Chapter 1 / Use

Contemporary struggles over property in urban areas often revolve around the concept of use. If people can use empty residential buildings for shelter, particularly when there are severe housing shortages in many major cities, shouldn't their interests in property prevail over that of a genuinely absentee owner?[1] The Plataforma de Afectados por la Hipoteca (PAH), to take one salient example, base their struggle for social housing on the idea that the social uses of property (residential housing stock in particular) should have greater weight in defining property interests than property's function as an instrument of financial investment and expropriation. In the face of a massive number of foreclosures and evictions in Spain in the aftermath of the 2008 financial crisis, PAH has sought to reinvigorate the provisions in the Spanish Constitution that explicitly protect the right to housing, and to challenge the primacy of the ideology of ownership itself.[2]

The relationship between the uses of property and property ownership has a complex history, which persists into the present. The question of whether the use of a thing gives rise (or ought to give rise) to an ownership interest has long been a matter of great contestation and revolves around the social, political, and economic value attributed to the particular form of use at issue. For instance, the Franciscans famously distinguished their use of property for the fulfillment of the necessities of life from the actual

ownership of that same property in view of their order's prohibition on accumulation.[3] The question of whether Franciscan monks ought to be allowed to use property without being ensnared within legal relations of ownership or, indeed, whether their use de facto constituted an ownership interest was continuously posed by powerful clergymen and the pope during the thirteenth and fourteenth centuries.[4] Ultimately, while the Franciscans' use of property was juridically defined as being above and beyond the legal domain, Thomas Frank argues that the undertaking to live in poverty was understood as reaping a spiritual dividend. There was a "high degree of exchangeability between material goods and spiritual performances," with the Franciscans' use of property dependent on the license freely given to them by the legal owners, the Roman Catholic Church.[5]

The separation of interests between those who use property or benefit from its use and those who are the legal owners also lies at the basis of the modern law of trusts. The modern trust is a legal device that has evolved over time in order to split beneficial (or equitable) ownership from legal title to property, which has its origins in the Roman law concept of "the use." Translated into the Norman idiom of the medieval period, the *cestui que use* denoted one who was the beneficiary of property legally held by another.[6] With the modern trust, the use of property for the good of beneficiaries covers a very wide spectrum indeed, encompassing both charities on one end and private trusts used to accumulate vast amounts of wealth, while often avoiding various liabilities, on the other.[7] Precisely because of the contested nature of use and its relationship to legal ownership—the question of how property can and ought to be used, by whom and for whose benefit—this conjuncture remains a potentially fruitful arena for reshaping prevailing property norms.

Despite the flexible and variable nature of the relationship between use and ownership, the physical occupation and use of land as a basis for ownership has been defined quite narrowly by an ideology of improvement in settler colonial contexts. Despite the widespread adoption in Canada, many states in the United States, and Australia, among other places, of a system of title by registration in the late nineteenth and early twentieth centuries (explored in chapter 2), the concept of use retains its place at the heart of indigenous struggles for land. The social use of property (i.e., use that is not solely defined by economic productivity and profit), and the use of

property to meet the basic necessities of life, such as shelter, form a part of contemporary struggles to redefine relations of ownership in urban spaces.[8] However, it is clear that historically speaking, in common-law jurisdictions, use that would justify an ownership right was defined by cultivation, and cultivation was understood within the relatively narrow parameters of English agrarian capitalism. In settler colonies, early modern property logics that posit cultivation as the basis of an ownership right shape the criteria for establishing indigenous rights to land, which, in the context of a land market where contemporary ownership is governed by a system of registration, produce anachronistic legal tests and legal subjectivities in the domain of aboriginal title.

It is instructive, in considering how use remains a central characteristic of aboriginal title in the Canadian context, as elsewhere, to consider the ideology of improvement that came to shape property law from the seventeenth century. The logics of quantification and measurement that subtend the ideology of improvement required new mechanisms for creating and attributing value to people and the land to which they were connected. We see in the work of early political economists such as William Petty the formulation of a scientific approach to the measurement of the value of land and people. The convergence of medical scientific understandings of the human body, and anatomy specifically, with a method of evaluation based on mathematics produced new forms of valuing land, produce, and people, and in turn justified new and emergent forms of colonial governance.

The imperative to quantify and measure value created an ideological juggernaut that defined people and land as unproductive in relation to agricultural production and deemed them to be waste and in need of improvement.[9] The creation of an epistemological framework where people came to be valued as economic units set the ground for a fusing together of ownership and subjectivity in a way that had devastating consequences for entire populations who did not cultivate their lands for the purposes of commercial trade and marketized exchange. These populations were by definition uncivilized and could be disposed of, cast out of the borders of political citizenship. The brutal displacement and dispossession of thousands of Irish that preceded the displacement of First Nations from their lands, based on the political arithmetic of Petty and those influenced by his work, such as John Locke and Adam Smith, is testament to the violence

engendered by methods of measurement and quantification, and conceptualizations of value defined primarily by economic productivity.

In this chapter, I argue that in the settler colony, use remains at the core of prevailing definitions of aboriginal title. Governed by an ideology of improvement, the manner in which First Nations have historically used their land and whether it conforms to an idea of cultivation and settlement that emerged during the transition to agrarian capitalism in England has formed a primary criterion in adjudicating aboriginal title claims in the Canadian context, and as we will explore in chapter 3, in the Israeli/Palestinian context as well. Indigenous ways of using and owning land that don't conform to this ideal of settlement have been relegated to a prehistory of modern law.[10] This ideology of improvement is one that binds together land and its populations; land that was not cultivated for the purposes of contributing to a burgeoning agrarian capitalist economy by industrious laborers was, from the early seventeenth century onward, deemed to be waste.[11] Whereas wasteland was free for appropriation, those who maintained subsistence modes of cultivation, for instance, were cast as in need of improvement through assimilation into a civilized (read English) population and ways of living. In this chapter, the racial regime of ownership that articulates both land and its people as in need of improvement reappears across many colonial jurisdictions at different historical junctures, each with their own specificities.

In seventeenth-century colonial Ireland, the value of land and populations was assessed on the basis of their productivity, the former measured according to agricultural output and the latter by their capacity to cultivate. In Petty's writings we see the beginnings of what could be termed an early labor theory of value, rendering the value of both land and human life as equivalences based on the cultivation of land. The subsequent evaluation of both uncultivated land and the people associated with subsistence modes of life as waste is distinct, however, from the concept of a surplus population, as elaborated by Marx. The colonial compulsion to improve the native was not conditioned by the need to create a reserve army of labor. Rather, what is evident is a desire to expel or criminalize populations who are not settled on the land and who do not engage in marketized forms of cultivation. The lack of fixity or the nomadic character of populations has long been a basis for their criminalization and expulsion from the body politic. Foucault points to the first economic analyses of delinquency in eighteenth-century France,

which identified the vagabond as a criminal element in society who deserved to be stripped of civil status: "[E]ntry into the world of vagabondage is the main thing to be punished; entry into the world of delinquency is the fact of travelling around, of not being settled on an estate, of not being defined by a job. Crime begins when one has no civil status, that is to say geographical location within a definite community, when one is 'disreputable (sans aveu).'"[12] The eighteenth century witnesses both the criminalization of groups of people not tethered or fixed geographically to regular work, as well as the rise in statistical forms of knowledge aimed at the governance of these (and other) populations. While Foucault does not address the colonial context, the criminalization of mobile groups of people found its legal expression, in the colonial context as elsewhere, in the crime of trespass. First Nations who, prior to the arrival of settlers, engaged in mobile and seasonal forms of cultivation and labor were rendered as inherently inferior, demonstrably lacking the norms of propriety required for full civil status. The Irish were viewed, from the beginnings of colonial settlement in the seventeenth century, as somewhat less than human on account of the lack of permanence that characterized the dwellings of laborers. In the nineteenth century, the racial difference of First Nations, based on the nature of their land use, is cast by the surveyor Trutch in British Columbia in civilizational terms; and finally in the twenty-first century, race appears primarily as a discourse of cultural difference in the case of the Tsilhqot'in land claims. The figure of the seminomad, recuperated and rehabilitated in recent indigenous rights litigation, bears the mark of this globalized history of exclusion.

This chapter proceeds in three parts. In the first part, I trace the history of the ideology of improvement through the work of William Petty. While Baconian influences on his thought are undoubtedly relevant, I focus here on the way in which Petty conceives of wealth and value in the *Political Anatomy* and *Political Arithmetick*. The fusing together of the value of land with the value of people emerges in the context of colonial Ireland, where early attempts to measure land with the use of a cadastral survey coincided with the desire to measure the value of the population on the basis of their consumption and productive labor. In the work of Locke and Blackstone, the attributions of savagery and underdevelopment to populations not engaged in waged

labor or capitalist agrarian production as set forth by Petty are historicized and spatialized. The Indians of North America, lacking the laws of private property, inhabit a premodern space, a time and place before the advent of civilization.

In the second part of the chapter, I examine colonial settlement in British Columbia, and the widespread use of preemption and homesteading as the primary legislative devices used to settle unceded aboriginal lands. An examination of the attitudes and actions of colonial administrators, notably Joseph Trutch, reveal how First Nations' land was surveyed and remapped in the service of consolidating colonial sovereign control over it. We glean insight into how both the land and First Nations were viewed by colonists such as Trutch, who was motivated as much by individual greed for personal profit as grand civilizational and imperial objectives. Possession and the acquisition of aboriginal land, the necessary precondition for the development of agriculture, industry, and the accumulation of wealth by individuals as well as the colonial states they represented, shaped land law in colonial British Columbia, as elsewhere. What is of interest here is the major role that the ideology of improvement played in this process, and the way in which it enfolded the valuation of land and indigenous populations into one juridical formation, governing colonial spaces through a racial regime of ownership predicated on cultivation and racial hierarchies determined by this form of land use.

By way of conclusion, I examine the aboriginal title case of *Tsilhqot'in v. British Columbia* (2014). I analyze key judgments of the Supreme Court of Canada relating to section 35 jurisprudence on aboriginal title, and consider the Supreme Court's redefinition of the concept of aboriginal title to include the practices, forms of land use, and worldview of seminomadic peoples. In augmenting the concept of aboriginal title in this way, I argue that the Supreme Court has taken a significant step forward in taking into account aboriginal perspectives within the parameters of a colonial legal paradigm and yet remains tethered to an anthropological schema that can only recognize indigenous difference in terms of the language of nomadism. This theme is then explored in relation to the dispossession of the Bedouin in southern Israel in chapter 3.

The concept of improvement as the defining criterion for establishing a legitimate right to property finds its clearest expression in the work of

Locke. However, the fusing together of the value of land and people, and the conceptualization of value according to specific ideas of improvement, emerges in the work of William Petty, whose *Political Anatomy of Ireland* and *Political Arithmetick* forged a new way of conceiving of and valuing wealth (and, significantly for my purposes, its constituent components including land and populations) in the space of the colony of Ireland. As I argue below, the ideology of improvement came to be governed by a logic of calculation and measurement. The approach taken by Petty reflects the influence of Baconian natural history on his thought; emerging ideas about taxonomy and classification, the use of mathematics to compile statistical knowledge of the human body and populations, coalesce with the desire to increase individual and national wealth. What emerges, as we see below, are new ways of quantifying both land and people, binding the value of one to the other. One of the first devices of measurement utilized to change the fabric of Irish society and economy was the land survey.

THE POLITICAL ANATOMY OF COLONIZATION

Labour is the Father and active principle of Wealth, as Lands are the Mother.
—William Petty, *Economic Writings*

William Petty was an inventor, an entrepreneur, a physician, and a progenitor of modern political economy. It was his appointment as physician-general to the army in Ireland, and to General Ireton, the commander in chief in 1651 that first took him to Ireland.[13] This appointment marks the beginning of a long period of time in which Petty would have a profound influence on the appropriation of Irish lands and the displacement and dispossession of countless communities. The use of the survey as a technology for quantifying the value of land was refined by Petty in the Irish context, and deployed in many different colonial contexts thereafter.

By the mid-seventeenth century, Ireland lay, in the eyes of the English colonial power, a conquered and defeated territory. What remained as a prime concern to the English, however, was how to render the Irish into a complete state of submission; as conflict raged between Protestants and Catholics all over the European continent, there was fear of ongoing conflict with the Irish. The mass displacement and transportation of the Irish

to England was viewed as a potential solution to war, but one that carried its own risks: "'The unsettling of a nation,' they [the colonial council] pointed out, 'is an easy work; the settling is not,' and the transplantation could have but one result—the permanent mutual alienation of the English and the Irish, and the division of the latter between a large discontented garrison beyond the Shannon and scattered bands of pillaging Tories on this side of the river."[14]

By 1687 Petty would have devised a plan that involved forcibly transporting up to a million Irish from their native lands. His plan was based not solely on the fear of religious foment, however, but on a calculation. The value of the Irish was quantified according to their potential labor value, a calculation based on the idea that mathematical rules could provide a neutral, objective means of producing knowledge, useful for creating and measuring wealth.[15] Viewing the Irish population as an amalgam of economic units was bound to his valuation of the land, which began with the Civil Survey.

Petty's partitioning and parcellization of Ireland began when he was appointed in 1654 to undertake a survey. The urgent need to survey and value the land was driven by the debt owed by the British Crown to the army, and the "private adventurers" who had defeated the Irish in the war of 1648. Approximately one-eighth of all of Ireland was set aside to pay those who had privately invested in the bloody suppression of the Irish in exchange for land. In order to pay the arrears in property, there was a need to survey, map, and value all of the appropriated land. Petty proposed a survey of Ireland, to be followed by a mapping exercise. This initial survey then was quite unrelated to the mapping exercise; Fitzmaurice notes that it was called a "Civil Survey" as it involved the making of lists of descriptions of existing estates and territory, their acreage and value. Fitzmaurice notes that "the Civil Survey was simply a specification of lands, recorded in lists, with brief descriptive notes as to acreage and value, and partook of the character of what in modern days is called a valuation list or register. There were no maps attached to it, and the scheme of the general map, though present to the minds of the authors of the 'Grosse Survey,' had hitherto never been effectually carried out, though commenced here and there."[16]

Petty was at the forefront of the Downs Survey, commenced in 1655, which was a large-scale mapping exercise based on a cadastral survey of the land. As Linebaugh and Rediker have noted, "the Downs Survey facilitated a massive

land transfer to private adventurers, soldiers, who were part of an 'immigrant landlord class.'"[17] Like other colonial surveyors of subsequent generations such as Joseph Trutch, Petty used his position as surveyor to amass a personal fortune. By 1688, he had been granted 160,000 acres in the county of Kerry.[18] He exploited Irish forests in the three baronies he had gained possession of, Iveragh, Glanaroughty, and Dunkerron, in order to make a quick profit.[19] While the ironworks he started were not as successful financially as he had initially hoped, they still yielded a profit for the enterprising colonist.[20]

In addition to appropriating Irish lands as payment to the English adventurers, Petty's assiduousness in pursuing the general survey of Ireland was a part of his larger objective of devising a means of calculating national wealth. A key component in assessing national wealth, in Petty's view, meant accounting for rent. Rent from lands formed a major plank in his method of calculation of national wealth, because it was a source of revenue through taxation, and because it reflected the size and productivity of the population.[21] As noted above, the size of the population was also a determining factor in the capacity of a nation to generate wealth. Poverty, as defined by Petty, was "fewness of people."[22]

The excision of "a sixth part of the rent of the whole, which is about the proportion, that the Adventurers and Souldiers [*sic*] in Ireland retribute to the King as Quit Rents" was in Petty's view the most secure way of generating the "publick charge."[23] Petty's ruminations on the most expedient form of tax collection involve a discussion of taxation on agricultural yield and, relatedly, the differential profits generated by a farmer as opposed to a landowner who rents his land to a tenant farmer. Who bears a greater taxation burden, the landowner who expends nothing on labor and yields no profit from the agricultural production of his tenant, but who collects a rent from a tenant, or the landowner-farmer who "with his own hands plants a certain scope of Land" with crops?[24] In this context we see one aspect of what is a major contribution to political economy, an early labor theory of value. What allows Petty to assess and evaluate these differences is not the price paid for agricultural yield or rent in gold or silver coins, but the "two natural Denominations . . . Land and Labour."[25] Land and labor ought to be the measures for the value of rent, and for the price of land itself. "[T]hat is, we ought to say, a Ship or garment is worth such a measure of Land, with such another measure of Labour; forasmuch as both Ships and Garments were the creatures of Lands and mens [*sic*] Labours thereupon: This being true, we should be glad to fine out a natural Par

between Land and Labour, so as we might express the value by either of them alone as well or better than by both, and reduce one into the other as easily and certainly as we reduce pence into pounds."[26]

Land and the labor of men ought to be conceptual equivalents; they are inextricably bound to one another. The improvement of one requires the improvement of the other. If men are not industrious and productive workers of the land, the land will be, like them, worth less, perhaps even worthless. Petty writes with unconcealed contempt of the "poor" Irish who farm and labor in sufficient quantities for subsistence but seemingly aspire to nothing more than that. Describing their existence as nothing short of brutish, Petty writes that the "Bulk of the Irish . . . are wretched Cabin-mens, slavishly bred."[27] The "nasty Cabbins . . . by reason of the Soot and Smoaks . . . and the Narrowness and Nastiness of the Place . . . cannot be kept Clean nor Safe from Beasts and Vermin, nor from Damps and Musty Stenches." They lived in a backward condition that required improvement if Ireland were ever to develop its natural fitness for trade.[28]

Land and the men who labored upon it were inextricably bound to one another in Petty's new method of valuation of wealth. The measures of wealth were land and people, and both were reduced to economic units. Another example of how land and the lives of men were reduced to economic equivalents of each other can be seen in Petty's method of valuing the fee simple title to a piece of land. He relates the value of land and the value of people through time, measured by the life span of men as workers. He takes three generations of men—grandfather, father, and son—and reasons that the land value is equal to the number of years its owners will be able to use and improve it (based on an estimation of the number of years that all three generations who are in a continual line of descent will coexist as producers). Here is where the rudimentary statistical information garnered in the Bills of Mortality generates the beginnings of data collection for the purposes of political economy and population control.[29]

In *The Political Anatomy of Ireland* the treatment of men, women, and children (or families) as economic units is honed to a crude science. Having accounted for the number of people based on religious belief, the number of families, and the relative wealth of families based on the type of dwelling (and the number of chimneys of each dwelling), Petty values the population according to their labor and the cost of reproducing the lives of la-

borers. In the *Verbum Sapienti*, the second chapter, titled "The Value of the People," reads like a slightly delirious set of calculations. Estimating the value of people's productive output, the cost of their labor, and the value of stock ("wealth") of the nation, Petty concludes that "6 Millions of People [are] worth 417 millions of pounds Sterling" and that accordingly, each one of them is worth "691 [pounds]."[30] This leads him to make concrete suggestions about how the cost of reproducing labor could be reduced (by, for instance, limiting the number and duration of meals laboring men normally consume) in order to increase wealth. The ideology of improvement tied the industriousness of individuals and national interests together, reflected in the metaphor of the beehive inscribed in Petty's coat of arms.[31]

This reductively economistic view of human life that was directly related to the value of land was at the same time racial and gendered in its conceptualization. Although Petty did not seem to attribute Irish laziness to the state of their bodily constitution, he did see Irish and English difference as somehow inherently biological.[32] His solution for quelling Irish rebellion involved the intermarriage of English women and Irish men, and Irish women to English men, who would raise their children to be English speaking, and the "whole Oeconomy [*sic*] of the Family" would be English.[33] The deficiencies of the Irish could be ameliorated by mixing their blood with that of the English. This appears as a precursor to the full-blown blood quantum racism in Australia in the nineteenth century, where the prevailing policy for several decades was to assimilate aboriginal communities starting with mixed-race children, who were perceived as closer to being white on account of their parentage. Petty's suggestion of mixing Irish and English blood through reproduction, in order to produce a more industrious and disciplined population, is akin to the method an agricultural scientist might utilize in the interbreeding of plant species to improve yield.

Intermarriage with the English was just one means of improving the Irish. In the report issued in 1676 from the Council of Trade in Ireland to the lord lieutenant and council, authored by Petty, he renders a list of "considerations relating to the Improvement of Ireland." These recommendations include the improvement of household dwellings, the planting of gardens (as stipulated by the Statute for Hemp and Flax), and the protection of "industriousness," among other things. Generally, Petty proposed that economic growth in Ireland depended on the settling and anglicizing of the Irish population.[34]

While modern biological racism had yet to emerge, conceptions of racial difference and, crucially, European superiority were conditioned at this time by the concept of land use described above. While Petty saw the Irish as capable of improvement, Jews were cast outside this paradigm altogether on account, at least in part, of their tenuous relationship to the land. In his *Treatise of Taxes*, he distinguishes Jews not only on the basis of communal and religious difference, but on the basis of their chosen livelihoods, which in his view rendered them justifiably liable to higher taxes in well-populated countries: "As for Jews, they may well bear somewhat extraordinary, because they seldom eat and drink with Christians, hold it no disparagement to live frugally, and even sordidly among themselves, by which way alone they become able to under-sell any other Traders, to elude the Excize, which bears but according to mean expenses; as also other Duties, by dealing so much in Bills of Exchange, Jewels, and Money, and by practising of several frauds with more impunity then others; for by their being at home every where, and yet no where they become responsible almost for nothing."[35]

The anti-Semitic trope of the wandering Jew that was all too familiar by the seventeenth and eighteenth centuries colors Petty's assessment of Jews in Europe. Avoiding tax by not participating in the general economy, with no attachment to the land, Jews were cast outside the bounds of legibility within the primary economy of landowners and laborers. Much like the Jewish characters in paradigmatic eighteenth-century novels such as *Waverley* and *Ivanhoe* by Sir Walter Scott, the figure of the Jew is rendered, in ways reminiscent of Foucault's vagabond, as one who deserves to be stripped of civil status and political rights due to an apparent lack of geographical fixity. It is also this form of anti-Semitism that arguably informs the Zionist emphasis on laboring on the land as key to the redemption of the Jewish people in Palestine, explored in chapter 3.

