalls
the posters of South-Asian Indian Sadhus and Native American Indians.
Affiliating tribal identity with geographic location, he says, “The tribes
were Berkeley, North Beach, Big Sur, Marin County, Los Angeles, and
the host, Haight-Ashbury . . .” (Earth 103). Claiming that tribalism is
based both in a series of practices linked to one’s land, yet divorced from
the ownership of that land and contingent in some ways on a nomadic
relation to the nation, Snyder presents us with the paradoxical ways in
which tribal identification is or is not linked to land mass. In think-
ing about the tribe he says, “we use the term tribe because it suggests
the type of new society now emerging within the industrial nations. In
America of course the word has associations with the American Indians,
which we like” (Earth 113). Emphasizing the nomadic nature of trib-
alhood, Snyder adds that “This new subculture is in fact more similar
to that ancient and successful tribe—the European Gypsies—a group
without nation or territory which maintains its own values, its language
and religion, no matter what country it may be in” (Earth 113). Snyder
here appeals to the value of maintaining an indigenous relation to the
land, as well as embracing a traveling notion of tribalhood devoid of
linkage to one land mass or political entity. Snyder’s further reliance
on Zen Buddhism, Hindu mythology, and Native American spirituality
in other sections of the text anchors Snyder’s insistence on the im-
portance to tribalhood of identifying with universal forms of nature.
Invoking larger natural categories Snyder says, for instance, that “men,
women, and children—all of whom together hope to follow the timeless
path of love and wisdom, in affectionate company with the sky, winds,
clouds, trees, waters, animals, and grasses—this is the tribe” (Earth 116).
Snyder’s emphasis on communing with the natural components of land
functions to idealize geographic elements, which are seen to resist na-
tional borders.
This reliance on localized yet nearly transcendent identification with geography correlates with the U.S. presence abroad in Vietnam in the late 1960s. Arguably, part of the counter-cultural movement of which Snyder was a part was necessarily implicated in linked efforts to halt both ongoing violence towards U.S. minorities (and explicitly Native Americans), and the projection and displacement of domestic racial violence onto other nations. Several scholars have stipulated the interrelationships between domestic and international affairs. Amy Kaplan has suggested, for example, that “international relations reciprocally shape a dominant imperial culture at home, and . . . imperial relations are enacted and contested within the nation. . . . Foregrounding imperialism in the study of American cultures shows how putatively domestic conflicts are not simply contained at home but how they . . . spill over national boundaries to be reenacted, challenged, or transformed” (“Left Alone with America” 14, 16).

Indeed, a significant portion of Snyder’s writing evaluates and links both Native American sovereignty battles, and the warfare in Vietnam. Though much of Snyder’s prose uses spirituality to look inwards, rather than cast opinions about the U.S. role in international affairs, Snyder does himself comment on the American ferocity abroad towards the Viet Cong. Despite stating that “nationalism, warfare, heavy industry and consumership are already outdated and useless” (Earth 116), Snyder does note in reference to the war in Vietnam that “the American Indian is the vengeful ghost lurking in the back of the troubled American mind. Which is why we lash out with such ferocity and passion, so muddied a heart, at the black-haired young peasants and soldiers who are the Viet Cong. That ghost will claim the next generation as its own. When this has happened, citizens of the USA will at last begin to be Americans, truly at home on the continent, in love with their land” (Earth 112). Snyder links national identity (being Americans), with private sensations of comfort and affiliation (feeling home in the geographic locale of the continent). The U.S. response in Vietnam seems, for Snyder, to be at least partially located in its subconscious awareness of the lurking American Indian consciousness, waiting to reclaim both land and ideology for the continent and return the American geography to a right-
ful notion of “being American.” Arguably, the projection of the perceived threat outside of American soil serves to refocus and seemingly quell fears that the Indian “way of life” will overcome American ideology. Moreover, ostensibly, the United States kills the visible threat of the Vietcong to eclipse Americans’ lurking fears of the more hidden threat of Indians within U.S. borders: Indians who challenge the vital intersectionality of our geographic and ideological locations. Snyder’s vision of the haunting Indian, waiting to bring America back to a geographic relationship to the planet, underlines the way in which a potential return to a native sensibility can be seen as both an impetus for and reaction to U.S. war involvement abroad. Philip Deloria has commented on these assumptions, claiming, “when it came to the war, the semantic and semiotic linkages could hardly have been more appropriate. Racially “red” Indians matched up well with the ideologically “red” Vietcong, and both joined “youth” as pure, antimodern primitives. . . . Countercultural rebels became Indians to move their identities away from Americanness altogether, to leap outside national boundaries . . . and offer what seemed a clear-eyed political critique. Yet, if being Indian offered one an identity as a critic of empire, that position was hardly uncomplicated” (Deloria 164, 166).

The complications resulting from this alignment with Indian identification derive in part from the dynamics of empire itself. American citizens, privileged by their relationship to the American nation, had an easy ability to shift identifications to a group who themselves had been at the core of negotiating the nature of sovereign status. As the maintainers of empire, American citizens could choose at discrete moments how they wished to visualize their positions as sovereigns. American Indians lacked that option, yet American citizens opting for Indian identification never willfully surrendered their positions of sovereign choice.

Gary Snyder’s work helps elucidate this complication as he rethinks the notions of jurisdiction and sovereignty inherent in empire—an issue endemic to postcolonial theory but one that arguably has traditionally excluded Indians from its overall purview. Snyder’s resistance to international violence in Vietnam gets envisioned through a return to an alternative geographical matrix—the reservation—one intriguingly linked
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to a space existing simultaneously both within and outside U.S. legal jurisdiction, and one which has itself been historically known as a site replete with violence. His work functions to reveal for us the paradoxes created by legal jurisdictional codes, themselves grappling with Snyder’s very questions: What are the relationships between material borders and ideological transgressions? Can they be jurisdictionally bounded or even regulated? The very consideration of these troubled categories, as a sort of conflictual montage present in the 1960s, is a presage to the complexities of globalization and postcoloniality in the twenty-first century. Examining the contradictions of jurisdiction and sovereignty enables a better understanding of their deceptively totalizing influences.

In considering the ontology of sovereignty, some scholars have suggested that the notion itself betrays a sense of autonomy and relies instead on mutuality. Elizabeth Heger Boyle and John Meyer have argued, for instance, that notions of national sovereignty depend not on isolated nation states, but global, even universal renderings. They assert, “Sovereignty is a peculiar claim: it is a claim to autonomous decision-making power, but under exterior universal principles and addressed to an exogenous and often universal audience. The idea of sovereignty itself emanates not from each nation independently but from the global recognition of the nation-state form” (Boyle and Meyer 69). Whether sovereignty appeals to a universally available principle or not, the notion that the sovereign body demands to be witnessed within a certain frame of autonomy—that it be perceived by others as presiding over itself—is compelling. And yet even the witnessing of self-declaration is not without complication. For what must be abjured in order to claim or witness sovereignty? As this article will later suggest, peculiar notions of development must be jettisoned for sovereignty to be witnessed.

Examining the nature of sovereignty, in an effort to understand its impacts, leads us to search for its location. But if, as Amy Kaplan has argued for instance, empire is understood not to be the static result of relations between domestic and foreign forces, but rather one emanating from “ambiguities,” “contradictions,” and “anarchic” networks of disorder (Anarchy 1), then searching for the location of tempestuous sovereignty is itself an elusive act. Moreover, if we accept, perhaps as a
key to democracy itself, Hardt and Negri’s premise that in our mode of imperial sovereignty, “there is no place of power—it is everywhere and nowhere. . . . It is a non-place” (Empire 190), and that consequently “if there is no place outside, then we must be against in every place” (Empire 211), then seeking to impact sovereignty is an attempt to impact a non-place, or an interstitial one.

Ironically enough, the reassertion of the import of local and regional studies has been involved in literally insisting on the viability of place as critical to impacting the elusive space of non-place. Such, in part, was Gary Snyder’s method in Earth House Hold. But even beyond that strategy, Snyder looked into a further query: What is the relation between personhood, or personal sovereignty, to the legal orders which themselves follow the pathways of the contradictions of empire and national sovereignty? Snyder invites us to inquire into how one—in their own personal sovereignty—avoids an affiliation with the deceptive concept of national sovereignty. A partial response to this inquiry is that the concept of national sovereignty, as notion, arguably belies a “thingness” which itself is without place. This “thingness” creates for the individual a distraction of fictional belonging to national boundaries which themselves counteract or complicate personal sovereignty.

Critic Bill Brown, in what he identifies as a fundamentally modernist question of “things” and their “thingness,” has asked about the degree to which there are ideas in things that exert pressure on us to engage them as something other than mere surfaces (12). For Brown, modernist art explored the compulsion with turning representation into “thingness” in American culture. He claims that a fundamental strain of modernism was to “imagine the work of art as a different mode of mimesis—not one that serves to represent a thing, but one that seeks to attain the status of a thing” (3). He also observes that after the turn of the century, “the effort to sell things . . . and to accumulate things had an inevitable result . . . Americans now lived life peculiarly possessed” (5). If some tenets of modernism can be seen as extending, or even expanding into the contemporary moment, we can think about how the representation and “thingness” of sovereignty has led to seeing the nation as an artistic form—no longer just representing its citizens
but taking on its own properties—with depth, levels, and contours. This vision of the sovereign as thing leads to an aestheticization of the national body and endows it with properties like affect and beauty. The aestheticized national body arguably in turn masks the ideas which have formed this “thing.” The Civil Rights Act of 1968 is an excellent example of this operation. There, representations of sovereignty are seen in terms of the good and willing body both establishing itself and tacitly, if not explicitly, consenting to national form. Particularly, the Act aestheticizes tribalhood in relation to the nation. Although legal holdings are not generally seen either as representations or as aestheticizing, we can see from the Civil Rights Act that the definition and fulfillment of personhood and tribalhood are indeed represented as bearing certain qualities with aesthetic properties: Section 201 of Title II claims for instance that “Indian tribe means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government” (Docs 250). This suggests then that the notion of “tribe” itself is linked to and dependent on issues of subjection and recognition. Indian tribes are those that are witnessed to be split: they are subject to U.S. national jurisdiction at the same time they are recognized through the lens of possession—possessing powers of self-government. They are a tribe because they are witnessed to possess certain “things” essential to the process of being seen: namely, they can be seen because they are deemed to exist in the realm of having “things”—in this case powers. They can be, and are represented because of the way in which they are aestheticized as containers for these things. And, as such, these containers (“tribes”) are launched necessarily by the Civil Rights Act, and other legal acts, into the realm of the aesthetic, albeit in non-explicitly stated ways. Additionally, individuals who possess rights are similarly positioned as vessels that autonomously secure those rights. The extension of the United States Bill of Rights to Indians in the 1968 Civil Rights Act then leads to posing questions like, “What does sovereignty over personhood mean if personhood is conceived of as a thing? What images does personhood produce if persons are conceived of as artistic forms with levels, surfaces, and contours?
Personhood’s relation to national legal orders has been examined elsewhere in areas like equal protection and slavery. Stephen Best’s work on the history of personhood in the United States, for instance, has revealed some of the paradoxes of personhood that get invoked in thinking about jurisdiction. Best argues that historically concepts of personhood have mingled with notions of things. As he suggests, “slavery provides a particular historical form of the ongoing crisis in which persons are treated as things, and things as persons, one that lends historical depth and contour to the subordination (at century’s end) of personality to the property relation” (38). Citing this example as one of many metaphoric substitutions occurring in the law, and fundamental to it, Best suggests that, “the relation between persons and things, and conceiving persons as things, becomes a varying preoccupation of the law in the aftermath of slavery” (39). While his argument underlines how the “thing-person” dichotomy in U.S. law has been central to the formation of legal protections for voice, thoughts, emotions, and sensations in right to privacy cases where the right to personality becomes a piece of self-ownership (Best 50), it also offers a launching point for examining how, in cases not of personal sovereignty, but national sovereignty, the nation as a “fungible” good can be subject to similar problems inherent to the person. If both national and personal sovereignty have resided partly in their status as “things,” aestheticized and representational, then the contemporary moment, as well as the nineteenth century about which Best writes, should attend to the ways in which national and personal sovereigns get aestheticized. Such a focus will enable a more comprehensive examination of sovereignty, one that will help reveal the problematic complexities of sovereignty itself.

In the case of American Indians, this aestheticization of the personal and national sovereign body has created images of Indians similar to those of other postcolonial bodies. Yet, U.S. governmental acts concerning Native Americans have largely been treated by critics outside of postcolonial parameters. As Louis Owens has asserted, “surprisingly, it would not take much time spent browsing through contemporary critical/theoretical texts—including especially those
we call postcolonial—to discover an even more complete erasure of Native American voices” (13). Owens lists the numbers of theorists, including Edward Said and Homi Bhabha, who, according to him, dismiss or silence indigenous Native American voices and writing even as they theorize postcoloniality (13). This sentiment is echoed by Kathryn Shanley and John Purdy when they consider how both postcolonial theories and cinematic images of Indians have erased Indians in history (Shanley 26, Purdy 112). As a remediation of this erasure, John Purdy has suggested that filmic renderings like Gerald Vizenor’s *Harold of Orange* are successful in “reversing images [popularly ingrained in his audience] . . . by problematicizing the directional framework inherent in the paradigm—[by] demonstrat[ing] the ideological and thus ethnocentric foundations upon which they are based . . .” (112). Purdy commends Vizenor for forcing a “reimagining” of orientations, frames of reference, and thus representations with which we are all familiar” (112).

These representations that challenge dominant paradigms of sovereignty are especially essential since legal acts and cases themselves are already propelling us into the realm of representation and aesthetics. Thus, cinematic images that reflect back on sovereignty itself by demanding newly conceived inclusions of the Indigenous in history are a natural extension of and response to a legal system that has already tacitly imagined sovereignty within the written text. Cases like *Colliflower v. Garland* and The Civil Rights Act of 1968 formulated conceptions of sovereignty through legal doctrine, and cinema engages with these productive legal notions. The cinematic image in particular reveals whether or how the “thingness” of sovereign personhood and nationhood—in the case of the 1968 Civil Rights Act represented in bodies and tribalhood replete with inalienable rights—operates. It reveals the ambiguities and ambivalences of sovereignty, ambivalences that show “transitional social realities” (Bhabha 1) as inherent to the contradictions of the sovereign image. Through the cinematic image we can start to understand and refine the importance of personal and national sovereignty, by thinking about its relation to bodies and the global interactive flows of personhood in which we participate.
III. Cinema and the Sovereign Image

In the context of the 1960s, several films were made which directly addressed the ways in which the localized idealization of the U.S. Indian—embattled with issues of sovereignty reflected in the 1968 Civil Rights Act—was used as a canvas to both reflect and create the problems of development and sovereignty fought over in Vietnam. Bruce Baillie’s *Quixote* has used, as David James has suggested for example, “... recurrent image clusters in which the remnants of the pre-colonial past—its geography, its fauna, and especially the richness of its aboriginal cultures—coalesce, fragments of an Indian summer shored against the ruin of the modern metropolis” (160–61). To envision the dilemmas of development, Baillie’s “collision” editing shows “adobe ruins and young Indian girls supplanted by industrial machinery gouging the earth” (160). Likewise, in the film *Mass for the Dakota Sioux*, as James points out, indigenous culture is “presented as a prelapsarian ideal, fall[s] to industrialism . . . and war” (161). There, however, “the utopian alternative is Vietnam, which like the domestic Third World is ravaged by the technology of corporate capital. But whereas the Indians of the West could be known or at least seen directly, Vietnam is knowable only indirectly, through television” (161). James notes that the final shot of the film reminds the viewer that the technologically underdeveloped Indians and Asians are joined through the color red which fuses their connection (162). He contends that the aesthetic qualities of the films allegorize social values by using the representative of counterculture and the emblem of the Third World, the American Indian (163–4). In these particular 1960s films then, cinematic technology is used to show the ways in which American Indian and Third World bodies get similarly aestheticized in the service of demonstrating both the problems of U.S. imperialism, and the projection of U.S. racial tensions abroad.

Aside from overtly highlighting the interconnectivity between domestic and foreign imperial relations, cinema’s properties also themselves reveal the instability of sovereign systems, calling into question conditions of being in sovereign things. The cinematic image’s movement through time and space inherently questions the qualities of autonomy, static being, and linear progression. Delueze’s philosophy of cinema
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has extensively shown how the cinematic image embraces “becoming” rather than fixity (58–9). As critic Brian Flaxman has highlighted about Deleuze’s ideas, cinema has the capacity to “de-territorialize the cogito” which has “dominated Western philosophy,” so that images get seen and experienced anew relative to prior “rituals of representation” (2–3). Cinema creates concepts because it removes us from what we have accepted as familiar. In so doing, it resists our recognizing the same predictable images repeatedly, and creates possibilities for witnessing new forms. Thinking through cinema about sovereignty opens up opportunities for understanding personal and national sovereign states because it can create conditions of possibility for reimagining the aestheticization of global citizens and sovereigns. By reflecting on the cinematic image, we cannot only glimpse how sovereign aesthetics have been created, but can disrupt them as well by destabilizing rigidified representations. We can begin to unpack, or even eschew sovereignty’s often unspoken totalizing influences by overtly visualizing what has previously been implicitly imagined through legal texts. As Flaxman has noted, Deleuze focuses in part on “judicial films” because he is interested in the problem of narration leading to judgment (36–7). Much like the way Gary Snyder’s work interacts with legal doctrines of the 1960s, so too does cinematic narrative imagine the problems and potential new conceptions of our judgments about what constitutes the individual and national sovereign body. Images and texts are in dialogue about the emerging discourses of sovereignty.

Moreover, Deleuze’s philosophy of cinema assists us in processing troubling notions of development attendant with contemporary considerations of sovereignty. Deleuze posits that the essence of a thing appears in the course of its development—rather than in a static quality. This notion of development differs from the same term’s usage in contemporary theories of democracy and globalization. In the exportation of democracy and perpetuation of globalization, development gets deployed as an economic telos rather than embraced as an ontological mode. When considered in light of sovereignty, however, a nation or person can be seen or experienced not solely for its economic progression or ideological alignment, but rather for its ontological development. When
understanding the sovereign image, Deleuze’s ideas compel us to imagine that if the ‘essence’ of a sovereign individual or nation appears in the process of development, that development is one in which the economic telos of development is abandoned. Development entails not linear and systematic progression towards an economic goal, but rather a constant process of interacting and becoming. Sovereignty, then, might be aestheticized not as an embrace of static separate things—distinct vessels possessing qualities—but rather as an interconnected process of constant activity. Such a process would create alternative images of sovereign personhood and nationhood, which could themselves shift our conceptualization of troublesome sovereignty itself. Thinking through cinema as a foundational mode offers this new possibility for uncovering the operations of legal doctrines and orders, which often appear beyond our reach.

IV. Sovereignty: The Interdisciplinary Link Between Law, Literature, and Cinema

Studying how legal forms like the Civil Rights Act of 1968, literary forms like Gary Snyder’s *Earth House Hold*, and cinematic depictions of the Vietnam War are interwoven in their consideration of sovereignty, entails thinking about flows of power and representation, as well as potentially reformatting our notions of representation itself. Critics typically distinguish, however, between the operative power of literary representations and legal doctrines. Legal documents are routinely considered to have immediate effects unlike representations. One is accustomed, for instance, to locating the impacts of the Civil Rights Act more quickly and easily than those of Gary Snyder’s idealization of American Indian lifestyles and reservations. However, looking at how legal doctrines instill concepts like sovereignty with representational, aestheticized properties shows the ways in which representational constructs also then function to re-inscribe legal concepts at the level of the image. At the site of the image, these aestheticized constructs are endowed with qualities like affect. Even representation expands beyond its lingual coordinates as literary culture and legal culture engage each other. So, Gary Snyder’s imagination of personal, tribal, and national sovereignty
perpetuates, responds to, and creates new images of sovereignty at work in the legal imaginary just as legal doctrines impact literary production. Both contribute to how we imagine and experience the sovereign image. It is through the moving image then, which reflects cross-disciplinary conversations in transit, that we can trace the movements of sovereignty and jurisdiction, noticing where and how these concepts are derived and felt. Moreover, we can think through the moving image as a non-static, continually shifting place where the functions and operations of sovereignty can be tracked. Such a process enables us to resist designating any ultimate veracity to images, so that while we may notice the formation of sovereignty, we need not be resigned to any ultimate form or shape it might take. We can acknowledge the shifting nature of images, and thus find agency to rewrite and re-imagine the legal concepts that form our personal and national affiliations.

Notes
1 In cases of abortion, for example, where the right to privacy has been construed as a claim to personal sovereignty, we find ostensibly conflicting interests in autonomy when we try to decide whose body or personhood should be granted acknowledgement—the mother, the embryo, the fetus, or the unborn child?
2 The Bill of Rights was finally explicitly extended three years subsequent to the Colliflower decision, extending the right of habeus corpus to members of all tribes.
3 As this essay will later show, this distinction between ideological and material assumption of jurisdiction is especially intriguing given Snyder's counter-cultural re-imagining of the reservation which invokes similar contradictions between spirit and material geography.
4 Much of postcolonial scholarship has been bounded by particular global geographic areas after the "end" of colonizing periods in the 20th century. Native Americans seem largely left out of these discussions, no doubt in part because of their confronting complicated ongoing legal relationship to the Federal government of the United States of America—and their arguable positions as "post" colonial subjects. There has not been a geographic removal of the colonizing forces in the United States in the same ways in which there has bee in India, parts of Africa, and the Caribbean, for instance. The work of Bhabha, and Said, while theoretically relevant to the situations of Native Americans, has then often not explicitly included them as subjects of study. There are exceptions to postcolonial theory's general global focus outside the United States, like the anthology Postcolonial Theory and the United States: Race, Ethnicity, and Literature.
Valerie Karno


5 Definitions of tribalhood have been debated in other arenas as well. See also, for instance, Jack Campisi, “The Mashpee Indians: Tribe on Trial.” Readings in American Law. Ed. Jo Carillo. Philadelphia: Temple UP, 1998. 32–42. There, Campisi relates court proceedings designed to ascertain the definition of a tribe for purposes of deciding whether the Mashpees constituted one.


7 For consideration of how legal decisions have impacted people’s actual appearances within the U.S. borders, see Ian Haney Lopez. White by Law. New York: NYU P, 1996.

Works Cited
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Contributions called for
KUNAPIPI: journal of postcolonial writing
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Special Issue for 2006 (XXVIII:2)

COOKBOOK

2006 will feature ‘The Kunapipi Cookbook’—a special issue on the significance of food to cultural communication, clash and commerce in the history of imperialism, colonisation and postcolonial/de-colonising worlds. Scholarly articles might address the place and significance of food—the cultivation, preparation, cooking, eating, disposing and selling of food—in a variety of literatures (broadly conceived)—including fiction and non-fiction—colonial and postcolonial. Themes and issues addressed might include the history of trade in salt, sugar, cocoa, coffee, tea, spices, fruits, vegetables, seeds. How and why food stuffs are valued. The iconography of food. The recipe book. The recipe in literature and performance. Feast and famine. The ceremony and etiquette of food and food consumption. Please include RECIPES.

Deadline for submissions is 1st July 2006.
Publication date Dec 2006.