Petty's political arithmetic was influenced by the revolution in scientific method heralded by Francis Bacon's *Novum Organum*. As is widely recognized, Petty (along with many other of his contemporaries) was inspired by Bacon's intellectual agenda, which emphasized the importance of an empirical method and the centrality of experimentation to the study of natural history.[36] Bacon lamented the sedimentation of ideas whose presuppositions were merely taken for granted on the basis of their age, and the repetition of

syllogisms based on abstract logic rather than observation and induction.[37] Bacon set out to devise a scientific method that would "equip the human understanding to set out on the ocean"; presumably Bacon meant the ocean of knowledge, but recognizing the influence of his method on colonial explorers and collectors of exotic specimens of plants and animals would foreshadow a much more literal application of his method throughout the colonial world.[38]

The influence of Baconian empiricism on Petty's work can be seen in the construction of mathematical data based on a keen observation of the Irish peasantry. The approach taken in the *Political Anatomy of Ireland* reflects his training as a physician; he observes the land and its inhabitants, collects whatever data were available about the people as a population, gives a diagnosis of the factors preventing improvement in Ireland, and gives a prescription for amelioration. In conceiving of the anatomy of the Irish economy, Petty's work focuses on the constituent parts of this body politic and also considers it as a whole. Individual habits of consumption, hours of labor and rest, and ways of living are analyzed in conjunction with economic categories and political interests. The peculiar mixture of mathematical accounting and scientific method that reduced human life to economic units was, in part, what marked the ingenuity of Petty's method.

The economic context in which Petty was writing was one to which the colonies had become quite central. Colonial trade in the seventeenth century not only was understood to increase consumption and the presence of consumer goods for an increasingly affluent class, but became a central pillar in Petty's calculations of English national wealth.[39] This was not, however, only a matter of inclusion in emergent methods of calculation; both the voyages of discovery and colonial spaces were central figures in both the scientific and economic imaginaries of the sixteenth and seventeenth centuries. Bacon was of the view that voyages of discovery had generated new insight into natural history, and that it was thus imperative for scientists to embrace a new method of analysis adequate to these new worlds. As noted by R. Hooykaas, Bacon believed that "surely it would be disgraceful if, while the regions of the material globe—that is, of the earth, of the sea, and of the stars—have been in our time laid widely open and revealed, the intellectual globe should remain shut up within the narrow limits of old discoveries."[40]

The growing importance of trade and commerce to political economists' theories of how to produce national wealth was an important dimension of the ideology of improvement. Paul Slack notes that increasing affluence in English society in the 1700s led writers to link "material satisfactions . . . to developing notions of linear improvement, advancement, or betterment in human affairs."[41] Those who adopted Baconian scientific methods in their approach to political and economic affairs, such as Petty, connected scientific advancement to material improvement. Improvement, whether it related to agricultural husbandry or increased commerce and trade, took on the cast of a linear, civilizational advancement. By the time Adam Smith penned *The Wealth of Nations*, civilization was not only linked to particular ways of holding and using land but was an explicit reflection of the existence of commercial trade.

As I've explored above, both race and the space of the colony figure quite centrally in Petty's emergent political economy. The ideology of improvement is grafted onto emerging ideas of racial difference, providing both the rationale for the perceived inability of particular populations to enter the pale of industrious, civilized life and the justification for the appropriation of their lands. Prior to the emergence of modern scientific racism in the nineteenth century, the use of classification as the primary means of ordering plant, animal, and human forms of life became the means of differentiating among different races. For instance, as Siep Stuurman has argued in relation to the racial thinking of François Bernier, a seventeenth-century doctor and career traveler, race was primarily conceived at this time on the basis of physical differences in skin color, facial features, and hair.[42] In Stuurman's analysis of Bernier's essay, "The Division of the Earth According to the Different Types of Races of Men Who Inhabit It," originally published in 1684, Bernier's classification of humankind into four or five "Species or Races" anticipates eighteenth-century racial anthropology. However, Bernier also locates the racial difference of Africans, who constitute a separate race, in the "blood or semen" of their bodies. Although these bodily fluids are the "same colour" as those of other species of human, herein lies the cause of their physical differences.[43]

These beginnings of racial classification and taxonomy reflect the fact that the predominant way of seeing human life within emergent political economies of land, labor, and commerce was inextricably tied up with colonial

spaces. As I have argued above, a concept of value emerged that linked the improvement of land through particular kinds of use (cultivation for commercial purposes) to the improvement of populations who were not capitalist tenant farmers or engaged in waged labor within emerging capitalist agrarian markets. Further, in relation to both the Irish context of the seventeenth century and the settlement of British Columbia in the nineteenth century, those who were not productive and industrious cultivators of land (or landowners, or engaged in commercial ventures of some kind) were deemed to be lacking in the qualities befitting the civilized.

In many critical engagements with the significant role of the law of property in colonial settlement, the work of John Locke is given primary attention. As the political philosopher, legislator, entrepreneur, and colonial administrator who established land policy in the colony of Virginia, this is unsurprising. However, in focusing on Locke's rationales for the accumulation of private property and the contours of the proper subject of ownership without examining the work of Petty, it is difficult to fully appreciate how effectively Locke naturalized the rationales for colonial land appropriation found in Petty's work. Petty's political arithmetic is striking for the rather explicit and unabashed reduction of human life (and people's relations to land and labor) to economic criteria. Moreover, while one can measure and quantify the value of land based on economistic criteria, one cannot measure blood as a means of quantifying some illusory concept of race. Emergent concepts of race and racial inferiority were smuggled into new forms of value, constructed, ostensibly, on logics of measurement and quantification. This becomes much more explicit in the nineteenth century with the emergence of racial science, explored in chapter 2.

HISTORICIZING THE EQUATION: PRIVATE PROPERTY = CIVILIZATION

Before turning to aboriginal rights jurisprudence in the Canadian context, a brief excursion into the work of Locke, whose notion of wasteland would come to legally justify the dispossession of indigenous peoples throughout North America and beyond, is necessary. It is the writings of Locke and subsequently Blackstone that provide the legal architecture for dispossession based on the concept of use elucidated above. In other words, it is in the

work of Locke and Blackstone that we see the ideology of improvement achieve its full expression in the laws of property. Like Petty, Locke was influenced by the scientific method of Bacon, immersed as he was in devising new means of improving productivity and wealth (both individual and national).[44] But I want to suggest here that the abstract, economistic logic of Petty appears naturalized and historicized in the work of Locke, who more explicitly articulates modern property logics through racial difference.

Locke, whose theory of ownership and consciousness makes a longer appearance in chapter 4, is well known for the moral and legal justification he devises for private property ownership. In his attempt to secularize the divine foundations of property law, he asserts that when man mixes his labor with the earth, this gives rise to a right in that land that he has improved.[45] While God gave to mankind the world in common, the capacity and ability of man to create and produce his world according to a rational order meant that his industry would justify the private appropriation of land.

Industry and improvement were defined solely in terms of the use of land for agricultural purposes. The value of uncultivated land is so little, writes Locke, that "Land that is left wholly to Nature, that hath no improvement of Pasturage, Tillage, or Planting, is called, as indeed it is, wast [*sic*]; and we shall find the benefit of it amount to little more than nothing."[46] However, while in Petty we see the economic imperatives that ground the ideology of improvement, in Locke and Blackstone, improvement as a legal concept, one that is constitutive of the racial regimes of ownership emerging in North America, is cast almost entirely in civilizational terms.

Locke queries whether the "thousand acres . . . [of] wild woods and uncultivated waste of America left to Nature, without any improvement, tillage or husbandry . . . will yield the needy and wretched inhabitants as many conveniences of life as ten acres of equally fertile land doe in Devonshire where they are well cultivated."[47] Indeed, the appropriation and cultivation of land was integral to the progression from a state of nature to a civilized state of being. Owning land in common, without individual private ownership, reflected a "state of primeval simplicity."[48] Furthermore, the earth was given by God to industrious and rational men: men who "subdue the earth" and "improve it for the benefit of life."[49] Industrious men who cultivated God's earth existed in contradistinction to those who roamed the earth freely and

did not enclose the land. In order for the fruits of the earth (or the earth itself) to really improve one's life, it was requisite to own that thing exclusively: "The fruit, or venison, which nourishes the wild Indian, who knows no inclosure [*sic*], and is still a tenant in common, must be his, and so his, i.e. a part of him, that another can no longer have any right to it, before it can do him any good for the support of his life."[50] Without ownership, and the law that accompanies it, there could be no civilization. The distinction between cultivated land and wasteland ultimately became the basis, during the eighteenth and nineteenth centuries, upon which European colonial powers justified their legal doctrines of *terra nullius* and discovery.[51]

The basis, according to both Locke and Blackstone, for exclusive ownership derived from the sustained occupation and use of the land.[52] While the earth was given to all mankind by God to enjoy, "there must of necessity be a means to appropriate [lands] some way or other, before they can be of any use, or at all beneficial to any particular man."[53] Because man, in the state of nature, has property only in his body, he also owns the "labour of his body," "the work of his hands."[54] This principle, according to Locke, is one of natural justice. As the continuation of the God-given dominion over the earth's territory, it was the God-given, natural right of men to appropriate land that was needed for sustenance as populations grew and land became scarce.[55] In this way, Locke and Blackstone naturalize the ideology of improvement as the foundation of private property ownership, casting it as a matter of nothing less than natural justice.

The last matter of interest to draw from Locke and Blackstone is the fictitious time of property and civilization that shapes their narrative of linear improvement. For Locke, as explored more fully in chapter 4, the secularization of the divine origins of property ownership to meet the needs of agrarian capitalism and commerce requires a fictive time of the premodern and prelegal world of uncultivated, wild lands, inhabited by uncivilized Indians. For Blackstone, the fiction that underlies his attempt to rationalize the laws of property into a science is, in a proto-Malthusian vein, that of scarcity and overpopulation. As the "earth would not produce her fruits in sufficient quantities without the assistance of tillage," property ownership became necessary to human survival. "As the world grew more populous, it daily became more difficult to find out new spots to inhabit, without encroaching upon former occupants," and thus the art of agriculture developed.[56]

The uncultivated wilds that threaten human existence, the time before the emergence of laws of property upon which civilization depends, are mapped onto the space of the settler colony. As we will see in the next section, the ideology of improvement, with its roots firmly embedded in both rationales for property ownership and the racial superiority of Europeans, will come to define the legal response to struggles for the recognition of aboriginal title to land.[57] Whereas for Petty, Ireland became a laboratory for new methods of valuing and producing national wealth, Locke and Blackstone naturalize these new concepts of value as the basis for legal categories and justifications for ownership based on specific notions of use, rather than possession. The racial regime of ownership that interpellated indigenous populations as lacking the requisite attachment to land and practices of cultivation to be owners of their land continues to operate as a juridical stranglehold over movements for justice and restitution.

WAYS OF SURVEYING

On Sunday, October 26, 2014, the premier of British Columbia took part in a ceremony in Quesnel, a small town in the interior of British Columbia, in Tsilhqot'in territory. The ceremony was held to mark the premier's apology for the hanging of five Tsilhqot'in chiefs in 1864. Acknowledging that the hangings were wrongful, premier Christy Clark marked the 150th anniversary of the hangings with an apology that was part of a larger reconciliation effort that followed the Supreme Court of Canada's judgment in *Tsilhqot'in v. British Columbia* ([2014] 2 S.C.R. 256), discussed at length below.[58] While the apology from a provincial government whose arguments at the Supreme Court appeal reflected a mentality deeply rooted in a colonial worldview, and for that reason alone is notable, it remains to be seen to what extent the provincial government will honor the letter and spirit of the Supreme Court of Canada's judgment on the Tsilhqot'in land claim that recognized aboriginal title to 1,750 square kilometers of their traditional territory.

In 1864, Judge Matthew Begbie sentenced the five Tsilhqot'in chiefs to be hanged because, in his words, "the blood of 21 white men calls for retribution."[59] The Tsilhqot'in warriors had allegedly killed twenty-one white men in what Begbie described as the "first thing approaching to a war" since

the formation of the colony of British Columbia in 1858.[60] The Tsilhqot'in had been defending their land from increasing encroachment of settlers since the early nineteenth century, when the Hudson's Bay Company attempted to establish a trading fort on Tsilhqot'in lands. Resistance to white settlement on their lands led to the fort being completely abandoned by 1844, a mere fourteen years after it had been established.[61] As Fisher notes, unlike many other First Nations, the Tsilhqot'in had "opted out of the fur trade."[62] As the fur-trading era transitioned to one of outright colonial settlement, the threat of encroachment became ever more present.

The appropriation of land by colonists that put the Tsilhqot'in in the position of having to defend their land through military means was typical of what was happening throughout the province. While the legal foundations of the settlement of British Columbia have been carefully recounted by scores of historians, I focus here on the twin legal devices of preemption and homesteading, which were the means through which aboriginal lands were appropriated and given their legal veneer. The enactment of legislation was accompanied by that indispensable and necessary practice that precedes nearly every colonial appropriation of land in the settler colonial context—the land survey. As Nicholas Blomley has argued, official representations of land have the power to "remake worlds." Quoting from the work of James Scott, Blomley notes that a state cadastral map "'does not merely describe a system of land tenure; it creates such a system through its ability to give its categories the force of law.'"[63] Here, I am interested in the survey not only for its power in redefining relations of ownership (also explored in chapter 2), but also to emphasize how it was a key device of measurement, not only in terms of mapping land in a quantitative sense, but as a key method of valuing land and people. Second, I aim to expose how individual surveyors such as Trutch, like Petty before him, exploited their offices to amass huge personal fortunes.

The proprietary colony of Vancouver Island was created in 1849, the Crown colony of British Columbia in 1858, and the two colonies were amalgamated into one in 1861.[64] James Douglas, chief factor for Hudson's Bay Company, became the governor of the colony in 1851 and remained in this position until 1864.[65] Douglas created and followed his own land policies, which included making treaties and purchasing land in some instances, while circumventing the issue of native title.[66]

In the early part of his tenure as governor of the colony of Vancouver Island, James Douglas recognized the proprietary interest of the native bands in their lands, and thus, in order to avoid justifiable anger against the settlers that might be engendered by the nonconsensual appropriation of those lands, he had a policy of purchasing the native rights in the land prior to the settlement of any district.[67] In mainland British Columbia, however, no such uniform policy was followed. Unlike in the rest of the colonial territories that would come to constitute Canada, no treaties were negotiated in mainland British Columbia.[68] Douglas's policies on the mainland had the twin objectives of creating reserves for aboriginal communities before settlement and, also, of facilitating the assimilation of aboriginal people into the mainstream in order that they would eventually be treated and recognized as equal with white settlers.[69] Douglas believed that native peoples should be able to preempt land in the same manner as white settlers.[70] And until 1866, native people were entitled to preempt land, although, as Cole Harris points out, due to the arduous conditions "for most Native people, pre-emption was still an unimaginable option."[71]

In keeping with the idea that settlement was integrally tied to civilization, the colonial authorities believed that it was in the best interests of the Indians to settle them in villages.[72] This strategy had been adopted by Sir George Grey in the Cape (of South Africa), and it was hoped that the "thoughtful policy of that vigorous and accomplished Governor" would enable the "long barbarous populations" to "[enter] into the pale of civilized life."[73] Settling the natives on reserve land was for their own protection from "oppression and rapid decay" in relation to the white settler population.[74] Governor Douglas was thoroughly convinced of the benefit that would accrue to the native subjects through settlement; Indians were not to be simply cast out of the colony, and through their confinement to reserves and leasing the remaining land allotted to them, they would be beneficiaries of the rent proceeds arising from the leases.[75]

In terms of reserving the land for First Nations, disputes were ongoing over the appropriate quality and quantity of land to be reserved for Indian bands, leading to successive land surveys. The commissioners for land, colonial governors, and colonial secretaries attempted to find a balance between appropriating the best and most fertile land for colonial settlers while reserving sufficient lands for First Nations to avoid violent disputes between

aboriginal communities and the settlers. However, after the Douglas era, it became more and more clear that colonial administrators restricted the allocation of reserve lands to sizes that were not acceptable to many aboriginal communities. The fact that they were unacceptable was marked by ongoing disputes over boundaries of the reserves and native protests against the attempted settlement of foreigners on their lands.[76] At the same time, some colonial administrators also perceived a need to redraw the boundaries of the reserves, which were deemed to be too generous for the needs of aboriginal people.[77] The most strident of the colonial surveyors to diminish Indian reserve lands was Joseph Trutch.[78]

While the views and policies of Edward Bulwer-Lytton, who became secretary of state for the colonies in 1858, or Frederick Seymour, the man who replaced James Douglas as governor of the province of British Columbia, would no doubt offer insight into the prevailing colonial attitudes toward land use, ownership, and perceived English superiority over First Nations, I choose to focus on Joseph Trutch for two reasons. To begin with, he was responsible for significantly diminishing the reserve land base on the basis of a worldview that was thoroughly Lockean in nature. The sole criteria for the redrawing of reserve boundaries, effectively expropriating native lands twice over, were whether they were being cultivated and the manner in which this cultivation was occurring. Coupled with this notion of use was a view of First Nations as savages, who lacked, in Trutch's view, the capacities for improvement, including the capacity for abstract thought.

Joseph Trutch forged a successful career as a colonial administrator, amassing a personal fortune along the way.[79] Born into a middle-class English family whose various members were, like many such families of the time, spread throughout the empire in various capacities, Trutch began his career as a surveyor south of the U.S.-Canada border.[80] In 1859, after his father had intervened on his behalf with government ministers, arranging a meeting between Trutch and colonial secretary Edward B. Lytton, Lord Carnarvon, and others, Trutch arrived in British Columbia without a colonial appointment secured.[81] Between 1859 and 1864, when Trutch was appointed chief commissioner of lands and works, he availed himself of private contracts to engage in road and bridge construction. In 1864, however, his new appointment afforded him the opportunity to make long-lasting and devastating changes to Indian land policy.

Trutch's actions were symptomatic of the worst excesses and abuses of colonial authority. As Robin Fisher has detailed, once he became lieutenant governor of the province, Trutch falsified records and misled his colleagues and superiors as to the policies followed by James Douglas, and the rationales upon which they were based.[82] Trutch was systematic in his denial of First Nations' land interests and his objective of reducing their land base down to a level that would not, in some cases, even support bare subsistence.

It is undeniable that Trutch held racist views of the aboriginal people he encountered and would eventually govern. Robin Fisher argues that Trutch's racism determined his attitude toward the question of Indian land. He writes, "It was these views regarding colonial development and the total inferiority of the Indian that governed Trutch's attitude to the question of Indian land. His attitudes coalesced to produce something of an obsession with the idea that the Indians were standing in the way of the development of the colony by Europeans. The absolute superiority of English culture implied an obligation to colonize new areas."[83]

Here, however, I offer a different interpretation of Trutch's policies concerning First Nations' land. In my view, the governing ideology, if there was one, of Trutch's approach to land and aboriginal people was that of improvement. Improvement was to be measured by agricultural production and the capacity to engage in rational—that is to say abstract—thought as an economic actor. For Trutch, First Nations people lacked both these qualities (despite overwhelming evidence to the contrary, on both counts). Even after attaining his appointment as the chief commissioner for lands and works, his attitude was determined by a view of what constituted the proper use of land, by proper subjects, in conjunction with one another. The Englishness that Trutch held up as superior was both racial in nature and based on a particular cultural and economic ideal of how to live as a rational, productive economic actor, which had a specific valence in the settler colony in relation to land use.

It is also clear from his voluminous correspondence with family members that Trutch was primarily concerned with his own financial interests. Colonial settlement was above all a business opportunity, and any religious imperatives that may have driven Trutch to civilize the natives (and I see no evidence of this in his case) came a distant second to personal profit. For instance, in the two years leading up to his move to British Columbia

in 1859, Trutch wrote several letters to his brother John while working as a surveyor in Oregon and, before that, Illinois. In nearly every letter, in addition to his brotherly concern for John, who apparently was a less than adequate letter writer, Joseph remarks on his financial interests. The value of contracts for surveying services rendered, the "safe and profitable" opportunities for surveying work in British Columbia, the value of Trutch's land speculation in Chicago, potential business ventures, the amount of money to be earned in the burgeoning settler colony of British Columbia, and other financial concerns mark nearly all of his correspondence with his brother.[84]

On July 27, 1858, Joseph was feeling particularly communicative and wrote a long letter to John, which is not only exemplary of much of his personal correspondence but captures the concerns of a private contractor, traveling throughout the colonies with the sole objective of making money. Why else would an Englishman leave his beloved homeland? As Trutch notes with emphasis, "*We can't live in England* for some years yet, that I *have satisfied myself* about, and a few weeks experience would equally satisfy you that it was not our destiny to live there now."[85] While he expresses disappointment about being in Canada, a temporary home for him, he is consoled by the fact that he (and his brother) will be able to "live as Englishmen under [their] own laws and flag."[86]

The letter begins in typical fashion, Joseph admonishing his brother for not writing with his news. Joseph then informs John of the travels of his family members between England, Madras, and Bombay, and the fevers and ailments they contracted in the colonies.[87] In addition to documenting the imperial trajectories of the family, the letter consists entirely of information regarding personal financial interests. He writes of having had "to pay another instalment to this RRd [railroad] stock as I anticipated, making now $4000 paid in. I shall have no chance of any dividend for a twelvemonth, so wait in patience. . . . Business is dull as ditchwater all over the U.S. and we do not now hope for any improvement until next Spring."[88] He continues to encourage his brother to consider moving to Vancouver Island or the mainland, as property values will rise, and to buy a farm there. He reassures his brother, "you will have money—now is the time to get a chance in."[89] In concluding, Joseph wrote, "My investments in this country although not readily convertible into money, are not by any means in a discouraging state, and if

you thought it advisable I could obtain money on them, although it is now a most unfavourable period to undertake to sell or mortgage."[90] Clearly, Joseph knew he would have to be patient to realize a profit on his investments in the young colony. Accumulating wealth was the primary motivation for Trutch, surely as it was for many other private agents and state actors involved in the appropriation and settling of First Nations' lands. The divide between the private, personal interests of agents and those of the state on whose behalf they were working was porous indeed.

His personal correspondence includes few if any remarks on Indians, even when recounting his surveying work. In a letter to his sister Charlotte in 1850, however, his virulently racist views emerge when he wrote from Oregon, "We have plenty of Indians in the neighbourhood but of course they are friendly, indeed we get all our fish etc., through them, & they are also useful in carrying letters & parcels up & down the river. I think they are the ugliest & laziest creatures I ever saw, & we should as soon think of being afraid of our dogs as of them."[91] Trutch's views of Indians come to the fore after he takes on his official position as commissioner for land and works and, subsequently, lieutenant-governor for the province of British Columbia. At the same time, it is also very clear that the rationale for reducing reserve lands has as much to do with his perception that First Nations people were not using the land (i.e., cultivating it) and therefore had no use or, more significantly perhaps, no right to this land. Seeing aboriginal peoples as savages and incapable of improvement is a consequence of how they use the land and, relatedly, their perceived cognitive capacities. The racial regime of ownership that emerges during this period of colonization in British Columbia is constituted through the desire for personal profit, the views of British colonial agents moving through imperial circuits, surveying and mapping as techniques of appropriation, and, ultimately, the fabrication of racial subjectivity that was tied to the ideology of improvement.

In 1867, three years after becoming commissioner of lands and works in British Columbia, Trutch authored a report titled "Lower Fraser River Indian Reserves." In this report, Trutch falsified the historical record when he wrote that the process of reserving lands for native use "does not appear to have been dealt with on any established system during Sir James Douglas' administration. The rights of Indians to hold lands were totally undefined."[92] This report is written in the context of a dramatic reduction

of Indian reserves in the Lower Fraser region. After rewriting the historical record to assert that Governor Douglas had given no "written instructions" as to how reserve lands should be determined, he asserted that Mr. Brew instructed Mr. McColl to mark out Indian reserves around existing Indian villages and "to mark out as Indian reserves any ground which had been cleared and tilled for years by Indians."[93] When Trutch makes his argument for a dramatic reduction of the Lower Fraser Indian reserves, his rationale is clear: "The Indians regard these extensive tracts of land as their individual property but of by far the greater portion thereof they make no use whatever, and are not likely to do so; and thus the land, much of which is either rich pasture, or available for cultivation and greatly desired for immediate settlement, remains in an unproductive condition, is of no real value to the Indians, and utterly unprofitable to the public interests."[94]

For Trutch, Indians had no rights to the land because they made no use of the lands, which were not "of any actual value or utility" to Indians.[95] Such lands could only serve the public interest if they were thrown open for preemption. He had taken the same approach two years earlier in regard to the reduction of reserves in the Kamloops region and claims made by the Shuswap First Nation. Trutch concurred with the view of Philip Henry Nind, gold commissioner for the Cariboo region of the interior, that the Shuswap Indians' claims to land were baseless as "they made no real use" of the land. As these claims were "very materially" preventing "settlement and cultivation," Trutch urged Colonial Secretary Lytton to authorize an enquiry into the true extent of Indian land interests throughout the province.[96]

Improvement, of both land and people, was the reigning idea governing Trutch's attitude toward First Nations and their entitlement to ever-diminishing tracts of reserve land. Responding to concerns voiced by the bishop of British Columbia and the Aborigines Protection Society in 1871, he noted in his letter to the secretary of state for the provinces that despite the benefits accorded to Indians by white settlement, he had yet to meet "a single Indian of pure blood [who had] attained to even the most glimmering perception of the Christian creed." Despite their concerted efforts to "advance the material and moral condition" and to "change their habit of mind," the "idiosyncras[ies] of the Indians . . . appear to incapacitate them from appreciating any abstract idea, nor do their languages contain words by which such a conception could be expressed."[97]

The language of savagery was deployed by Trutch to express what First Nations lacked in a racial and anthropological sense: the capacity for abstract thought, which consequentially made it impossible for them to relate practices of cultivation to a general settler economy of agricultural production. For Trutch, the lack of homesteads in the English model provided evidence for his conclusion that aboriginal people lacked the "habit of mind" required for civilization. In either case, in Trutch's view, aboriginal people lacked the very capacities defined by Locke as the conditions for proper human subjectivity (explored in depth in chapter 4). We can recall Fanon's acute description of a related tautology: "In the colonies the economic infrastructure is also a superstructure. The cause is effect: you are rich because you are white, you are white because you are rich."[98] Here, and as we will see in chapter 4 in relation to the racial assessment of Palestinians by early Zionist settlers, the alleged lack of mental capacity for abstract thought explains the absence of legible forms of ownership, and the apparent absence of ownership justifies the conclusion that these racial subjects lack the capacity for abstract thought.

As outlined above, Trutch redrew the boundaries of reserves because he deemed them to be too generous for the needs of First Nations.[99] The amount of land determined to be suitable for their needs in the Lower Fraser amounted to "the villages and spots where they have been in the habit of cultivating potatoes, as would amount in the aggregate to ten acres of tillable land to each adult male in the tribe, together with a moderate amount of grazing land for those tribes which possess cattle and horses."[100] As the "Indians of Snatt Village," situated at the Burrard Inlet (of Vancouver) wrote to Joseph W. Trutch in 1869, a mere ten acres per Indian family was a "very small portion indeed" compared to the 160 acres allotted to each white family.[101]

One of the primary devices utilized to endow white settlers with vast tracts of land was preemption. The law of preemption allowed white settlers to stake out territory and, upon improving the land by cultivation, to obtain ownership of that land. The first preemption act in 1860 was proclaimed by Governor Douglas and marked the definitive transition from the fur-trading era to one of formal colonial settlement. During Douglas's tenure as governor of Vancouver Island, he provided that each couple

would be given two hundred acres, with an additional ten acres provided for every child. In mainland British Columbia, a settler could preempt 160 acres and buy adjoining land at twenty-five pence an acre, as established by the Pre-Emption Consolidation Act in 1861.

Subsequent to Douglas's policies, as set out in section 33 of An Act to Amend and Consolidate the Laws Affecting Crown Lands in British Columbia, 1875, settlers had to prove that after two years they had made permanent improvements on the land to the value of $2.50 per acre in order to be granted letters patent for the land. It was not until a certificate of improvement had been granted to the homestead settler that the fee simple title to the land would be executed in favor of the individual (s.36). Similarly, An Act Further to Amend the "Dominion Lands Act, 1883," 1886 R.S.C. ch.27, amended clause 29 of the 1883 act to stipulate that in order to fulfill the conditions of cultivation, the settler had to break the land and prepare a certain number of crops in order to secure patent to the land (see clause 38(d)). Consistent with Locke's philosophy of ownership, a settler could preempt land (i.e., appropriate it) and come to own it by mixing his labor with the land and cultivating it to a degree deemed sufficient by the colonial administration.

By 1908, the homestead was one of the key methods of settling the land entrenched in federal legislation. A "homestead" was defined as "land entered for under the provisions of this Act or of any previous Act relating to Dominion lands for which a grant from the Crown may be secured through compliance with conditions in that respect prescribed at the time the land was entered for."[102] The land that was available for homestead entry or for sale had been surveyed in accordance with the provisions of the Dominion Lands Surveys Act (along with other conditions), unlike the initial preemption of land in British Columbia in the 1850s, where unsurveyed land was also available for preemption.

Homesteading was a heavily racialized and gendered phenomenon. A man who was eighteen years of age could apply for a homestead. A woman, however, could make such an application only if she was the sole head of a family. Any doubt as to whether she was the sole head of a family was grounds for refusal of her application (Dominion Lands Surveys Act, sections 9(1) and (2)). A woman could make an application to homestead

only if she was a single mother; if she was involved in a relationship with a man who was resident in her home, then her right to application could be refused. Legislation passed in 1911 by the province of British Columbia delineated similar conditions under which a white woman could preempt land to include a woman who was a widow, a woman over the age of eighteen who was self-supporting, a woman deserted by her husband, or a woman whose husband had not contributed to her support for two years.[103] The ability of white women to preempt land was informed by a Victorian morality that made their ability to own land conditional on their status as abandoned or widowed women.

Under An Act Respecting the Land of the Crown, RSBC, 1911, vol. 2, ch.128, the right to preempt land did not extend to "aborigines" except to such as shall have obtained special permission.[104] The dominion land legislation was the same as the provincial legislation in the paucity of references to aboriginal peoples. In An Act Further to Amend the "Dominion Lands Act, 1883," referred to above, there were only two references to aboriginal people. Section 39(2) stipulated that no lands were to be set aside for the purpose of an Indian or other public reserve, until other lands had been selected in lieu of these lands.

What emerges from an examination of the land legislation enabling colonial settlement is the creation of two separate economies of land and identity, the Indian reserve and the private market of individual ownership. The near-total absence of any mention of First Nations people in land legislation that secured their dispossession is symptomatic of this separation. Aboriginal people were written out of this new economy of property relations that was being mapped onto the province, relegated to a time and space that was set apart, and, as we will see in the next section, in a time prior to the instantiation of modern law in the settler colony.

One exception to the general absence of provision for First Nations in land legislation is section 76 of An Act Further to Amend the "Dominion Lands Act, 1883," which provides for the powers of the governor in council. Under this section, he could "withdraw from the operation of this Act, subject to existing rights as defined or created thereunder, such lands as have been or may be reserved for Indians." Section 76 also enables the governor in council to grant lands in satisfaction of claims of "half-breeds" arising out of the extinguishment of their Indian title. Third, the section enables

the governor to make free grants of land to people. Such grants would effectively extinguish Indian title if the settlers could "satisfactorily establish undisturbed occupation of any lands within the said territory or tract." Indian lands, assumed to be free or vacant lands, were transformed into private property for settlers through the mere fact of their occupation and cultivation.

The early proclamations dealing with preemption and the granting of homesteads to British subjects and aliens made no mention of the rights of aboriginal people to maintain their rights over their lands or indeed to preempt land.[105] As mentioned above, James Douglas had allowed for the preemption of land by First Nations so long as they fulfilled certain requirements with respect to its agricultural cultivation. Those who preempted land were expected to assimilate; in order to gain the same rights as British subjects they had to live in a nuclear family, cultivate the land and produce crops, and forego their cultural practices and traditional ways of living, which included any notion of aboriginal title.[106] (Another aspect of this racial regime of ownership, explored in greater depth in chapter 4, was an acutely gendered notion of racial difference.) These provisions foreshadowed similar aspects of the Indian Act, 1886, which had as its objective the civilization and assimilation of aboriginal peoples.

CONSTITUTING AND CAPTURING THE SUBJECT OF RIGHT

Nearly 120 years after the hanging of the Tsilhqot'in warriors and struggles waged for the recognition of aboriginal ownership of land and resources in the courts, the incorporation of section 35 of the newly patriated Constitution would be hailed as a legal and political victory. The patriation of the Constitution signified a putative break with Canada's colonial history. Putative because, as constitutional theorist Peter Hogg has written, the Canada Act 1982, which included as Schedule B the Constitution Act, 1982, was in fact an imperial statute, enacted by the U.K. Parliament.[107] Canada's Constitution was not the result of a revolution, nor was it an act internal to the state.[108] Rather, the Canada Act 1982 was an imperial statute that proclaimed that "the Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect."[109] The Canada

Act 1982 expressly abdicated the authority of the British legislature over Canada.

In yet another imperial gesture, this was done without any consultation or agreement by First Nations, many of whom still hold the view that the British Crown remains their partner in treaties signed during the nineteenth century, despite British conclusions to the contrary. Thus, in 2013, members of the Federation of Saskatchewan Indian Nations and other First Nations elders traveled to London to mark the 250th anniversary of the Royal Proclamation of 1763. Issued by King George III at the conclusion of the Seven Years' War, the proclamation recognized that all unceded lands of Indians would be left as such until they were ceded by way of treaty with the British Crown.[110] While the unilateral decision to transmute its treaty obligations to the Canadian Crown seems legally tenuous (at best), the British Crown has resolutely denied that it has any continued obligations whatsoever to the First Nations of Canada. In yet another instance of the fractured temporality that characterizes legal modernity in the settler colonial context, the colonial sovereign imposes a new postcolonial temporal order on First Nations, who remain subject to a colonial sovereign power that has changed in persona but not, fundamentally, in substance.

The constitutional reforms and the patriation of the Constitution in 1982 can be understood as a break with Canada's colonial past only in terms of the settler society's relationship to the imperial power. Along with this significant movement toward establishing an independent, postcolonial nation was the introduction of a Charter of Rights and Freedoms, provisions for the protection and enhancement of multiculturalism, and section 35. The constitutionalization of fundamental rights and freedoms has become an iconic dimension of Canada's identity as a nation, both within its own borders and internationally.

Section 35, which was lauded as a major political and legal shift in the status of aboriginal rights in Canada, provides the following:

(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Although aboriginal rights had been recognized at common law, section 35(1) elevated those rights, affording them constitutional status and protection. While governments may regulate aboriginal and treaty rights where justified, they cannot abolish these rights. Section 35(1) ensures that constitutional amendments to the provisions of the Constitution Act that "apply directly" to aboriginal peoples will not be undertaken without a constitutional conference to which representatives of the aboriginal peoples of Canada will be party. However, it is important to note that this section does not provide aboriginal peoples and their representatives with a veto power over potential amendments, which means that constitutional amendments can be made without their consent.[111]

Section 35 was a major milestone in First Nations' struggle for the recognition of their rights to their traditional territories and resources. However, the definition of the content of aboriginal title has been shaped by Anglo-Canadian common-law concepts of ownership, a reflection of the repeated insistence that the Crown holds underlying or radical title to the land. The historical weight of property logics that were used to dispossess First Nations overshadows the attempts to reconcile aboriginal and Canadian interests. Aboriginal title is rendered as a hybrid form of property, based on the prior occupation of the land by First Nations but defined according to Anglo-Canadian concepts of private property ownership. While the judgment of the Supreme Court of Canada in *Tsilhqot'in Nation* has gone some distance in incorporating First Nations' conceptions of use and ownership into the concept of aboriginal title, as we will see below, the court fails to fundamentally alter legal precedent that has continually reinscribed the primacy of Crown control over indigenous land in conjunction with the racialization of First Nations and their ways of life as inferior to settler society.[112]

DEFINING ABORIGINAL TITLE

In 1997, the Supreme Court of Canada handed down its long-awaited judgment in *Delgamuukw v. British Columbia*. The appellants were members of the Gitksan and Wet'suwet'en hereditary chiefs. Individually and on behalf of their Houses, they claimed separate portions of 58,000 square kilometers in British Columbia. Their claim before the Supreme Court of Canada was for aboriginal title over the land in question, and the government of British Columbia counterclaimed for a declaration that the appellants had no right or interest in and to the territory or, alternatively, that the appellants' cause of action ought to be for compensation from the Government of Canada.[113]

Delgamuukw v. British Columbia was the first judgment to deal with the "nature and scope of the constitutional protection afforded by section 35(1) to common law aboriginal title."[114] The power and imperturbable nature of colonial sovereignty preempted the determination of the substantive issues on appeal because of the court's formalistic approach to the pleadings. The court found that a new trial was required on two bases and left the factual issue of whether the appellants had aboriginal title unconsidered. The first ground for ordering a new trial was that the appellants tried to alter their pleadings on appeal so as to change the fifty-one claims brought by Gitksan and Wet'suwet'en Houses into two collective claims brought by the Gitksan and Wet'suwet'en Nations. The court found that such an amendment would prejudice the respondents because the pleadings had not been amended, and therefore the respondents had been denied the ability to address the issue of a collective claim at trial. John Borrows has persuasively argued that this finding was "rather formalistic and inflexible":

> It is interesting to note that the result of the *Delgamuukw* case, which considers the wholesale territorial dispossession of two entire Aboriginal peoples, turns on the court's finding that the province suffered prejudice in framing the pleadings. By imposing these technical requirements on the form of a grievance, the courts, like the legislatures before them, make an assertion of sovereignty. By relying on a defect in the pleadings to refuse to consider the claim, this Crown Court announces that disputes will be resolved on the settlers' terms. There is something deeply troubling about allowing Crown assertions of sovereignty to drive the

decision in a case that radically challenges these assertions and their effects.[115]

The other basis upon which the court found that a new trial was necessary was the misapprehension of oral history testimony by the trial judge, evidence that was crucial to the appellants' case. The court found that given the complexity and volume of the "factual issues at hand," the court would not do justice to either party by sifting through the evidence and coming to new factual findings.[116] As a result, the factual issues before the court in the first aboriginal title case brought under section 35(1) were left unsettled. As Borrows has written, "given the imbalance in the parties' financial and political resources, and the century-long denial of Aboriginal land and political rights in British Columbia, this sleight of hand is remarkable."[117] Despite the fact that the central factual issue before the court—whether the Gitksan and Wet'suwet'en had aboriginal title over their ancestral lands—was left undetermined, the court decided that when the factual issue went back to trial, the lower courts would need guidance as to the content of the right to aboriginal title itself. Accordingly, they proceeded to delineate the test for proving aboriginal title.

The court held that claimants must satisfy three criteria in order to prove the existence of aboriginal title:

(i) the land must have been occupied prior to sovereignty;
(ii) if present occupation is relied upon as proof of occupation presovereignty, there must be a continuity between present and presovereignty occupation; and
(iii) at sovereignty, that occupation must have been exclusive.[118]

In defining the criteria necessary to establish aboriginal title, the court imports one of the central features of Anglo-European private property ownership—exclusive possession—into the definition of aboriginal title. However, the definition of aboriginal title as being constituted by one of the central characteristics of Anglo-Canadian private property ownership exists alongside (and perhaps in conflict with) the temporal requirement that aboriginal nations must have enjoyed exclusive occupation prior to the assertion of colonial sovereignty and the imposition of Anglo-European private property relations. This points to the fundamental paradox that lies

at the heart of aboriginal rights: they are based on aboriginal peoples' prior occupation of the land but defined in relation to Anglo-Canadian norms of private property ownership and colonial sovereign power. The fact that Peter R. Grant, lead counsel for the Gitksan and Wet'suwet'en chiefs in the *Delgamuukw* trials, has stated that the appellants argued for exclusive possession to be one of the defining characteristics of aboriginal title, so that the Crown could not interfere with First Nations' land held under aboriginal title, serves to emphasize the contradictory nature of aboriginal title. In this instance, protection from continued Crown interference even in the face of a (potential) legal declaration of aboriginal title had to be sought (perhaps unsurprisingly) through recourse to common-law concepts of private ownership.[119]

Questions of what constitutes exclusive possession are highly contextual and depend on the facts of each case. But it is here that we see the concept of use and the ideology of improvement determining what constitutes possession.