Scholarly articles for the special issues ‘The Kunapipi Cookbook’ (2006) should be between 3,000 & 5,000 words although articles of up to 7,500 words are accepted if the subject justifies the additional length. Poetry, short stories, photographic essays and interviews are also invited. Kunapipi publishes images in b&w & colour; if sending images to accompany text please burn high resolution tifs to CD and send to Dr. Anne Collett, Editor Kunapipi, English Literatures Program, University of Wollongong, Wollongong, NSW, 2522, Australia. Contributions should be sent as an email attachment (Microsoft Word or Rich Text Format) to
<acollett@uow.edu.au>
“From Many Peoples, Strength”:
Towards a Postcolonial Law and Literature

Isobel M. Findlay

There is no human being who is not the product of every social experience, every process of education. . . Indeed, even if it were possible, a judge free of this heritage of past experience would probably lack the very qualities of humanity required of a judge. Rather, the wisdom required of a judge is to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave.

True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind. . .

Canadian Judicial Council

Commentaries on Judicial Conduct (1991)

You cannot just ‘write the truth,’ you have to write it for and to somebody, somebody who can do something with it.

Bertolt Brecht “Writing the Truth: Five Difficulties”

To promote legal cultures that fulfill their mandate to create and sustain a democratic society requires rethinking conceptual, institutional, cultural, legal, and other boundaries. If culture is what people do habitually and hence often unthinkingly, then cultural critique means probing the terms, rationality, and knowledge a particular culture takes for granted, and/or enthusiastically imposes on those it colonizes. Only in understanding culture in the plural and as a set of historically contingent practices and protocols can we develop means of improving or replacing what at a particular time and place seems to be the sole or the “natural” way to think, act, and interact. Only by doing so can we confront “privileged innocence” (McIntyre) and overcome “the wall
of ignorance” (Ndebele 336) constructed by colonial apparatuses and dominant knowledge paradigms that sustain domination. And the decolonization of a postcolonial law and literature worthy of the name can proceed effectively only with the assistance and authority of those construed as colonized others, as Paulo Freire among others has argued, and in the space “between law and custom” recently mapped by Peter Karsten for the “lands of the British diaspora.”

My purpose in sharing my experience as a non-Aboriginal woman trained in literary study and cultural theory, teaching interdisciplinary seminars in a Law College, and working collaboratively with Aboriginal scholars is to try to rearticulate legal and literary thinking/teaching in order to further the reciprocal acculturation of Aboriginal and non-Aboriginal precepts and practices the Supreme Court of Canada seeks in recent groundbreaking decisions, including Van der Peet, Delgamuukw, and Gladue. These decisions show how inadequate to the task of dismantling ideological obstructions and enabling a postcolonial justice are the autonomy and good intentions of the Court. Yet it is a task in which we all have an interest—and an obligation and opportunity to use our knowledge and to learn from Aboriginal scholars and writers (to whose work I am greatly indebted) to make a difference. We have all, though not equally, been affected by what Mi’kmaw scholar Marie Battiste calls “cognitive imperialism” and have much to gain from “unfolding the lessons of colonization,” learning from diverse perspectives, and seeing “the many sides of our confinement, our box” (xvi–xvii). Source of and sanction for the brutal simplicities of complex identities collapsed into the crude calculus of Aboriginal and non-Aboriginal difference, for example, that colonial box constructs cultural divides that keep us firmly within the status quo. Unpacking the historical inscription of cultural divides and the law’s participation in the creation of difference is the beginning of redress. As Njabulo S. Ndebele argues, “It is justice we must demand, not guilt. . . . The demand for justice . . . is more immediately and concretely threatening: it keeps our attention firmly on the search for the actual process of redress.” To do otherwise, Ndebele concludes, is to neglect the past so “deeply embedded in the present” and “to postpone the future” (340–43).
Towards a Postcolonial Law and Literature

As my epigraphs suggest, I am interested in intellectual and social formations and what they can mean for decision-making and the dissemination of knowledge useful within and beyond the academy, within internally conflicted yet cohesive communities. When writers and researchers deny the relational nature of all identity and meaning, and the embeddedness of discourses in larger cultural contexts, disciplinary strength (or depth and breadth) doubles as sterility. When such writers and researchers operate in enclaves, they are obstructed by the very institutional structures that remain unexamined because apparently so "natural" or "proper" and incidentally lucrative.

It is here that a postcolonial interdisciplinary law and literature, a form of Gayatri Spivak’s disciplinary “interruption” (21), can usefully unsettle disciplinary formations, terms, and assumptions and help unpack and unsettle more thoroughly Eurocentric systems within law and literature—systems that sustain oppression and suppress relationality without acknowledging their own role in the process. Such oppressive systems remain firmly in place in legal and educational institutions where Aboriginal or Indigenous knowledge is too often treated as at best a supplement to Eurocentric thought—the privileges and priorities of which are as invisible as they seem natural and benign:

Alienation is to the oppressed what self-righteousness is to the oppressor. Each really believes that their unequal relationship is part of the natural order of things or desires by some higher power. The dominator does not feel that he is exercising unjust power and the dominated do not feel the need to withdraw from his tutelage. The dominator will even believe, in all good faith, that he is looking out for the good of the dominated, while the latter will insist that they want an authority more enlightened than their own to determine their fate. (Noël 79)²

While recent decisions offer important new paradigms, the Courts have evidently gone as far as they can within legal protocols to reconceive terms and categories to achieve redress and now look to dialogue across disciplines and cultures to help think through issues of authority, identity, and difference. If culture has always supported and supple-
mented the law’s efforts to regulate human behaviour, legal studies has not always been attentive to the defining characteristics of its relation to the broader culture(s) it inhabits and purports to serve. If legal argument too depends on the culture of the expert, on the academic capacity to present argument, it is a culture and dependency so habitual as to resist and resent conscious and critical scrutiny. All this despite the challenges and best efforts of Critical Legal Studies, Critical Race Theory, and Feminist Legal Studies. What remains invisible is the complicity of knowledge economies—buttressed by an exaggerated faith in (predominantly White male) expert testimony—in producing and reproducing identities and difference, inequalities and injustices.

The result is that Aboriginal peoples in the justice system are reduced to objects of the expert gaze, “preserved, dissected, analysed, written-about, and, above all, owned, controlled, appropriated” (Wright 117), their experiential or local knowledge rendered invalid even as they are forced to bear the burden of proof. The expert gaze, as Frantz Fanon argues, repeats the “perverse logic” of colonialism whereby it “distorts, disfigures, and destroys” the “past of an oppressed people” (qtd. in Lawrence 23) and creates what Mi’kmaw professor Bonita Lawrence calls the “stick figures” of non-Indigenous acts of excavation (24). When Aboriginal peoples “say today that they have had to go to court to prove they exist, they are speaking not just poetically, but also literally” (Culhane 48). And there is no denying the costs of such defensive postures and the charges of special pleading they typically entail. What Mohawk professor Patricia Monture-Angus recommends is a refocusing of energies and analyses, “turning the conversation around so that Canada is required to be accountable for the wrongs it has perpetuated . . . . an articulation of their role rather than a repackaging of Aboriginal thought” (Thunder 253).

Thus, as important as interdisciplinary work to progressive scholarship and transformative practice are Aboriginal modes of thinking and experiencing that understand themselves as always already relational, and do so within historically specific understandings of socially organized power. Only with such assistance can the Courts “entertain and act upon different points of view with an open mind,” as the Canadian
Judicial Council advises, and achieve that “enlargement of mind” that the Court considers “not only consistent with impartiality,” but also “its essential precondition” (R.D.S. at para. 42). If there is no avoiding power imbalances or the pattern of inclusion/exclusion in any institutional structure or power-knowledge matrix, we still have options other than repeating the patterns of the past. Aboriginal activism’s double gesture of working within and against dominant theories and structures of legitimacy (Smith; Battiste) can help bring about postcolonial justice if we connect landmark legal judgments to their cultural antecedents and consequences in the so-called old and new humanities.

If the history of English Studies is deeply implicated in forms of internal and external colonization (Baldick; Hunter; Willinsky, for example), Cultural Studies, feminist, and postcolonial studies have done much to retrieve that history and redress its effects. Each of these projects emphasizes productive mediation, contexts of power, and the complex exchange involved in making meaning, extending understanding, and assigning value and status. Challenging traditional distinctions between high and low culture or between the marginal and the central, these so-called new humanities—and particularly the Indigenous humanities (see Len Findlay)—stress too the researcher’s/ writer’s responsibility for those framings of projects that help create and shape what many claim to discover existing fully formed “out there.” Far from disavowing power or retreating into research or art for its own sake, teacher-scholars in these areas actively work for more equitable participation in education and in a more diverse yet just society. Decolonizing methodologies, for Maori academic Linda Tuhiwai Smith, for instance, means challenging dominating universals, resisting the “systemic fragmentation” of disciplinary knowledges, and researching back “with a view to rewriting and rerighting our position in history” and settling “some business of the modern” (28–34).

Let me illustrate some of these general contentions by way of specific examples from the law and literature, beginning with three Supreme Court of Canada decisions before turning to legal education and the rich source of useful knowledge to be found in the Aboriginal cultural archive and current cultural renaissance. Although in the 1996 Van der
Peet decision, centering on the definition of Aboriginal rights recognized and affirmed by s.35 (1) of the Constitution Act, 1982, the Court explicitly cautions that “Aboriginal rights cannot . . . be defined on the basis of the philosophical precepts of the liberal enlightenment” (para. 19), it remains unable to attend equally to the authority of different legal cultures. The decision is structured around secure notions of the central and marginal or incidental, difference reduced to the singularity of “the Aboriginal perspective” (emphasis added) feminized in its association with sensitivity and its opposition to non-Aboriginal knowledge and expertise. Following the Dickson Court in the 1990 Sparrow decision, the Court agrees that it is “crucial to be sensitive to the Aboriginal perspective itself on the meaning of the rights at stake” (at para. 49, citing Sparrow p. 1112). Yet, that Aboriginal perspective must be “cognizable to the Canadian legal and constitutional structure” (at para. 49).

Significantly, despite an avowed concern with the specifics of the case, the appellant (Dorothy Marie Van der Peet, a member of the Sto:lo nation “charged with selling [ten] fish caught under the authority of an Indian food fish licence, contrary to s.27 (5) of the British Columbia Fishery (general) Regulations, SOR/84-248” ) is quickly obscured in the generalizing categorizing of legal discourse concerned with the fixing of Aboriginal identity, with developing “a basic analytical framework for constitutional claims of Aboriginal right protection under s.35.1” of the Constitution Act, 1982 and with the retrieving of some “pristine Aboriginal society,” as Justice L’Heureux-Dubé comments in her dissent (paras. 131 and 168).

The new test increases the burden of proof regarding Aboriginal rights, adding to the Sparrow test in the most abstract and impossible of terms: “an activity must be an element of practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right” and be “central to the Aboriginal societies that existed in North America prior to contact with the Europeans” while manifesting “continuity with” those customs etc. “that existed prior to contact” and “cannot be simply as an incident” (paras. 44–46; 55–63; emphasis added). In elaborating the test, the Court invokes the unquestioned authority of the Concise Oxford Dictionary on the distinction between distinct and distinctive—
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despite recent studies of the history of the OED and the ideological activity of dictionary making more generally (Willinsky).5

Nor could Delgamuukw act on its efforts to achieve a new judicial analysis placing “equal weight” on different legal cultures, oral and written evidence. Although the Court took a bold step in recognizing the importance of culture and modes of crosscultural encounter and exchange in modern as well as traditional societies, it could not break with colonial thinking that depends on false polarities whereby oral storytelling is relegated to an exoticized cultural realm while written documentary history is constructed as authoritative and truthful. The Court insists that “the trial judge’s assessment of expert witnesses must be shown due deference” (para. 78), but nowhere is there sensitivity to the construction of expertise (and its need of its other—myth, fiction, untruth)—or to the exaggerated suspicion of oral evidence (Magner 68) and story in “dominant knowledge paradigms” (Razack Looking 36–55). In citing uncritically—and incompletely—the Report of the Royal Commission on Aboriginal Peoples (vol. 1, 33), the Court re-inscribes the opposition, “objective” written history/ “subjective” oral testimony even as it tries to respect oral history equally. The Court overlooks RCAP’s emphasis on the myth of progress underpinning traditional western humanist historiography, its presumptions about the naturalness of its separations (“the scientific from what is religious or spiritual”), its investment in distance and linearity, and the contrasts (“rich and complex” rather than “absolute”) between “Aboriginal and non-Aboriginal historical traditions” with “different purposes for revisiting the past, different methodologies and different content and forms” (vol. 1, 35). The Court likewise overlooks an endnote that warns about the presumption that oral accounts need validating in the written record, recommends an understanding of “the broader cultural and institutional contexts from which the oral history and the documentary record come,” and concludes that “divergent histories” be resolved “by mutually respectful negotiation” (vol. 1, 40–41). Thus, traditional disciplinary authority proves a major roadblock to new judicial thinking (Findlay “Just” 52–54).

Despite the best intentions of the Court, it (like the traditional law school) remains confined within the very enlightenment reasoning that
the legal and literary canon sustains (and is sustained by) and that the Court knows cannot properly define Aboriginal rights or render justice for Aboriginal peoples (Van der Peet at para. 19; Gladue at paras. 33–34). Aboriginal peoples in 1997 represented 12% of the prison population but only 3% of Canada’s population; Saskatchewan’s figures are an appalling 72% and 12% respectively [Gladue para. 58]). Though the US has the highest rates of incarceration at 649 inmates per 100,000 (Bauman 115), Canada is another world leader at 130 per 100,000 (Gladue para. 52). In registering these sorry statistics, the Court cites approvingly the Royal Commission on Aboriginal Peoples, Bridging the Cultural Divide:

The Canadian criminal justice system has failed the Aboriginal peoples of Canada—First Nations, Inuit and Métis people, on-reserve and off-reserve, urban and rural—in all territorial and governmental jurisdictions. The principal reason for this crushing failure is the fundamentally different world views of Aboriginal and non-Aboriginal people with respect to such elemental issues as the substantive content of justice and the process of achieving justice. (Cit. Gladue at para. 62)

But such a recognition treats these “different world views” as pre-existent, stable, and self-evident without understanding the history of the production and reproduction of difference.7

The Gladue decision is itself striking evidence of the Court’s determination to alter “the method of analysis” (para. 33) in order to address the disproportionate incarceration of Aboriginal peoples by attending to their exceptional circumstances, as required by s 718.2(e) of the Criminal Code:

All available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

While the Court strives to attend respectfully to those exceptional circumstances, give the mandated “fair, large and liberal construction
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and interpretation,” and give “real force” to remedial objectives (paras. 32–34), it has failed to do so effectively. It remains confined by inherited Eurocentric categories of identity, motivation, and relevant circumstances, reducing the life of nineteen-year-old Aboriginal woman Jamie Tanis Gladue to social symptoms (poverty, abuse, educational and economic disadvantage) severed from their historical sources, individual from collective experience, private from public, present from past circumstances. The Court’s determined “impartiality” ironically blinds it to persistent biases that read to confirm existing beliefs about relevant circumstances and Aboriginal heritage without learning from the knowledge accumulated over centuries by Aboriginal peoples to revalue the “Indigenous Difference” (Macklem) and develop a more effectively healing legal hermeneutic.

Without coming to terms with the intersecting systems of domination, sexism and racism, and the particular histories of colonization, the Court cannot comprehend the circumstances that gave rise to the events in the life of Jamie Gladue sentenced to three years’ imprisonment for manslaughter in the killing (on her nineteenth birthday) of her twenty-year-old common law husband Reuben Beaver. Effectively, the Court isolates the appellant from the histories of her community and the violence of colonial experience. Instead the Court locates issues within bourgeois notions of “the spousal relationship,” and blames her as “the aggressor,” although she was five months pregnant and Beaver had already been convicted for assaulting her, while focusing on her need to correct her “problem” with alcohol. The result is that the British Columbia Court of Appeal decision is upheld and the appeal dismissed.8

Though for its efforts in such decisions, the Supreme Court has found itself accused of activism and reverse racism,9 it has struggled to change its terms and evidentiary standards. It has thus struggled to live up to its fiduciary duty to Aboriginal peoples and the constitutional recognition of Aboriginal rights and the Court’s obligation to render “a generous and liberal interpretation” of the constitutional provision, resolve ambiguity “in favor of Aboriginal peoples,” and “be sensitive to the aboriginal perspective on the meaning of the rights at stake” (Van der Peet at paras. 24–49). In rethinking those terms and evidentiary standards, the Court
might profitably attend to those who have written about dominant terms of engagement in Canadian society. Writing about the invisibility and elasticity of the whiteness that constitutes Canadian nation-building and legitimates its “myth-making intellectual elite,” Dionne Brand comments on the particular challenges facing those “excluded” from Canadian whiteness and especially the difficulties of protecting oppositional terms from co-optation by the state. In this context, “excluded”—already too benign a term “for the denial of history”—is but one of a number of terms that have become “bureaucratic glosses for human suffering,” while preserving white privilege and its “innocence.” From her perspective, “Access, representation, inclusion, exclusion, equity. All are other ways of saying race in this country without saying that we live in a deeply racialised and racist culture” (175–79). Monture-Angus is similarly concerned to reject dominant terms, including the divisive categories of the Indian Act, that keep people fighting for “assorted crumbs, rather than spending [their] energy shedding the shackles of [their] colonial oppression” (“Standing” 89–90). Reflecting on the mandate (“equality of opportunities for women”) of the Royal Commission on the Status of Women in Canada, legal scholar and now provincial court judge Mary Ellen Turpel-Lafond deconstructs culturally inappropriate dominant discourses that install White men as the measure of all things:

Equality is simply not the central organizing political principle in our communities. It is frequently seen by our Elders as a suspiciously selfish notion, as individualistic and alienating from others in the community. (180)

What is more, equality as sameness discourses have a habit of conveniently eliding the history of inequalities. Anatole France is but one of many critics who have shown the irrationality of the formal equality principles of the law that ignore as they legitimate unequal socio-economic and other relations:

The law in all its majestic impartiality forbids both rich and poor alike to sleep under bridges, to beg in the streets and to steal bread. (qtd. in Hunt 184)
Helpful in understanding legal education’s role in the sort of impass- 
es experienced by the Court is African-American legal scholar Patricia 
Williams who challenges legal discourse and rationalities and their pre-
tensions to universal truths by considering them not within “the four 
corners of a document” but within the broader framework of the dis-
ciplines of “psychology, sociology, history, criticism, and philosophy.” 
Her belief is that “theoretical legal understanding and social trans-
formation need not be oxymoronic”; that legal theory need not be a 
matter of “exclusive categories and definitional polarities” (8–9). Yet 
her work has been dismissed as “trendy” and “marginal”—or “nice and 
poetic”: “This is a law review, after all. This is just a matter of style,” 
claimed one editor supporting his editorial changes (7, 48). Even stu-
dents concluded that what Williams taught was “not law” (95). But 
from Williams’ point of view, “formalized, color-blind, liberal ideals” 
of legal writing ensure “an aesthetic of uniformity, in which difference 
is simply omitted” (48). The enabling (and enabled) fiction of neutral-
ity, the myth of “a disinterested knowledge” that John Barrell identifies 
with “a particular social class” (92) as well as gender and race, explains 
the backlash against her own efforts to include those disadvantaged by 
a system that marginalizes the many by universalizing the experience of 
the few. One of the troubling consequences is the distorted public per-
ception that “blacks commit most of the crimes” despite U. S. Bureau 
of Justice Statistics for 1986 that show whites accounting for 71.7 per-
cent of all crimes and all others responsible for the remaining 28% 
(Williams 73). Such distorted perception is replicated here in Canada 
where crime is racialized, the work of alien or infantile others threaten-
ing the social fabric, and white crime rendered relatively invisible. The 
result is such claims as these:

Unfortunately, these days most of the murderers seem to be 
Black. . . . Are we a society of racists? Certainly not. It’s just 
that White Canadians are understandably fed up with people 
they see as outsiders, coming into their country and beating 
and killing them. (Maharj, Toronto Star, 15 April 1994; qtd. in 
Henry and Tator 3)
Although statistics are banned, everybody knows the tale they tell: Young Black men are responsible for a disproportionate amount of violent crime in Toronto. (John Barber, *Globe and Mail* 12 April 1994: A3; qtd. in Henry and Tator 171)

To illustrate how legal education itself “makes invisible white criminality” (88), Williams considers how an exam in criminal law can “convey stereotypes, delimit the acceptable, and formulate ideals” (85) by asking students to “individualize the test” of provocation in a scenario based on Shakespeare’s *Othello*. “The model answer” gave points for recognizing that “a rough untutored Moor might understandably be deceived by the wiles of a *more sophisticated* European” (Williams 80; emphasis added). When a student complained that the exam was racist (not to mention sexist), the professor appealed to Shakespeare’s “facts,” while invoking his own academic freedom (84). Especially troubling is the way in which the exam “frame” reduces “the facts to . . . racist generalizations and stereotypes” and, without acknowledging responsibility for the “facts,” puts black students in the position of “speaking against” themselves (82), “writing against their personal knowledge” and even assuming a “racist/sexist/homophobic . . . mentality in order to do well in the grading process” (87). Such experience of Eurocentric framing is the source of what W. E. B. Du Bois termed “double consciousness”: “This sense of always looking at one’s self through the eyes of others, of measuring one’s soul by the tape of a world that looks on in amused contempt and pity” (45). Monture-Angus has reflected on “the intense pain” of similar forms of self-erasure, has faced backlash when she was urged to “make this academic and stop feeling for a while,” and been shuffled around as a person of colour “to accommodate the White experience” of a conference (*Thunder* 24, 19, 25). In such ways hegemony induces the marginal to internalize the appropriateness of their own ongoing oppression—or to resist, as in the case of the persistent challenges of Monture-Angus’s scholarship to mainstream legal thinking.

In the Canadian academic context, Sheila McIntyre exposes “studied ignorance” and “privileged innocence” that uphold the status quo and assign to the few power and privilege, and an agency that gives them
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access to elite institutions and hence the capacity to shape the dominant “truths.” Such privilege allows its holders to persist in not knowing, in “‘un-knowing’ and ‘un-thinking’ the realities of systemic inequality, including our own roles in perpetuating those realities.” As McIntyre argues, such “studied ignorance enables and entrenches the freedom of the systemically privileged to dissociate themselves from, and presume themselves innocent of, the cumulative appropriations and dispossessions that define systemic relations of domination” (159). Ian Hingley has written powerfully about his own journey of discovery that clarified the interdependence of oppressor and oppressed, the systematic dependence of his own power and privilege on the oppression of others, and his own responsibilities for the choice to work for change (101–11).

Unfortunately, Hingley’s story is all too rare. Indeed, the more institutions are invested in the discourses of free inquiry and exchange, critical thinking, objectivity, disinterest, and excellence, the less able they are ironically to countenance or tolerate, far less promote and value, difference—the diversity of thinking on complex matters, the diversity of interests people seek to advance, the diversity so crucial to a multicultural society and its democratic institutions. It is the so-called “hidden curriculum” (Jackson), what Dorothy Smith calls “relations of ruling” (qtd. in Margolis 3), so prominent yet so natural and habitual as to be invisible, that masks the particular interests of a disinterest that is an indifference to all but the privileges of the status quo. Those who like Williams and McIntyre would “out” the system or “who rock the boat risk a painful immersion in chilly waters” (Acker 77). Within the academy Aboriginal students and faculty are frequently required to write within and take their departure from mainstream academic discourse in ways that intensify their sense of alienation (Lawrence 24).

In helping bridge what the Royal Commission on Aboriginal Peoples has called the “cultural divide” between Aboriginal and non-Aboriginal legal and literary orders, I draw on one of Canada’s foremost intellectuals: Cree playwright Tomson Highway and his Dry Lips Oughta Move to Kapuskasing. Highway’s work is a useful corrective to the sort of intercultural sensitivity training available on the market that urges people to regard culture as décor or a consolingly consumable version of dif-
ference (Morrison et al, for example). Far from being enriched or transformed by such instruction, readers will find stereotypes reinforced. Further, such thinking underpins much academic discourse where talk of becoming culturally attuned to diversity betrays old colonial habits of harmonizing or assimilating the anomalous to dominant views and ways—without exploring its own complicity in systems of domination.

Cultural anthropologist Edward T. Hall’s model of high- and low-context cultures defined in terms of their dependence on the contexts of messages has proven a potent means of managing difference and organizing or filtering apprehension of the world so that attention is diverted from power relations to ritual and logic (or their absence) and behavioural gestures. In such a model our gaze is drawn to body language and eye contact as access to a culture’s meanings and values. Similarly, charts of Native and non-Native values are widely used in Canadian judges’ training sessions (Razack *Looking* 184). Legal positivism has nothing to fear here. And the dangers of so isolating cultural signs from their history and social contexts are highlighted by the Special Rapporteur to the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, Dr. Erica-Irene Daes:

> the heritage of an indigenous people is not merely a collection of objects, stories and ceremonies, but a complete knowledge system with its own concepts of epistemology, philosophy, and scientific and logical validity. The diverse elements of an indigenous people’s heritage can only be fully learned or understood by means of the pedagogy traditionally employed by these peoples themselves, including apprenticeship, ceremonies and practice. Simply recording words or images fails to capture the whole context and meaning of songs, rituals, arts or scientific and medical wisdom. This also underscores the central role of indigenous peoples’ own languages through which each people’s heritage has traditionally been recorded and transmitted from generation to generation. (Para. 8)

As Sherene Razack argues too, cross-cultural communication problems are not a matter of “technical glitches” or navigating “unchanging
essences” but of understanding the history of social relations and the ways “an alienating and racist environment” produces behaviours and identity (Looking 8–10). Only then will we face the racism that is not exceptional but foundational to Western rationality and notions of progress (Bhabha 41–43). Also, without confronting intersections of sexism and racism, we’ll never counter Aboriginal women’s over-representation in Canadian prison. According to the Aboriginal Justice Inquiry of Manitoba, Status women are 131 times more likely to be incarcerated than white women—and their imprisonment is most often related to a history of abuse (Razack Looking 68).

If English, like the Law, has proven a loyal servant of imperial formations, it has also, in extending its ambit and authority across cultural, national, and other differences, been transformed in the process and become a crucial site and symptom of resistance and struggle. African-American feminist Audre Lorde’s famous challenge—“the master’s tools will never dismantle the master’s house” (112)—is not as self-evidently helpless and hopeless as many have taken it to be. In a form of linguistic determinism, some activists dispatch English from their toolbox without recognizing how it differs from itself in the hands or mouths of those who use it otherwise in resistance. In the face of statistics showing only 4—Cree, Inuktitut, Ojibway, and Dakota—of 50 Aboriginal languages in Canada with a chance of survival (Ignace, qtd. in Philip A6; Statistics Canada 1999), clearly the dominance of English cannot be underestimated. Still, tools are transformed by their strategic deployment for diverse ends, as Metis-Salish writer Lee Maracle suggests when she claims, “we’ve taken hold of that language and made it partly our own. Instead of an imposition, it’s become our own, and it has a beauty, when we use it” (Kelly 79). Likewise Lorde’s emphasis on the master’s house directs us to deconstruct and reconstruct institutions to new designs that will liberate the many rather than sustain the luxury of the few. As Ruth Wilson Gilmore has argued, this means concentrating on “fundamental orderings in political economy. If the master loses control of the means of production, he is no longer the master” (70). This for me means collaborating across cultures and disciplines (and not accumulating intellectual private property) and communicating in multiple
locations inside and outside mainstream institutions to keep connected to the crises and contradictions of social conditions.

Deriving authority and strength from multiple sources entails understanding and acting upon a cultural poetics and politics of difference such as Highway offers in a wonderfully humorous and unsparingly critical play that shows us how legal scholars and culture workers alike can bridge that “cultural divide.” If we cannot fully understand others’ stories, we retain some capacity to look, listen, and learn. Highway’s *Dry Lips Oughta Move to Kapuskasing* invites just such looking, listening, and learning. Indeed, it is a text that students and I have found enormously useful in the context of a Law and Culture seminar—in part because it is not a predictable source. It is a text without obvious relevance for those interested in law and justice and in the particular challenges to judicial thinking of difference as a category of cultural identity. It is a text that critiques while refusing to give centre stage to colonial realities that have had disproportionate space in the historical record. Instead, the play focuses on life on the reserve, on Aboriginal heritage, culture, and stories, while showing that there is no secure inside or outside to the reserve or the identities of community members, no escaping the colonial institutions of education, religion, and the law constructing and reconstructing identity and difference—and supporting the work of Corrections Canada. From the earliest lines, characters are correcting one another, preoccupied with past and present violence, with betrayal and bickering, pattern and paternity, legitimacy and illegitimacy, inclusion and exclusion, innocence and guilt, ignorance and knowledge, rules and resistance, domination and self-determination. Memories of efforts to retrieve historical sites at Wounded Knee, South Dakota, 1973, bring back earlier violent confrontations at the Wounded Knee Massacre in 1890, the last major clash between federal troops and American Native peoples.

In an interview Highway has commented on the surprising cultural ignorance that has survived highly developed communications technology. Outrage at his play taught him that:

non-Native people . . . knew more about the size of Elizabeth Taylor’s breasts, Michael Jackson’s most recent nose job and
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Madonna’s most recent fuck than they did about their own systems of gods and goddesses. So that a Cree Indian from caribou country ended up knowing more about Hera and Zeus [whose story is reworked in the play]... than the people the stories belonged to. (“Let Us Now Combine” 25)

In another interview Highway has talked about the need to fill people’s heads not with Greek and Christian mythology but with “our own hero stories, our own Weesageechak stories, our own Nanabush stories, our own incredible times of heroism and tragedy and incredible comedy. Because until that day arrives we are going to continue to be colonized” (Loucks 9). Still, Highway is not restrained, as the Courts are inclined to be, by notions of frozen or authentic traditional culture but mixes mythologies and languages (Cree, Ojibway, and English) in order to remake meanings, to enrich who we are and help us become who we would like to be.

If mainstream audiences were often perplexed by early performances, Aboriginal women experienced the pain of their representation in the play. Anita Tuharsky could find no redeeming qualities in the play, “nothing to balance the negativity,” the presentation of Aboriginal women as “loose, unfaithful, sleazy drunks,” nothing to correct “the damaging stereotypes” of Aboriginal men and women. In short, she argued, “Highway’s images only open the wounds and adds salt to them” (5, 13). Poet and activist Marie Annharte Baker offers a more nuanced but no less troubled review of the play. She understands that some look to the play “to educate the public about racism and sexism in a community in transition,” yet she concludes the play “silenced Aboriginal women.” Still, she “had to see it for herself” and she found laughter as “unavoidable” as the determination not to be thought unable to “get it” (88). If the play could prove “a wonderful revelation about contradictions in Indian lives” for “whites and white-nosers,” “to a young Indian person, the play might be another affront to one’s identity.” Even more damaging, Baker wonders if anyone would come away with a better understanding of sexism and racism or if we are yet able to “describe the frontier attitudes toward sex which end in intolerable violence toward...
women and children. We are still far too willing to participate in the vio-
lent fantasies about us.” Finding “a small comfort to see poison,” Baker 
hopes “the cure doesn’t kill” (89).

The role of the artist that Highway likens to “the role of the shaman 
in traditional, pre-Christian Indian society” (“Let Us Now Combine,” 
27) is clearly a risky one, especially when the artist plays with taken for 
granted assumptions about cultural and other categories. In his attempts 
to recover “the sacred woman in all of us, a woman and land who have 
been raped, distorted and abused by centuries of exploitation, oppres-
sion and victimization,” Highway “steps harshly on our sensibilities, our 
deepest fears and yet he is constantly urging us to turn around and take 
a second look” (Loucks 11).

His is a play, then, that breaks the silence of shame and self-blame and 
moves Aboriginal people to speech and action while exposing cycles of 
abuse and connecting individual and collective histories to current re-
sponsibilities in Aboriginal as well as non-Aboriginal societies. It does 
so by having the trickster-teacher Nanabush (Weesageechak, Raven, 
Coyote) make visible cycles of abuse and their sources. The Trickster-
teacher straddles the consciousness of humanity and the Great Spirit, 
the physical and spiritual, past and present, is neither he nor she, and 
is very much “the worse for wear and tear” since colonization (12–13). 
The residents of the Wasaychigan (window) reserve have lived with their 
problems for so long that those problems are invisible because appar-
ently so natural. Now, “before the healing can take place, the poison 
must first be exposed” (as the epigraph from Lyle Longclaws makes 
clear). The play begins with signs of neglect and cultural domination 
(a Marilyn Monroe poster) overlooking the remains of a party, Zachary 
Jeremiah Keechigeesick’s “bare, naked bum” and Nanabush/Gazelle 
Nataways with the markers of objectified womanhood: “a gigantic pair 
of false, rubberized breasts” and the first words are a symptom of oppres-
sion within the Native community: “Hey, bitch!” (15–16).

Unlike those concerned to manage cultural diversity, Highway is not 
content with recording the visible signs of cultural difference. Instead he 
is concerned to unravel the multiple and conflicted histories that explain 
the current state of affairs and to do so by drawing on English, Ojibway,
and Cree as well as classical, Christian, and Aboriginal myth. The journey of discovery as recovery and redress connects current conditions inside the reserve to a history of colonization, to the persistent power of sexism, racism, capitalism inside and outside. We register the repetition of past colonial violence in current patterns of domestic violence, external racism internalized as sexist abuse so that, as Maracle claims, “men have a vested interest in holding on to the issue of racism, because then the enemy is external” (Kelly 80). In the process Aboriginals and non-Aboriginals alike recognize the legacy of the so-called “gifts” of colonization (alcohol, disease, guns, and the institutions of patriarchy, education, religion, law, and medicine): dispossession, confinement, poverty, crime, violence, and the fetal alcohol syndrome that literally silences Dickie Bird (Cockney rhyming slang for “not a word”—and a nice reminder of resistance at the heart of empire). In reliving and even repeating the past, characters (and audience) learn to stop laying blame elsewhere—“That wasn’t my fault, Joe. It’s that witch woman of yours Gazelle Nataways” (23)—and come to an understanding of collective accountability. Thus, characters acknowledge that “we were all there” (85) and none had intervened to stop the self-abuse and come to the rescue of Gazelle Nataways and her unborn child. In learning to respect community sanctions, they stop indulging in forms of singular scapegoating too often supported by the judicial system.

Remembering the words of the Canadian Judicial Council and Brecht (with whom I began) can help us maintain an optimum awareness of audiences and outcomes. Such awareness, I would argue, should not mean the zealous defence of purity or objectivity but of productive hybridity empowering faculty research and student curiosity. It is not a matter of moving the mental furniture in a limiting add-on fashion as much as furnishing mental and social movement in modes of exchange both respectful and rigorous. Productive hybridity remains easier to articulate than to accomplish. Consider the resistance to and backlash against Patricia Williams, Patricia Monture-Angus, Sheila McIntyre, the Supreme Court of Canada, and Tomson Highway. Yet, we need a critical mass of faculty and a mass of critical students, and that requires at all stages effectively transformative communication across communities of redress.
Hence, my emphasis is on connecting Aboriginal and non-Aboriginal students and not only to the net! But to many histories, literatures, and knowledges that will serve them and others well inside and outside the academy so that we can derive strength from our many peoples (as the Saskatchewan motto in my title suggests). That means, as Monture-Angus suggests, “shar[ing] the definitional power that creates the legitimacy whereby words and phrases gain their accepted meaning” and attending to the ways that English “sanctions particular worldviews” and is experienced in “hierarchical and gendered” and even “colonial” ways (*Journeying* 43). It means too not leaving all the work of history to professional, academic historians but attending to the elders, story-tellers, and writers in Aboriginal and non-Aboriginal culture—and not showing undue reverence to male authorities of either culture: the Supreme Court’s 1990 *Sparrow* decision, for example, cited only male non-Aboriginal authorities (Monture-Angus *Journeying* 113).

We need to recognize what “we” take for granted—our languages, history, and culture—and the identities and legitimacies they entail. We might recall the privilege of carrying on conversations in our own languages and consider the experience of “the contradictions that arise for those of us who are continually forced to negotiate, converse and discuss in a second and foreign language” (Monture-Angus *Thunder* 264). Justice Gerald Morin has talked about the value of the Cree court established in Northern Saskatchewan as access to legitimacy, as, importantly, the experience, the feeling of empowerment and justice by those given voice in their own terms. Then we might better appreciate the lessons of Tomson Highway who on behalf of the true “aristocrats” of the land *welcomes* us to share that land (“Tomson Highway”).

I do not claim to speak on behalf of Aboriginal peoples or share anthropological assumptions about the knowable other, reducing cultural complexities and identities to a matter of material practices and the academic management and consumption of difference. Nor do I want to promote academic careerism (“I *do* postcolonial studies) that thrives on the oppression of Indigenous or other marginalized groups (much as nineteenth-century professionalizing depended on the monitoring and measuring of the underclasses). We should never forget that “research is
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probably one of the dirtiest words in the indigenous world’s vocabulary” and colonialism has meant disconnecting Indigenous peoples from their histories and languages and forms of “systematic fragmentation” that put their skulls in museums, art work in private collections, “customs” to anthropologists, and languages in the hands of linguists (Smith 1, 28). Teaching and collaborating with others across disciplines and cultures has taught me, however, the importance of historicizing, theorizing, and Indigenizing notions of authority, identity, difference, and language as a means of identifying intellectual roadblocks and reproductive engines built into the institutions we inhabit. In this context too showing solidarity with Aboriginal peoples and emphasizing the specificities of the production of difference might help us eventually dislodge the colonial and neo-colonial paradigms that we have inherited in the names of truth, knowledge, and an endlessly well-intentioned mission and that we have deployed in the name(s) of justice.

Notes
1 Versions of this paper were presented at the third annual meeting of the Working Group on Law, Culture and the Humanities, Georgetown Law Center, Washington, DC, 10–12 March 2000, and the meetings of the Association of Canadian College and University Teachers of English at the annual Congress of the Social Sciences and Humanities, University of Alberta, Edmonton, 24–27 May 2000. I gratefully acknowledge the generous and suggestive comments of the reviewers of this essay. I am as always grateful to James (Sakej) Youngblood Henderson, Marie Battiste, Lynne Bell, and Len Findlay for ongoing and enriching discussions on issues of difference, law, and postcolonial justice.
2 For a fuller discussion of the embeddedness of colonial thinking in the law and efforts to displace colonial discourse, see Henderson, Benson and Findlay, especially 247–329.
3 See, for instance, Daniel Jutras’ argument for comparative legal scholarship in considering the relationship of everyday life and state law.
4 Building on the critical turn of such scholars as Roberto Unger and Duncan Kennedy, Critical Legal Studies (CLS) has been concerned to demystify legal reasoning and underline its indeterminate, value-laden, and political character. Not content with CLS efforts to change thinking, Critical Race Theory (CRT)—associated in the US with Patricia Williams, Mari J. Matsude, Charles R. Lawrence III, Richard Delgado, and Kimberlé Williams Crenshaw, among others—is explicitly political and activist in its orientation, analyzing the role of
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racism and the experience of people of colour, recognizing the limits of rights discourses, and seeing in the law both a resource and a powerful source of inequality. John Borrows, Patricia Monture, Mary Ellen Turpel-Lafond, and James (Sakej) Youngblood Henderson elaborate what CTR can mean for Aboriginal peoples seeking justice in Canada, while Carole A. Aylward and Constance Backhouse add importantly to the history of racism and the law in Canada. Monture, Turpel-Lafond, and Sherene Razack have likewise been powerful voices for women’s issues, working to ensure that gender is not treated as an isolated category but one of several intersecting systems of domination in the context of law and justice.

5 For a wonderfully enlightening and entertaining fable for non-Aboriginal peoples on “their own distinct (or distinctive?) cultural context” (995), see Barsh and Henderson.

6 In addition to Findlay, “Just Expression” and Williams, Alchemy discussed later in this essay, see Canada Law and Learning; Razack, Looking; Borrows, Introduction, Recovering Canada; and Costello, “ Schooled by the Classroom” for thoughtful critiques of legal education.

7 On the need of a contextualized understanding of difference and the complicity of scholarship in producing and reproducing inequalities, see Razack, Looking, and Razack, ed. Race. Patrick Macklem’s emphasis on legal-cultural hybridity, his refusal to reduce Indigenous difference to cultural difference, and his attentiveness to “history and context” (4–29) lead him in directions similar to those pursued by Henderson, Benson and Findlay.

8 For a fuller discussion of the case, see Findlay, “Discourse.”

9 For some recent media examples, see Ibbitson and Chase; Wallace; “The Supreme Court All At Sea.” Far from seeing juridical activism as a threat, Kelly and Murphy argue that it deepens constitutional supremacy (3–27).

10 On “the cold game of equality staring,” see Razack, Looking, 23–35; Williams, Alchemy. See too Macklem, Indigenous Difference.

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Power Politics and International Public Law:
Lessons from Benito Cereno
Jason P. Gottlieb

Silent leges inter arma. During war, the laws are silent.
Marcus Tullius Cicero, ProMilone 11

I. Introduction

Alone on the high seas, on the verge of the 19th century, the Spanish galleon San Dominick, captained by Benito Cereno, is engulfed in revolution when its cargo decides to alter their status. The slaves’ rebellion, led by their most intelligent, Babo, and their strongest, Atufal, upends the Spaniards’ routine transportation of their “legal property” to the New World. When an American ship crosses paths with the San Dominick, its captain, Amasa Delano, boards the Spanish galleon as Cereno’s guest, blissfully unaware that Cereno is no longer in power. Knowing that his rebellion will be quickly quashed if the Americans discover the slaves’ mutiny, Babo orchestrates an elaborate act, in which the slaves pretend to be slaves, and the masters pretend to be masters, on pain of death. Eventually, though, Cereno manages to alert the naïve Delano to the situation, and the Americans promptly overpower the slaves with their superior strength, numbers, and firepower. In the battle, Atufal is shot and killed, and Babo is captured. He is taken back to land and subjected to a trial under Spanish law. With all “due process,” Babo is tried, and hanged.

On the high seas, the law is the tool of the strong, not necessarily the just. What passes for “governing law” on the high seas is not a mutually agreed-upon compact of peace and order between equals, but the law of the slave owners, enforced at gunpoint. In the sea of international relations, a veneer of agreements, protocols, and resolutions passes for public international law. But as Herman Melville’s 1855 novella Benito Cereno suggests (certainly not for the first or last time), law is meaningless in the absence of power. While a putative first-world definition of
“law” is absolutely dependent on mutual compacts between equals, the inequality between first world and third world in international relations, represented by the novella’s white owners and black slaves, means that there can be no such compact. How can treaties between “partners” that are radically unequal be bargained for fairly and justly? How will deals between the developed and developing world be enforced when—not if, but when—the powerful decide to abrogate their agreements and flout the very notion of an international law? What recourse, for example, do Bangladesh and Micronesia—countries whose very existence is threatened by global warming—have against the United States for abandoning the Kyoto Protocol? If a just law requires a contract of equals, public international law is a “knot of contrariety” between two paradoxical pulls. On one end of the rope is the first world’s advocacy of democracy and justice. On the other end is the first world’s vested interest in maintaining the globe’s order of inequality.

Babo’s execution may suggest that any temporary disorder on the high seas will be ordered by the law of the victor, inexorably quelled, by violence if necessary. But Captain Benito Cereno’s desolate demise, following shortly after the legal formalism of his testimony in the Babo case as presented through a deposition transcript, hints that even the master of a system of radical inequality cannot survive it.

This paper examines the connections between the power imbalance on the high seas of Melville’s text and the power imbalance that inheres in international relations, in order to explore how parties of unequal status behave, and why they behave as they do, in the absence of a controlling and enforcing authority. Section II discusses the power politics surrounding the formation of two recent international treaties. Section III explores the similarities between the formation of these treaties and Melville’s concept of the law of the high seas. Section IV discusses the complexities in the concept of self-defense in criminal law and its application to these questions. Finally, Section V asks whether Melville offers any lessons on power politics, or whether Benito Cereno (the man or the text) suggests any way to cut the Gordian knot that is the law in a world of unequally powered relationships—whether it may be possible for international law to rise above the paradox of its birth.
II. The Ratification Process In Two Recent Treaties
As the world’s most powerful nation-state, the United States plays a significant role—be it a beneficial one or a detrimental one—in virtually every major international treaty. Two recent major treaties, the Rome Convention forming an International Criminal Court and the Kyoto Protocol of the United Nations Framework Convention on Climate Change, proved no exception. In both cases, the United States took part in the negotiations for these treaties, attempting to form them to suit the United States’ desires—hardly an unusual or blameworthy move, as all nations negotiating the treaties were doing the same. Yet the United States failed to ratify both treaties, leaving their efficacy uncertain at best. In both cases, the United States defended its non-ratification as a defense of its interests, and implying an attack by the treaty-supporting countries.

A. The Rome Convention and the Kyoto Protocol
The Rome Convention forming an International Criminal Court (ICC) was adopted on July 17, 1998 by a vote of 120 to 7 among the countries discussing it. All European Union member states voted in favor of the treaty, as well as some countries whose governments had good reasons to oppose a criminal court that would punish large-scale human rights violations, such as Afghanistan and the Democratic Republic of Congo. Voting against the treaty were the People’s Republic of China, Iraq, Libya, Yemen, Qatar, Israel, and the United States. Following the vote, the countries that voted for it each went to their national legislatures to ratify the Convention. The treaty quickly reached the 89 countries necessary (under its own terms) to come into force.

United States President Bill Clinton signed the treaty on the last date it was open for signature, December 31, 2000. However, when he signed it, Clinton explicitly said that he had no intention to submit it to the Senate for ratification (as is arguably necessary under the Constitution). Clinton cited the United States government’s concern that the ICC would exercise jurisdiction over United States soldiers involved in United Nations peacekeeping missions abroad. The George W. Bush administration distanced itself more permanently from the
treaty, saying that the United States had no intention to become a party to it.\textsuperscript{5} Despite American opposition, the ICC collected enough ratifying countries to launch, without the Americans, on March 11, 2003.\textsuperscript{6}

One might think that the United States, as an actor ostensibly concerned with the rule of law, might like to have an International Criminal Court. Such a forum would provide the ability to try widely acknowledged war criminals without the political difficulty of unilateral action. Additionally, a ready-made forum alleviates the need to set up special ad hoc tribunals as was done in Rwanda and Yugoslavia, each of which took a great deal of time and political capital to initiate, and each of which have been haunted by inefficiencies that a permanent tribunal might be able to avoid through regularized practice.\textsuperscript{7} However, concerns over the protection of American interests against foreign countries who might seek to bring United States citizens in front of this Tribunal outweighed any perceived benefits, and so the United States backed out of the Rome Convention.