> The evidence at trial brought by the appellants was, as the majority judgment notes, "based on their historical use and 'ownership' of one or more of the territories." Recounting the trial judge's findings, they note that the proof of use and "ownership" [*sic*, placed in scare quotes by Chief Justice Lamer of the SCC], were "physical and tangible indicators of their association with the territories . . . totem poles with the Houses' crests carved, or distinctive regalia" [para 13]. The Gitksan Houses had presented their adaawk at trial, the "sacred oral tradition about their ancestors, histories and territories. The Wet'suwet'en each have a 'kungax' which is a spiritual song or dance of performance which ties them to their land."[120]

In defining aboriginal title, the court noted that the source is the "prior occupation of Canada by aboriginal peoples."[121] The prior occupation of the land is relevant not only as the source of aboriginal title but as the physical fact of occupation derives from the common-law principle that occupation is proof of possession in law.[122] The characteristics of this sui generis form of title also include its being held communally: "Aboriginal title," notes the court, "cannot be held by individual aboriginal persons."[123] Further, the court noted that the uses to which the aboriginal claimants may put the land

are not restricted to the customs, activities, or practices that are integral to the distinctive aboriginal culture of the claimant.[124] At the same time, the inherent limit on aboriginal title is defined by the "nature of the attachment to the land which forms the basis of the group's claim to aboriginal title."[125] Aboriginal title is sui generis and distinct from " 'normal' proprietary interests" such as fee simple.[126]

This means, in practice, that "a group [who] claims a special bond with the land because of its ceremonial or cultural significance may not use the land in such a way as to destroy that relationship (e.g. by developing it in such a way that the bond is destroyed, perhaps by turning it into a parking lot)."[127] Of course, the court notes that this does not negate the right of a First Nation to surrender their lands to the Crown in exchange "for valuable consideration" were they to seek development of their land in a way deemed inconsistent with their cultural or spiritual relationship to that land.[128] The definition of aboriginal title was, at this point, clearly caught within the epistemological framework of the colonial legal system of property; fee simple ownership that allows for modern commercial relations of exchange and alienability exists in contradistinction to aboriginal title, which is defined overwhelmingly by a notion of culture firmly separated from modern economies of ownership. Race and racial difference are cast in the idiom of culture, which defines the specificity of the racial regime of ownership produced through aboriginal title litigation.

In *Delgamuukw*, the court found that both aboriginal perspectives and the common law are to be used as the basis for proving aboriginal title. How would aboriginal laws relating to ownership be translated into a legible form in Canadian courts? As the court notes, "if at the time of sovereignty, an aboriginal society had laws in relation to land, those laws would be relevant to establishing the occupation of lands which are the subject of a claim for aboriginal title. Relevant laws might include, but are not limited to, a land tenure system or laws governing land use."[129]

It is clear that in addition to identifying exclusive possession as a defining characteristic of aboriginal title, the criteria for establishing exclusive possession are only derived from aboriginal laws insofar as they mirror common-law concepts of use. How is factual possession to be established? Once again, the characteristics are those that are potentially legible to common-law concepts of private property ownership: "Physical occupation may be

established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources."[130] Occupation, which grounds the claim of possession, is defined on the basis of cultivation, enclosure, or regular use of the land claimed. Settled villages, as Trutch would have remarked upon in the course of surveying, provide proof of occupation.

While the court notes that the common-law concepts of exclusive possession must be "imported into the concept of aboriginal title with caution," the test remains "the intention and capacity to retain exclusive control."[131] Where two or more First Nations used or occupied the same territory, this would be translated into the common-law concept of "joint title."[132] First Nations' ways of owning and using land, assuming that they were indeed based on a completely different system of law, find no recognition in the law of aboriginal title as it was initially delineated, unless they were already compatible conceptually with the common law.

The emphasis on improvement reaches its apex in the justification test for the limitation of an aboriginal right. When an aboriginal right has been established, it can be justifiably limited if certain conditions are met. The test for a justifiable limitation on an aboriginal right was first established in *R. v. Sparrow* [1990] 1 S.C.R. 1075. In determining whether a right has been infringed, the court initially makes three inquiries: whether the limitation on the right is reasonable, whether the regulation at issue imposes undue hardship, and whether the regulation denies holders of the right their preferred means of exercising the right.[133] After determining whether there has been an infringement according to these three criteria, the court then inquires as to whether the infringement can be justified. In making this determination, the court must ask whether the government is acting pursuant to a valid legislative objective (conservation of fish, for example, was held to be a valid legislative objective in *R. v. Sparrow*). Second, the government must demonstrate that its actions are consistent with its fiduciary duty toward aboriginal peoples.[134]

The doctrine of limitation and the justification test developed in *Sparrow*, *Gladstone*, and *Van der Peet* are transposed to the context of an aboriginal title claim in *Delgamuukw*. The court reiterates the proposition that the objective of reconciliation underlying section 35 informs the limitation

analysis and justification test. As established in *Gladstone*, the court notes that the objective of reconciliation (of aboriginal prior occupation with the assertion of the sovereignty of the Crown) will be the one most relevant to the justification test. This is because, just as aboriginal rights are central to the "reconciliation of aboriginal societies with the broader political community of which they are a part," "limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole," equally necessary.[135]

In the context of aboriginal title claims, the court finds that "the range of legislative objectives that can justify the infringement of aboriginal title is fairly broad."[136] In *Delgamuukw*, the court goes on to list any activities that further the improvement or development of the land: "In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims are the kinds of objectives that are consistent with this purpose, and in principle, can justify the infringement of aboriginal title."[137] The development of industry and the improvement of the land in order to settle foreign populations continues, it seems, from the beginnings of formal settlement in the nineteenth century to the post-1982 realm of constitutional recognition, as a rationale for the dispossession of First Nations. Unlike the colonial administrators who oversaw the settlement of the province of British Columbia in the nineteenth century, contemporary courts recognize aboriginal title to land while justifying its limitation according to the same rationale used to justify the original dispossession of First Nations.

Similarly, the racial logic of improvement that emerges so blatantly in the legislative provisions and views of colonial administrators such as Trutch continues well into the present day. In *Dying from Improvement: Inquests and Inquiries into the Deaths of Aboriginal Deaths in Custody*, Sherene Razack explores in forensic detail the structural violence embedded in the public inquiries into the cause of death of aboriginal men in British Columbia and Saskatchewan. She argues that having been deemed to be "beyond improvement" by the settler state, aboriginal bodies become a site where settler violence is repeatedly enacted in order to secure and legitimate settler ownership over aboriginal land, particularly in the urban context.[138] The routine and

often lethal violence that aboriginal people are subjected to at the hands of the police reveal the function of police power in enacting the violence of a settler legal regime, evidenced by the outcomes of the inquests, which rarely, if ever, result in police prosecution. At the same time, the inquest functions as a means of quelling settler anxieties about their dominant status, by allowing the settler regime to commit itself to "improving Aboriginal lives."[139] Improvement thus functions as both the ideological cause of systemic and structural violence against aboriginal bodies, and the proposed policy solution for settler crises of legitimacy.

While Razack points to the connection between land appropriation and racism as the twin forces of dispossession in the settler colony, her focus remains steadfastly on the racial dimensions of settler violence. Here, my aim is to elucidate the other side of the equation, that is, the modern concepts of property that subtend racial formations in the settler colony. Rationales for appropriation and private ownership emerging from the seventeenth century onward produced and reflected new conceptions of value, in relation to land, goods, commodities, and the value of human life. The racial logic that is continually reinforced in settler colonial spaces has economic roots among its origins, in that it emerges in conjunction with new forms of value and methods of evaluation used to classify land as available for particular kinds of use and ownership. As discussed throughout this chapter, the racial regime of ownership takes the notion of improvement as its primary mode of articulation.

The content of aboriginal title was reconfigured to some extent by the Supreme Court of Canada in *Tsilhqot'in Nation v. British Columbia*. The Tsilhqot'in First Nation challenged the blatantly Eurocentric nature of the legal criteria required to be fulfilled to establish occupation (and therefore possession) in their appeal to the Supreme Court of Canada. Among the issues on appeal in *Tsilhqot'in Nation* was the test for aboriginal title to land, the nature of that right, and the means of reconciling broader public interests with the rights conferred by aboriginal title (para. 1).

The court held that the Tsilhqot'in hold ownership rights "similar to those associated with fee simple."[140] This includes "the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits

of the land; and the right to pro-actively use and manage the land."[141] However, the court maintained that the nature of aboriginal title, as a collective form of title, means that it "cannot be developed or misused in a way that would substantially deprive future generations of the benefit of the land."[142]

It is clear in *Tsilhqot'in Nation* that the court goes further in this judgment than before, in recognizing what they refer to as "the aboriginal perspective." In fact, during the hearing, one of the justices interrupted counsel for one of the provinces, and asked, "Can't we just look at this from the aboriginal perspective?"[143] What would it mean to look at this case "from the aboriginal perspective" of the claimants? Where does the law of the Tsilhqot'in enter into the deliberations of the court, and, specifically, where do their laws relating to land appear in the judgment? To what extent did the court decenter the English common-law concept of improvement as the basis for an ownership right?

As to the content of aboriginal title, the court posed the issue in the following way: "How should the courts determine whether a semi-nomadic indigenous group has title to its lands?" They clarify the test as established in *Delgamuukw* to provide for the way of life and perspectives of First Nations who are characterized as "semi-nomadic." In the appellant's factum, counsel argues that Tsilhqot'in use of their territory was historically exclusive, and that the exclusive possession of their lands as an "occupying owner" bears "the very stamp of possession at common law."[144] At the same time, they argue that the standard applied by the Court of Appeal, that the test for aboriginal title requires proof of "intensive presence" at particular sites, "leaves no space to consider Aboriginal perspectives on land, including their systems of law."[145]

A perusal of the appellant's factum reveals that the aboriginal perspective on occupation differs from the common-law principles elucidated above, in that the Tsilhqot'in, among others, used and cultivated their lands in a seasonal fashion, and planted and harvested root plants, medicines, and berries for subsistence purposes, rather than commercial exchange.[146] In their judgment, the court extends the boundaries of recognition when they redefine "occupation" to include "the way of life of the Aboriginal people, including those who were nomadic or semi-nomadic."[147] They summarize the test as follows:

> [W]hat is required is a culturally sensitive approach to sufficiency of occupation based on the dual perspectives of the Aboriginal group in question—its laws, practices, size, technological ability and the character of the land claimed—and the common law notion of possession as a basis for title. It is not possible to list every indicia of occupation that might apply in a particular case. The common law test for possession—which requires an intention to occupy or hold land for the purposes of the occupant—must be considered alongside the perspective of the Aboriginal group which, depending on its size and manner of living, might conceive of possession of land in a somewhat different manner than did the common law.[148]

They find that a "culturally sensitive approach" means that the regular, as opposed to the intensive, use of territories for "hunting, fishing, trapping and foraging is 'sufficient' use" to establish aboriginal title.[149] The test for occupation is augmented to include ways of living on the land that did not conform to the model of settlement outlined in the section "Ways of Surveying" in this chapter. To this extent, the judgment marks a dramatic improvement in the approach developed hitherto. Even though the basic principles as established in *Delgamuukw* and other section 35 jurisprudence (notably *Sparrow*, *Haida Nation*, and *Marshall*) are reaffirmed by the court, there is a clear shift in the emphasis placed on perspective of the Aboriginal claimant.

However, there remains an outstanding question regarding the status of aboriginal laws in the legal process through which the content of aboriginal title is defined. The Supreme Court affirmed the trial judge's findings, which were based on the acceptance of a great deal of evidence given by elders of the Tsilhqot'in, along with anthropologists and historians who testified as expert witnesses. Oral history testimony was accepted by the court as proof of historical occupation of the lands by the claimants. Tsilhqot'in collective memory and the passing down of history through an oral tradition was given due weight in the adjudication of the land claim.

In the appellant factum, counsel described the relationship between the landscape and the meaning it holds for the Tsilhqot'in people: "The landscape of the Claim Area resonates for Tsilhqot'in people with deep meaning: it is the physical expression of the legends that describe their origins,

their laws, and their identity as Tsilhqot'in people. Some of the Claim Area's most distinctive features, such as the towering Ts'il?os (Mount Tatlow), are revered today as living persons with powerful personalities that must be respected."[150] The testimony of the elders demonstrated a long history of seasonal rounds that took place throughout the claimed territory. Tsilhqot'in forms of land use that did not, historically, conform to settled modes of cultivation and the laws and their identity as Tsilhqot'in are rendered in the archaeological and anthropological language of nomadism. It is arguable that the "aboriginal perspective" is taken into account only insofar as it can be rendered legible within an epistemological frame shaped by an anthropological discourse that has long been embedded within racialist discourses of human development.

Do the Tsilhqot'in see themselves as seminomadic? Do their laws, upon which their rights to land are grounded, recognize the language of nomadism? According to one journalist who interviewed chief Roger Williams, apparently not: "That's why the habit of government officials, of media and even of supreme court judges to call the Tsilhqot'in 'nomadic' bothers Williams so much: his people have lived on these lands for thousands of years, while it is non-natives who are constantly moving and resettling. And what could be more nomadic and transient than the extractive industry itself—grabbing what resources and profits it can before abandoning one area for another."[151] The nomad, and the more contemporary notion of the seminomad are terms devised within the fields of archaeology and anthropology to describe ancient modes of life that persist into the present in some parts of the world. However, historically, rendering indigenous people (and the nonindigenous poor and homeless) as "mobile and unfixed" has been used to "force a separation between a population and the space it occupies, rendering a collective claim to this space void, even invisible."[152] As Blomley has argued persuasively, mobility "compromises the telos of property," that improvement to land as a ground of legitimate ownership claims is utterly inconsistent with populations of people who are in transit and who move. As we will see in chapter 3, the Bedouin in southern Israel have been dispossessed of their lands on the basis that as nomads, they have no attachment to the land they claim as theirs.

What are we to make of the use of the term "seminomad" for progressive purposes by the Supreme Court of Canada? In *Delgamuukw*, the Supreme

Court ordered a new trial, in part on the basis that neither the trial judge nor the majority on the Court of Appeal had sufficiently taken into account the perspectives of the aboriginal claimants, and had failed to give adequate weight to the oral history testimony. As the majority held, "[A]lthough the doctrine of aboriginal rights is a common law doctrine, aboriginal rights are truly sui generis, and demand a unique approach to the treatment of evidence which accords due weight to the perspective of aboriginal peoples. However, that accommodation must be done in a manner which does not strain 'the Canadian legal and constitutional structure.' "[153]

Even where the court moves toward recognizing modes of land use that do not conform to an ideology of improvement as the basis for an aboriginal title claim, they have yet to do so on the basis of aboriginal concepts of land use and ownership. Furthermore, in not overturning the test for a justifiable infringement of aboriginal title established in *Delgamuukw*, the court refuses to address the constitutive violence that is repeated with every judgment that reiterates the fiction that the Crown maintains underlying sovereignty over First Nations lands. As John Borrows has pithily observed, with regard to the *Tsilhqot'in* judgment, "[The] assertion of Crown sovereignty leading to radical Crown title rests on an 'inanis iustificationem': an empty justification. It is a restatement of the doctrine of terra nullius despite protestations to the contrary. The assertion of radical title retroactively affirms the Crown's appropriation of Indigenous legal interests without their knowledge or consent. In some other contexts, this would be called stealing—at the least it would be considered dishonest to say you own something when it previously belonged to someone else."[154] Stealing, speculation, appropriation—all the corollaries of ownership in the settler colony, where the mystical foundation of colonial sovereignty is persistently and doggedly repeated by the highest legal authorities in the land. The racial regime of ownership that articulates improvement and use as rationales for ownership together with the figure of the native who requires civilizational uplift remains intact; here with the modification afforded by the racial-anthropological figure of the seminomad.

In chapter 2, I examine the shift to more abstract conceptualizations of property ownership reflected in the system of title by registration. Whereas the ideology of improvement was rooted in a turn to the quantification and measurement of land in relation to the labor of cultivation, the logic of ab-

straction deracinated land and its multiple usages even further, rendering its value in the form of a general equivalence with other commodities. The quantification and assessment of agricultural labor as a means of assigning racial and economic value to colonial populations is rearticulated in more abstract and putatively scientific terms as colonized peoples are taxonomized in a globalized schema of racial difference.

Notes

INTRODUCTION

1 Edward Said, *Culture and Imperialism* (New York: Vintage, 1993), 71.

2 Sara L. Maurer, *The Dispossessed State: Narratives of Ownership in 19th-Century Britain and Ireland* (Baltimore, MD: Johns Hopkins University Press, 2012), 20.

3 Even if we take a broader view of colonial endeavors, the role of property in colonization beyond land was also central to the formation of capital markets and revenue extraction. See Ritu Birla, *Stages of Capital: Law, Culture, and Market Governance in Late Colonial India* (Durham, NC: Duke University Press, 2009), particularly the discussion of trusts law in chapters 2 and 3.

4 Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (Ann Arbor: University of Michigan Press, 2003), 3; and see also, in the context of colonial India, Piyel Haldar, *Law, Orientalism and Postcolonialism: The Jurisdiction of the Lotus Eaters* (London: Routledge, 2007).

5 Kalyan Sanyal, *Rethinking Capitalist Development: Primitive Accumulation, Governmentality and Post-Colonial Capitalism* (New Delhi: Routledge, 2013); Birla, *Stages of Capital*.

6 Peter Fitzpatrick, *The Mythology of Modern Law* (London: Routledge, 1992), 83.

7 See Laura Brace, *The Politics of Property: Labour, Freedom and Belonging* (Edinburgh: Edinburgh University Press, 2004).

8 See, for example, Margaret Jane Radin, *Reinterpreting Property* (Chicago: University of Chicago Press, 1993); Carol Rose, *Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership* (Boulder, CO: Westview, 1994);

Margaret Davies, *Property: Meanings, Histories, Theories* (Abingdon: Routledge-Cavendish, 2007).

9 Frantz Fanon, *The Wretched of the Earth* (London: Penguin, 2001), 28.

10 For example, see Eric Williams, *Capitalism and Slavery* (Chapel Hill: University of North Carolina Press, 1944); Sterling Stuckey, *Slave Culture: Nationalist Theory and the Foundations of Black America* (Oxford: Oxford University Press, 1987); Colin Dayan, *The Law Is a White Dog: How Legal Rituals Make and Unmake Persons* (Princeton, NJ: Princeton University Press, 2011).

11 See Lisa Lowe, *The Intimacy of Four Continents* (Durham, NC: Duke University Press, 2015).

12 Cedric J. Robinson, *Forgeries of Memory and Meaning: Blacks and the Regimes of Race in American Theater and Film before World War II* (Chapel Hill: University of North Carolina Press, 2007), 4–5.

13 Cornel West, "Race and Social Theory: Towards a Genealogical Materialist Analysis," in *The Year Left: Toward a Rainbow Socialism*, vol. 2, ed. Mike Davis, Manning Marable, Fred Pfeil, and Michael Sprinkler (London: Verso, 1987), 83.

14 Robinson, *Forgeries of Memory and Meaning*, 29. Robinson distinguishes, for instance, the "racial passions infecting English consciousness" during the Elizabethan era that were primarily confined to a nationalist stage, to the white racism that would follow in subsequent centuries, which "aggregate[d] the global to the domestic" (29).

15 Robin D. G. Kelley, "What Did Cedric Robinson Mean by Racial Capitalism?," *Boston Review*, January 12, 2017, 7.

16 Cheryl Harris, "Whiteness as Property," *Harvard Law Review* 106, no. 8 (June 1993): 1716.

17 Harris, "Whiteness as Property," 1716.

18 Ruth Wilson Gilmore, "Fatal Couplings of Power and Difference: Notes on Racism and Geography," *Professional Geographer* 54, no. 1 (2002): 16.

19 Harris, "Whiteness as Property," 1722.

20 My use of the term "recombinant" bears little relation to the content or context of the piece that inspired its use: David Stark, "Recombinant Property in East European Capitalism," in *Laws of the Market*, ed. Michel Callon (Oxford: Blackwell, 1998), 117–46. Stark defines recombinant property as a type of hedging used in emerging capital markets in postcommunist Hungary in order to "hold resources that can be justified or assessed by more than one standard of measure" (119).

21 Paul Gilroy, *After Empire: Melancholia or Convivial Culture?* (London: Routledge, 2004).

22 Avery F. Gordon, "'I'm Already in a Sort of Tomb': A Reply to Philip Scheffner's *The Halmoon Files*," *South Atlantic Quarterly* 110, no. 1 (winter 2011): 133.

23 Stuart Hall, "Gramsci's Relevance for the Study of Race and Ethnicity," *Journal of Communication Inquiry* 10, no. 5 (1986): 23–24.

24 Stuart Hall, "Signification, Representation, Ideology: Althusser and Post-structuralist Debates," *Critical Studies in Mass Communication* 2, no. 2 (June 1985): 91.

25 Although underexplored by Hall, the gendered nature of particular forms of labor, as the feminist literature on the centrality of reproductive labor to capitalist social formations recalls, draws our attention to how patriarchal constructions of gender similarly determine the value attributed to work traditionally done by women. In considering the geopolitical specificity of some of the worst forms of labor exploitation, labor relations and class formations cannot be adequately understood without considering the gendered and racialized nature of labor practices. See, for example, Silvia Federici, *Revolution at Point Zero: Housework, Reproduction, and Feminist Struggle* (Oakland, CA: PM Press / Common Notions, 2012).