The Kyoto Protocol was born from the 1992 United Nations Framework Convention on Climate Change. The Protocol was signed by the United States (specifically by then-Vice President Al Gore) on November 12, 1998, joining 177 other nations. The Protocol called for a 5% reduction in carbon dioxide by 2012 from advanced nations, and essentially exempted many developing nations, such as China and India, from those targets.\textsuperscript{8}

Two conditions were required for the Kyoto Protocol to come into force. First, the Protocol must be ratified by at least 55 of the countries that originally signed the Convention (known as Annex I countries). Second, the ratifying countries must represent among them at least 55% of the carbon dioxide emissions from Annex I countries for 1990.\textsuperscript{9} After being stalled just short of the 55% level for some time, the Kyoto Protocol achieved these ratification goals and entered into force on February 16, 2005, ninety days after Russia ratified the treaty.\textsuperscript{10}

The United States alone could have ratified the treaty before Russia’s ratification, as the United States is the world’s largest producer of green-
house gases, emitting around 25% of the total. However, once again, the Bush administration distanced itself from an international treaty the United States had signed, publicly withdrawing from the Kyoto Protocol. The Protocol was never submitted for ratification to the United States Senate, since that body would not have ratified it—in fact, the Senate passed a resolution (by a vote of 98 to 0) making ratification of the Kyoto Protocol conditional on assurances that United States’ competitiveness in world markets would not be harmed. As one conservative American critic put it, “Kyoto is arguably in truth an economic instrument by which foreign competitors hope to mitigate U.S. competitive advantages.” Again, the rationale presented was one of a defense of United States interests—and once more against “foreigners,” the developing world who would be exempt from restricting their own pollution so as to enhance their economic development.

There has been, of course, a wealth of opinion on the costs, benefits, and climatological effects of the Kyoto Protocol. But one point is starkly clear: to the extent a cost/benefit analysis is predictable and would yield net benefits, such benefits would inure disproportionately to poorer countries. One such analysis of the Kyoto Protocol predicts a global benefit-to-cost ratio of $166 trillion to $94 trillion, but because the costs would be borne principally by the first world, the ratio for the first world would be less than one, which explains the United States’ disinterest in signing on. And the worst-case costs of not controlling carbon emissions are not just hampered child development due to local pollution, but a global sea-level rise, which could be disastrous in low-lying countries such as Bangladesh and Micronesia. How can such countries, with neither altitude nor affluence, bargain with the first world in defense of their very existence?

III. Rome, Kyoto, Senegal, Peru
The purpose of a treaty, like the purpose of any contract, is to protect agreed-upon rights, and provide for predictability and stability in a relationship. But how protective and predictive is a contract—or a treaty—if it can be abrogated at will by the stronger party? And what incentives prevent the stronger party from abrogating those agreements?
A. Entering Unequal Treaties . . .

The formation of the contract may affect how we analyze that question. At one point during the revolt aboard the *San Dominick*, Benito Cereno enters a kind of contract with Babo: if the former slaves stop killing the Spaniards, Cereno, the ship’s only remaining capable navigator, will guide them from their current position (off the coast of Peru) to Senegal. In the midst of a slave rebellion, a treaty of equals seems to emerge. They need each other: Cereno is dependent on Babo for his life in an immediate way, and Babo is dependent on Cereno if he ever wants to return to Africa safely. This is a contract that could not have been made between master and slave.15

Who has the superior bargaining position in the formation of this contract? Most immediately, the ship is bereft of crew and short of supplies, and probably is not capable of sailing across the South Atlantic to Senegal. The slaves may not actually need Cereno to pilot them back to a local harbor where they can restock and repair, making him of little immediate use—and thus expendable. But they will need Cereno once they reach a local harbor to secure provisions, since the local Spanish authorities would quickly recapture masterless slaves captaining a Spanish galleon. And if the former slaves decide to press on to Senegal, with or without fresh supplies, Cereno’s advantage increases, as his navigation skills will be needed all the more.

As with many contract negotiations, information is key. Cereno’s strategy depends on what he knows (or what he thinks he knows) about what Babo knows (or what he thinks he knows). Babo may have no idea they are close to South America and that a local port is an option. If he thinks their only option is to sail across the seas to Senegal, and Cereno is vital to that grand plan, Cereno’s bargaining power is improved. On the other hand, they have little to no chance of reaching Senegal in their current depleted state. If Cereno knows that (and Babo does not), Cereno is playing a desperate strategy: betting on Babo’s ignorance of the impossibility of their voyage, he may be stalling, playing time as his only card, as skillfully as he can. Or, if Cereno knows that an attempt to go to Senegal will surely result in his (and everyone else’s) death, and a local landing is their only option, he could be angling for such a local
landing. Again relying on Babo’s ignorance, Cereno could keep the ship at sea for some time—enough to make it seem to inexperienced sailors like a transatlantic voyage, but not enough so that their supplies run out—before a turn back to Spanish territory in South America. Cereno may also be gambling that even if his ploy were discovered, Babo would be hard-pressed to enforce their deal, given that Babo’s basic method of enforcement (killing Cereno) is only effective in its threat. The deal is not only unenforceable: Cereno is in fact quite likely to breach it in any event. He knows that in the unlikely event they should actually reach Senegal, he will have outlived his usefulness.

All of the above stratagems were worth considering when negotiating this contract. But all of the strategies assume rational actors. Cereno does not know whether, despite their recent enslavement and debasement, Babo and all of the former slaves will be rational and patient during any such “negotiations.” Indeed, Babo does not know whether, despite his recent enslavement and debasement, and the constant threat of imminent death, Cereno is still capable of the same. So each party has imperfect information about the counterparty’s intentions, and even less perfect information about the probability of success for any possible choice. Who, then, is the “stronger” party? This might be a moment of true equality between the parties after all—neither Cereno nor Babo have much hope of extricating themselves from their current positions. Both are equally stuck.

Regardless of how equitable the eventual “contract” may seem, in the end, this treaty seems forced upon Cereno, given the more immediate threat to his own life, making Babo not his equal, but his superior. How highly, then, should Cereno have valued that contract? If the law is meaningless in the absence of an outside power capable of brokering and enforcing equal agreements, contracts are made with whatever advantage can be brought to the table at the time of formation, and broken at the first opportunity for advantage.

B. . . . Leaving Them . . .

Realizing the hopelessness of the deal he has entered, Benito Cereno abrogates his agreement to take Babo to Senegal by signaling his di-
lemma to the Americans at the first opportunity he can do so without being killed. As the American captain Amasa Delano takes his leave and boards his own ship, Cereno jumps aboard Delano’s ship. In the chaos that ensues, the Americans amply demonstrate their strength, both individually and collectively. Captain Delano begins the battle by assessing the situation: he physically holds down Cereno with one hand, and Babo with one foot, while he pauses to consider the situation, and who may pose a real threat to himself and his crew. Delano, however, quickly grasps the situation, deciding that Cereno is escaping from Babo, and that he should come to Cereno’s aid. He thus surrenders the role of an arbiter to become a partisan, and orders an American attack. The Americans swiftly overtake the Spanish ship and install a new order.

Cereno’s physically manifested leap out of his agreement with Babo begs the question: does a party to a contract, however entered, have a moral right to abrogate that contract at will? The first answer in the laws of an advanced nation is the underpinning of the entirety of contract law: contracts must be honored, assuming, rightly or wrongly, that the parties entered the deal freely. When a party abrogates a contract in the law of the developed world, the counterparty, weaker or stronger, generally has recourse to a neutral forum with the power to administer the dispute and enforce compliance with the terms of the deal (or at least award monetary damages against an aggrieved party). But sometimes there is no such neutral arbiter, or as in Delano’s case, the neutral party becomes a partisan. We might all agree that a sufficiently great harm being inflicted on a weaker party by their treaty partner in the context of the treaty relationship justifies abrogation. The type or level of “harm” that is sufficient to justify breaking a treaty is a fact-specific inquiry in each instance, and of course this inquiry will depend on the (third-party) inquirer’s opinion of what is justified. Babo and Atufal’s revolt signals an abrogation of the revolting “treaty” forced upon them. Babo and Atufal were clearly not willing parties to a contract of slavery, but once captured and brought on board the San Dominick, a deal was implicit: they behave like slaves, and in return, they remain alive. It does not take a “treaty” as unequal as a compact of slavery for a third-party observer to sympathize with and support the weaker party in
abrogating the deal. American contract law is filled with (controversial) examples of judges allowing a party to breach a contract entered from a radically weaker bargaining position under the doctrine of unconscionability. So the law recognizes situations in which weaker parties may breach their contracts, and indeed, abrogation is all but inevitable when an unequal treaty is forced on a weaker party and will inflict sufficiently great harm on that party. It is not difficult to sympathize morally with the weaker party in these instances.

But is there ever a justification for a stronger party to abrogate a treaty, or, further, to refuse to enter a treaty that will not inure entirely to its benefit? In rejecting the Rome Convention, the justification offered by the United States was potential violence to Americans in the form of imprisonment (or at least violence to their due process rights). In rejecting the Kyoto Protocol, the United States justification was potential “violence” to its economic interests. Finding harm sufficient to justify breaking a contract is a matter of opinion. And power helps opinions prevail.

C. . . . And Enforcing Them Against Those Who Leave.

Justification or fairness aside, Spanish justice applies to Babo in the end, and he is tried for crimes under Spanish law. In modern international law of the sea jurisprudence, the law that is applicable aboard a vessel on the high seas is the law that is applicable in the home country of that vessel. Every vessel is supposed to have a “nationality,” and fly the flag of a given country. The “flag state” is supposed to exercise effective authority and control over the ship, and may exercise jurisdiction to prescribe, adjudicate, and enforce any conduct that takes place on the ship. In the case of the San Dominick, flying under a Spanish flag, Spanish justice applied to Babo from the moment he came aboard. Once Babo is transported back to land, he is subjected to the penalties of Spanish colonial law. The law on the land ends up being much the same as on sea—the strong win, and, as demonstrated by Babo, who never again speaks after his defeat on the ship (including at his trial), the weak don’t even have a voice. The only difference between the law of land and sea is that the law on land is better dressed, clothed in the formality of legal
process, a process more expansive than at sea, where juries, lawyers, and appellate courts are in short supply.

The pomp and circumstance of judicial process in a formal courtroom may salve our consciences about an execution—but only when we are comfortable with the system that renders the verdict. If Babo had prevailed, taken Benito Cereno to Senegal, given Cereno a fair trial under Senegalese law, and then executed him, would we be comfortable saying justice had been done? Perhaps. Could such a trial be called fair? In our positions, in our day and age, we might be comfortable with such a trial precisely because it would not be “fair,” so much as it might be considered “just”—the slave trader adjudged by the slaves.

If the result of Babo’s trial, or a hypothetical Senegalese trial of Benito Cereno, would be a foregone conclusion, why have a trial in the first place? United States Supreme Court Justice Robert Jackson, who led the United States prosecution team at the Nuremberg trials, offers one possible answer: the judicial process provides a historical record upon which we can reflect, while trying to build a fairer system. In his opening statement at those tribunals, Justice Jackson stated:

That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that power has ever paid to reason. . . . We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well. (98)

The powerful nations, the ones who set the rules, are not destined to be powerful forever, and rules designed to favor the powerful only encourage the powerful to do whatever is necessary to remain in power. How can the community of nations ensure the fairness of a process of justice, ensure that the strong do not define that process to the detriment of the weak?

Giving a “voice” to the weak is not much good when, as in Babo’s trial, its use would be utterly unavailing. Indeed, even the idea of “giving” a
voice is problematic. If a weaker party’s opportunity to speak is tied to a procedural format that is tailored by a stronger party, the opportunity may be rendered insignificant. It is hardly generous justice to allow the accused the opportunity to speak for an artificially brief period, or with undue evidentiary or other constraints. Even an accused as intelligent as Babo would have no reason to understand the formal rules of a trial. From his point of view, the trial would be a baffling sequence of times when he may speak (and why, and on what subjects), and times when he is required to be silent; arguments he may make, and arguments he will be summarily disallowed from making. Babo likely recognized the uselessness of a slave’s “self-defense” claim, which I will discuss further, assuming that no Spanish court would recognize that a slave had any such right. Procedure can be an instrument of enslavement as easily as it can be an instrument of justice.20

Even the necessary (and thus seemingly innocent) requirement of a common language disadvantages the weaker party. However unappealing Babo’s hypothetical statement of defense might have been to a Spanish-speaking court, a presentation in his native language would have been far less convincing to that assembly. The problem is not simply one of translation. At the United Nations, a cadre of skilled translators is always available to translate words and grammar, but a phrase asserted in the “language” of first-world industrial economics regarding a tradeoff between employment percentages and environmental protection may be incomprehensible in the language of an island nation whose existence is threatened by that econometric tradeoff. A Spanish judge’s careful explanation of the law of slavery—even skillfully translated into Babo’s native language—would be unlikely to convince Babo why the violent enslavement of a Spaniard was punishable by death while the violent enslavement of an African was perfectly acceptable.

We can design, in all good faith, a system of checks and balances, but such a system is useless when no power is strong enough to check any other single power. We can try to design a system where there are no “majorities,” no singular power, but what happens if one power becomes stronger than all others? Or when coalitions of pluralities form a strong majority, giving that majority the ability to act against the weak
unilaterally and with absolute force? Once the powerful are entrenched, is there any way to solve this problem, other than waiting for the fall of empire?

IV. The Right of Self-Defense in Criminal Law

Babo, Atufal, and the rest of the former slaves do not merely overpower their captors. They kill most of the Spaniards, and indeed cannibalize at least one of them. Was the harm inflicted upon them sufficient to justify their revolt and murder? Was the harm inflicted by Babo and Atufal in their revolt sufficient to justify an American assault that re-enslaves or kills them? These questions echo longstanding debates in criminal law regarding the boundaries of the right of self-defense.

Generally speaking, a person has a right of self-defense to prevent an imminent harm to himself. All but the most devout pacifists would agree that, if Adam is in the process of punching Bill (or has done so already), Bill is morally entitled to punch back, in order to stop Adam’s assault. Common law countries tend to codify that moral judgment. Further, Bill has a right of mortal self-defense (i.e., killing his attacker) to prevent an imminent mortal harm to himself (i.e., his own death). So, if Adam is indisputably going to kill Bill (Adam has his sword out, say, and is rushing at Bill screaming death threats), Bill is legally justified in drawing his gun and shooting Adam. But the doctrine of self-defense requires proportionality: Bill may draw his gun and fire in self-defense if Adam is rushing at him with pointed sword, but Bill may not fire away if Adam is merely throwing a punch. Most jurisdictions extend the right of mortal self-defense to prevent an imminent mortal harm not only to the defender, but also to a third party. So, if Adam is indisputably going to kill Bill (again, Adam has his sword out, rushing at Bill, screaming threats), and Carol wanders onto the scene and witnesses the events unfolding, Carol is justified in killing Adam to save Bill.

In these examples, it is a given that harm is imminent. But it is not always so clear. Most common-law jurisdictions in the United States require the harm to be objectively imminent, but a few jurisdictions (and the Model Penal Code) require only a subjective belief of imminent harm. The former, the objective standard, requires there to be actual ob-
jective danger of mortal harm in order to justify inflicting mortal harm in self-defense. The attacker actually must be attacking with deadly force, and it is not sufficient for the defender merely to believe such an attack was imminent. The latter, the subjective standard, would only require that the defender “reasonably believed” (or some similarly worded standard) that mortal harm was imminent. In a jurisdiction that requires objective danger to exercise self-defense, the defender must prove the danger to him in order to be excused from any violence committed in self-defense. In a jurisdiction that requires a subjective belief of danger to exercise self-defense, the defender must only prove that he believed that there was a danger to him.25

As a concrete example of the important difference between these two regimes, let’s say that Bill claims Adam has “deadly weapons,” and is about to use them on Bill. Bill thus kills Adam in “self-defense.” But in truth, Adam does not have any such weapons. Under the objective standard, Bill’s claim of self-defense is untenable, and Bill should be subject to the legal penalties for murder. Under the subjective standard, Bill would only have to believe that Adam was about to employ his deadly weapons, and at most, Bill would be required to prove to some neutral arbiter (should one be found) that he had some reasonable grounds to believe Adam’s deadly attack was imminent.26

The parallels to the problems of modern international law should be clear. For example, what if the United States claims Iraq has deadly weapons and is about to use them on the United States, and thus attacks Iraq in self-defense? Under the objective standard, if Iraq in truth does not have any such weapons or was not about to use them, the claim of self-defense is untenable, and legal penalties should follow. Under the subjective standard, the United States would merely have to believe that Iraq was about to use its deadly weapons, and at most, the United States would have to prove to some neutral arbiter—should one be found—that there was reasonable grounds to believe a deadly attack was imminent.

The introduction of a third party yields another problem. Let us say, as above, Adam is (objectively) about to kill Bill (sword out, death threats screamed). Bill is justified in drawing his gun, shouting a few choice threats in response, and shooting Adam in self-defense. But this time,
before Bill can draw his gun, Carol walks onto the scene. As mentioned above, Carol would be justified in killing Adam on Bill’s behalf, in an exercise of the right of self-defense as applied to the defense of third parties. But, Carol got to this particular scene a little late, and did not see the objective imminent threat from Adam. She only sees Bill with gun drawn, shouting his threats. Carol misunderstands the situation, and thinks that Adam’s sword waving is a desperate act of self-defense against Bill’s gun attack. Is Carol justified in killing Bill to defend Adam from Bill’s imminent mortal attack?

Under the objective standard, Carol got it wrong. Bill was not an aggressor, but was rather acting in self-defense, and thus Carol should not have killed Bill—and the appropriate legal penalties may be applied to Carol. However, under the subjective standard, Carol had good reason to believe that Bill was the aggressor, and would have little trouble arguing to a neutral arbiter that she (Carol) indeed believed that, and that her belief was reasonable. Thus, in such a jurisdiction, Carol will be excused from liability on the basis that it was an appropriate extension of the right of self-defense to the defense of a third party.

Once again, parallels to international law are clear. As an example that is hopefully more far-fetched: what if the United States claims Iran has weapons of mass destruction and is about to use them on Israel, and thus attacks Iran in defense of Israel? If Iran really was about to attack Israel, then the United States would be justified under either an objective or subjective standard. But if Iran’s attack was actually an exercise of self-defense against an attack by Israel—an attack that was either objectively about to occur, or Iran subjectively believed was about to occur—then the United States would itself have to assert the subjective standard; that it had reason to believe that Iran was the aggressor. Of course, lacking a truly neutral arbiter of such a claim, the United States would never really be required to justify its actions.27

With this analysis as predicate, we now return to the question of whether the harm inflicted by Babo and Atufal in their revolt is sufficient to justify the American assault that re-enslaves or kills them. Captain Delano (Carol, in our hypothetical analysis) has wandered onto a scene in which Babo has inflicted harm on Benito Cereno and his
crew. But between Babo and Cereno, who is our Adam, the “objective” initiator of violence? Certainly, the slave revolt is mortally violent, but is Cereno’s transportation of slaves less of an act of violence just because these particular slaves were not killed? Under the subjective standards of self-defense extended to third parties outlined above, Delano’s violent quelling of the slave rebellion is excusable—he came to the scene just in time to witness the slaves’ mortal violence against the Spanish, after the capture of the slaves (probably violent, but not mortally so) was completed. Delano may have “reasonably believed”—to the extent that such a belief was reasonable at the time—that the slaves were the instigators of the mortal violence.

Of course, as noted above, most jurisdictions would allow mortal self-defense against certain heinous crimes, even when not mortal, and kidnapping and enslavement might easily to fall into that category. But recall the year of Melville’s writing (1855) and the year in which the story is set (1799)—at these times, the question of whether enslavement is a crime that justifies mortal self-defense in response was rather more hotly debated. In *The Amistad*, the Supreme Court case whose facts Melville undoubtedly adopted for *Benito Cereno*, slaves aboard a Spanish schooner en route from one Cuban port to another rose up and killed their masters, only to be “salvaged” later by an American ship off the coast of Long Island (40 U.S. 518 1841). The Spanish captain of the *Amistad*, whose life the slaves had spared for his navigation abilities, sailed the ship east (toward Africa) during the days, but northwest at night, in an apparent attempt to reach the Southern United States. Once the ship was discovered, the Spanish made a claim for the return of their “property,” including the ship and the slaves. The United States Supreme Court refused the Spanish claim, holding that if the Africans had been slaves under Spanish law, they ought to be returned. However, they were not slaves, because they had been “procured” contrary to an 1820 treaty between Spain and Britain forbidding the importation of slaves to British territories. Instead, they were deemed to be:

[K]idnapped Africans, who, by the laws of Spain itself, are entitled to their freedom, and were kidnapped and illegally car-
ried to Cuba, and illegally detained and restrained on board the Amistad; there is no pretence to say, that they are pirates or robbers. We may lament the dreadful acts by which they asserted their liberty, and took possession of the Amistad, and endeavored to regain their native country; but they cannot be deemed pirates or robbers, in the sense of the law of nations. (40 U.S. at 594)

Justice Joseph Story’s opinion thus appears to forgive the slaves’ violent acts, casting them instead as self-defense—even while cautioning that if the Africans’ capture had been “legal” under Spanish law, his ruling might have been different. As a counter-example, consider the 1831 slave rebellion in Southampton County, Virginia, led by Nat Turner, which claimed the lives of over 50 whites, mostly slave owners and their families. Scores of blacks were killed in return—not only those who participated in the rebellion, and not only by organized judicial process. After the rebellion, Virginia’s state legislature considered abolishing slavery in order to prevent any recurrences, but in the end, decided instead to tighten slavery codes: an unsurprising result.

In each “jurisdiction,” the question of whether self-defense was an allowable claim was decided by those in power, depending in large part on the tolerance levels of those in power for slavery. After considering the historical context, we are led to harder questions: would Delano be justified in using deadly force to quell the slave revolt under an “objective” standard of self-defense? Whose objectivity is to be used as the measuring stick, and how much has that “objectivity” changed in the last two hundred years? How different are these two theories of self-defense, when what is “objective” is defined by a majority that enjoys a tremendous power advantage, to the point that their subjective beliefs become objective truths, particularly in the application of law through a “reasonability” standard? A community of nations with no neutral arbiter and no interest except self-defense is the ultimate in a subjective system of law. In such a system, how do we avoid a situation where the strong act against the weak, within or without the law, unilaterally and with absolute force?
V. The Lessons of Power Politics

Melville offers a way out of this thicket, but it is not a promising one. Aboard the *San Dominick*, before Delano realizes the truth of the situation, he watches a Spanish sailor nervously tying what is described as a Gordian knot. The sailor tells Delano that it is “for someone else to undo,” (176) and then throws it at him, telling Delano (in the only English spoken on the ship), “Undo it, cut it, quick” (176). The knot might well be Walt Whitman’s “knot of contrariety,” the contradictory understanding of slavery in an ostensibly democratic country like America in the 18th and 19th century. And although Whitman’s “Crossing Brooklyn Ferry” was written in 1856, one year before *Benito Cereno*, the Spanish sailor sounds to be echoing Whitman’s verse: “I am he who knew what it was to be evil” (line 70 967). Although Delano ponders the knot, he succeeds only in making himself queasy. The knot is tossed around the ship a bit, and eventually thrown overboard. The voyagers, black and white, see no solution but to toss it into the sea. The sailor’s solution (and perhaps Melville’s), to “cut it quick,” is the brutal Alexandrian solution; it would render the rope useless. But it is the solution the Americans employ: aboard the *San Dominick*, the Americans untangle the slave revolt like a sword through rope, at significant cost to both crews. And, to stretch the analogy of the Gordian knot, the Americans have once again fulfilled that ancient prophecy—undoing the knot by use of the sword, and by those means winning an empire.

At least one among the (supposedly) stronger party is rendered useless by the episode. After the revolt is quashed and his deposition testimony proffered, Cereno’s health quickly fails. He predicts his own death, declaring that what has “cast such a shadow” on him is “the Negro” (222). Slavery reversed has made the master understand the nature of slavery. After experiencing the life of a slave—after knowing what it is to be evil, and to have evil inflicted upon him—Cereno’s life is no longer worth living. But having tasted the bitterness of slavery, what other choice does Benito Cereno have? Can he return to captaining slave ships? Can he, in a Spanish colony in 1799, become an abolitionist? Can he escape the question altogether by rejecting his society? If the knot is not cut by the sword, it can only be tossed into the sea. Although we do not see Cereno’s
funeral, we can imagine it is that of a sailor: like the knot, burial at sea, the only other way to “solve” the problem of the knot.

What lessons can the stronger parties of the world draw from this conclusion? What would it take to move the first world to champion the weak, or at least to construct a process through which the weak have a true voice? Perhaps it would take a revolt, a violent upending of the slavemasters, even if only temporary, to make a strong actor who is abusing that strength understand the plight of the weak. After all, it took the Civil War and the subjugation of the South to end slavery in the United States. One would hope that lesser measures could convince the United States merely to honor agreements it signs. But in the absence of a truly neutral arbiter, violence perpetrated by the weak of the world against the strong would almost certainly not be seen by the strong as self-defense, but as an act of aggression—a criminal act, much as Babo is criminalized for his act of rebellion, which he undoubtedly viewed as justifiable self-defense.

Melville was probably not writing with a violent solution in mind, or to provoke a war, but rather to force the stronger parties of his time to think about the problems of a society in which the strong arrange and enforce unfair “agreements” and “protocols” with the weak, only to abrogate those deals when convenient. An objective system depends on a neutral arbiter of such disputes, and in a world where all parties are interested, only process can be neutral. Such a neutral process in the international context requires a tribunal in which the membership rotates regularly, such that no party is forever the stronger, and rule of law is honored not out of convenience or momentary self-interest, but out of fear of being the powerless defendant in the next trial. It is not necessary for the slavemasters to be made slaves to understand that a system of masters and slaves is unjust. It is only necessary that the slavemasters understand that they, like Captain Benito Cereno, forever run that risk, and their best defense is not abuse of power, but use of process. For the United States to be concerned that the International Criminal Court would exercise jurisdiction over United States soldiers may well be the strongest indication that the ICC would be just: only when each country is concerned that it might be unfairly targeted next by the ICC are
the members of that body likely to enact and effectuate neutral procedures that will maintain a balance between the powerful and powerless. The problems inherent in the interaction between unequal powers that Melville frames did not end with the Emancipation Proclamation, and will not end with the International Criminal Court or the Kyoto Protocol. The lessons of Benito Cereno—text and man—are still worth study and debate in the corridors of the powerful, and the powerless.

Notes

1 A version of this paper was first presented at the annual convention of the American Comparative Literature Association in April 2003. I am utterly indebted to Professor Robert Ferguson of Columbia University for introducing me to *Benito Cereno*, and several of the ideas in this paper (noted more specifically within), which were presented in lectures on October 16 and 18, 2000. Gratitude is also due to Stephanie Elsky and Gwyneth Horton, both formerly of Cleary, Gottlieb, Steen & Hamilton LLP, for their editing efforts and valuable feedback. Finally, this paper would never have been written is not for the constant encouragement, keen editing, and invaluable advice of Sailaja Sastry.

2 The “Gordian knot” was, according to Phrygian tradition, an impossibly complex knot tied by Gordias, who was made king of the city of Telmissus when he fulfilled a prophecy by wandering into town with an ox-cart. In gratitude to the god Sabazios, he tied the ox-cart to a post, creating with the rope the Gordian knot, which became a metaphor for a seemingly intractable problem. It was then prophesized that the one who could undo the knot would become ruler of the Asian empire. Alexander the Great finally “solved” the problem by slicing the knot in half with his sword (Lane 149–51).

3 For those unfamiliar with the process of how a multilateral treaty comes into force, I present a brief and simplistic overview. First, a certain number of countries that have negotiated its terms must vote to approve its text as a general matter. Second, if the text is approved by a sufficient number of countries, a designated number of countries have to become signatories to the treaty (that is, their executive or administrative officers must agree to its terms). Third, as most treaties also require countries to ratify them (such treaties are called “non-self-executing”), each signatory country must also approve the treaty in its designated legislative body. For example, for the United States to become party to a treaty, first the U.S. State Department negotiates the terms of the treaty and then, if satisfied with those terms, votes for it; then the President or a designated official signs it; and then the Senate ratifies it by majority vote. For more on the rather complex process of how a treaty is concluded and entered into force, see Sinclair 29–36.
Despite American’s explicit rejection of ratification, one may argue that the ICC has jurisdiction over Americans anyway. On its face, the treaty gives authority to try non-signatories in the ICC. This makes sense, since it was unlikely that, for example, a Slobodan Milosevic would sign such an instrument. And the treaty was also designated to take into account stateless actors, such as, for example, Osama bin Laden.

Under Article 18 of the Vienna Convention, to which the United States is a signatory, a non-ratifying signatory to a treaty, while not held to the document's specific terms, is nonetheless prohibited from any act, which would defeat the object and purpose of a treaty. See, for example, the Vienna Convention on the Law of Treaties, Exec. L, 92nd. Cong. 1st Session. (1971), art. XVII: “A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.” See also Case of the German Settlers in Polish Upper Silesia, 1926 P.C.I.J., Ser. A, No. 7, at 30.

Formally rejecting the treaty for the formation of the ICC, as the Bush administration did, is almost certainly an act defeating the object and purpose of the treaty. Note, however, that a treaty can lose its binding effect if a sufficient number of parties engage in conduct that is at odds with the constraints of the treaty.

This was not the first time that the United States withdrew from an international crime court. The United States had been a participant in the International Court of Justice since August 1946, but President Reagan revoked the United States’ acceptance of the ICJ’s jurisdiction and withdrew fully in October 1985 after Nicaragua won a judgment against the United States in the ICJ for mining its harbors and aiding the “contra” rebels in the Nicaragua v. United States case. The merits of the decision of that case is available at <http://www.gwu.edu/~jaysmith/nicos3.html> (last accessed September 2005).

For example, a proposed tribunal to examine war crimes in Burundi following the 1994 massacres in the Security Council because of disagreements over penalties from local states: Rwanda, for example, at the time a nonpermanent member of the Council, would not support a tribunal unless it carried that ability to impose a death penalty, whereas France would veto any proposed Tribunal that had such a capability. Eventually, the proposed Burundi Tribunal became an “international commission of inquiry,” without any power to punish. See, for example, U.N. Sec. Council Res. S/RES/102 (1995) 28 August 1995.

The overall 5% target for developing countries is to be met through cuts of 8% in the European Union (EU), 7% in the US, and 6% in Canada, Hungary,
Japan and Poland. New Zealand, Russia, and Ukraine are to stabilize their emissions, while Norway may increase emissions by up to 1%, Australia by up to 8% and Iceland by up to 10%. See United Nations Framework Convention on Climate Change <http://www.dti.gov.uk/ccpo/faqs_kyoto.htm> (last accessed September 2005).


13 See, for example, Cline, William R. “Meeting the Challenge of Global Warming.” Ed. Bjorn Lomborg. Global Crisis, Global Solutions. Cambridge: Cambridge UP, 2004. Note that prices given are 1990 prices (the goals set by the Kyoto Protocol were to freeze the first world’s carbon emissions at 5% below their 1990 levels).

14 Of course, this essay is not the first to pose the question of why nations obey international law to the extent that they do; there is widespread disagreement on that question on both positive and normative levels. For a survey of sources examining this questions see Koh, Harold Hongju. "Why Do Nations Obey International Law?" Yale Law Journal 106 (1997): 2599, 2603. One of Koh’s many contributions in this area is the observation that “fair” international rules must penetrate into a domestic legal system, “thus becoming part of that nation’s international value set,” such that “repeated compliance gradually becomes habitual obedience” (2599).

15 I am indebted to Robert Ferguson for the idea, presented in a lecture on October 18, 2000 at the Columbia University School of Law in New York City, that this compact between Babo and Cereno could be considered some form of contract.
Killing Cereno is not actually Babo’s only enforcement option. He could torture Cereno, or threaten torture, until Cereno submitted. Indeed, Babo could even justify such torture as self-defense—were they not to reach Senegal, he and the rest of the slaves are likely to be caught and executed. The legal justification for torture as necessary means of self-defense has been advocated recently by the United States Department of Justice’s Legal Office of Legal Counsel, in an August 1, 2002 memorandum written by Assistant Attorney General Jay S. Bybee. After its June 8, 2004 release by the Washington Post (see <http://www.washingtonpost.com/wp-dyn/articles/A23373-2004Jun7.html>), the Bush administration distanced itself from the memorandum. Subsequent to authoring the memorandum, Bybee was nominated by President Bush, then confirmed by the Senate, as a federal judge on the Ninth United States Circuit Court of Appeals.

American contract law, at least, allows for an “economically efficient” breach of contract by a rule of damages that generally awards damages to an aggrieved party in the amount that the party expected to receive from the contract. For example, Adam agrees to sell Bill and apple for $1. Before they can exchange the apple and money, Carole offers Adam $2 for the apple. Adam can break his contract with Bill, and take Carole’s offer for more money. Since Adam has no more apples, Bill is required to buy an apple in the open market, and it is more expensive—$1.50. Bill can sue Adam for the extra fifty cents he had to spend due to Adam’s breach of contract. Adam will have to pay Bill that fifty cents, but will still walk away from the deal with and extra fifty cents more than he would have had if he did not breach the contract. Even in losing the lawsuit Adam has been rewarded for his economically efficient breach of contract. However, Adam’s solution does not address the problem of whether the breach was morally justified, given that he has forced upon Bill certain other transaction costs, including time, aggravation, and the cost of suing to recover the fifty cents. These costs were, so to speak, more than Bill had bargained for. Although this scenarios raises several issues of justice of a cost-efficient breach, it does not imply any moral failings on Adam’s part; simply a rational economic decision.


See Restatement (3rd) of the Law of the Sea, § 502. As one British case from around the time of Melville’s writing put it, “it is clear that an English ship on the high seas, out of foreign territory, is subject to the law of England” (Regina v. Leslie 8 Cox Crim. Cas. 269 Ct. Crim. App. 1860). In another case from the era, an American crewman on board a British vessel in a river in France murdered a crewmate, and a British Court upheld his conviction under British law; see Regina v. James Anderson, 11 Cox Crim. Case 198 Ct. Crim. App. 1868.

See, for example, Gilmore, Grant. The Ages of American Law. New Haven: Yale UP, 1979, 48, where he states, “Law reflects but in no sense determines the
moral worth of a society. The values of a reasonably just society will reflect them-
selves in a reasonably just law. The better the society, the less law there will be.
In Heaven there will be no law, and the lion will lie down with the lamb. The
values of an unjust society will reflect themselves in an unjust law. The worse the
society, the more law there will be. In Hell, there would be nothing but law, and
due process would be meticulously observed.”

21 America’s Model Penal Code of 1962 (in §35.15) does not use the concept of
“imminence,” but instead talks about “the Present occasion.” The New York
Penal Code (in §35.15) justifies self-defense “from what [a person] reasonably
believes to be the use or imminent use of unlawful physical force by such other
person.” The Model Penal Code is not itself law, but rather an academic model
that some jurisdictions have adopted as law in whole or in part. For a good
overview of these issues of self-defense, see Fletcher, George P. Basic Concepts of
example of the imminence requirement can be found in State v. Marshall, 208
N.C. 127, 179 S.E. 427 (N.C. 1935), in which the Supreme Court of North
Carolina held that because an “aggressor” picked up a hammer during a bar
fight, but did not have the hammer “in a striking position” the trial court was
correct in disallowing the defendant’s assertion of self-defense for shooting the
hammer-bearer.

22 As a less severe, but similar example, a New York court held that is was not self-
defense to throw a rock at an “aggressor’s” head when the “aggression” consisted
of a thorough splashing with a bucket of water (In re Taylor, 62 Misc.2d 529, 309

23 Jurisdictions vary in terms of what assaults can justify mortal self-defense. Most
American jurisdictions allow a defender to use mortal self-defense not only to
defend against deadly assault, but also against such heinous crimes as rape, and
some allow mortal self-defense against other serious crimes. See, for example,
Model Penal Code, §3.04(b)(2) that allows the use of deadly force in self-defense
against imminent threat of death, serious bodily harm, kidnapping, or sexual
intercourse compelled by force or threat. For the contrary view, see State v. Clay,
297 N.C. 555, 256 S.E. 2d 176, 182 (1979) which limits the use of deadly force
in self-defense to instances of imminent death or great bodily harm.

24 Model Penal Code, § 3.04. Most American states have adopted the objective
theory of self-defense described herein. But some, such as California, have ad-
opted a more subjective theory, and New York takes the middle ground of re-
quiring the “reasonable” belief that an attack is imminent—giving the defender’s
belief some credence, but requiring the defender to have some objective basis
for his/her belief.

25 This distinction can be broken down further: most subjective jurisdictions re-
quire the defender to point to objective factors that caused his belief (for ex-
ample, that his subjective belief was reasonable), but the degree of latitude that
the defender has in asserting the reasonability of his own belief can vary. For example, in *State v. Fair*, 45 N.J. 77, 211, A.2d 359 (N.J. 1965), the Supreme Court of New Jersey held that, under New Jersey law, a party may intervene in defense of a third person if he subjectively believes that the third person is in danger; but, to avoid being convicted for harming the person the intervener thought was the aggressor, the jury must “objectively find that the intervener reasonably arrived at the conclusion that the apparent victim was in peril, and that the force he used was necessary.”

26 To reverse the roles: what if Bangladesh decides its existence is imminently threatened by global warming, which it determines is caused by pollution, the plurality of which is generated by the United States? Would Bangladesh be “justified” in launching an attack on smog-producing factories in the United States? Under the subjective standard, Bangladesh could even prove its theory on an objective standard, if it could reasonably prove to an objective third party—again, if one could be found—that in fact its existence was “imminently” threatened. Of course, it is unlikely that Bangladesh would be provided with “due process” to state any such claims after having attacked the United States.

27 The court of public opinion may have some influence, as the United States would want to demonstrate for political reasons that it was justified. However, a position of sufficient strength can adequately substitute for, or render moot, a failure to justify one’s actions.

28 Melville handles this counterfactual supposition in part by setting his story in 1799, before the 1820 treaty between Britain and Spain, and thus, presumably alters what would have been the Court’s reasoning had the *San Dominick* been found off the Long Island coast.

29 See, for example, Aptheker. See also Foner.

30 Again, I thank Robert Ferguson for raising the connection between “the knot of contrariety” from Whitman’s poem “Crossing Brooklyn Ferry,” and the understanding of slavery in 18th and 19th century America.

**Works Cited**


_Amistad_, 40 U.S. 518 (1841).


Power Politics and International Public Law


Juris-fiction: Literature and the Law of the Law
Peter Fitzpatrick

The poem is the cry of its occasion,
Part of the rest itself and not about it.
Wallace Stevens, “An Ordinary Evening in New Haven”

Lauding editors on these occasions is rightly suspect, but here it is simply unavoidable. Gary Boire’s pathbreaking, of course, conspectus and analysis of colonial law and postcolonial literature provides not only a point of departure for my paper but also its generative orientation—a continuing on the path already broken.

Briefly, for now, Boire draws on representations of law in postcolonial literatures to reveal a disruptive ambivalence in colonial law. Bluntly, for now, I will try to show how that ambivalence also constitutes law, and not just colonial law, and try to show how this constitution of law can be derived from a quality of literature, and not just postcolonial literatures. All of which will not involve minimizing or marginalizing the postcolonial in its relation to law or to literature. On the contrary, the postcolonial will provide the focal opening to these perceptions of law and of literature more generally conceived. And, as it will transpire, the postcolonial does this with an apt irony, an irony that can be summarily derived from Hardt and Negri’s criticism of postcolonial positions. They perceive, with some accuracy, that the postcolonial is derived from colonialism. For them that derivation containedly limits the utility of the postcolonial to “rereading history” (146). Not for the first time, Hardt and Negri fail to see the point of what they are criticizing. The very force of the postcolonial comes from its integral yet resistant relation to the colonial, and from its thence revealing what is constituently of, and yet denied by, that selfsame colonial condition. This is not the revelation of some marginal matter but, rather, the disclosure of the very structuring
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(if the word may still be allowed) of the colonial. It is this efficacy of the resistant within imported by the postcolonial that is brought to bear now on the constitution of law generically.

I. On the Immodesty of the Supplement
In a way that captures its pretensions, Boire sees colonial law as the dominating figure of colonial settlement and authority, as a hierarchized and monadic ordering that would encompass indigenous reality (e.g. 203, 209, 212). More pointedly, law enacts an interpretation of the social that “continues monologically throughout the entire social order by hegemonically drawing other areas of production into the perimeters of its own field” (203–04). This acquisitive movement of law is bolstered in its claim to neutrality and generality, even to universality (204, 209–10). Inevitably, there results an “implosive ambivalence” in law, and this entails a “repression” of what insistently remains counter to law, of what transgressively opposes yet constitutes it (202, 204, 207, 211).

Obviously we must return to these rich insights, but continuing in a synoptic vein, Boire finds in postcolonial literatures a tangible reflection of this ambivalence, and that reflection is the colonized subject who “is both the site of imperial legal inscription and that which threatens this very inscription” (204). The threat has something of a patinated quality, however. It is manifested as irony, mimicry, as a resistance dependent on “its own oppression” (212). Rather more exuberantly, that situated threat evokes the carnivalesque and the Saturnalia. Yet the Saturnalia must end, the carnival is over for another year. There seems, in all, to be some primal efficacy given to the colonial and to a colonial law whose “heterodoxic potential . . . is always subject to the exercise of hierarchical orthodoxy” (204). That this accurately depicts an impelling element of colonial law, even of law more widely understood, can hardly be denied. But what I want to begin putting in place now is something of a reversal of emphasis, a putting of “heterodoxical potential” before “hierarchical orthodoxy,” and to do this in the spirit of Tuitt’s brilliant depiction of the ability of the postcolonial text, literary or legal, to surpass the containment of the colonial, “to go outside the source that is presupposed by its very existence” (76). And a beginning can be derived from
the extension of carnival in a way that Boire would want, in the company of Bakhtin, so as to celebrate, as carnival would, the “liberation from the prevailing truth and from the established order,” and so as to elevate what always opposes the “immortalized and completed” (see 206).

The claim to completeness—to an achieved, universalized truth—is aptly attributed by Boire to the type of imperialism his postcolonial literary representatives inhabit, to the nationalist imperialism of the nineteenth and twentieth centuries. This nationalist imperialism laid claim to the universal, even though it was the product of particular nations. An inexorable logic ensued. The claim was an assertion of an absolute truth, a truth exemplified in the particular imperial nation. And this exemplarity could not be an identity positively conceived, a positive realization of the universal in the particular. This impossibility had two monumental, and contradictory, correlates. For one, the identity came to be formed negatively by constituting, for example, the savages as its antithesis. So much is commonplace. But analysis has to go further if this negative attribution of identity is not simply to reinforce the original arrogation of completeness, as happens in such as Said’s circular seeing of the West constructing itself in an oppositional reference to an Orient also constructed by it (Orientalism). So, to continue, the antithesis of the absolute or the universal can only be utterly antithetical. It has to be of a totally different kind of existence. Yet, and this is the further correlate and where the contradiction comes in, the universal has to be all-inclusive. The universalized existence exemplified by the imperial nations was one that all peoples would come to, including the colonized, even if that would take a conveniently long time. Hence, social evolution. Yet the claim to the universal, to the absolute, has to remain relentless in its exclusion. Since the claim depends upon (for example) a savage condition apart, for the claim to stay in existence, the condition must stay always apart. It has to remain, in an ultimate way, quite unredeemable. Put another way, the claim to the universal can never be achieved in its own terms. It can never be ‘truly’ universal and thence all-inclusive because of its dependence on what must remain ever beyond it. That which is ever beyond, this intrinsic unsurpassability, marks the place of the postcolonial and institutes its “ambivalence.”
To equate this quality of the postcolonial with law may at first seem extravagant. After all, law was at the forefront of the civilizing mission, not just a prime carrier, but also a valiant enforcer of colonial truth. And, as it came to pass, a blinkered colonial law proved incapable of existing beyond this attributed content. We may, for example, feel some faint sympathy for a colonial governor of Bombay when he remarked on “the perilous experiment of continuing to legislate for millions of people, with few means of knowing, except by a rebellion, whether the laws suited them or not” (Thornton 181). Yet there are instances, now inadequately memorialized, where colonized people seized a colonial law and shaped it to their purposes in effecting liberatory transformations.¹ Let me now take a more prominent illustration of the contrast between law as liberatory and law as arrogated truth, an illustration that can carry the remainder of my analysis including a “literary supplement” which is rather less “modest” than the part Boire would allow such supplementing (213).

II. Mandela

The illustration is derived, with Derrida’s considerable help, from the thought of Nelson Mandela. The genres involved, autobiography and the speech from the dock, are at least unusual in engagements with post-colonial literatures, but they do have a quiddity, which is important for my argument and, in any case, their depictions of law will be connected to more ‘fictional’ genres shortly.

The momentous puzzle which Mandela presents us, and makes present, begins with Mandela as a critic of the laws, a legal realist, in describing his disenchantment with the rule of law and with the notion of equality before the law:

[M]y career as a lawyer and activist removed the scales from my eyes. I saw that there was a wide difference between what I had been taught in the lecture room and what I learned in the courtroom. I went from having an idealistic view of the law as a sort of justice to a perception of the law as a tool used by the ruling class to shape society in a way favourable to itself. (Long Walk 309)
And indeed, with the struggle against apartheid, it would be difficult to conceive of a situation where there was less cause for commitment to the laws, or to conceive of a person more intimately justified in refusing such commitment. Mandela was certainly perspicacious and forthright on the matter of law’s pointed oppressions and failings, and not only in its constraining and incipiently deadly effect on him but also, and primarily, in law’s tentactular and pervasive subordination of his “people.”