26 Hall, "Signification, Representation, Ideology," 93.

27 Étienne Balibar, "Plus-value et classes sociales: Contribution à la critique de l'economie politique," in *Cinq études de matérialisme historique* (Paris: Francois Maspéro, 1974), 165–67.

28 Louis Althusser, "Contradiction and Overdetermination: Notes for an Investigation," in *For Marx* (London: Verso, 2005), 112.

29 Hall, "Signification, Representation, Ideology," n2, 113–14.

30 Stuart Hall, "Race, Articulation and Societies Structured in Dominance," in *Sociological Theories: Race and Colonialism*, ed. UNESCO (Paris: UNESCO, 1980), 312.

31 Witness, for instance, how ownership has become a prime strategy for racialized groups to achieve long-denied economic and social security, and to assert their equal value and respectability as individual persons. The powerful fallacy that ownership is sufficient to render groups of people long denied recognition as having the same value and worth as middle-class white proprietors certainly exacerbated the effects of the exploitative reverse redlining practices present during the subprime crisis. Indeed, grasping the complexity and contradictions of the racial character of contemporary real estate markets in North America, among other places, requires an account of the histories of racial dispossession that inform current ideologies of ownership. See Brenna Bhandar and Alberto Toscano, "Race, Real Estate and Real Abstraction," *Radical Philosophy* 194 (November/December 2015): 8–17.

32 Robinson, *Forgeries of Memory and Meaning*, xii.

33 Robinson, *Forgeries of Memory and Meaning*, xi.

34 For instance, Robinson argues that English abolitionists, mainly white middle-class professionals who were driven in part by a sense of moral superiority and a belief in their Christian duty to assist in the uplift of black slaves, induced (the implication here is unintentionally) the creation of literature and visual representations of black people that subverted notions of black inferiority. Robinson, *Forgeries of Memory and Meaning*, 41.

35 Robinson, *Forgeries of Memory and Meaning*, xiv.
36 Robinson, *Forgeries of Memory and Meaning*, xii.
37 Robinson, *Forgeries of Memory and Meaning*, 184.
38 Robinson, *Forgeries of Memory and Meaning*, 185.
39 "Race presents all the appearance of stability. History, however, compromises this fixity. Race is mercurial—deadly and slick. And since race is presumably natural, the intrusion of convention shatters race's relationship to the natural world." Robinson, *Forgeries of Memory and Meaning*, 4.
40 Ranajit Guha, *A Rule of Property for Bengal: An Essay on the Idea of Permanent Settlement* (Durham, NC: Duke University Press, 1996), 8–9. The illusory divide between the public and the private that is an organizing rationale for liberal, capitalist democratic forms of governance travels to the postcolonial space of transition, where, as André van der Walt has shown in the context of postapartheid South African property jurisprudence, the public/private divide so central to juridical forms is porous indeed. A. J. van der Walt, "Un-doing Things with Words: The Colonization of the Public Sphere by Private Property Discourse," *Acta Juridica* (1998): 235–81.
41 While her book covers much more ground than this, see on the competition of interests Laura Underkuffler, *The Idea of Property* (Oxford: Oxford University Press, 2003). See, in the American context of historical development, Gregory Alexander, *Commodity and Propriety: Competing Visions of Property in American Legal Thought, 1776–1970* (Chicago: University of Chicago Press, 1997); Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism* (Chicago: University of Chicago Press, 1990). On social norms, see Joseph W. Singer, *Entitlement: The Paradoxes of Property* (New Haven, CT: Yale University Press, 2000). On distribution, see Radin, *Reinterpreting Property*; Rose, *Property and Persuasion*.
42 Singer, *Entitlement*, 6, 31–32.
43 Jennifer Nedelsky has challenged the idea of the autonomous, bounded self in the context of constitutional provisions governing property law, and argues instead for a relational theory of the self. See Jennifer Nedelsky, "Should Property Be Constitutionalized? A Relational and Comparative Approach," in *Property on the Threshold of the 21st Century*, ed. G. E. van Maanen and A. J. van der Walt (Antwerp: Maklu, Blackstone, Nomos, Jurdik and Samhaelle, Schulthess, 1996), 417; Jennifer Nedelsky, "Law, Boundaries, and the Bounded Self," *Representations*, no. 30 (spring 1990): 162.
44 Nicholas Blomley, "The Boundaries of Property: Complexity, Relationality, and Spatiality," *Law and Society Review* 50, no. 1 (2016): 224–55.
45 Gregory Alexander notes that the metaphor of the bundle of rights "was intended to signify three key insights. First, it indicates that ownership is a complex legal relationship. Second, the metaphor illuminates the fact that the constitutive elements of that relationship are legal rights. Third, and most important, it underscores the social character of that relationship." Alexander, *Commodity and Propriety*, 319.

46 Underkuffler, *The Idea of Property*, 25–26.
47 Singer, *Entitlement*, 29–31.
48 Singer, *Entitlement*, 37.
49 See, for instance, Lee Godden, "Grounding Law as Cultural Memory: A 'Proper' Account of Property and Native Title in Australian Law and Land," *Australian Feminist Law Journal* 19, no. 1 (2003): 61–80; Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001); and Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon, 1989), among others.
50 For instance, Patricia J. Williams's classic study *The Alchemy of Race and Rights* (Cambridge, MA: Harvard University Press, 1991); Harris, "Whiteness as Property."
51 Patrick Wolfe, *Traces of History: Elementary Structures of Race* (London: Verso, 2016), 18.
52 André van der Walt, *Property in the Margins* (Oxford: Hart, 2009), 15.
53 Van der Walt, *Property in the Margins*, 14.
54 Hall, "Gramsci's Relevance for the Study of Race and Ethnicity," 23–24; see Achille Mbembe, *On the Postcolony* (Los Angeles: University of California Press, 2001).
55 David Lloyd, *Irish Times: Temporalities of Modernity* (Dublin: Field Day, 2008), 3.
56 Audra Simpson, *Mohawk Interruptus: Political Life across the Borders of Settler States* (Durham, NC: Duke University Press, 2014); Joanne Barker, *Native Acts: Law, Recognition, and Cultural Authenticity* (Durham, NC: Duke University Press, 2011); Bonita Lawrence, *"Real" Indians and Others: Mixed-Blood Urban Native Peoples and Indigenous Nationhood* (Lincoln: University of Nebraska Press, 2004); Glen Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014); Noenoe K. Silva, *Aloha Betrayed: Native Hawaiian Resistance to American Colonialism* (Durham, NC: Duke University Press, 2004); in relation to Australia, Aileen Moreton-Robinson, *The White Possessive: Property, Power, and Indigenous Sovereignty* (Minneapolis: University of Minnesota Press, 2015); Jodi Byrd, *The Transit of Empire: Indigenous Critiques of Colonialism* (Minneapolis: University of Minnesota Press, 2011).
57 Brenna Bhandar, "Resisting the Reproduction of the Proper Subject of Rights: Recognition, Property Relations and the Movement towards Post-colonialism in Canada," PhD diss., University of London, 2007.
58 On legacies of territorial reorganization, see Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton, NJ: Princeton University Press, 1996); Mahmood Mamdani, *Saviours and Survivors: Darfur, Politics, and the War on Terror* (New York: Pantheon, 2009).
59 Patrick Wolfe, "Settler Colonialism and the Elimination of the Native," *Journal of Genocide Research* 8, no. 4 (2006): 387.

60 Byrd, *The Transit of Empire*, xxiii.
61 Byrd, *The Transit of Empire*, 39.
62 For a critical discussion of this tendency, see Brenna Bhandar and Rafeef Ziadah, "Acts and Omissions: Framing Settler Colonialism in Palestine Studies," *Jadaliyya*, January 14, 2016, http://www.jadaliyya.com/pages/index/23569/acts-and-omissions_framing-settler-colonialism-in-.
63 David Lloyd and Patrick Wolfe, "Settler Colonial Logics and the Neoliberal Regime," *Settler Colonial Studies* 6, no. 2 (2016): 112.
64 In the Australian context, in relation to the Northern Territory Emergency Legislation, see Irene Watson, "Aboriginal Women's Laws and Lives: How Might We Keep Growing the Law?," *Australian Feminist Law Journal* 26, no. 1 (2007): 95–109; and in the Canadian context, in relation to the First Nations Property Ownership Act, see Shiri Pasternak, "How Capitalism Will Save Colonialism: The Privatization of Reserve Lands in Canada," *Antipode* 47, no. 1 (January 2015): 179–96.
65 Lloyd and Wolfe, "Settler Colonial Logics and the Neoliberal Regime," 113.
66 Lloyd and Wolfe, "Settler Colonial Logics and the Neoliberal Regime," 109, 111. On Israel's settlement practices, see Adam Hanieh, *Lineages of Revolt: Issues of Contemporary Capitalism in the Middle East* (London: Haymarket, 2013); R. Khalidi and S. Samour, "Neoliberalism as Liberation: The Statehood Programme and the Remaking of the Palestinian National Movement," *Journal of Palestine Studies* 40, no. 2 (2011): 6–25.
67 Avtar Brah, *Cartographies of Diaspora: Contesting Identities* (London: Routledge, 1996), 154.
68 Brah, *Cartographies of Diaspora*, 155–56. For a discussion of some of these feminist traditions of thought, see Delia Aguilar, "From Triple Jeopardy to Intersectionality: The Feminist Perplex," *Comparative Studies of South Asia, Africa and the Middle East* 32, no. 2 (2012): 415–48; Brenna Bhandar and Davina Bhandar, "Cultures of Dispossession: Rights, Status and Identities," *Darkmatter* 14 (2016), http://www.darkmatter101.org/site/2016/05/16/cultures-of-dispossession/; Silma Birge and Patricia Hill Collins, *Intersectionality* (London: Polity, 2016).

1. USE

1 A genuinely absentee owner, versus owners who are absent due to being displaced at the hands of an occupying power. The abuse of the Absentees' Property Law 1950 by the state of Israel is summed up by Adalah: "Property belonging to absentees was placed under the control of the State of Israel with the Custodian for Absentees' Property. The Absentees' Property Law was the main legal instrument used by Israel to take possession of the land belonging to the internal and external Palestinian refugees, and Muslim Waqf properties across the state." See "Absentees' Property Law," Adalah, accessed August 14, 2017, https://www.adalah.org/en/law/view/538.

2 One goal of PAH's political campaign is to reassert the right to housing that is enshrined in article 47 of the Spanish Constitution, which provides that "all Spaniards have the right to enjoy decent and adequate housing." The article places a positive duty on the government to make this right effective and to "prevent speculation." Article 33, which stipulates that private property must be limited by the social function of property, is also relevant. Despite these constitutional guarantees, mortgage laws, the deregulation of credit and lending, and the unrestrained bolstering of real estate development at any cost hollowed out the substance of article 47. See Adrià Alemany and Ada Colau, *Mortgaged Lives* (Los Angeles: Journal of Aesthetics and Protest Press, 2014), 38–44.

3 See Giorgio Agamben, *The Highest Poverty: Monastic Rules and Forms of Life* (Stanford, CA: Stanford University Press, 2013).

4 Thomas Frank, "Exploring the Boundaries of Law in the Middle Ages: Franciscan Debates on Poverty, and Inheritance," *Law and Literature* 20, no. 2 (summer 2008): 244–46.

5 Frank, "Exploring the Boundaries of Law in the Middle Ages," 257.

6 The concept of use underlying "the use" or its modern form, the trust, reflected the social and economic conditions of a time when warfare in far-flung places (including, infamously, the Crusades), religious prohibitions on ownership, and laws relating to primogeniture made the splitting of ownership an attractive proposition.

7 The modern trust has come to operate, as noted by Roger Cotterrell, in ways that obscure the social power that beneficial ownership endows upon a beneficiary, and is used to great effect today to avoid tax liability. See Roger Cotterrell, "Power, Property and the Law of Trusts: A Partial Agenda for Critical Legal Scholarship," *Journal of Law and Society* 14, no. 1 (1987): 85.

8 See Nicholas Blomley, *Unsettling the City: Urban Land and the Politics of Property* (London: Routledge, 2003).

9 Eva Mackey describes improvement as a concept foundational to Western epistemologies, whereby "the highest value in human relationships with land and the natural world is based on particular kinds of labour perceived as 'improvement'; specific kinds of improvement can make a human being into the owner and master of land and nature; and that other kinds of relationships with land preclude that ownership." Eva Mackey, *Unsettled Expectations: Uncertainty, Land and Settler Decolonization* (Halifax: Fernwood, 2016), 126.

10 Peter Fitzpatrick, *The Mythology of Modern Law* (London: Routledge, 1992).

11 Robin Fisher, *Contact and Conflict: Indian-European Relations in British Columbia, 1774–1890*, 2nd ed. (Vancouver: University of British Columbia Press, 1992), 66; and see John McLaren, Andrew R. Buck, and Nancy E. Wright, eds., *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: University of British Columbia Press, 2005).

12 Michel Foucault, *The Punitive Society* (Basingstoke: Palgrave Macmillan, 2015), 46.

13 Edmond Fitzmaurice, *The Life of Sir William Petty, 1623–1687* (London: Murray, 1895), 20.
14 Fitzmaurice, *The Life of Sir William Petty*, 34.
15 Mary Poovey, *A History of the Modern Fact: Problems of Knowledge in the Sciences of Wealth and Society* (Chicago: University of Chicago Press, 1998), 143.
16 Fitzmaurice, *The Life of Sir William Petty*, 40–41.
17 Peter Linebaugh and Marcus Rediker, *The Many-Headed Hydra: The Hidden History of the Revolutionary Atlantic* (London: Verso, 2002), 122.
18 T. C. Barnard, "Sir William Petty as Kerry Ironmaster," *Proceedings of the Royal Irish Academy Section C: Archeology, Celtic Studies, History, Linguistics, Literature* 82C (1982): 4.
19 Barnard, "Sir William Petty as Kerry Ironmaster," 2, 30.
20 Barnard, "Sir William Petty as Kerry Ironmaster," 28.
21 William Petty, *Political Anatomy of Ireland with the establishment for that kingdom when the late Duke of Ormond was Lord Lieutenant: to which is added Verbum sapienti, or, An account of the wealth and expences of England, and the method of raising taxes in the most equal manner* (London: D. Brown and W. Rogers, 1691), 38–39.
22 Petty, *Economic Writings*, 34.
23 Petty, *Economic Writings*, 39.
24 Petty, *Economic Writings*, 43.
25 Petty, *Economic Writings*, 44.
26 Petty, *Economic Writings*, 45.
27 Petty, *Political Anatomy*, 170.
28 The volume of trade in Ireland was inhibited, in Petty's view, by a population who "led a largely self-sufficient life." Adam Fox, "Sir William Petty, Ireland, and the Making of a Political Economist, 1653–87," *Economic History Review*, New Series, 62, no. 2 (May 2009): 398; Petty, *Political Anatomy*, 190.
29 Petty, *Economic Writings*, 45.
30 Petty, *Political Anatomy*, 108.
31 Paul Slack, "Material Progress and the Challenge of Affluence in Seventeenth-Century England," *Economic History Review*, New Series, 62, no. 3 (August 2009): 596.
32 In referring to Irish laborers, Petty writes, "Their Lazing seems to me to proceed rather from want of Imployment and Encouragement to Work, than from the natural abundance of Flegm in their Bowels or Blood" (Petty, *Political Anatomy*, 201).
33 Adam Fox explains Petty's plan in greater detail. It involved "a five-year plan for repatriating 100,000 Irish Catholic families who spoke little or no English, and distributing them evenly around England such that there would be one for every 11 indigenous families. They were to be accompanied by 40,000 unmarried women between 15 and 30 years old and 10,000 youths aged between 15 and 20 years. . . . In return, 100,000 of the families which the English hearth tax

returns revealed to be insolvent were to be shipped in the other direction, or alternatively 40,000 single women, 'to marry with Irish men.' " Fox, "Sir William Petty," 397. See Petty, *Political Anatomy*, 158.

34 Fox, "Sir William Petty," 398.

35 Petty, *Economic Writings*, 84.

36 Stanley G. Mendyk, *Speculum Britanniae: Regional Study, Antiquarianism, and Science in Britain to 1700* (Toronto: University of Toronto Press, 1989), 146.

37 Francis Bacon, *Novum Organum: Or, a True Guide to the Interpretation of Nature* (London: Bell and Daldy, 1859), 16.

38 Bacon, *Novum Organum*, 15. See Londa Schiebinger and Claudia Swan, eds., *Colonial Botany: Science, Commerce, and Politics in the Early Modern World* (Philadelphia: University of Pennsylvania Press, 2007).

39 Petty, *Economic Writings*, 302.

40 As quoted in R. Hooykaas, "The Rise of Modern Science: When and Why?," in *The Scientific Revolution*, ed. Marcus Hellyer (Oxford: Blackwell, 2003), 39.

41 Slack, "Material Progress and the Challenge of Affluence," 578.

42 Siep Stuurman, "François Bernier and the Invention of Racial Classification," *History Workshop*, no. 50 (autumn 2000): 4.

43 François Bernier, "The Division of the Earth According to the Different Types of Races of Men Who Inhabit It," *History Workshop*, no. 51 (spring 2001): 248.

44 Neal Wood, *John Locke and Agrarian Capitalism* (Berkeley: University of California Press, 1984), 65.

45 A full discussion of the labor theory of self-proprietorship appears in chapter 3.

46 John Locke, "Of Property," in *The Two Treatises of Government* (Cambridge: Cambridge University Press, 1960), 40.

47 Locke, *Two Treatises of Government*, 336.

48 William Blackstone, *Commentaries on the Laws of England* (London: Routledge, 2001), 4.

49 Locke, *Two Treatises of Government*, 213–14.

50 Locke, *Two Treatises of Government*, 209.

51 Pat Moloney, " 'Strangers in Their Own Land': Capitalism, Dispossession and the Law," in *Land and Freedom: Law, Property Rights and the British Diaspora*, ed. A. R. Buck, John McLaren, and Nancy E. Wright (Aldershot: Ashgate, 2001), 23–26; and see Mackey, *Unsettled Expectations*, 49–55.

52 Locke, *Two Treatises of Government*, 213.

53 Locke, *Two Treatises of Government*, 209.

54 Locke, *Two Treatises of Government*, 209.

55 Blackstone, *Commentaries on the Laws of England*, 6–7.

56 Blackstone, *Commentaries on the Laws of England*, 6–7.

57 Eva Mackey has elucidated how settler communities who are actively opposed to aboriginal land rights in Canada and the United States come to have expectations of security and certainty in their property rights. She argues that "such certainty in property, enacted through philosophy, law and land claims policies, has

been, and continues to be, pivotal in establishing and maintaining the 'fantasy of entitlement' and the 'settled expectations' of settler society." Mackey, *Unsettled Expectations*, 67.

58 See Vaughn Palmer, "'The Finest Savage I Have Met with Yet'—but Judge Begbie Sent Him to Hang Anyway," *Vancouver Sun*, October 25, 2014, http://www.vancouversun.com/news/Vaughn+Palmer+finest+savage+have+with+Judge+Begbie+sent+hang+anyway/10323091/story.html.

59 Matthew Begbie to Governor Frederick Seymour, September 30, 1864, *Papers Connected with the Indian Land Question*, BC Provincial Archives (Victoria: Government Printing Office, 1875).

60 Begbie to Governor Frederick Seymour, September 30, 1864.

61 Fisher, *Contact and Conflict*, 35.

62 Fisher, *Contact and Conflict*, 35.

63 Blomley, *Unsettling the City*, 7–8.

64 Cole Harris, *Making Native Space: Resistance, Colonialism and Reserves in British Columbia* (Vancouver: UBC Press, 2002), 32.

65 Harris, *Making Native Space*, 45.

66 Harris, *Making Native Space*, 32.

67 Harris, *Making Native Space*, 19.

68 Harris, *Making Native Space*, 30.

69 Harris, *Making Native Space*, 34.

70 As I discuss below, preemption was one of the two principle ways in which aboriginal lands were appropriated by colonial settlers. In order to preempt land that was unsurveyed, unoccupied, or unreserved for other settlers or Indians, a settler merely needed to stake out the land that he desired with posts or even natural markers such as a tree trunk. After staking out the land physically, one needed to complete various types of registration in order to solidify one's ownership interest in law and equity. An Act to Amend and Consolidate the Laws Affecting Crown Lands in British Columbia, Statutes of the Province of British Columbia, 4th Session of First Parliament of BC, 1875, section 5.

71 Harris elaborates on why it was so difficult for aboriginal peoples to acquire land through preemption: the initial fee and the requirements of crop production were arduous to begin with; and also, taking out preemptions cast natives into a "bureaucratic environment that assumed English language literacy, paperwork and the rudiments of Cartesian geometry." Harris, *Making Native Space*, 36, 68.

72 Dispatches between the Right Honourable Sir Edward Bulwer-Lytton and Governor James Douglas, *Papers Connected with the Indian Land Question*, 15–16.

73 *Papers Connected with the Indian Land Question*, 15.

74 *Papers Connected with the Indian Land Question*, 16.

75 *Papers Connected with the Indian Land Question*, 15, 16.

76 *Papers Connected with the Indian Land Question*, 36, 37, 45.

77 *Papers Connected with the Indian Land Question*, 46.

78 As Patrick Wolfe has pointed out, settler colonialism is a process, a structure, not a singular event. The diminishing of reserve boundaries was intended to impoverish and eliminate indigenous populations seen as waste. More recently, the notion of the border as a technique of control has emerged as a way of understanding the shifting territorial terrain marked by unstable boundaries. In Israel/Palestine, Eyal Weizman argues that in the post-Oslo period, the rapidly shifting boundaries policed by flying checkpoints has become a primary technique of destabilizing and controlling the Palestinian population in the West Bank. Eyal Weizman and Fazal Sheikh, *The Conflict Shoreline: Colonization as Climate Change in the Negev Desert* (Brooklyn: Steidl, 2015).

79 In addition to significant property holdings, Trutch "successfully bridged the Fraser [River] a short distance [above the town of] Yale" in 1863 and held this under a toll charter right until 1870. Gilbert Malcolm Sproat, "Sir Joseph William Trutch, K.C.M.G.," in the Provincial Archives of British Columbia, 3. In fact, as Lynch notes, he was granted by charter tolls on the roads that he had built as a private contractor during the years 1859–1864. Hollis R. Lynch, "Sir Joseph William Trutch, a British-American Pioneer on the Pacific Coast," *Pacific Historical Review* 30, no. 3 (August 1961): 249.

80 Joseph Trutch's father was employed as a clerk of the peace in St. Thomas, Jamaica, and Joseph Trutch "spent his boyhood on the family estates on the British island." Lynch, "Sir Joseph William Trutch," 243. Trutch's sister, Emily Pinder, married and spent several years in India. Trutch Archives, Box 1, File 5, University of British Columbia Library, Vancouver, BC.

81 Joseph Trutch to John Trutch, September 13, 1858, Trutch Archives.

82 Robin Fisher, "Joseph Trutch and Indian Land Policy," *BC Studies*, no. 12 (winter 1971–72): 12–16.

83 Fisher, "Joseph Trutch and Indian Land Policy," 7.

84 Joseph Trutch to John Trutch, March 6, 1857, 1; Joseph Trutch to John Trutch, March 6, 1857, 3; Joseph Trutch to John Trutch, July 31, 1857, 1–2; Joseph Trutch to John Trutch, September 13, 1858, 1; Joseph Trutch to John Trutch, November 15, 1858, 3–4, Trutch Archives.

85 Joseph Trutch to John Trutch, July 27, 1858, 3, Trutch Archives.

86 Joseph Trutch to John Trutch, July 27, 1858, 3, Trutch Archives.

87 Joseph Trutch to John Trutch, July 27, 1858, 1, Trutch Archives.

88 Joseph Trutch to John Trutch, July 27, 1858, 3, Trutch Archives.

89 Joseph Trutch to John Trutch, July 27, 1858, 4, Trutch Archives.

90 Joseph Trutch to John Trutch, July 27, 1858, 5, Trutch Archives.

91 Joseph Trutch to Charlotte Trutch, June 23, 1850, 4, Trutch Archives.

92 Joseph Trutch, "Lower Fraser River Indian Reserves," August 28, 1867, 1, Trutch Archives; and see Fisher, "Joseph Trutch and Indian Land Policy," 16.

93 Trutch, "Lower Fraser River Indian Reserves," 4.

94 Trutch, "Lower Fraser River Indian Reserves," 6–7.

95 Trutch, "Lower Fraser River Indian Reserves," 8.

96 Joseph Trutch to Colonial Secretary, September 20, 1865, *Papers Connected with the Indian Land Question*, 30.

97 Joseph Trutch to Secretary of State for the Provinces, September 26, 1871, *Papers Connected with the Indian Land Question*, 101.

98 Frantz Fanon, *The Wretched of the Earth* (London: Penguin, 2001), 34.

99 *Papers Connected with the Indian Land Question*, 46.

100 *Papers Connected with the Indian Land Question*, 46.

101 *Papers Connected with the Indian Land Question*, 77.

102 An Act to Consolidate and Amend the Acts Respecting the Public Lands of the Dominion ("The Dominion Lands Act"), 1908, ch.20, 7–8, section 2.

103 An Act Respecting the Land of the Crown, RSBC, 1911, vol. 2, ch.128, section 7.

104 I have thus far emphasized that the preemption of land and homesteading were racialized processes in their near-categorical exclusion of aboriginal peoples from the ability to preempt land. However, it was not only aboriginal peoples who could not preempt land but also immigrants from China and, later, those who arrived from India to work as laborers in British Columbia's resource industries. The ability to own property privately through preemption of the land was a racialized phenomenon, generally speaking. For instance, section 160 of An Act Respecting the Land of the Crown stipulates that "it is unlawful for the Commissioner or other person to issue a pre-emption record of any Crown land or sell any portion thereof to any Chinese." During the late nineteenth and early twentieth centuries, Asian immigrants, who constituted a large labor force in British Columbia's natural resource industries, were also excluded from the burgeoning economy of private property relations. For an analysis of the relationship between race, immigration, labor, and nation building, see B. Singh Bolaria and Peter S. Li, *Racial Oppression in Canada* (Toronto: Garamond, 1988). For reference to discriminatory laws that were passed against Chinese and Japanese immigrants during the nineteenth and early twentieth centuries, see Joel Bakan et al., eds., *Canadian Constitutional Law*, 3rd ed. (Toronto: Emond Montgomery, 2003), 644–56.

105 Paul Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849–1989* (Vancouver: University of British Columbia Press, 1990), 34–35.

106 Tennant, *Aboriginal Peoples and Politics*, 34–35.

107 Peter Hogg, *Constitutional Law of Canada* (Toronto: Thompson Reuters, 2000), 53.

108 Hogg, *Constitutional Law of Canada*, 56.

109 Section 52(1), Constitution Act, 1982; Hogg, *Constitutional Law of Canada*, 53.

110 See Brenna Bhandar, "The First Nations of Canada Are Still Waiting for the Colonial Era to End," *Guardian*, October 21, 2013, http://www.theguardian.com/commentisfree/2013/oct/21/canada-colonial-mentality-first-nations.

111 Shin Imai, *Aboriginal Law Handbook* (Toronto: Carswell, 1999), 10.

112 John Borrows, *Nookomis' Constitution: Revitalizing Law in Canada* (Toronto: University of Toronto Press, forthcoming), chapter 3, manuscript on file with author.
113 *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010, para. 7.
114 *Delgamuukw v. British Columbia*, para. 1.
115 John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2007), 84, 85.
116 *Delgamuukw v. British Columbia*, para. 108.
117 Borrows, *Recovering Canada*, 85.
118 *Delgamuukw v. British Columbia*, para. 143.
119 Peter R. Grant, interview with author, June 25, 2015, Vancouver, BC.
120 *Delgamuukw v. British Columbia*, para. 134.
121 *Delgamuukw v. British Columbia*, para. 114.
122 *Delgamuukw v. British Columbia*, para. 114.
123 *Delgamuukw v. British Columbia*, para. 115.
124 *Delgamuukw v. British Columbia*, para. 117.
125 *Delgamuukw v. British Columbia*, para. 125.
126 *Delgamuukw v. British Columbia*, para. 125.
127 *Delgamuukw v. British Columbia*, para. 128.
128 *Delgamuukw v. British Columbia*, para. 131.
129 *Delgamuukw v. British Columbia*, para. 148.
130 *Delgamuukw v. British Columbia*, para. 149.
131 *Delgamuukw v. British Columbia*, para. 156.
132 *Delgamuukw v. British Columbia*, para. 158.
133 *R. v. Gladstone* [1996] 2 S.C.R. 723, para. 39.
134 *R. v. Gladstone*, para. 54.
135 *Delgamuukw v. British Columbia*, para. 161.
136 *Delgamuukw v. British Columbia*, para. 161.
137 *Delgamuukw v. British Columbia*, per Chief Justice Lamer, para. 165.
138 Sherene Razack, *Dying from Improvement: Inquests and Inquiries into Indigenous Deaths in Custody* (Toronto: University of Toronto Press, 2015).
139 Razack, *Dying from Improvement*, 95.
140 *Tsilhqot'in Nation v. British Columbia* [2014] 2 S.C.R. 256, para. 72.
141 *Tsilhqot'in Nation v. British Columbia*, para. 72.
142 *Tsilhqot'in Nation v. British Columbia*, para 74. With regard to the issue of economic development on indigenous land, the court also reiterates the duty to consult with aboriginal title holders owed by the government and others that was established in *Haida Nation v. British Columbia (Minister of Forests)* [2004] 3 S.C.R. 511.
143 For the webcast of the appeal at the Supreme Court of Canada, see Webcast 34986, July 11, 2013, http://www.scc-csc.ca/case-dossier/info/webcast-webdiffusion-eng.aspx?cas=34986.

144 Appellant factum, para. 176, on file with author.
145 Appellant factum, para. 177.
146 Appellant factum, para. 180.
147 Appellant factum, para. 38.
148 Appellant factum, para. 41.
149 Appellant factum, para. 42.
150 Appellant factum, para. 30.
151 Martin Lukacs, "The Indigenous Land Rights Ruling That Could Transform Canada," *Guardian*, October 21, 2014, http://www.theguardian.com/environment/true-north/2014/oct/21/the-indigenous-land-rights-ruling-that-could-transform-canada.
152 Blomley, *Unsettling the City*, xx.
153 *Delgamuukw v. British Columbia*, para. 82, quoting from para. 49 of *R. v. Van der Peet* [1996] 2 S.C.R. 507.
154 Borrows, *Nookomis' Constitution*, 73.

2. PROPERTIED ABSTRACTIONS

1 Hernando de Soto, *The Mystery of Capital* (Reading: Bantam Press, 2000), 6.
2 Rashmi Dyal-Chand queries the sufficiency of de Soto's explanation for the subprime mortgage crisis, which amounted to a criticism of the lack of transparency involved in the securitization of subprime mortgages. For de Soto, it was the failure to maintain the system of recording typical of property registration that was largely to blame, as it was impossible to identify and attribute risk to the chain of actors involved. The MERS system has received critical commentary by both scholars and the judiciary: see Joseph Singer, "Foreclosure and the Failures of Formality, or Subprime Mortgage Conundrums and How to Fix Them," *Connecticut Law Review* 46, no. 2 (December 2013): 497–557; *Jackson et al v. MERS Inc* 770 N.W.2d 487 (Minn. 2009). Rashmi Dyal-Chand, "Leaving the Body of Property Law? Meltdowns, Land Rushes, and Failed Economic Development," in *Hernando de Soto and Property in a Market Economy*, ed. D. Benjamin Barros (Surrey: Ashgate, 2010), 83–96.
3 Timothy Mitchell, "The Work of Economics: How a Discipline Makes Its World," *European Journal of Sociology* 46, no. 2 (2005): 297–320.
4 Dyal-Chand, "Leaving the Body of Property Law?," 92.
5 De Soto, *The Mystery of Capital*, 110.
6 Dipesh Chakrabarty, *Provincialising Europe* (Princeton, NJ: Princeton University Press, 2007); Gayatri Spivak, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* (Cambridge, MA: Harvard University Press, 1999).
7 See, for instance, Ezra Rosser, "Anticipating de Soto: Allotment of Indian Reservations and the Dangers of Land-Titling," in *Hernando de Soto and Property in a Market Economy*, ed. D. Benjamin Barros (Surrey: Ashgate, 2010), 61–81.

8 J. Kēhaulani Kauanui, *Hawaiian Blood: Colonialism and the Politics of Sovereignty and Indigeneity* (Durham, NC: Duke University Press, 2008), 76.

9 Kēhaulani Kauanui, *Hawaiian Blood*, 76; and in relation to the use of allotment and homesteading as a means of "propelling Indians from the collective inertia of tribal membership into the progressive individualism of the American dream" in the late nineteenth-century United States, see Patrick Wolfe, *Traces of History: Elementary Structures of Race* (London: Verso, 2016), 182–83.

10 Kēhaulani Kauanui, *Hawaiian Blood*, 77.

11 Kēhaulani Kauanui, *Hawaiian Blood*, 77.

12 Kēhaulani Kauanui, *Hawaiian Blood*, 77.

13 See J. C. Altman, C. Linkhorn, and J. Clarke, "Land Rights and Development Reform in Remote Australia," discussion paper no. 276/2005 (Canberra: Centre for Aboriginal Economic Policy Research, 2005).

14 Aileen Moreton-Robinson, *The White Possessive: Property, Power, and Indigenous Sovereignty* (Minneapolis: University of Minnesota Press, 2015), 69.

15 See Ranajit Guha, *A Rule of Property for Bengal: An Essay on the Idea of Permanent Settlement* (Durham, NC: Duke University Press, 1996).

16 Geremy Forman, "Settlement of the Title in the Galilee: Dowson's Colonial Guiding Principles," *Israel Studies* 7, no. 3 (2002): 63.

17 Bill Maurer and Gabriele Schwab, *Accelerating Possession: Global Futures of Property and Personhood* (New York: Columbia University Press, 2006), 2.

18 Maurer and Schwab, *Accelerating Possession*, 1–4.

19 E. P. Thompson, *Customs in Common* (London: New Press, 1992); Ellen Meiksins Wood, *Liberty and Property: A Social History of Western Political Thought from the Renaissance to Enlightenment* (London: Verso, 2011).

20 Alain Pottage, "The Originality of Registration," *Oxford Journal of Legal Studies* 15, no. 3 (1995): 377.

21 The term "affective" is used here to denote the sentiments, emotions, and sensibilities that come to explicitly ground justifications for ownership in the work of Bentham, Blackstone, and others; namely, desires, expectations, and fear of loss and insecurity. For an excellent discussion of how affect operates in contemporary Canadian settler colonial property relations, to engender a sense of entitlement to and expectation of property ownership among settler communities, see Eva Mackey, "(Un)Settling Expectations: (Un)Certainty, Settler States of Feeling, Law and Decolonization," *Canadian Journal of Law and Society* 29, no. 2 (2014): 235–52.

22 For analysis of the imposition of a system of title by registration in colonial Bengal, see Guha, *A Rule of Property for Bengal*; for Mandate Palestine, see Zeina B. Ghandour, *A Discourse on Domination in Mandate Palestine: Imperialism, Property and Insurgency* (London: Routledge, 2009).

23 However, land registries now run the risk of being privatized, as proposed in the Neighbourhood Planning and Infrastructure Bill. It is briefly outlined in the Queen's Speech of May 2016. See https://www.gov.uk/government/uploads

/system/uploads/attachment_data/file/524040/Queen_s_Speech_2016_background_notes_.pdf. Relatedly, the privatization of the Mortgage Electronic Registration System in the United States has been identified as a major detriment to the interests of homeowners in their struggles against foreclosure; see Singer, "Foreclosure and the Failures of Formality."

24 Lee Godden, "Grounding Law as Cultural Memory: A 'Proper' Account of Property and Native Title in Australian Law and Land," *Australian Feminist Law Journal* 19, no. 1 (2003): 61–80.

25 See David J. Hayton, *Registered Land* (London: Sweet and Maxwell, 1981), 10–12; Alfred William Brian Simpson, *An Introduction to the History of Land Law* (Oxford: Oxford University Press, 1961), 254.

26 The Registration Act 1617 provided for a system of registration of land in Scotland.

27 Avner Offer, *Property and Politics, 1870–1914*: *Land Ownership, Law, Ideology and Urban Development in England* (Cambridge: Cambridge University Press, 1981), 69.

28 Richard Robert Torrens, *Notes on a System of Conveyancing by Registration of Title (with instructions for the guidance of parties dealing, illustrated by copies of the books and forms in use in the land titles office)* (Adelaide: Register and Observer General Printing Office, 1859), 6–7.

29 Offer, *Property and Politics*, 69.

30 As noted below, the Torrens system was introduced in the colony of British Columbia in 1870, and a system of land registration was introduced into Ghana (or the Gold Coast as it was known at the time) in 1883. See Patrick McAuslan, *Bringing the Law Back In: Essays in Land, Law and Development* (Abingdon: Ashgate, 2003), 74.

31 David Sugarman and Ronnie Warrington, "Land Law, Citizenship, and the Invention of Englishness: The Strange World of the Equity of Redemption," in *Early Modern Conceptions of Property*, ed. John Brewer and Susan Staves (London: Routledge, 1996), 111.

32 Sugarman and Warrington, "Land Law, Citizenship, and the Invention of Englishness," 112. See also Philip Girard, "Land Law, Liberalism, and the Agrarian Ideal: British North America, 1750–1920," in *Despotic Dominion: Property Rights in British Settler Societies*, ed. John MacLaren, Andrew R. Buck, and Nancy E. Wright (Vancouver: University of British Columbia Press, 2005), 131.

33 And presumably, in some instances, trust between individuals who were attached to others through social and kinship relations.

34 Robert T. J. Stein and Margaret A. Stone, *Torrens Title* (London: Butterworths, 1991), 4.

35 Alain Pottage, "The Measure of Land," *Modern Law Review* 57, no. 3 (May 1994): 363.

36 Pottage, "The Measure of Land," 365.

37 Pottage, "The Measure of Land," 366. See Tithe Commission and Ordnance Survey, *First Report of the Registration and Conveyancing Commission* PP (London: House of Commons, 1850), 32.
38 Pottage, "The Measure of Land," 366.
39 *Copy of the Second Report made to His Majesty by the Commissioners appointed to inquire into the Law of England respecting Real Property*, dated 29 June 1830 (575) Sess. vol. XI, p. 1.
40 Greg Taylor, *The Law of the Land: The Advent of the Torrens System in Canada* (Toronto: University of Toronto Press, 2008), 24.
41 Torrens wrote, "If the comparative indivisibility in land constitutes a difficulty, it exists in a yet greater degree in a ship. Here also we find the characteristic of individuality. We must identify the particular ship to be transferred by a long description in the register. Here again the contingency of adverse possession requires to be guarded against. Finally the attribute of immobility renders transfer by registration more suitable for that description of property than for shipping which may be removed beyond the ken and jurisdiction of the registering officer; yet the transfer and encumbrance of shipping property through the instrumentality of registration has given universal satisfaction, ensuring certainty, simplicity and economy." Torrens, *Notes on a System of Conveyancing by Registration of Title*, 10–11.
42 Torrens, *Notes on a System of Conveyancing*, 10–11.
43 Torrens, *Notes on a System of Conveyancing*.
44 Torrens, *Notes on a System of Conveyancing*, 43.
45 Torrens, *Notes on a System of Conveyancing*, 10–11.
46 William Searle Holdsworth, *The History of English Law*, vol. 2 (London: Sweet and Maxwell, 1936), 224.
47 See, for instance, Nicholas Jickling (Customs Officer), *A Digest of the Laws of the Customs Comprising a Summary of the Statutes in Force in Great Britain and Its Foreign Dependencies Relating to Shipping, Navigation, Revenue and other matters within the cognizance of the officers of the Customs, from the earliest Period to the 53 Geo. III inclusive, Part II* (London: No. 41, Pall Mall, 1815). For a discussion of the importance of customs records to revenue collection, as customs duties provided a more reliable source of income than excise taxes or Parliament, see Mary Poovey, *A History of the Modern Fact: Problems of Knowledge in the Sciences of Wealth and Society* (Chicago: University of Chicago Press, 1998), 126.
48 Henry Thring, *A Memorandum of the Merchant Shipping Law Consolidation Bill; Pointing Out and Explaining the Points in Which the Existing Acts Are Altered* (London: George E. Eyre and William Spottoswoode, HM Stationery Office, 1854), 4–5.
49 Thring, *A Memorandum of the Merchant Shipping Law Consolidation Bill*, 4, 5.
50 Thring, *A Memorandum of the Merchant Shipping Law Consolidation Bill*, 9.
51 William Pietz, "Material Considerations: On the Historical Forensics of Contract," *Theory, Culture and Society* 19, no. 5/6 (2002): 42. On bookkeeping, see Poovey, *A History of the Modern Fact*.