All of which could be sharply set against another Mandela, a Mandela existentially identified with the law, a Mandela who in the very midst of a realist critique lauds the court system as “perhaps the only place in South Africa where an African could possibly receive a fair hearing and where the rule of law might still apply” (Long Walk 308); a Mandela who presents himself before the very law he rejects, “rejects in the name of a superior law, the very one he declares to admire and before which he agrees to appear” (Derrida “Reflection” 27); a Mandela who “regarded it as a duty which I owed, not just to my people, but also to my profession, to the practice of law, and to justice for all mankind, to cry out against this discrimination which is essentially unjust” (qtd. in Derrida “Reflection” 35). Mandela, it would seem is now of “an idealistic view” and direct contrary to Mandela the realist, but not so.

The “superior law” which Mandela affirms is not something set apart from, or something about the existent law. Rather, it is integral to law as it is. Mandela advances a conception of “professional duty” which operatively respects and admires both the law and its judicial institution, even as the pervasive legal oppressions of apartheid are being brought to bear on him (Derrida “Reflection” 15–16, 33–37). The law which calls forth this magnanimous regard is the law that incipiently extends beyond its determinate existence through certain enabling qualities which “tend toward universality,” such qualities as the generality of the law, equality before the law, and “the independence and impartiality of . . . [the] judiciary” (Derrida “Reflection” 17, 20–22; Mandela “Prepared to Die” 9). These qualities are not ideals detached from a contrary legal reality, a reality of which Mandela was only too intimately aware (Long Walk 261, 309–10). They are qualities intrinsic to the being of law, to its integral extensiveness.
The dimension of law sustaining these qualities of generality, impartiality and such (and they will be returned to later) could be extracted from the generality of law by way of Derrida’s “Force of Law.” There Derrida would want to “make explicit or perhaps produce a difficult and unstable distinction between justice and law, between justice (infinite, incalculable, rebellious to rule and foreign to symmetry . . .) and the exercise of justice as law, legitimacy or legality, a . . . calculable apparatus [dispositif], a system of regulated and coded prescriptions” (250). “Force of Law” was prefigured in Derrida’s “The Laws of Reflection: Nelson Mandela, in Admiration” where the “superior law” (27) which Mandela embraces can be retrospectively equated with this “exercise of justice as law” in “Force,” with justice as it is realized by law, and as it thence and integrally subsists in law. This perception is a making experiential of a justice, which it is impossible to experience in itself, even as that denies justice in its plenitude. For law to be in such a relation to justice it must be utterly responsive, “without history, genesis, or any possible derivation. That would be the law of the law” (“Before the Law” 19—his emphasis, but conveniently for me). It is in the operative combining of the law in its determinate dimension with this law of the law importing law’s vacuity, and hence law’s incipient possibility, that Mandela is in Derrida’s estimation “a man of the law by vocation” (“Reflection” 35). Mandela is then not an idealist. He is a realist but one who sees more in the real, and in the realizable, more than others see.

III. Law like Literature
The affinity between law and literature can illumine this dimension of law, the dimension enabling law to bring possibility into normatively determinate existence. The affine can be a troublesome category, however, and it has proved to be so here. “Law and literature” has become a settled enough field when it entails exploring literary depictions of the juridical, or when it comes to extracting literary qualities from an at times reluctant law (Aristodemou 8, 22). What remains challenging is the identification of law with literature (Tuitt 78). This would seem to go against law’s being tied to ‘reality,’ a constraint which would contrast law to literature, a constraint from which literature could liberate law,
perhaps (Aristodemou 262–63; Goodrich). In the alternative, as it were, the contrast between law and literature corresponds to a necessary separation. Most notably, of course, there is Plato with his supposed hostility to the poet—the poet who confounds the laws by calling everything into question by making “the words of poetry similar to whatever he [the poet] happens to be or regards virtue or wickedness” (Plato para. 656c). Poetry opposes law as imagined worlds oppose what is ‘real,’ as the possible opposes the actual and the established (Aristodemou 18–19, 180). Yet literature itself is often seen as the slave of the determinate, as ultimately serving certain specific and usually oppressive interests (Aristodemou 5–6), and this not just as a matter of its variable contents but in its very genres—a location that has proved troubling on this score to postcolonial writers (Ashcroft, Griffiths and Tiffin 181–87). Can the novel, for example, surpass the bourgeois origins with which Said would saddle it (Culture and Imperialism 84, 92–93)?

If these issues suggest some similarity with law’s determinate dimension (a similarity taken up later), a reversal of the comparison suggests another. Returning to “Force of Law,” Derrida’s initiating engagement with Montaigne would equate “historical or positive” law with what is “fictional,” with what is “artifice” (240). Likewise, it would seem, with Jean-Luc Nancy’s “juris-fiction” the law is that which is “modeled or sculpted (fictum) in terms of right” . . . Since the case is not only unforeseen but has to be so, and since right is given as the case of its own utterance, so judicial discourse shows itself to be the true discourse of fiction” (Finite Thinking 156–57). Put in another perspective, if the situation of the case were entirely foreseeable or stilled, it would be given ‘fact’ and there would be no call for decision, for determination, for law. There would be no fictive making the case speak. What is always involved with law, then, is the creative reaching out to a possibility beyond its determinate existence, a beyond where law ‘finds itself’ in being integrally tied to, and incipiently encompassing of, its exteriority. For Nancy, again, this would be the “law of the law itself [which] is always without law. The law overhangs all cases, but is itself the case of its institution;” hence “the law is able to be here, there, now, in this case, in this place . . .” (Corpus 48). 2
Taking now a condign account of “literature” from the many that Maurice Blanchot would offer, this one being apt because it is a prelude to his conception of right, we find that literature is an “opening” to what is beyond, to alterity and possibility, to “what is when there is no more world,” or “to what would be if there were no world,” to “the void” (“Literature” 388). But this void is of the kind encountered by Blanchot’s protagonist in The Madness of the Day for whom it was disappointing, a void which inexorably becomes “a presence” and protean: “one realizes the void, one creates a work” (Madness 8; “Literature” 395).

Between the realized and the unrealizable, between the appropriated and that which is still “ours for being nobody’s,” there is a “shifting,” a “passing,” a “movement” impelled by “a marvelous force” which is the impossibility of the movement being otherwise. This is an activity always situated, an emplaced “affirmation,” “an operation” which cannot be separated “from its results” (Unavowable 29; “Literature” 363, 365, 369, 387, 389).

Literature for Blanchot, then, is a work like any other—he instances building a stove—even if it is such “to an outstanding degree” (“Literature” 371). Law and literature, it could now be said, share the same ambivalence between existent instantiation and what is ever beyond yet incipient in it. The comparison between law and literature more usually points to their opposition, of course. Literature’s realms of the imagined and the possible oppose the all-too-solid certainty of law—that law-confounding power of Plato’s poets for example. Yet it is exactly the aspect of literature to which Plato would putatively object, to its illimitable inventiveness and its quality of fiction, which impels law’s making. And despite the incessant jurisprudential efforts to render law as ‘positive’, as posited, or as fact, society, economy, and so on, it refuses being in “a world sapped by crude existence” (“Literature” 395, for the phrase). Peremptorily, the legal fiction can illustrate the formative location of law beyond existence, for with the fiction the enounced content of the particular law remains the same whereas operatively, and by way of the fiction, that content has changed to its opposite. So, and for example, in Roman law only Roman citizens could initiate certain litigation, but foreign litigants were able to do the same because of a
fction deeming them to be citizens for the purpose (Maine 21). Thus, in Blanchot’s terms, a fiction is “truth and also indifference to truth” (“Literature” 396–97).

IV. The Law of the Law
Paralleling, and the culmination of, this engagement with “literature,” we find that for Blanchot the law of the law is inseparable from law and right (“Literature” 375–78). Law ‘in’ and of itself is quite uncontained and unsubordinated, a self-affirmation made “without reference to anything higher: to it alone, pure transcendence” (The Step 25). This law takes its instituted existence from its being beyond. “Let us grant,” says Blanchot, “that the law is obsessed with exteriority, by that which be-leaguers it and from which it separates via the very separation that insti-tutes it as form, in the very movement by which it formulates this exteriority as law” (Infinite Conversation 434). This exteriority which is yet of the law, this law of the law, entails for Blanchot “a responsibility . . . towards the Other” that is “irreducible to all forms of legality through which one necessarily tries to regulate it,” but which ultimately “cannot be enounced in any already formulated language” (Unavowable Community 43).

Matching this law of the law now with the dimensions derived from law earlier, it could be said that law ‘is’ the settlement in terms of a normative continuity of the existential divide between a determinate positioning and a responding to what is beyond position, and it is in the necessity yet impossibility of such settlement that law is iteratively impelled into existence. In their separation yet inexorable combining, these two dimensions form the horizon of law, a moving horizon—the horizon both as a condition and quality of law’s contained existence, and the horizon as opening onto all that lies beyond this existence. Law’s position within that horizon cannot be at all ironically set.

To give emphasis to this responsive dimension of law is to go against the epochal elevation of occidental law’s determinate dimension over the responsive. Yet this emphasis is hardly to deny that, if law continually becomes itself and is sustained in its responsiveness to exteriority, there must nonetheless be a positioned place where this responsiveness
can be made determinate. That which is purely beyond is merely inaccessible, and out of responsive range. Law always returns to determinate position, and to sustain position there must be some shielding from an importunate responsiveness. There has, with any law, to be a constant, reductive effort to ensure that “the aleatory margin . . . remains homogeneous with calculation, within the order of the calculable” (Derrida “Psyche” 55). So, even though law has to exceed all fixity of determination, has to in order to remain pervaded by the relation to what is beyond, labile and protean to an illimitable extent, there has also to be an accessible ordinariness to law’s extraordinary responsiveness. This responsiveness is something commonplace in processes of legal decision-making and in the quotidian claims, which law’s adherents make on one another. The sense of originating, “the sense/ Of cold and earliness is a daily sense” (Stevens 123).

V. Consequences
The affinity I have tried to sketch between law and the postcolonial, by way of the idea of literature, has been in terms of a mutually supportive similarity between them. That endeavor took its initiating impetus from Boire’s configuring of law and postcolonial literatures. Whilst there was agreement that in the colonial situation law embedded the interest of the colonist in a “hierarchical orthodoxy” (202, 204), I sought to amplify Boire’s intimations that law, like the postcolonial, surpassed and disrupted such containment. Now, in something of a counter-corrective, I will conclude by implicating law’s surpassing as itself as cause of the containment, only then to indicate and illustrate how law’s surpassing ultimately does surpass.

To set this closing enquiry, we could return to the disturbing point about literary genres, to their constituent implication with the specific histories and powers that generated them. In an immediate way, that would seem to be at odds with the illimitable openness of Blanchot’s “literature” until we remember that literature, like law, is for Blanchot (also) an existent “work” in the world (“Literature” 371), that it is some realization of an unrealizable which is inexorably compromised in the process. With law, the situation is even more stark for, canonical fiats
aside, law is unlike literature in its intrinsically requiring an authorita-
tive realization ‘for the time being,’ a determinative bringing of what is beyond into the normatively determinate. If law is to be able to do this, as we saw, it must be quite unrestrained. It cannot be attached to a past, even its own past, or to anything else (Derrida “Before the Law” 190). Yet, and here is where the counter-corrective comes in, law’s unrestrained responsiveness, its lack of any confining ties, results in its not having any enduring content of its own. Law always depends for its very content and for much of its force on some power apart from itself.

However, what also must follow from law’s refusal of any primal attachment is that its taking on of content is always to be mediated through law itself. No matter how seemingly abject law’s dependence in this, law will itself endow its borrowed contents with its own force and meanings, meanings which will often differ markedly from their source apart from law. Also, law will not simply absorb and recreate some singular source but will draw on many such, and even where law determinately elevates one source over another, this is not to exclude the other finally, much less to elevate the included pervasively.

A final consequence, now, of the vacuity that comes from law’s intrinsically incorporative regard for what is ever beyond: this regard does not, or does not just, involve a denial of determinate content but involves, rather, the responsive opening of that content to the possibility of being otherwise, to becoming an effect of this possibility. This reflects, in a different light, Boire’s telling depiction of how law’s ‘universalizing and neutralizing rhetoric,’ law’s generality,’ serves particular imperial interests by elevating them to some absolute condition. Whilst monotonously agreeing with that assessment also, let me extend law’s self-subversion to this scene as well. That will involve a quality found in any generative legal concept, but only two will be selected here, those singled out by Boire and, as we saw, exalted by Mandela: the neutrality and the generality of law. As for neutrality, or impartiality as it is usu-
ally put, its legal force could be conveyed, at least obliquely, by looking at an example of its opposite, the political trial. Such a trial is not con-sidered to be legal because some power apart from law determines the outcome. We tend to see this as a subterfuge, as something being pre-
sented as law that is not law. But what is it about law that this offends? After all law’s dependence on power apart from it has just been emphasized. Yet, as we also saw, at the same time law cannot be ultimately beholden to a power apart from itself. Much of that is conveyed by law’s impartiality. The lack of containing ties to the existent that comes with law’s responsive dimension orients it towards an absence of attachment in its ‘application.’ Yet impartiality is not finally feasible since it becomes inevitably compromised in the influence-ridden scene of application, in the judicial decision for example. This inevitable diminishing, however, does not counter the integrity of the quality of impartiality. This much can be discerned negatively in that it would not be an answer to a failure of impartiality to say that one was impartial in part. Within the determinate, within the realized law there would still subsist the unrealized possibility of its opening to, or falling into, being otherwise—the possibility of its being without the partiality of its determinate existence. This possibility always remains anterior to the law iterably made determinate. The incipience of impartiality remains within that law. So positioned, impartiality is a “manner of being” in law (cf. Derrida “Negotiations” 13).

Likewise with law’s generality. Because of the requirement that laws be general, it used often to be said that a putative law effecting a specific determination does not count as law (Locke 396; Rousseau 82). So, legislating for the specific liability of a specific wrongdoer would not count as law, as opposed to a law prescribing a general standard of liability for all wrongdoers generically categorized. Yet, if the general cannot find itself in that determinate existence of law which would result from a specific determination, it cannot be so general that it adheres to nothing specific and has no operative content. Hence the common and paradoxical requirement that law’s “generality must be specific” (Neumann 28). The generality of law will always be countered in its specific ‘application,’ but within that specificity there is always the incipience of law’s extending in its generality and being otherwise. In such ways, as with its impartiality and generality, law moves beyond the assertion of particular power and receptively responds to possibility. Its strength, like the poet’s, is the lack of strength, and the lack in strength:
Spender told Auden he wondered whether he, Spender, ought to write prose. But Auden put his foot down. “You must write nothing but poetry, we do not want to lose you for poetry.” “But do you really think I’m any good?” gulped Spender. “Of course,” Auden frigidly replied. “But why?” “Because you are so infinitely capable of being humiliated. Art is born of humiliation.” (Fenton 248)

Notes
1 See, for example, Fitzpatrick (‘Transformations’ and ‘Crime as Resistance’). For an opening out by way of ‘law and literature’ to other perspectives beyond law, and colonial law, as usually conceived see Manji (“Mask Dancing,” “Someday” and “Law, Literature, Labour”).
2 My translation.
3 Significant orientations of works of literature, but not of the idea of literature itself, towards the law of the law are provided by Butler (33–55) and Ramshaw.
4 A beautiful elaboration of this conception of literature and a relating of it to law can be found in Foucault (“Blanchot”).
5 The situation is adroitly rendered in Blanchot’s picaresque, The Madness of the Day, in which the feminine law emanates from “me”: she is “born of the one for whom she becomes the law,” and she is abjectly dependent on this all-powerful, determinate one (14–15). Then that dependence is inverted by the law herself. Having become the law, she then comes from beyond me and denies me a place anywhere and the ability to do anything: “she exalted me, only to raise herself up in her turn” (16).
6 The supportive strength that comes with Sara Ramshaw’s invaluable research assistance must also be recorded. And returning to the combination of kindness and editors, I am grateful for the thoughtfulness of Cheryl Suzack.

Works Cited
Peter Fitzpatrick


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Special Issue for 2007 (XXIX:1)

BIRDS

Submissions on the significance of Birds to colonial/postcolonial worlds and world-views are invited for this issue. Scholarly articles might address the literary significance given birds in colonial and postcolonial literatures, the role of the ornithologist, bird societies and cultures of bird-watching, painting and photography of birds, birds and dance, national iconography, use of bird mask and bird plumage in costume, clothing and material cultures—from indigenous and settler perspectives and practices, the place of the bird in museums, private collections, world fairs etc., birds and music . . . and much much more. I would like the issue to be wide-ranging, eclectic and multi-disciplinary. Lots of images please!

Deadline for submissions is 1st October 2006.
Publication date July 2007.

Scholarly articles for the special issue ‘Birds’ (2007) should be between 3,000 & 5,000 words although articles of up to 7,500 words are accepted if the subject justifies the additional length. Poetry, short stories, photographic essays and interviews are also invited. Kunapipi publishes images in b&w & colour; if sending images to accompany text please burn high resolution tifs to CD and send to Dr. Anne Collett, Editor Kunapipi, English Literatures Program, University of Wollongong, Wollongong, NSW, 2522, Australia. Contributions should be sent as an email attachment (Microsoft Word or Rich Text Format) to
<acollett@uow.edu.au>
In many ways law is colonialism's first language. The language of law, or more specifically, the performative aspects of legal discourse, provided the first European explorers with a dramatic medium by which they might familiarize the unfamiliar, a way to locate themselves as governing subjects in what was, for them, a new found land. During those terrorizing yet fascinating first moments of the colonial arrival European law functioned for the European imagination as a socially sanctioned theatrical process. This was a ritual by which their imaginations might move to a position of authority over what they perceived to be, not transgressive (at least not yet), but unintelligible. For those Europeans wandering in what they believed to be either *terra nullius* or (later) a land populated by barbarians, transplanted European law became the one singular method of both political order and psychological stability. Law from back home, as it were, became a method both of writing the new land into ordered existence and, later, of reading its inhabitants out of resistance and into control. Consider, for example, Christopher Columbus’ “legalized” landfall in 1492.

Beginning with the most famous of beginnings (or endings, depending on your point of view), Stephen Greenblatt recalls Columbus’ celebrated account of his first voyage. Possession of the “new” world occurred, in the first instance, as an action executed through a series of preordained gestures and speech-acts. Greenblatt cites Columbus’ unfurling of the royal standard; his reading of a proclamation, and his giving of new names to various islands—all performed in front of the fleet’s official recorder. Greenblatt also mentions a number of ritualistic actions performed by later explorers: the erection of crosses, flying of flags, saying of prayers, cutting of branches, throwing of sands, construction of houses or chapels, and, most important, the notarizing of documents
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Columbus’ papers were then “carefully sealed, preserved, carried back across thousands of leagues of ocean to officials who in turn countersign and process them according to the procedural rules; the notarized documents are a token of the truth of the encounter and hence of the legality of the claim” (57). Perhaps most striking throughout the records is Columbus’s explicit insistence that no person “contradicted” him while reading his proclamations. As Greenblatt points out, what is important is that Columbus followed the legal rules of proclamatory procedure: “Why there was no objection is of no consequence; all that matters is that there was none” (59).

To Greenblatt, it is imperative that we recognize just how strange these processes were—not only in their bizarre political posturing, but also in their psychological necessity. These speech acts, acts fashioned over centuries of mediated contact with other cultures, here constituted for Columbus and the other early Europeans “the reassuring signs of administrative order” (54), what Greenblatt, quoting de Certeau, characterizes as a “scriptural operation” (58). Faced with the absolute radical otherness of the American lands and peoples, Europeans “naturally” reached for the most familiar (and familiarizing) artificial procedures at hand: the written “script” of law. In Greenblatt’s words, Columbus’ display marks “the formality of the occasion and officially designates the sovereign on whose behalf his speech acts are performed; what we are witnessing is a legal ritual observed by men whose culture takes both ceremony and juridical formalities extremely seriously” (55).

Certainly the juridical process here functions as a familiarizing ritual (a series of verbal statements, theatrical performances, and writing activities) which somehow, not unlike magical rites in the face of The Great Plague, tries to render the unintelligible or the threatening both intelligible and tame. The process reinscribes the conventional superiority of writing cultures over oral ones; these acts, moreover, are public and official: as a representative of the king and queen, as a distant lieutenant of their power, Columbus follows a set of pre-ordained gestures in order to legitimate his actions. And, as a legitimizing discourse the performative aspects of law are then used both to install the Spanish crown’s claim to sovereignty and to ensure Columbus’ own status. Most significant in all
Symbolic Violence: Law, Literature, Interpretation

of these actions is a rationalization at the heart of Greenblatt’s discussion: all of Columbus’ quasi-legal actions “are performed entirely for a world elsewhere” (56). Legal ritual here functions, not for the edification or correction of the locals (they have not yet been encountered), but for the valorization of an imposing, alien culture. This statement is true not only in the sense that Europeans would later deem irrelevant (or, if not irrelevant, in need of adaptation) whatever the yet-undiscovered locals thought or felt; but this statement is also true, more crucially, in the sense that law here stretches time and space in order to sustain European epistemology. Conversely, European ways of knowing and thinking are themselves stretched to realize a chronology and a geography perceived as lawless and therefore essentially unreal. Let me elaborate.

In the first instance Columbus’ legal actions seem to perform a simultaneous action of erasure and inscription. Stephen Slemon has astutely observed,

If colonial discourse’s first act of tropological figuration is to constitute the site of the Other as discursively uninscribed, its second act is to fill that space. . . . For within the ‘totalizing global vision’ of the colonizing gaze, no territory can be left uncharted, no region can remain incognita or nameless or unclaimed. . . . Within this process the guarantee of ‘knowledge—the matrix upon which the Other is made subject within discourse—is not observation or empiricism, but rather, authority.’ (qtd. in Brydon and Tiffin 105)

As an authorizing force, the law, even in Columbus’ most attenuated, delegated, and performative form, seems to perform this double action of violent appropriation. Precisely this concept of a legalized authoritarian “violence” underlies Walter Benjamin’s famous 1928 essay on law, his “Critique of Violence,” as well as the superb essays contained herein by Christopher Bracken, Ravit Reichman, and Valerie Karno. Any kind of native symbolic system (including, most notably, that of law)—whether it be based on oral custom or hieroglyphic tablature—is erased by the legal inscriptions of the European arrivistes. Functioning as a kind of theatrical displacement or exorcism of European anxiety, the invoca-
tion of European juridical forms always, already, and also places the yet-to-be-encountered Other within the discursive grids of Eurocentric authority. The othered subject exists, in effect, always and already as an object to be known, a transgression waiting to happen—or, in Isobel Findlay’s elegant argument, a “difference” about to be elided. Likewise, any potential symbolic systems of the other are emptied of meaning, or filled with negative meaning in need of rectification, long before those symbolic systems are encountered, as a pre-condition of their impossibility.

From their earliest beginnings European literatures contain, not a simplistic, but a tremendously ambivalent attitude toward the law. English writers, for example, from Chaucer and Langland onwards have persistently and sardonically deployed legal imagery to explore shifting political, social, or moral themes. These explorations, predictably enough, cover the entire spectrum of interests of their various authors, and one can produce myriad examples for myriad positions. From Chaucer’s own sleazy Sargeant at Law, through Shakespeare’s trial of Shylock, to Dickens’ plaintive Mr. Bumble (“the law is a ass”), to Forster’s famous trial scenes in *A Passage to India*, even onto Agatha Christie’s sepia-tinted novels of suspense, intrigue and horrid murder, British writers have systematically deployed images of law (or, at the very least, of its corrupt practitioners) to expose political immorality and human folly.