52 Pottage, "The Measure of Land," 383.
53 Jonathan Levy, *Freaks of Fortune: The Emerging World of Capitalism and Risk in America* (Cambridge, MA: Harvard University Press, 2012), 99.
54 Pottage, "The Originality of Registration," 377.
55 Pottage, "The Originality of Registration," 381–82.
56 South Australia Parliamentary Debates, June 4, 1857, 202, British Library archives, London.
57 Another perceived defect with the system of conveyancing was the cost involved. The perusal of title deeds and related investigations into the land, the lucrative preserve of lawyers, was indeed expensive, and this proved particularly onerous in the colonies, where the initial outlay of expenses to obtain land were high. In the colonies of New South Wales and South Australia, immigrants would first purchase land orders that they could sell on the private market. Speculation became rife, and with an especially transient settler population in the early days of settlement, problems relating to the insecurity of title were exacerbated.
58 James Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (New Haven, CT: Yale University Press, 1998), 4.
59 Scott, *Seeing Like a State*, 35.
60 Nicholas Blomley, *Unsettling the City: Urban Land and the Politics of Property* (London: Routledge, 2003).
61 Blomley, *Unsettling the City*, 55; and see Lee Godden, "The Invention of Tradition: Property Law as a Knowledge Space for the Appropriation of the South," *Griffith Law Review* 16, no. 2 (2007): 375–410.
62 Pottage, "The Measure of Land," 363; and see Alain Pottage and Brad Sherman, *Figures of Invention: A History of Modern Patent Law* (New York: Oxford University Press, 2010), for a novel discussion of how abstraction (and Marx's labor theory of value) were central to modes of propertization in the development of patent law doctrine, particularly chapter 2.
63 Writing about the colonization and commercialization of the Mississippi Valley, Walter Johnson notes how the surveying, mapping, and sale of land was concomitant with its "racial pacification." Walter Johnson, *River of Dark Dreams: Slavery and Empire in the Cotton Kingdom* (Cambridge, MA: Harvard University Press, 2013), 34.
64 See Cole Harris, *Making Native Space: Resistance, Colonialism and Reserves in British Columbia* (Vancouver: UBC Press, 2002), and discussion of Trutch in Harris's chapter 3; Blomley, *Unsettling the City*.
65 Torrens, *Notes on a System of Conveyancing*, 13.
66 Torrens, *Notes on a System of Conveyancing*, 19.
67 *Fourth Annual Report of the Colonization Commissioners for South Australia (1839)* (London: House of Commons, 1836–40), 3.
68 *Fourth Annual Report of the Colonization Commissioners*, 4.
69 *Fourth Annual Report of the Colonization Commissioners*, 4.

70 *Fourth Annual Report of the Colonization Commissioners*, 4.
71 *Fourth Annual Report of the Colonization Commissioners*, 4.
72 Henri Lefebvre's insight that "capitalism and neo-capitalism [produce] an abstract space that is a reflection of the world of business on both a national and international level, as well as the power of money and the *politique* of the state" seems quite apt here. Henri Lefebvre, *State, Space, World: Selected Essays*, ed. N. Brenner and S. Elden, trans. G. Moore, N. Brenner, and S. Elden (Minneapolis: University of Minnesota Press, 2009), 187.
73 Torrens, *Notes on a System of Conveyancing*, 7.
74 Elizabeth Povinelli, "The Governance of the Prior," *interventions* 13, no. 1 (2011): 20.
75 See, for instance, Godden, "Grounding Law as Cultural Memory"; Blomley, *Unsettling the City*.
76 Of course, the reality of how land was used, exchanged, mortgaged, and so on was to some extent conditioned, as explored above, by a general suspicion among landowners of the fictive nature of these propertied abstractions, and resulted in a mixture of real estate practices that reflected multiple property logics.
77 Derek Sayer, *The Violence of Abstraction: The Analytical Foundations of Historical Materialism* (London: Basil Blackwell, 1987), 86.
78 Sayer, *The Violence of Abstraction*, 88.
79 Karl Marx, *Poverty of Philosophy* (1847), 154, quoted in Sayer, *The Violence of Abstraction*, chapter 2.
80 Alberto Toscano, "The Open Secret of Real Abstraction," *Rethinking Marxism: A Journal of Economics, Culture and Society* 20, no. 2 (2008): 275. See also Jordana Rosenberg, *Critical Enthusiasm: Capital Accumulation and the Transformation of Religious Passion* (Oxford: Oxford University Press, 2011), 22–25; and Alberto Toscano's thorough exploration of the way in which abstraction functions in the work of Whitehead, Stengers, and Marx in "The Culture of Abstraction," *Theory, Culture and Society* 25 (2008): 57.
81 See China Miéville, *Between Equal Rights: A Marxist Theory of International Law* (London: Pluto, 2005), 77–84; Evgeny Pashukanis, *Law and Marxism: A General Theory* (London: Pluto, 1989), 51.
82 Pashukanis, *Law and Marxism*, 51.
83 Pashukanis, *Law and Marxism*, 112.
84 For an insightful analysis of the feminist critiques of this Marxist theory of law, which obscures forms of labor that fall outside commodification, such as reproductive labor in the home, see Ruth Fletcher, "Legal Form, Commodities and Reproduction: Reading Pashukanis," in *Feminist Encounters with Legal Philosophy*, ed. Maria Drakopoulou (London: Routledge, 2013). Fletcher presents a cogent and critical reappropriation of Pashukanis's theory of law in the context of valuing women's labor in the realm of reproductive biotechnology. See Pashukanis, *Law and Marxism*, 110.
85 Pashukanis, *Law and Marxism*, 122.

86 Pashukanis, *Law and Marxism*, 110–11; see also Karl Marx, "On the Jewish Question," in *Early Writings*, trans. D. McLellan (London: Penguin, 1972), and discussion of C. B. MacPherson above.
87 Pashukanis, *Law and Marxism*, 110, 114, 119.
88 Paul Hirst, *On Law and Ideology* (London: Macmillan, 1979), 98–100.
89 Hirst, *On Law and Ideology*, 138.
90 Hirst, *On Law and Ideology*, 101.
91 Possession and occupation precede this shift, this transformation that marks the commodification of land, and eventually do not provide a justification for ownership. However, possession remains central to the lifeworld of property; notions of privilege and entitlement shape the contours of one's consciousness, based on the possession of particular qualities and characteristics that once constituted the prerequisites of one's ability to own. See Cheryl Harris, "Whiteness as Property," *Harvard Law Review* 106, no. 8 (June 1993): 1707–91.
92 Jeremy Bentham, *Theory of Legislation* (London: Kegan Paul, Trench, Trübner, 1896), 120.
93 Bentham, *Theory of Legislation*, 118–19.
94 Bentham, *Theory of Legislation*, 118.
95 Bentham, *Theory of Legislation*, 117, 116, 89.
96 Bentham, *Theory of Legislation*, 113.
97 See Laura Brace, "Colonisation, Civilisation and Cultivation: Early Victorians' Theories of Property Rights and Sovereignty," in *Land and Freedom: Law, Property Rights and the British Diaspora*, ed. A. R. Buck, John McLaren, and Nancy E. Wright (Aldershot: Ashgate, 2001), 23–38; Peter Fitzpatrick, " 'No Higher Duty': *Mabo* and the Failure of Legal Foundation," *Law and Critique* 13, no. 3 (2002); Irene Watson, "Aboriginal Laws and the Sovereignty of Terra Nullius," *borderlands* 1, no. 2 (2002).
98 See Michael O'Malley, *Face Value: The Entwined Histories of Money and Race in America* (Chicago: University of Chicago Press, 2012).
99 On this issue, see Wolfe, *Traces of History*, 38–40.
100 Nancy Stepan, *The Idea of Race in Science: Great Britain, 1800–1960* (London: Macmillan, 1982), xx.
101 See A. S. Curran, *The Anatomy of Blackness: Science and Slavery in an Age of Enlightenment* (Baltimore, MD: Johns Hopkins University Press, 2011).
102 Ivan Hannaford, *Race: The History of an Idea in the West* (Baltimore, MD: Johns Hopkins University Press, 1996), 156.
103 Hannaford, *Race*, 156.
104 Mary Louise Pratt, *Imperial Eyes: Travel Writing and Transculturation* (London: Routledge, 1992). See A. W. Crosby, *The Measure of Reality: Quantification and Western Society, 1250–1600* (Cambridge: Cambridge University Press, 2007), for a history of the long development of quantification in science, mathematics, and aesthetic forms.
105 Stephen J. Gould, *The Mismeasure of Man* (New York: Norton, 1996), 56.

106 Stepan, *The Idea of Race in Science*, xvii–xviii.

107 See Colin Perrin and Kay Anderson, "Reframing Craniometry: Human Exceptionalism and the Production of Racial Knowledge," *Social Identities: Journal of Race, Nation and Culture* 19, no. 1 (2013): 90–103; Patrick Wolfe, *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event* (London: Cassell, 1999), 48–49; Gould, *The Mismeasure of Man*, 105–40. See Curran, *The Anatomy of Blackness*, 2, where he discusses the identification of "black bile and blood" by eighteenth-century French anatomists in their attempt to understand the "anatomical and conceptual status of blackness." For a fascinating account of how racial identity based on the notion of biological difference required, in the context of racial identity trials in the United States, the performance of whiteness or blackness, and other modes of fashioning of racial selves, see Ariela J. Gross, *What Blood Won't Tell: A History of Race on Trial in America* (Cambridge, MA: Harvard University Press, 2008); and see generally Wolfe, *Traces of History*.

108 Michel Foucault, *The Order of Things: An Archaeology of the Human Sciences* (New York: Vintage, 1994), chapter 2.

109 William H. Tucker, *The Science and Politics of Racial Research* (Chicago: University of Illinois Press, 1994), 9; Stephen Jay Gould, "The Geometer of Race," *Discover*, November 1, 1994.

110 Gould, *The Mismeasure of Man*, 66.

111 Gould, *The Mismeasure of Man*, 66.

112 Cuvier, *Recherches sur les ossemens fossils*, vol. 1 (Paris: Deterville, 1812), 105, cited in Gould, *The Mismeasure of Man*, 66.

113 Pratt, *Imperial Eyes*, 30.

114 Pratt's work provides something between a supplement and corrective to Foucault's analysis of eighteenth-century natural history, which, as she notes, "[does] not always underscore the transformative, appropriative dimensions of its conception." Pratt, *Imperial Eyes*, 31.

115 Gould, *The Mismeasure of Man*, 106.

116 Gould, *The Mismeasure of Man*, 106.

117 Hannaford, *Race*, 148.

118 Warwick Anderson, *The Cultivation of Whiteness: Science, Health and Racial Destiny in Australia* (Melbourne: Melbourne University Press, 2002), 186.

119 Anderson, *The Cultivation of Whiteness*, 195.

120 Anderson, *The Cultivation of Whiteness*, 190.

121 Wolfe, *Settler Colonialism and the Transformation of Anthropology*.

122 South Australia Parliamentary Debates, January 27, 1858, 792.

123 Shitong Quio, "Planting Houses in Shenzhen: A Real Estate Market without Legal Titles," *Canadian Journal of Law and Society*, no. 29 (2013): 253–72.

124 Forman, "Settlement of the Title in the Galilee," 63.

125 Ghandour, *A Discourse on Domination in Mandate Palestine*.

126 Ghandour, *A Discourse on Domination in Mandate Palestine*, 53.

127 Forman, "Settlement of the Title in the Galilee."
128 Martin Bunton, "'Home,' 'Colony,' 'Vilayet': Frames of Reference for the Study of Land in Mandate Palestine," paper presented at workshop, Brown University, March 2014.
129 Martha Mundy and Richard Saumarez Smith, *Governing Property, Making the Modern State: Law, Administration and Production in Ottoman Syria* (London: I. B. Tauris, 2007), 7.
130 Mundy and Saumarez Smith, *Governing Property*.
131 Bunton, "'Home,' 'Colony,' 'Vilayet.'"
132 See "Land Registration and Settlement of Rights Department," Land Regulation and Registry, Israel, accessed July 14, 2014, http://index.justice.gov.il/En/UNITS/LANDREGISTRATION/Pages/default.aspx.
133 The difference between unsettled land described here, and unregistered land in jurisdictions such as the United Kingdom, is that in the latter context, the land is automatically registered upon sale, or alternately can be initiated as a "first registration" in the land registry pursuant to its guidelines.
134 Daniel Seidemann, interview with author, Jerusalem, July 2011.
135 Seidemann, interview.
136 Seidemann, interview.
137 Elias Dauoud Khoury, interview with author, Jerusalem, July 2011.
138 Jac Isac and Fida' Abdul-Latif, *Jerusalem and the Geopolitics of De-Palestinianisation* (Jerusalem: Arab League Educational, Cultural and Scientific Organisation, 2007), 53.
139 Khoury, interview.
140 Khoury, interview.
141 See Forman, "Settlement of the Title in the Galilee."
142 In Jerusalem, the construction of the light rail system led to the expropriation of occupied land in East Jerusalem, and literally "cements the presence of settlements in East Jerusalem, making their presence more permanent and perhaps irreversible." See Hanna Baumann, "The Heavy Presence of Jerusalem Light Rail: Why Palestinian Protestors Attacked the Tracks," Open Democracy, July 6, 2014, https://opendemocracy.net/north-africa-west-asia/hanna-baumann/heavy-presence-of-jerusalem-light-rail-why-palestinian-protesters-attac.
143 Dawood Hamoudeh, interview with author, July 12, 2011; and see Nadera Shalhoub Kevorkian, "Stolen Childhood: Palestinian Children and the Structure of Genocidal Dispossession," *Settler Colonial Studies* 6, no. 2 (2016): 142–52.
144 Edward Said, *After the Last Sky* (Somerset: Butler and Tanner, 1986), 82.

3. IMPROVEMENT

1 That day, I was traveling through the area with Fazal Sheikh, Alberto Toscano, Eyal Weizman, and Ines Weizman.

2 As Haneen Naamnih has pointed out (pers. comm.), the term "unrecognized village" is a creation of the Israeli government and works to discursively situate the displaced Bedouin as a problem to be solved.

3 Oren Yiftachel, *Ethnocracy: Land and Identity Politics in Israel/Palestine* (Philadelphia: University of Pennsylvania Press, 2006), 202.

4 The Prawer Plan, or, in its most recent legislative iteration, the Prawer-Begin Bill, "will result in the destruction of 35 unrecognised Bedouin villages and the forced displacement of up to 70 000 people." Adalah, "Demolition and Eviction of Bedouin Citizens of Israel in the Naqab (Negev)—the Prawer Plan," accessed January 27, 2017, https://www.adalah.org/en/content/view/7589#What-is-the-Prawer-Plan. The plan was officially suspended in 2013, but the destruction of Bedouin villages continues into the present.

5 Shirly Deidler, "Israel Begins Razing Bedouin Village of Al-Arakib—for 50th Time," *Haaretz*, June 12, 2014, http://www.haaretz.com/news/israel/.premium-1.598414; and see Eyal Weizman and Fazal Sheikh, *The Conflict Shoreline: Colonization as Climate Change in the Negev Desert* (New York: Steidl, 2015), 9.

6 Alison Deger, "Bedouin Village Razed 83 Times Must Pay $500,000 for Demolitions, Israel Says," *Mondoweiss*, May 9, 2015, http://mondoweiss.net/2015/05/bedouin-village-demolitions.

7 Thabet Abu Ras, "Land, Power and Resistance in Israel," lecture, Leo Baeck Institute, London, December 3, 2015.

8 Hanna Nakkarah, unpublished manuscript, on file with author, 154. Nakkarah (1912–84) was one of the first legal advocates for Palestinian rights.

9 Atheel Athameen, interview with author, Khasham Zaneh, April 2014, translator Thabet Abu Rasa.

10 Josef Fraenkl, *Herzl: A Biography* (Jerusalem: Ararat, 1946), 111, 126.

11 Gabriel Piterberg, *Returns of Zionism: Myths, Politics and Scholarship in Israel* (New York: Verso, 2008).

12 Piterberg, *Returns of Zionism*, 65, 85.

13 Shlomo Avineri, *Arlosoroff* (London: Peter Halban, 1989), 46.

14 Alex Bein, ed., *Arthur Ruppin: Memoirs, Diaries, Letters*, trans. Karen Gershon (London: Weidenfeld and Nicolson, 1971), 22–24.

15 Bein, *Arthur Ruppin*, xiii.

16 Bein, *Arthur Ruppin*, 60–63.

17 Bein, *Arthur Ruppin*, 75–76.

18 Bein, *Arthur Ruppin*, 76.

19 Arthur Ruppin, *The Agricultural Colonisation of the Zionist Organisation in Palestine* (London: M. Hopkinson, 1926), 5.

20 Ruppin, *The Agricultural Colonisation*, 23.

21 Ruppin, *The Agricultural Colonisation*, 5–6.

22 Ruppin, *The Agricultural Colonisation*, 2, 66–68.

23 Ruppin, *The Agricultural Colonisation*, 2.

24 The focus on the specific exploitation of women recurs throughout Ruppin's writings, and the significance that Ruppin places on women's role in the colonization effort is discussed below.
25 Ruppin, *The Agricultural Colonisation*, 3.
26 Ruppin, *The Agricultural Colonisation*, 28–29.
27 Ruppin, *The Agricultural Colonisation*, 28–29.
28 Ruppin, *The Agricultural Colonisation*, 29. The notion of possessive nationalism can be understood as a corollary of possessive individualism. The psychoaffective dimensions of the possessive individual, including the desire to possess exclusively, to fulfill the need for security and to calm the fear of losing one's property, are transmuted to the stage of the nation-state; the possessive individual develops a close identification with national identity. Frank Cunningham describes possessive nationalism as a coalescence of the "worst aspects of national or ethnic chauvinism and aggressive capitalism" with the values of the self-possessive individual, including greed and selfishness. Frank Cunningham, "Could Canada Turn into Bosnia?," in *Cultural Identity and the Nation-State*, ed. Carol C. Gould and Pasquale Pasquino (Lanham, MD: Rowman and Littlefield, 2001), 36–37. Judith Butler observes, in relation to Palestine, "In the early years of Zionism, it was clear that Jews invoked Lockean principles to claim that because they worked the land and established irrigation networks, this labouring activity implied rights of ownership, even rights of national belonging grounded on territory. We can see how, in fact, the aims of both the nation and the colony depended upon an ideology of possessive individualism that was recast as possessive nationalism." Athena Athanasiou and Judith Butler, *Dispossession: The Performative in the Political* (London: Polity, 2013), chapter 1.
29 Ruppin, *The Agricultural Colonisation*, 33.
30 Amos Morris-Reich, "Arthur Ruppin's Concept of Race," *Israel Studies* 11, no. 3 (fall 2006): 1–30.
31 Arthur Ruppin, *Three Decades of Palestine: Speeches and Papers on the Upbuilding of the Jewish National Home* (Jerusalem: Schocken, 1936), 78–79.
32 Ruppin, *Three Decades of Palestine*, 78.
33 Morris-Reich, "Arthur Ruppin's Concept of Race," 11.
34 Reproduced in Morris-Reich, "Arthur Ruppin's Concept of Race," 20.
35 Ruppin, *The Agricultural Colonisation*, 51.
36 Ella Shohat, "The Narrative of the Nation and the Discourse of the Modernization: The Case of the Mizrahim," *Critique: Critical Middle Eastern Studies* 6, no. 10 (1997): 11.
37 Ruppin, *The Agricultural Colonisation*, 134–35.
38 Fraenkel, *Herzl*, 70.
39 Fraenkel, *Herzl*, 75–76.
40 Theodor Herzl, *The Jewish State* (1896), trans. Sylvie D'Avigdo, 15–16, MidEastWeb, http://www.mideastweb.org/jewishstate.pdf.
41 Herzl, *The Jewish State*, 16.

42 Walid Khalidi, "The Jewish-Ottoman Land Company: Herzl's Blueprint for the Colonisation of Palestine," *Journal of Palestine Studies* 22, no. 2 (winter 1993): 30.
43 Khalidi, "The Jewish-Ottoman Land Company," 31.
44 Articles 1 and 2, Khalidi, "The Jewish-Ottoman Land Company," 44.
45 Khalidi, "The Jewish-Ottoman Land Company," 33–34. See Stuart Banner, where he argues that the colonization of New Zealand occurred primarily through the use of contracts that enabled individuals to make truly massive land purchases on behalf of colonization companies. Stuart Banner, "Conquest by Contract: Wealth Transfer and Land Market Structure in Colonial New Zealand," *Law and Society Review* 34, no. 1 (2000): 47–96.
46 The Anglo-Palestine Bank went on to become Bank Leumi, one of the most important banks in Israel and a core part of what would become the capitalist class. Adam Hanieh, personal correspondence, December 10, 2015.
47 Fraenkel, *Herzl*, 71.
48 Ruppin, *Three Decades of Palestine*, 148.
49 The tension of using private-law mechanisms for the acquisition of land held collectively by an ethnonational entity produced certain legal complexities. For instance, until 1920, there was no legal recognition of cooperative activity in Palestine. As of 1920, the Kvutzah, the primary type of cooperative agricultural settlement in Palestine, gained the right to be registered as a cooperative society with a definite legal status. However, when the American professor Mead visited Palestine in 1923 on the invitation of Ruppin, he identified the lack of contracts between individual settlers and the colonization company as a dangerous omission; it was virtually impossible to account for the financial obligations owed by settlers to the companies that had supported their endeavors financially. Investing in Palestine could hardly be an attractive proposition for Jews in the diaspora under these conditions. Ruppin, *The Agricultural Colonisation*, 172.
50 Gershon Shafir, *Land, Labor and the Origins of the Israeli-Palestinian Conflict, 1882–1914* (Cambridge: Cambridge University Press, 1989), 41.
51 Shafir, *Land, Labor and the Origins*, 23.
52 Shafir, *Land, Labor and the Origins*, 33–34.
53 Shafir, *Land, Labor and the Origins*, 29.
54 Shafir, *Land, Labor and the Origins*, 41; and see Patrick Wolfe, "Purchase by Other Means: The Palestine *Nakba* and Zionism's Conquest of Economics," *Settler Colonial Studies* 2, no. 1 (2012): 155–59.
55 Wolfe, "Purchase by Other Means," 153.
56 Carlo Ginzburg, preface to Amnon Raz-Krakotzkin, *Exil et Souveraineté: Judaïsme, sionisme, et pensée binationale* (Paris: La Fabrique, 2007), 11.
57 Amnon Raz-Krakotzkin, "Exile, History and the Nationalisation of Jewish Memory: Some Reflections on the Zionist Notion of History and Return," *Journal of Levantine Studies* 3, no. 2 (winter 2013): 42.
58 Raz-Krakotzkin, "Exile, History and the Nationalisation of Jewish Memory," 42.
59 Piterberg, *Returns of Zionism*, 78.