Yet interestingly this same law—warts and all—is also consistently foregrounded by English writers as the originary model for all legitimate legal systems throughout the Empire. English law, whatever its shortcomings, marks for the Eurocentric imaginary the single point of origin, the beginning of legal civilization for everywhere that exists beyond British boundaries, particularly throughout the British Empire. Consider, for example, Edmund Spenser’s 1596 image of English and Irish legal systems in his *A View of the State of Ireland*, an image that falls squarely into the orientalized binarisms of Self and Other, Sameness and Difference, so well-known to present-day postcolonialists. For Spenser, British law is a system of regulations “ordained for the good of the common-weale,” a system bluntly contrasted to the “barbaric” “ceremonies and superstitious rites” of the indigenous Irish (4, 11). Renisa
Mawani makes similar powerful and convincing arguments about the North American Aboriginal.

My point here is that the ambivalent and at times contradictory literary representation of law is hardly the sole preserve of an oppressed postcolonial elite, a marginal activity practiced outside of, and against, Britain (or France or Spain or America). On the contrary, the ambivalent literary imaging of law is, in the first instance, a European legacy; but one that colonial and postcolonial writers continually subject to the most intricate forms of hybridization, adaptation, and deconstruction. As Jason Gottlieb superbly illustrates in his essay herein, the imaging of law becomes one way to interrogate postcolonial voices, subjective agency, and political urgency.

The representation of law, moreover, not surprisingly dominates both the historical and literary narratives of colonial settlement. As a social and moral cartography, British common law was traditionally understood within British colonies to articulate the customary body of communally held moral and social values. In addition to governing the social relations of subjects, it was used, obviously, to demarcate borders, establish property, and set out the limits of accepted and unacceptable behaviours. In North America one thinks immediately, perhaps, of The Royal Proclamation of October 7, 1763, in which King George generously gave “Power” to the Governors of Quebec, East Florida, West Florida, and Grenada, and politely invited them “to make, constitute, and ordain Laws, Statutes, and Ordinances for the Public Peace, Welfare, and good Government of our said Colonies . . . as near as may be agreeable to the Laws of England” (6). “As near as may be agreeable,” that is, the same but different. Law, in a flourish of common sense, here embodies not only distant British communal values (happily imported into North America), but also the entire epistemology of Western morality.

Written colonial law was no less poetical, and was also meant to be perceived and presented, ideally, as independent of the discourse that embodies it; ideally again, written law was to be experienced as the fixation of natural regulations necessary to preserve and protect the health of an entire body politic. Colonial law emerges within and for colonial cultures as the necessary forceful inscription of authoritarian desire, or what
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Pierre Bourdieu so poetically calls “the entire [official] activity of ‘world-making’” (838). As Ronny Heaslop, E.M. Forster’s vapid Magistrate, remarks in *A Passage to India*, “We’re out here to do justice and keep the peace . . . I am out here to work, mind, to hold this wretched country by force . . . We’re not pleasant in India, and we don’t intend to be pleasant. We’ve something more important to do” (50).

Ronny’s unpleasant faith in Britain’s imperialist burden, however, unconsciously implies its own fearful corollary. That is to say: the construction of a colonial legal system, and the worldmaking that it constitutes, is hardly an unresisted or uncomplicated political or psychological process. The imposition of colonial law—from the first symbolic actions during the first colonial encounter, through to the actual bloodshed of armed settlement and deracination—is a violent process comprised primarily of resisted force. But a force (and series of resistances) undreamt of in Ronny’s philanthropy. Colonial law, as Ravit Reichman shows in her wonderful argument, is a force remarkable, not only for the ease with which it could mystify the brutal massacre of indigenous peoples and cultures, but also for the uneasy smoothness with which it could (and continues) to mask both its own internal fissures and pressures and its external opponents who threaten continually to undermine its effectivity.

The law, colonial or otherwise, in other words, is hardly a unified, univocal phenomenon. It is, as Eric Cheyfitz and Peter Fitzpatrick subtly interrogate in this issue, a site of desire, both authoritarian and resistant, a site where desire is actualized. Even as a discourse of control, needless to say its most dominant manifestation, law is always riven by internal divisions and external upheaval. The force of law, then, is remarkable principally for its multivalent violences, the virtual panoply of strategies (both complementary and contradictory), with which it struggles to institute and replicate itself as the central discourse of official power. Amongst these many strategies are an inherent theatricality, a hegemonic realignment of indigenous systems of law, and a deployment of both physical and symbolic violence. These multiple aspects of the state apparatus, these chameleon-like strategies of colonial law, are what form the nucleus of this very special issue of *ARIEL*.
As all of the essays in this special issue attest, the “Law and Literature” movement has come a long way since its inception within Anglo-American literary and legal circles so many years ago. The movement itself has been a complex and multivalent interdisciplinary enterprise, one in which law is recognized, *prima facie*, as a specialized language or narrative, a series of performative acts governed, in turn, by a variety of rhetorical or literary tropes and regulations. James Boyd White, Stanley Fish, Sanford Levinson, Costas Douzinas, and Ronnie Warrington, to name but a few, have already shown us that the figure of law not only permeates our cultures of the past and present, but is itself a “literature” complete with its own rhetorical tropes, poetical paradoxes, and points of contested interpretation. As Canada’s Tina Loo so succinctly puts it, the discourse of law is characterized by “a particular language and a way of seeing and explaining the world. The ‘person’ is the law’s ‘object of attention’: it defines what and who a person is or may be” (7).

It is a mistake to see the Anglo-American Law and Literature movement, however, as a unified group of academics working on a single topic. Certainly the principal part of the “movement” began with people like James Boyd White and soon after the likes of Fish, Posner, Weisberg, Graff, and Mailloux, a group made up, primarily, of legal and literary academics in America and critical legal theorists in England who began to explore the crossovers between literary theory and legal writing. Early critics of their efforts scoffed at the idea of literary scholars “practicing” bad law and good lawyers “doing” bad literary theory. Some legal theorists also saw the movement as trivializing the processes, workings, and application of “real” law.

But the movement itself, as the essays in this collection illustrate, developed into a number of diverse and intriguing areas, which include predictable topics such as censorship, and interpretations of American constitutional law; identity politics and law, the discourse of land claims, narrative and story. The movement, in other words, developed into a series of movements, ranging from the simplistic (identifying images of law in literature or film; exploring the narrative techniques of summaries and/or addresses to the jury) to the extraordinarily complex (for example, Greenblatt on Columbus’ legalistic rhetoric as a key
justification of the colonizing project). Recently, attention has begun to be paid to the intersections of law and literature within a postcolonial context and there have been notable achievements by all of our authors, as well as such books as Eve Darian-Smith and Peter Fitzpatrick’s *Laws of the Postcolonial* and various articles in journals such as *Mosaic* and *Studies in Law and Literature* (most notably Joseph Pugliese’s fine study, “Rationalized Violence and Legal Colonialism: Nietzsche contra Nietzsche”).

A subtle and complex thread throughout the study of law and culture, moreover, has been the political psychoanalytical critics who approach the legal site as a place where narrative takes on a highly specialized meaning. As Walter Benjamin argued in the early twenties, the law inscribes and re-inscribes its own violent interests behind a facade of transcendent univocal judgment so that the figure of law thus constitutes, in one sense, the perfect metonym of that colonial symbolic network which both installs subjects within an economy of hierarchical values and inexorably forms, in the minds of those subjected, an internalized epistemic reliance on the legitimacy of its own force. Uncannily prefiguring Iraqi responses to American belligerence in contemporary Iraq, Frantz Fanon wrote in the early 1950s:

In the colonies it is the policeman and the soldier who are the official, instituted go-betweens, the *spokesmen* of the settler and his rule of oppression . . . by their immediate presence and their frequent and direct action [they] maintain contact with the native and *advise* him by means of rifle-butts and napalm not to budge. It is obvious here that the agents of government *speak the language of pure force*. The intermediary does not lighten the oppression, nor seek to hide the domination; he shows them up and puts them into practice with the clear conscience of an upholder of the peace; yet he is the bringer of violence into the home and *into the mind of the native*. (29; my emphases)

Yet in its very ambivalence, what I will argue later is its implicit psychic “splittenedness,” the law also stands most importantly as a metonym of imperialism’s always and already threatening condition of implo-
sion. Ironically, the ambivalent, internally conflictual, and hybridized language of imperialist law also provides many postcolonialists with the state’s weakest link, its most fragile social ritual, one ripe for the revisioning. And revisioning, in an inescapable logic, never exists “outside” its own oppression; as an intrinsic aspect of the differential/deferential ambivalence that is the colonialist equation, “revisioning” is itself a mirrored series of constant re-arrangements, re-alignments, and re-negotiations.

The notion that these various kinds of “narrative” and “interpretation” are key concepts in law (as well as in literature and film) is a truism in the early Law-as-Literature movement. Early theorists and critics, represented especially in Sanford Levinson’s and Steven Mailloux’s *Interpreting Law and Literature: A Hermeneutic Reader*, concentrate on law as storytelling, a state-sponsored written narrative that enshrines the commonly held values of communities and is subject to interpretations by legal authorities. In a lucid and provocative essay, for example, Sanford Levinson invokes the image of the magistrate as a literary critic deployed by the State to interpret the “true meaning” of legal narratives. In an odd echo of both Pierre Bourdieu and Percy Bysshe Shelley, he depicts law and the legal enterprise respectively as a textual object and an interpretive process, as well as a kind of Ozymandian hieroglyphic: “Constitutions, of the written variety especially, are usefully viewed as a means of freezing time by controlling the future through the ‘hardness’ of language encoded in a monumental document, which is then left for later interpreters to decipher” (Levinson 156).

Levinson’s remark is important for a number of reasons: it highlights what he calls “the centrality of textuality to the lawyer’s enterprise” (156); it implicitly notes “the centrality to law of textual analysis” (157); it registers the early Law and Literature movement’s fascination with law as a social narrative, a story that can be best decoded with the tools provided by literary theory (most notably, deconstruction); and it sets in place a way of looking at law that continues to reverberate in analogous critical fields such as film (a notable example is David A. Black’s description of film and law as types of “narrative regimes” 34).

But Levinson’s enthusiastic handling of the literary legal text received both outright condemnation (for example, Owen Fiss’s infamous rebut-
tal that Levinson was a nihilist, 166), as well as an extremely interesting qualification. Two years following the initial publication of Levinson’s “Law as Literature,” Robin West, one of the movement’s important participants, made the following important critique in the fine essay, “Adjudication is Not Interpretation: Some Reservations about the Law-as-Literature Movement:”

The analogue of law to literature, . . . although fruitful, has carried legal theorists too far. Despite a superficial resemblance to literary interpretation, adjudication is not primarily an interpretive act of either a subjective or objective nature; adjudication . . . is an imperative act. Adjudication is in form interpretive, but in substance it is an exercise of power in a way, which truly interpretive acts, such as literary interpretation, are not. Adjudication has far more in common with legislation, executive orders, administrative decrees, and the whimsical commands of princes, kings and tyrants than it has with other things we do with words, such as create or interpret novels. Like the commands of kings and the dictates of a majoritarian legislature, adjudication is imperative. It is a command backed by state power. No matter how many similarities adjudication has with literary linguistic activities, this central attribute distinguishes it. If we lose sight of the difference between literary interpretation and adjudication, and if we do not see that the difference between them is the amount of power wielded by the judiciary as compared to the power wielded by the interpreter, then we have either misconceived the nature of interpretation, or the nature of law, or both. (Qtd in Black 36)

West’s caveat is tremendously important because it opens up the field to so many crucial further qualifications. On one hand the statement constitutes a healthy salvo against the pretensions of literary academics who over-value the modest political and social effects of their so-called “interventions.” Likewise, the analogy of law to a royal imperative nicely delineates the Foucauldian genealogy of modern law starting in the classical view that law is a scriptural embodiment of the king’s body and
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hence of the king’s will (Foucault x). But there are also many begged questions that qualify, if not undermine, West’s insistence on the essential differences between adjudication and interpretation, and these problems emanate, I think, from an understanding of four key concepts: power, subjectivity and its performative aspects, truth affects and the nature of literary interpretation.

For West, adjudication is an “imperative act” (an exercise of power backed by the state), and therefore something essentially different from, though similar in form to, “truly interpretive acts” of either a subjective or objective nature; different from the amount and nature of any “power wielded by the interpreter;” and, most importantly, different from non-judicial “linguistic activities” which are implicitly powerless in comparison to the formidable forces of state power. Now, West’s argument seems to depend on the premise that “power” is a tool possessed by some and not by others. The state possesses power; interpreters do not. Or, at the very least, literary interpreters possess less power than the judiciary. Certainly a “real” judge who sentences a “real” defendant to prison possesses more social power than a literary critic who protests against the sentence. This is clearly the case, for example, in the unjust sentencing of Donald Marshall or David Milgaard in Canada despite powerful counter-arguments testifying to their innocence, or most recently, the execution of Stanley “Tookie” Williams notwithstanding large protests against (alternative interpretations of) the death penalty in California.

West’s one crucial error, I think, lies precisely in this binaristic view of power and, consequently, the assumptions that (1) law is autonomous from other social discourses; (2) there is the possibility of “objective” interpretations, not to mention “truly” (as opposed to “falsely”) interpretive acts; and (3) power is something tangible that can be possessed rather than something intangible that can be negotiated. This is clearly not the case, for example, in either the 1928 judicial decision that categorized D.H. Lawrence’s *Lady Chatterley’s Lover* as “pornographic” or the more recent “interpretation” and “adjudication” by the Ayatollah Khomeini of Salman Rushdie’s *The Satanic Verses* or the conflicting interpretations of cartoons of the Prophet Mohammed by a variety of in-
terpreters both within and outside the Islamic world. In the former case literary “interpreters” made notable progress in negotiating the balance of power, and with the hindsight of the 21st century we can see who ultimately possessed in this case and over a period of time more or less power concerning censorship and publication. In the cases of Khomeini’s infamous fatwah on Rushdie and the recent spate of violent protests over journalistic cartoons, we have cases where “literary” interpretation is not only an act of adjudication but also an act of theological speculation and judgment with real life and death consequences.

My point is that West’s argument operates within a conservative modernist field where there is such a thing as “objective” truth; where a unified authentic essential subjectivity is a given; and where power is narrowly defined as the ability to act in a particular way, or to make socially sanctioned (and sanctioning) decisions, which last into perpetuity. But power, as Foucault has shown us, is never merely an instrument in the pay of one historically specific group or individual; power, rather, is the force emanating from below, the energy that is everywhere and always being negotiated by a myriad number of participants.

As this entire special issue of ARIEL demonstrates again and again, it is a state illusion, an ideological construction that the law is anything other than an historically specific construction built by a culturally specific group for application in a particular time and space. W. Lance Bennett and Martha S. Feldman elsewhere remark, “[The] achievement of justice is not so much dependent on the procedure, per se, as on the societal acceptance of the procedure and the coherence of societal beliefs with the procedure” (cited in Black 47). Or, as my flimsy examples of Lawrence, Rushdie, and the cartoons of the Prophet Mohammed illustrate, power is something that is never static but always and already in a state of change. Add to this dynamic sense of power the fact that the public practice of law (as in the public trial) is primarily performative, although hardly the “showbiz” represented in the fluffy film Chicago, law is nonetheless a series of speech acts and choreographed movements performed by a variety of “actors,” very few of whom have any accurate perception of their social and political dispensability, all of whom have significant self-serving interests.
West’s own image of royal prerogative, in other words, contradicts the main thrust of his argument. Foucault has clearly shown that, if the law embodies the monarch’s will, indeed, if the law is the scriptural written embodiment of the king’s (and in time, the state’s) body, then any law is by definition the embodiment of desire. As an embodiment of desire, furthermore, the law cannot help but become the embodiment of various biases—class, gender, national, racial and so on. Law (or power or adjudication) is hardly a transparent “imperative act” similar to “linguistic activities;” it is, rather, an essentially linguistic activity practiced by a warring group of individuals with varying amounts of power, an activity that, in turn, narrates a myriad of desires and biases. As such, law is never, as Levinson argues, a freezing of time through the “hardness of written words” (156) nor, as West posits, a transcendent act of semi-divine decision-making. Law is, rather, a language that embodies state power, a language constantly being spoken, written, interpreted and shared by all who are contained in and by it. Adjudication, in a word, is not “different” from interpretation but is in fact merely one of the latter’s many forms, one of many state exercises that we call discourse.

The crucial point here is that the practice of law by lawyers and judges, of course, has a different effect on individuals in the community than the writing or reading of a novel by literary interpreters; magistrates obviously have more impact on people’s lived lives than poets or literary critics or theorists. But as a discourse that narrates a series of categories in social and political life, as a performative process, law is never an autonomous, self-contained, seamless, hermetically sealed body of writing resistant to continual refinements through continual interventionist interpretation. Law as power as representation is always, rather, a site of conflictual adjudication, a site whose “imperative acts” are always open to question, resistance and interpretive refusal. And it is this redoing or re-writing that concerns the representations of law in this issue of ARIEL.

In many senses Christopher Columbus’s quasi-legal theatrics constitute the seeds of what Pierre Bourdieu describes as the “symbolic violence” of law. For Bourdieu, the term describes the structured ways different social groups differentiate between themselves and others, be-
tween desirable and undesirable, between permitted and transgressive, and how these divisions (and, more generally, how any symbolic representations (languages, conceptualizations, portrayals) are “imposed on recipients who have little choice about whether to accept or reject them” (Terdiman 812). In a nutshell, symbolic violence is, according to Richard Jenkins, “the imposition of systems of symbolism and meaning (culture) upon groups or classes in such a way that they are experienced as legitimate” (104).

As a symbolic act, the earliest proclamations, the earliest rituals of possession set into place a symbolic order which will, in time, be installed inexorably as the general social order. Indigenous symbolic systems (especially law) are not so much erased as so radically realigned and repositioned as to be virtually invisible. Columbus’ early actions constitute a grim mummery indeed, a mime of order which would violently replace existing systems as the effective mode of governance, the dominant mode of socially symbolic meaning making. In this sense the imposition of European law creates a “truth” imbricated by and founded upon European paradigms of discursive knowledge. But a “truth” radically undermined by its own ambivalence. It is this ambivalence, these inner contradictions of law, literature and representation, that form the crux of the challenging essays in this issue of *ARIEL*—essays that the editors have been honoured to read, interpret and debate.

**Works Cited**


Symbolic Violence: Law, Literature, Interpretation


Call for Expression of Interest

Approaches to Teaching Nguigi wa Thiong’o
(Modern Language Association series)

For the series Approaches to Teaching World Literature, the Modern Language Association Publications Committee has approved development of “Approaches to Teaching the Works of Ngugi wa Thiong’o”, to be edited by Oliver Lovesey (University of British Columbia).

Examples of MLA’s Approaches to Teaching World Literature can be seen in most libraries or can be ordered through the MLA website: www.mla.org/

If you wish to contribute to the volume, please send your name and mailing address to Jeremy George at the MLA office by 1 June 2006 (fax: 646 458-0030; <jgeorge@mla.org>).


Since the end of the Cold War, Islam has resurfaced as one of the West’s primary Others. Edward Said has shown that Islam has long provided a mirror or foil for the West’s self-definition; what these two studies by Nabil Matar powerfully demonstrate is that the role it has played in this process of self-definition has not remained constant. The Islam of *Orientalism* dates largely, argues Matar, from the eighteenth century, when the Ottoman Empire’s long, slow decline was already underway. During the sixteenth and seventeenth centuries, by contrast, Islam was the object of fear, admiration and fascination, “a powerful civilization which [Britons] could neither possess nor ignore” (*Islam* 20). Although England was at this time laying the groundwork for their colonial empire, “In the interactions between Britons and Muslims there was no colonial discourse, practice or goal. Muslims were seen to be different and strange, infidels and ‘barbarians,’ admirable or fearsome, but they did not constitute colonial targets” (*Turks* 12). In this particular cultural encounter, the English were by no means confident of their superiority.

In these two works, Matar convincingly makes the argument that the place of Islam in the English world picture has not been adequately accounted for in scholarship on the period. This, in spite of the fact that Muslims “represented the most widely visible non-Christian people on English soil in this period—more so than the Jews and the American Indians, the chief Others in British Renaissance history” (*Turks* 3). When scholarship does take notice of Muslims, argues Matar, it often unhelpfully conflates North Africans with sub-Saharan, which “is misleading because England’s relations with sub-Saharan Africans were relations of power, domination and slavery, while relations with the Muslims of North Africa and the Levant were of anxious equality and grudging emulation” (*Turks* 7–8). In spite of the ongoing skirmishes between English and Muslim pirates and privateers, Elizabeth’s government, shows Matar, had very cordial relations with both the Ottoman Empire and various North African states, particularly the kingdom of Algiers. Both sides, at various points, either expected or asked for military assistance from the other.

Matar’s work thus challenges recent, more monolithic accounts of difference within the early modern period, and it also offers ample demonstration that the most familiar view of Muslims, that offered by the Renaissance stage,
is not the only, or even the dominant, view of Muslims in England at the time. The two studies cover overlapping terrain. The earlier study, *Islam in Britain, 1558–1685*, is concerned largely with the representation of Islam or the Muslim world in English writing, whether religious, political or literary. *Turks, Moors and Englishmen in the Age of Discovery* casts a wider net, looking at actual encounters between England and the Muslim world, whether this took the form of Muslim ambassadors visiting London or English pirates being held in slave prisons in Algiers. Ultimately, the argument of the latter book is that the representation of Islam changes significantly in the early modern period, at least partly as a result of England’s encounter with the natives of North America.

In *Islam in Britain*, Matar surveys a range of texts that offer representations of Muslim culture, tradition or religion, including sermons, plays, English translations of the Qur’an, alchemical treatises, religious polemic and eschatological writings. Not surprisingly, conversion, whether from Christianity to Islam or the reverse, surfaces frequently. In actual fact, shows Matar, the conversions were overwhelmingly in one direction: the Muslim world offered soldiers and sailors, many of whom converted after being captured, advantages that they could never have in England, including wealth, status, and influence: “Although travelers, captives and chroniclers always made a point of denigrating the convert for renouncing his religion and country, they confirmed that renegades lived in prosperity and wealth: indeed, the over-all portrait of the renegade in their writings is of one who had met with success” (50). On stage, however, they fared rather differently, where the figure of the renegade is used to show “the futility and despair of apostasy” (51), sometimes by changing quite dramatically the histories of actual renegades. Matar argues that playwrights did this in order to “inject fear about the consequences of apostasy” (58), but this raises the question as to why the commercial theatre, which was not an agent of the state, would worry about such a thing in the first place. It is at least equally likely that the stage is playing on some deeper fear or anxiety about conversion, or some desire on the part of the culture at large to believe that the converts were in fact wrong. Given that the renegades were most often the common man, with little hope for advancement in England, it may well be that these anxieties are ultimately about class.

In scientific and philosophical writings, the picture was markedly different. There was a great respect for Arabic learning at Oxford and Cambridge, which both established chairs of Arabic Studies in the 1630s, and “Arabic became an adjunct to a complete university education and, as P. M. Holt has stated, the hallmark of the enlightened Englishman—particularly the man
of science” (87). The Arabic influence is seen most clearly in scientific fields that would rapidly become intellectually disreputable, alchemy and astronomy, but other Arabic texts in translation were also widely read and referred to, including the twelfth-century Sufi work by Ibn Turayl, *Hayy ibn Yaqzan*, and the Qur’an, which first appeared in English in Alexander Ross’s 1649 translation.

A third major source of references to Muslim culture included religious polemic (generally of the “even the Turks are better than the Catholics/Puritans” variety) and works concerned with conversion to Christianity. Actual missionary activity was low to non-existent (121, 132–7), but the conversion of the Turk nonetheless remained a cherished dream. In the large body of writings both popular and academic that concerned the coming apocalypse, conversion became a millennial imperative; it is in these eschatological writings, argues Matar, that we see “the first anti-Muslim and anti-Arab racism in English thought” (155). Here as elsewhere, Matar’s scholarship usefully complicates the accepted picture of the origins of racialized thinking in England. According to the most popular eschatological fantasy, the Jews would resettle Palestine after driving out the Muslims, and then would convert to Protestantism. This represents a significant historical change: “In the medieval period, the Muslim was the ‘ally’ of the Jew as the object of Christian invective and polemic: by the beginning of the seventeenth century, English writers differentiated the two groups and pitted one against the other” (181). This more sympathetic (or at least utilitarian) approach to the Jews is partly the result of different status of Jews and Muslims within the period: Jews were a scattered and oppressed nation, whereas the power of the Ottoman empire made them largely inassimilable to the European imagination.

The historical shifts in England’s thinking about Islam, especially in relation to its Others, is also the subject of *Turks, Moors and Englishmen in the Age of Discovery*. Once again, Matar offers documentation of an amazing range of encounters between England and Islam, whether in London, Istanbul, off the coast of Tangiers or Dover. Here Matar advances the thesis, which he hinted at in the first book, that the changed thinking about the Muslim world is at least partly the result of England’s encounter with the natives of North America: “for the first time, Muslims of the Ottoman Empire and North Africa began to be categorized as ‘Barbarians’ by English (and other European) writers. The use of the term at this stage in the history of Christian-Muslim interaction is striking because in the medieval period, the term had not been used” (14–15). The label, of course, ultimately stems from North American encounters.
The parallel appellation is not the result of any symmetry between the encounters. The book argues instead that calling the Muslims “barbarian” was a psychological compensation, born out of an anxiety produced by encountering a powerful culture that viewed the English as inferior: “English writers and strategists recognized, from the first establishment of the Turkey Company until the Great Migration and well into the rest of the seventeenth century, that their colonial ideology was winning against the Indians but losing against the Muslims; they were enslaving Indians while Muslims were enslaving them” (103). In spite of these striking differences, the English increasingly viewed the two cultures through the same lens, until “By the end of the seventeenth century the Muslim ‘savage’ and the Indian ‘savage’ became completely superimposable in English thought and ideology” (170).

The accusations of barbarism were bolstered in both cases by discoveries of sodomy, but here the argument goes a little astray. Matar shows how ubiquitous the references to sodomy in Muslim lands were in travel literature, but doesn’t really address the accuracy of these observations or what might be revealed by this English fascination with perversion abroad. Behind the argument is the implicit suggestion that things are pretty much the same all over, and the English are simply being hypocritical. The admirable historical and cultural nuance that Matar elsewhere displays is here lost and the argument is further muddied by the assertion that “sodomy” is simply the period’s term for homosexuality (109). This is, interestingly enough, contradicted by Appendix C, which contains an excerpt from Ahmad bin Qasim’s dialogue between a Frenchman and a Muslim; in the dialogue, it is clear that “sodomy” refers to heterosexual anal intercourse (193–4).

In both of these studies, Matar points in a highly illuminating way to the wide gulf that frequently existed between how Muslims figured in the English imagination to what the English actually knew about Muslims through their many encounters. Not least among the valuable lessons we are given is that race and cultural difference in the period are complex and often contradictory matters. And not only are they contradictory, they are not stable across time. The highly schizophrenic relation of England to the Muslim world that is mapped out in these two books, alternately admiring and vilifying, would change as the power of England and its technology grew, and the Ottoman empire began to decline. It was only then that Europe felt to free to mythologize the Orient as it pleased. Opening up what was largely forgotten territory, these works both exemplify and call for a more sensitive approach to the differences and the parallels between the various nations and peoples that England encountered on its way to empire.

Jim Ellis

“I came to the study of Canadian poetry late,” volunteers Susan Glickman in her preface to The Picturesque and the Sublime. “A poet myself,” she explains, “I wanted to know more about my antecedents, and perhaps because I never studied ‘Canlit’ formally, my reading remained a private pleasure—without obligation, and without preconceptions. It was random and idiosyncratic…” (vii). Suggesting later that she is “not interested in constructing a master narrative,” Glickman describes her book as a collection of essays in literary history, not the unfolding of a thesis. Continuity is implied by the chronological order of the pieces, coherence by the repetition of themes and variations, but the structure of the book, and of the essays themselves, is ruminative rather than linear. Like the poets who roam through this work, I too wish to wander, ponder, and digress, according to the dictates of the landscape. (x)

A promising but misleading catalogue from an author who asserts, at the same time, that her “mandate is twofold: to illuminate the contributions of European theories of the picturesque and the sublime to Canadian depictions of nature, and to explore the critical reception to poems informed by these aesthetics” (x). More narrowly, it is “the argument of this book that eighteenth-century aesthetic conventions still inform English Canadian poetry, particularly the poetry of landscape” (ix), which, she contends, articulates an understanding of the sublime that is “unique to this country; indeed, because of its profound contribution to the ideology of our first writers, it is one of the formative ideas of Canadian culture” (59).

In “An Introductory Ramble through the Picturesque and the Sublime,” Glickman provides a lively genealogy of topographical poetry, from classical pastorals and georgics through the local knowledge informing John Denham’s Cooper’s Hill (1642). “What is new” in Denham’s poem, Glickman argues persuasively, “is the poet’s insistence that he is describing a real and specific scene that speaks to him of his own time and place” (6) rather than constructing a vision that adheres strictly to models from elsewhere and before. From this vantage point, Glickman’s argument unfolds elegantly, balancing the ideas of Gilpin, Burke, and Wordsworth, all of whom contributed to the emergence of a new understanding of the sublime that accentuated the forces
of awe and terror. The sublime evolved into both “a new kind of religion” (ix) and a new poetic, one that “interested itself in how nature made one feel, as opposed to how it looked, what moral lessons it taught, or how it could be exploited to make a more comfortable life” (viii).

Philosophic backdrop in place, Glickman moves to a series of essays that overlay the picturesque and the sublime onto a hitchhiker’s guide to Canada’s poetic history, beginning with Thomas Cary’s *Abram’s Plains* (1789) and wandering through Susanna Moodie’s “Enthusiasm” (1831) and Charles G.D. Roberts’s “Ave! An Ode for the Centenary of the Birth of Percy Bysshe Shelley” (1892). These chapters are solid but unspectacular, more a gathering together of familiar ideas than a pushing into new territory. The final two pieces shift the focus into the twentieth century by way of an essay that is, by turns, insightful (on the ambivalences fissuring Roberts’s later sonnets) and puzzling (her claim that W.W.E. Ross is regarded “with reverence” by “the critical establishment in Canada” [117]). Her closing essay follows a similarly uneven pattern: a fresh reading of Paulette Jiles’s “Song to the Rising Sun” complements thoughtful glances toward Canada’s burgeoning eco-poetic; a revisiting of the *Preview-First Statement* bickering retreads tired ground; and an unconvincing positioning of Margaret Atwood’s “Progressive Insanities of a Pioneer” suggests reading it as an inferior ‘reworking’ of Earle Birney’s “Bushed.”

Despite Glickman’s prefatory posturing, this is a thesis-driven study that remains, admittedly, “limited to English-language poetry” and is “by no means encyclopaedic” (x). As Glickman acknowledges, “other, perhaps better, poems might have been considered than those I have chosen. I hope that those who recognize my lapses will remedy them. Nothing could please me more than knowing I had provoked more serious discussion of these issues” (x). Fair enough, but such caveats ring hollow given that Glickman discounts the argument of D.G. Jones on the grounds that “in order to support [his] thesis he . . . takes to selective quotation and ignores contradictory evidence” (51). Or when she points out that the “laudable ambition” informing Gaile McGregor’s *The Wacousta Syndrome* (1985) is undercut by “generalization and some rather selective quotation” (55). Curious charges coming in a book that is itself tendentiously selective, touching only cursorily, if at all, on a number of poems that might challenge Glickman’s thesis in provocative and valuable ways. One wonders why D.C. Scott’s “The Height of Land,” Archibald Lampman’s “Heat,” or E.J. Pratt’s “The Titanic” were not given substantive attention. Moreover, to write of early Canadian reactions to the sublimity of Niagara Falls without mention of Hennepin’s famous 1697 sketch is an oversight (or was it a choice?) that points to serious limits to
Glickman’s proposed poetics, as does her unwillingness to engage the work of early explorers, cartographers, and natural scientists. Scholars interested in a more inclusive “poetics” of early Canadian landscape will be better served by W.H. New’s *Land Sliding: Imagining Space, Presence, and Power in Canadian Writing* (1997) or Victoria Dickenson’s *Drawn From Life: Science and Art in the Portrayal of the New World* (1998).

Problematic, too, are Glickman’s attempts to reinscribe Arnoldian disinterestedness as a viable stance from which to launch her polemic. A faithfulness in the acuity of the mythical “unbiased reader” (56) pervades this book; indeed, she reminds readers that the “propensity of critics speaking from prejudice to make errors is well-known” (121). On the one hand, such confidence allows her to chastise McGregor for allowing “negativity to lead . . . into outright nonsense” and to conclusions that are “absurd” (56) as well as to accuse Atwood of “[d]isingenuously underplaying her own academic training” (54) in *Survival* (1972). On the other hand, she can argue, apparently without prejudice, that the “critic who has most consistently given early Canadian poetry unbiased and attentive readings is D.M.R. Bentley” (22). Bentley’s biases aside, it is a dated theoretical stance that only diminishes her argument.

Ironically, it is when Glickman drops these Arnoldian presumptions that her own book begins to deliver its critical promise. Her overview of the tenacity of Frye’s garrison thesis as “simply a given among many critics even now” (55), though far from original, is appropriately thorough, as is her argument that, until recently, it has been too readily accepted “that our poets demonstrate ‘terror’ in their encounters with the wilderness, but little awareness of the prestige of terror as an aesthetic category during the eighteenth and nineteenth centuries.” Rather than exploring terror as a “transitional” stage, critics, iterating Frye’s negative construction, have aligned it “with colonial timidity,” “post-colonial neurosis,” or an expression “of a uniquely local pathology” (45), the latter most influentially in Atwood’s *The Journals of Susanna Moodie* (1970).

Honoured with both the Gabrielle Roy Prize (Association of Canadian and Quebec Literatures) and the Raymond-Klibansky Prize (Humanities and Social Sciences Federation of Canada), *The Picturesque and the Sublime* clearly made an impression on the “critical establishment” in Canada. Candidly, I don’t understand what all the fuss was about.

Klay Dyer

This book opens by stating the premise on which it is based—that an adequate interpretation of early modern drama must necessarily take into account the spatial context in which it was originally performed. Developing this argument, West explores the interaction of the spatial aspects of the theatre—both its textual, thematic concerns with space and the spatial dimensions of drama as an art form—in their interaction with the social context of the Jacobean period (1603–1625). He points out that "many of the controversial social and political questions in debate were issues of space: questions of enclosure, of rural unemployment and vagrancy, of social mobility, of relationships between court, country and city" (3) and that inherent in these tensions are the antinomic desires for mobility and flexibility versus fixed and rigid social structures. Since Jacobean drama often refers to various sides of these issues, as well as to those whose interests were at stake in them, the drama itself participated in these debates. In addition to these thematic concerns, West maintains, early modern drama frequently references its own spatial nature. Since the tensions of early modern society, a society that believed in social and cosmic hierarchies, were often conceived of spatially, and since the theatre both articulated and commented on the tensions of society, the theatre occupied a position simultaneously within and without social change, able to both take part in conflicts and criticize them.

West claims that his book fills a void in Renaissance theatre studies, which has not followed the broader theoretical interest in investigating the spatial aspects of social life that has emerged since the Second World War. Initiated by the French philosophers Bachelard, Lefebvre, and Foucault, this interest in conceiving of social phenomenon spatially has affected almost every aspect of the human sciences. Until then, space had been thought of as a container that could be filled, and was “stable, homogenous, empty and neutral” (West 4). In contrast, when the theory of relativity, as well as other advances in the social sciences in twentieth century, brought the fixed, consistent nature of space into question, space came to be seen as being constituted by, rather than pre-existing, social structures. West refers to Lefebvre, who theorizes that “each historical period, characterized by particular social forms, particular modes of production, and particular political conflicts, expresses these social structures in corresponding spatial configurations of private dwellings, public spaces, buildings, or the spatial movements of its subjects; changes
in social modes of production engender new spatial arrangements” (4). For West, the result of this theoretical impetus is an eruption of theorizing on the spatial aspects of social life, to which the objection has been made that if everything can be conceived of as a spatial phenomenon, then the concept of space has come to mean nothing. West, however, sees the problem as being not the meaninglessness of the term, but the vagueness with which it is applied. Since the objects to which spatial theorization can be applied are limitless, the term needs to be defined in a way specific to each case. Consequently, this book does not limit itself to a single definition of space but continuously redefines the notion in order to investigate multiple aspects of the spatial dimensions of social reality. Yet despite this shifting definition, the spatial signifying practice of the theatre underlies all notions of space throughout the book.

According to scholarship since the Prague structuralist theatre analysts, the spatial signifying practice of the theatre involves a process of spatial semiosis; almost every part of a performance—“stage design, scenery, lighting, actor positioning with respect to the audience and with respect to other actors, gesture and mime, vice projection, costuming” and even the text—has a spatial aspect that contributes to the production of meaning (6). Further, there is a “primary sign-system” of “iconic” stage signs that mimic entities existing outside of the theatre, but, since, unlike in film, there is no camera to mediate between the viewer and this primary sign-system, a secondary system is needed to make connections between elements of the primary system. This secondary system functions via indexical signs, which, “following Pierce’s famous definition, creates relationships of causality” (6), or spatially foregrounds certain signs in order to suggest a relationships between signs. While some criticism has taken up the role of space in Renaissance Literature, this approach has not been explored in relation to Renaissance theatre. West attempts to fill this void by taking the material and spatial existence of the sign as the central theoretical principle of his book. He claims that his book takes up de Saussure’s founding assumption regarding the materiality of the sign[,] . . . that signification, far from transparently communicating reality, has its own substance and consistence, its own rules of operation; signification is a material practice which is no less productive than the worldly processes which it ‘mediates’ and thus makes available for reception by perceiving subjects. (7–8)

In taking this theoretical basis, his book addresses a significant as yet unaddressed question of theatre semiotics: it articulates “the material processes of semiosis on the stage upon the thematic and narrative content of the drama
on the one hand, and the context of production on the other” (8). Rather than unsystematically imposing a contemporary conception of space onto the drama of a period that pre-existed these notions, West believes that the contemporary rethinking of space only now makes it possible to understand earlier aspects of these plays.

The first chapter is intended to prevent grafting contemporary notions of space onto Renaissance texts by examining the ways that thought, speech, communication, and social identity were conceived of topographically or spatially in early modern England. The remainder of the book examines various aspects of the spatial nature of social life in early modern England, or rather in its drama. Chapter two examines court masques as the staging of a stable universe or spatial realm over which the monarch ruled, or as was increasingly the case in the masques later in James's reign, failed to control. Chapter three describes the inherent spatial dynamics of incipient capitalism: fluidity (the exchange of one thing for another) and social mobility, as well as the theatre's own position as a market commodity. Social mobility as it affected social identity is examined further in chapter four, and chapter five explores the threat posed to the social order by vagrants, who had left their socially determined place in the countryside due to shifting economic circumstances, as well as the association commonly made between vagrants and players (also mobile, masterless men). Chapter six focuses on travel drama as it represents the potentially subversive process of defamiliarization of one's original place that occurs retrospectively from the perspective of a new place. The final chapter looks at the effects of economic and geographic mobility on individual identity, which came to be thought of less as determined by one's place in a hierarchy and more as a space contained by boundaries and possessed by the individual, who could determine its nature. This section proves valuable in that it poses a counter claim to Greenblatt's conception of identity as self-fashioned: whereas for Greenblatt self-fashioning was always though not exclusively grounded in language, for West it is always though not exclusively grounded in the spatial transformations of social reality (217).

West's analysis takes examples from a wide range of materials including not only prominent plays, but also those that are less studied. The result is a strong analysis which draws attention to subtly varied notions of space that underlie the plays and connect them to the context in which they were performed—connections that, from out modern perspective, are far from obvious. Perhaps the best example is his description of how the association of players with vagrancy influenced the semiotic mobility of players on stage, who acted out a social mobility corresponding to their actual spatial vagrancy (168). Yet despite this book's strengths, West fails to avoid what he himself
identifies as a weakness of theatre studies—their over reliance on textual and thematic rather than spatial and material aspects—though this weakness can be expected as a result of the scarcity of surviving information on the spatial characteristics of performances. Nevertheless, in working out the ways in which the theatre, as a predominantly spatial art form, simultaneously comments on and participates in some of the most pressing debates of the period, this book will be especially useful to those interested in the position of the theatre in early modern social reality.

Karen Walker


*Tricks with a Glass* consists of an Introduction, fourteen essays, and two interviews that attempt to investigate what Rocío Davis calls “the diverse ways in which Canadian writers have negotiated identity and space in terms of the realities of ethnicity” (xiii). The essays analyze literary texts by writers such as Michael Ondaatje, Neil Bissoondath, Rohinton Mistry, Nino Ricci, Antonine Maillet, Janice Kulyck Keefer (who also contributes an memoir/essay to the volume), Rudy Wiebe, SKY Lee, Joy Kogawa, Lee Maracle, and Rachna Mara; the two interviews, which function as a coda to the volume, provide a sympathetic and resonant dialogue between Rocío Davis and Wayson Choy and a somewhat flat exchange between Rosalía Baena and Linda Hutcheon. The collection ranges widely and eclectically over contemporary Canadian writing almost exclusively in English: white ethnic writers, writers of colour, First Nations writers, and francophone Acadian writer Maillet (the only writer in French discussed in the volume)—all fall within the bounds of this volume’s investigation of “ethnicity in Canada.” Despite being published in Europe, the collection follows the prevailing biases of English literary studies in Canada by proceeding as if Québec does not exist.

In such an eclectic collection, one might reasonably expect the Introduction to make sense of the topics addressed and the possible theoretical or conceptual issues under investigation. Davis asserts in the Introduction that “The conceptualization of ethnicity is currently undergoing a radical change based upon the increasingly complex politics of representation,” but she sidesteps a further theorization of this “radical change” through an appeal to plurality: what Davis calls “The multifarious ways in which ethnicity is registered
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and articulated in literature,” which, she argues, “make it virtually impossible to offer a single working definition of the term” (xiv). So while Davis acknowledges that “theorizing on ethnicity is a valuable critical enterprise,” she asserts that “this collection will centre instead on the actual inscription of ethnicity in concrete texts; together, these essays, it is hoped, match at least the central pattern of Canada’s mosaic” (xiv). My central quarrel with the collection’s Introduction is not with its side-stepping of “theorizing” ethnicity as such, although I would have hoped for a more thorough engagement with the theoretical debates that have animated critics in Canadian literary studies throughout the 1990s. My quarrel is rather with the Introduction’s apparently unselfconscious recirculation of Canadian multicultural ideology (such as the clichéd image of the mosaic) and the conceptual fuzziness of the critical terms it puts forward. These two problems come together near the end of the Introduction, where Davis writes: “The appreciation of ethnic culture and the recognition of variety only serve to enhance the richness of Canadian literary life. The images created by the diverse ‘tricks with a glass’ performed by writers are the shaping stones in the multicultural mosaic” (xxiii–xxiv). The specific terms of “appreciation” and “recognition” and enhanced “richness” all call out for closer critical scrutiny than the Introduction provides, while the assertion that “images” are “shaping stones in the multicultural mosaic” remains thoroughly unclear to me as a description of the work performed by the essays and interviews that follow.

Readers should note that the Introduction and the majority of the essays in Tricks with a Glass do not cite any works published after 1994, a limitation that seriously compromises the ability of a collection published in 2000 to contribute to and extend contemporary scholarly debates. Important scholarship published before 1994 also remains unacknowledged: Kathleen Firth’s analysis of Neil Bissoondath’s novel A Casual Brutality (1988), for example, makes no mention of incisive critiques of Bissoondath’s work by M. Nourbese Philip and Dionne Brand (see Philip; and Brand), critiques that have circulated widely and would have productively cut across the essay’s banal conclusion that Bissoondath’s novel suggests that “all human beings live ‘lives cut hopelessly adrift’” and “that all of us are wayfarers, very far from home” (69). Eva Darias Beutell’s more theoretically sophisticated analysis of the “centrality of the historiographical” (191) in Joy Kogawa’s novel Obasan (1981; incorrectly listed as 1983) and SKY Lee’s novel Disappearing Moon Cafe (1990) likewise proceeds without acknowledging the fact that such concerns have been discussed time and again over the past twenty years in the scholarly record surrounding Obasan (for an influential uncited example, see Goellnicht). Typos abound: Trent University Canadian Studies scholar James Struthers is re-
ferred to as “James Struther” (16); The Empire Writes Back (1989) is cited as being published in 1993 (33); and Sister Vision Press is referred to as “Sisters of Colour Vision” (252). My purpose in making these points is not to scold critics for omissions and errors but rather to underline the uneven and sometimes inadequate manner in which these essays participate in contemporary scholarly debates over ethnicity in Canadian literary studies.

Taken as a whole, Tricks with a Glass provides a few instances of fairly dense theoretical writing (particularly in the essays by Beautell) and many straight-ahead close readings of contemporary Canadian literary texts in English. In reading these essays one after another, I found myself missing a more sustained meditation on the question of how critics might analyze and discuss texts considered to be “ethnic”—not how critics might trace thematic tropes within these “ethnic” texts (an approach well represented in this volume) but rather how critics might engage with and attempt to realign the act of criticism itself. In this sense, Davis’s appeal (which I quoted above) to “the actual inscription of ethnicity in concrete texts” (xiv) seems to forestall the necessary and genuinely difficult project of reworking the disciplinary codes that govern the ways we might write literary criticism dealing with questions of ethnicity, an ongoing project being undertaken in Canada by critics such as Roy Miki, Fred Wah, and Smaro Kamboureli, amongst others (see Miki; Wah; and Kamboureli). Tricks with a Glass records how certain scholars have approached the topic of “writing ethnicity in Canada” in the 1990s but it stops short of showing us possible ways to rethink and push forward future critical discussions of “cultural difference” in Canada.

Works Cited

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