60 Ruppin, *The Agricultural Colonisation*, 127.
61 Patrick Wolfe, in discussing the conquest of labor as a primary strategy of settlement in Palestine, argued that it was sustained ideologically through the figure of the "New Jew, whose distinctive iconography bore the marks of the extreme nationalisms that were emerging in Europe." This observation is accompanied by a Jewish National Fund poster calling for Zionist colonization of the Galilee from 1938 titled "The New Jew" and depicts a strong, muscular man wielding an axe as he looks across at a plowed field and mountains. Wolfe, "Purchase by Other Means," 152.
62 *Israel's Agriculture*, a pamphlet produced by Orit Noked, Minister of Agriculture and Rural Development (Tel Aviv: The Israel Export and International Cooperation Institute), 8, http://www.a-id.org/pdf/israel-s-agriculture.pdf.
63 Michael Palgi, "Organization in Kibbutz Industry," in *Crisis in the Israeli Kibbutz: Meeting the Challenge of Changing Times*, ed. U. Leviatan, H. Oliver, and J. Quarter (New York: Praeger, 1998).
64 Ivan Vallier, "Social Change in the Kibbutz Economy," *Economic Development and Cultural Change* 10, no. 4 (July 1962): 341–42.
65 Vallier, "Social Change in the Kibbutz Economy," 343.
66 Palgi, "Organization in Kibbutz Industry."
67 Palgi, "Organization in Kibbutz Industry."
68 Tobias Buck, "The Rise of the Capitalist Kibbutz," *Financial Times*, January 26, 2010, http://www.ft.com/cms/s/0/d50b3c20-0a19-11df-8b23-00144feabdc0.html#axzz3gXdG9hgy.
69 Yiftachel, *Ethnocracy*, 144.
70 Noked, *Israel's Agriculture*, 30.
71 See Hussein Abu Hussein and Fiona McKay, *Access Denied: Palestinian Land Rights in Israel* (London: Zed, 1993); Raja Shehadeh, *Occupier's Law: Israel and the West Bank* (Beirut: Institute for Palestine Studies, 1988); George Bisharat, "Land, Law and Legitimacy and the Occupied Territories," *American University Law Review* 43 (1994): 467–561; Salman Abu Sitta, *An Atlas of Palestine, 1917–1966* (London: Palestine Land Society, 2010).
72 Abu Sitta, *An Atlas of Palestine*, 1.
73 Abu Sitta, *An Atlas of Palestine*, 54.
74 Abu Sitta, *An Atlas of Palestine*, 54.
75 Abu Sitta, *An Atlas of Palestine*, 56.
76 Abu Sitta, *An Atlas of Palestine*, 141.
77 Abu Sitta, *An Atlas of Palestine*, 142.
78 However, Oren Yiftachel, Alexandre (Sandy) Kedar, and Ahmad Amara argue that the 1858 reforms merely codified already existing practices in land ownership. Oren Yiftachel, Alexandre (Sandy) Kedar, and Ahmad Amara, "Questioning the 'Dead (*Mewat*) Negev Doctrine': Property Rights in Arab Bedouin Space," paper prepared for "Socio-Legal Perspectives on the Passage to Modernity in the Middle East," Ben Gurion University, Be'er Sheba, June 2012, 13, on file with author.

79 Bisharat, "Land, Law and Legitimacy," 493–94.
80 Nakkarah, unpublished manuscript, 141.
81 Bisharat, "Land, Law and Legitimacy," 494.
82 Bisharat, "Land, Law and Legitimacy"; Alexandre (Sandy) Kedar, "The Legal Transformation of Ethnic Geography: Israeli Law and the Palestinian Landholder 1948–1967," *NYU Journal of International Law and Politics* 33, no. 4 (2001): 933.
83 Kedar, "The Legal Transformation of Ethnic Geography," 933.
84 Sami Hadawi, *Land Ownership in Palestine* (New York: Palestine Arab Refugee Office, 1957), 12–14. Sami Hadawi worked at the Mandatory Land Registration Office and the Land Settlement Department until he was forced into exile in 1948.
85 Nakkarah, unpublished manuscript, 144.
86 Oren Yiftachel, " 'Ethnocracy' and Its Discontents: Minorities, Protests and the Israeli Polity," *Critical Inquiry* 26, no. 4 (summer 2000): 725–56.
87 Zeina B. Ghandour, *A Discourse on Domination in Mandate Palestine: Imperialism, Property and Insurgency* (London: Routledge, 2009), see discussion in chapter 2.
88 Martin Bunton, *Land Legislation in Palestine* (Cambridge: Cambridge University Press, 2009).
89 Nakkarah, unpublished manuscript; Abu Sitta, *An Atlas of Palestine*; Yiftachel, " 'Ethnocracy' and Its Discontents."
90 Abu Sitta, *An Atlas of Palestine*, 46.
91 Abu Sitta, *An Atlas of Palestine*, 49.
92 Ahmad Amara, Ismael Abu-Saad, and Oren Yiftachel, eds., *Indigenous (In)Justice: Human Rights Law and Bedouin Arabs in the Naqab/Negev* (Cambridge, MA: Harvard University Press, 2013), 28.
93 Amara, Abu-Saad, and Yiftachel, *Indigenous (In)Justice*, 42.
94 Amara, Abu-Saad, and Yiftachel, *Indigenous (In)Justice*, 42.
95 Amara, Abu-Saad, and Yiftachel, *Indigenous (In)Justice.*
96 Abu Sitta, *An Atlas of Palestine*, 46–48.
97 Bunton, *Land Legislation in Palestine*, 55; and see Kedar, "The Legal Transformation of Ethnic Geography," 936.
98 Yiftachel, Kedar, and Amara, "Questioning the 'Dead (*Mewat*) Negev Doctrine,' " 4.
99 See Abu Sitta, *An Atlas of Palestine*; Bisharat, "Land, Law and Legitimacy"; Kedar, "The Legal Transformation of Ethnic Geography."
100 Bisharat, "Land, Law and Legitimacy," 490.
101 Ronen Shamir, "Suspended in Space: Bedouins under the Law of Israel," *Law and Society Review* 30 (1996): 236.
102 Yiftachel, Kedar, and Amara, "Questioning the 'Dead (*Mewat*) Negev Doctrine,' " 2. For a detailed analysis of some of these judgments, see Kedar, "The Legal Transformation of Ethnic Geography." Kedar analyzes the ethnocratic definitions of landholding that transform the mewat doctrine into a tool of

expropriation of Bedouin lands, exposing the inherently political nature of the Israeli land regime.

103 See, for example, John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2007); Irene Watson, "Aboriginal Laws and the Sovereignty of Terra Nullius," *borderlands* 1, no. 2 (2002), http://www.borderlands.net.au/vol1no2_2002/watson_laws.html.

104 Alex Reilly, "From a Jurisprudence of Regret to a Regrettable Jurisprudence: Shaping Native Title from *Mabo* to *Ward*," *Murdoch University Electronic Journal of Law* 9, no. 4 (December 2002), http://www.austlii.edu.au/au/journals/MurUEJL/2002/50.html.

105 For further discussion, see Brenna Bhandar and Rafeef Ziadah, "Acts and Omissions: Framing Settler Colonialism in Palestine Studies," *Jadaliyya*, January 14, 2016, http://roundups.jadaliyya.com/pages/index/23569/acts-and-omissions_framing-settler-colonialism-in-.

106 The subheading is taken from the title of a publication by Suhad Bishara and Haneen Naamnih, *Nomads against Their Will: The Attempted Expulsion of the Arab Bedouin in the Naqab: The Example of Atir-Umm al-Hieran* (Haifa: Adalah, Arab Centre for Minority Rights, 2011). This report sets out in great detail the means by which the Bedouin have been cast out of their land and homes, focusing on the case of al-Hieran in particular, rendering them "nomads against their will."

107 *The State of Israel v. Tzalach Badaran*, P.D. 16(3) 1717 [1962], 2.

108 Kedar, "The Legal Transformation of Ethnic Geography," 955.

109 *The State of Israel v. Tzalach Badaran*, P.D. 16(3) 1717 [1962], 2.

110 David Lloyd, *Irish Culture and Colonial Modernity, 1800–2000* (Cambridge: Cambridge University Press, 2011), 61.

111 Lloyd, *Irish Culture and Colonial Modernity*, 62.

112 Weizman and Sheikh, *The Conflict Shoreline*, 55.

113 *Badaran*, 2.

114 Kedar, "The Legal Transformation of Ethnic Geography," 961.

115 Kedar, "The Legal Transformation of Ethnic Geography," 961.

116 Kedar, "The Legal Transformation of Ethnic Geography," 962.

117 See Kedar, "The Legal Transformation of Ethnic Geography," 964–65.

118 *Selim 'Ali Agdi'a al-Huashela et al. v. State of Israel* [1984], Civil Appeal No. 218/74.

119 Aharon Ben-Shemesh, *Land Law in the State of Israel* (Masadeh, 1953), cited in *al-Huashela v. State of Israel* (1984), para. 3.

120 Moshe Doukhan, *Land Law in Israel*, 2nd ed. (Ahva, 1952), 47, cited in *al-Huashela v. State of Israel* (1984), para. 3.

121 *Al-Huashela v. State of Israel* (1984), para. 4.

122 See Shamir, "Suspended in Space."

123 Weizman and Sheikh, *The Conflict Shoreline*, 54–55.

124 Bishara and Naamnih, *Nomads against Their Will*, 5.

125 Weizman and Sheikh, *The Conflict Shoreline*, 46.
126 *Al-Uqbi v. the State of Israel* (2015), para. 29.
127 *Al-Uqbi v. the State of Israel* (2015), para. 29.
128 *Al-Uqbi v. the State of Israel* (2015), para. 15.
129 *Al-Uqbi v. the State of Israel* (2015), para. 40.
130 *Al-Uqbi v. the State of Israel* (2015), para. 41.
131 *Al-Uqbi v. the State of Israel* (2015), para. 41.
132 *Al-Uqbi v. the State of Israel* (2015), para. 41.
133 *Al-Uqbi v. the State of Israel* (2015), para. 42.
134 Evidenced by the voluminous amount of Mandate-era correspondence, reports, and ordinances established in order to survey and register the land surrounding Be'er Sheva, which was driven by the needs, as noted above, to improve cultivation and settle land rights in a determinate way. See Bunton, *Land Legislation in Palestine*.
135 Aziz Alturi, interview with author, al-Araqib, April 2014.
136 Here I refer to the specific settlers encroaching on Palestinian land in the West Bank that is under the jurisdiction of the Palestinian Authority, as opposed to the general category of Israeli settlers.

4. STATUS

1 *McIvor v. The Registrar, Indian and Northern Affairs, Canada* [2007] BCSC 827, para. 7.
2 The British Columbia Court of Appeal radically narrowed the basis upon which Madame Justice Ross's judgment was made, by restricting the group of people against which those in McIvor's position were to be compared. Whereas Madame Justice Ross found that the registration provisions of the 1985 Indian Act "continue to prefer descendants who trace their Indian ancestry along the paternal line over those who trace their Indian ancestry along the maternal line" (para. 7), the Court of Appeal decided that the matrilineal and patrilineal dimensions of status determination were not "analogous grounds" under the charter (para. 99–100), and that the case was to be adjudicated simply on the basis of sex discrimination under section 15 of the charter. Finding that section 6 was discriminatory on the basis of sex, the Court of Appeal went on to find that the discrimination applied only to "the group caught in the transition between the old regime and the new one" (para. 122). They narrowed the question to whether section 6(1) of the 1985 Registration Provisions was underinclusive. They found, under the section 1 analysis (a four-part test devised to determine whether the charter violation is legally justifiable), that section 6(1) did not "minimally impair" the rights of Sharon McIvor's son, Mr. Grismer. The comparator group were those who had a modified status as a result of the Double Mother rule, a 1951 amendment which provided that children whose mother and paternal grandmothers had not been entitled to status except through marriage to an Indian man would have Indian status only to the age of twenty-one. This restriction was reversed in 1985 but created a distinction between the comparator

group and those in Mr. Grismer's position, that is, those whose mothers had been disenfranchised on the basis of marrying non-Indian men. It was on this much narrower basis that the Court of Appeal found a charter violation in favor of Mr. Grismer and his mother, Sharon McIvor.

3 Here, I draw on Foucault's concept of the *dispositif*, defined as a "certain manipulation of relations of forces, of a rational and concrete intervention in the relations of forces, either so as to develop them in a particular direction, or to block them, to stabilize them, and to utilise them." Indian status can be described as an apparatus insofar as it incorporates juridical processes, relations of power, and colonial forms of knowledge, in order to assert a hegemonic and strategic form of control over the lives of First Nations people. See Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings, 1972–1977*, ed. Colin Gordon (New York: Pantheon, 1980), 194–96.

4 Joanne Barker, *Native Acts: Law, Recognition, and Cultural Authenticity* (Durham, NC: Duke University Press, 2011), 22, emphasis in original.

5 Barker, *Native Acts*, 5.

6 Barker, *Native Acts*, 82.

7 Aileen Moreton-Robinson, *The White Possessive: Property, Power, and Indigenous Sovereignty* (Minneapolis: University of Minnesota Press, 2015), 50.

8 Moreton-Robinson, *The White Possessive*, 50.

9 Davina Bhandar, "Decolonising the Politics of Status: When the Border Crosses Us," *Darkmatter* 14 (2016), http://www.darkmatter101.org/site/2016/05/16/decolonising-the-politics-of-status-when-the-border-crosses-us/.

10 William Alexander Hunter, *Introduction to Roman Law* (London: W. Maxwell and Son, 1897), 129.

11 Stuart Elden, *The Birth of Territory* (Chicago: University of Chicago Press, 2013), 220–21.

12 Alain Pottage, "Law after Anthropology: Object and Technique in Roman Law," *Theory, Culture and Society* 31, no. 2–3 (March–May 2014): 147–66.

13 Elden, *The Birth of Territory*, 234–35.

14 Elden, *The Birth of Territory*, 221.

15 Hunter, *Introduction to Roman Law*, 670.

16 Orlando Patterson, *Slavery and Social Death: A Comparative Study* (Cambridge, MA: Harvard University Press, 1982), 30.

17 Patterson, *Slavery and Social Death*, 89.

18 Patterson, *Slavery and Social Death*, 31.

19 William Blackstone, *Commentaries on the Laws of England* (London: Routledge, 2001), 18.

20 Blackstone, *Commentaries on the Laws of England*, 31.

21 Blackstone, *Commentaries on the Laws of England*, 31.

22 Blackstone, *Commentaries on the Laws of England*, 17.

23 Carl Schmitt, *Constitutional Theory*, ed. and trans. J. Seitzer (Durham, NC: Duke University Press, 2008), 118, emphasis added.

24 Schmitt, *Constitutional Theory*, 118.
25 And see John Weaver, "Concepts of Economic Improvement and the Social Construction of Property Rights: Highlights from the English-Speaking World," in *Despotic Dominion: Property Rights in British Settler Societies*, ed. Andrew R. Buck, John MacLaren, and Nancy E. Wright (Vancouver: UBC Press, 2004).
26 The debates of the first Canadian Parliament in 1867 are rife with preoccupation about the viability of commercial exchange and markets, generally reflecting a view of political economy that accords with Adam Smith's emphasis on commercial exchange in a free market as the basis of economic development. See House of Commons Debates, 1st Parliament, 1st Session, Library of Parliament, 1867–68, http://parl.canadiana.ca/view/oop.debates_HOC0101_01/1?r=0&s=1.
27 John Milloy, "Indian Act Colonialism: A Century of Dishonour, 1869–1969" (Ottawa: National Centre for First Nations Governance, 2008), 2–4.
28 Milloy, "Indian Act Colonialism," 4, 6.
29 Milloy, "Indian Act Colonialism."
30 Shelagh Day, "The Charter and Family Law," in *Family in Canada: New Directions*, ed. E. Sloss (Ottawa: Canadian Advisory Council on the Status of Women, 1985), cited in *McIvor v. The Registrar*, para. 12; Glen Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014).
31 *McIvor v. The Registrar*, para. 16.
32 Audrey Huntley and Fay Blaney, *Bill C-31: Its Impact, Implications and Recommendations for Change in British Columbia—Final Report* (Vancouver: Aboriginal Women's Action Network, 1999), 6.
33 See, for instance, Patricia Monture-Angus, *Journeying Forward: Dreaming First Nations' Independence* (Winnipeg: Fernwood, 1997); Emma La Roque, "The Colonisation of a Native Woman Scholar," in *Women of the First Nations: Power, Wisdom, and Strength*, ed. Christine Miller and Patricia Chuchryk (Winnipeg: University of Manitoba Press, 1996); Andrea Smith, *Conquest: Sexual Violence and the American Indian Genocide* (Boston: South End, 2005).
34 Sarah Carter, *Capturing Women: The Manipulation of Cultural Imagery in Canada's Prairie West* (Montreal: McGill-Queen's University Press, 1997), 51–52.
35 Bonita Lawrence, *"Real" Indians and Others: Mixed-Blood Urban Native Peoples and Indigenous Nationhood* (Lincoln: University of Nebraska Press, 2004), 73.
36 Lawrence, *"Real" Indians and Others*, 73.
37 Saidiya Hartman, *Scenes of Subjection: Terror, Slavery and Self-Making in Nineteenth-Century America* (Oxford: Oxford University Press, 1997), 195.
38 Smith, *Conquest*; Sherene Razack, "Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George," in *Race, Space and the Law: Unmapping a White Settler Society*, ed. Sherene Razack (Toronto: Between the Lines, 2002).
39 Lawrence, *"Real" Indians and Others*, 47.
40 Lawrence, *"Real" Indians and Others*.

41 See discussion of homesteading in chapter 1.
42 Indian Act, 1886, section 85.
43 Indian Act, 1886, section 88; and see Lawrence, *"Real" Indians and Others*. The Act for the Gradual Civilization of the Indian Tribes in the Canadas, 1857, had as its aim the gradual assimilation of First Nations peoples into white society. The stated objectives of this act were to gradually bestow citizenship upon Indian subjects and thereby remove all legal distinctions between "Indians" and other "Canadian Subjects." Ironically, this act came into force at the same time that the category of Indian was legislated into being, a category of subjects that were defined as noncitizens. Although this act applied to Upper and Lower Canada, it did have consequences for native communities in the west (J. R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada* [Toronto: University of Toronto Press, 2000], 139–40). The new dominion legislation in 1869, the Gradual Enfranchisement Act, set out similar requirements for the enfranchisement of the Indian population.
44 Robert Nichols, "Contract and Usurpation: Enfranchisement and Racial Governance in Settler-Colonial Contexts," in *Theorizing Native Studies*, ed. Audra Simpson and Andrea Smith (Durham, NC: Duke University Press, 2014), 105.
45 Nichols, "Contract and Usurpation," 105.
46 Nichols, "Contract and Usurpation," 106.
47 Nichols, "Contract and Usurpation," 105.
48 C. B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford: Oxford University Press, 1962), 264.
49 James Tully, *An Approach to Political Philosophy: Locke in Contexts* (Cambridge: Cambridge University Press, 1993), 82.
50 Tully, *An Approach to Political Philosophy*, 138.
51 Neal Wood, *John Locke and Agrarian Capitalism* (Berkeley: University of California Press, 1984).
52 Tully, *An Approach to Political Philosophy*, 150; Barbara Arneil, *John Locke and America: The Defence of English Colonialism* (Oxford: Clarendon, 1996).
53 The idea that property is relational is a fairly standard way of understanding ownership. As Kevin Gray and Susan Frances Gray write in their widely consulted textbook, *Elements of Land Law*, "property law [is] a network of jural relationships between individuals in respect of valued resources." Kevin Gray and Susan Frances Gray, *Elements of Land Law* (Oxford: Oxford University Press, 2005), 5. The idea of absolute ownership, where the owner has exclusive power over the object of ownership, derives from the Roman law concept of *dominium* and has little relevance to the contemporary operation of the common law of property.
54 Gray and Gray, *Elements of Land Law*, 69–72, 426.
55 Étienne Balibar, " 'Possessive Individualism' Reversed: From Locke to Derrida," *Constellations* 9, no. 3 (2002): 303.
56 Étienne Balibar, *Identity and Difference: John Locke and the Invention of Consciousness*, trans. Warren Montag (London: Verso, 2013), 41; Jordana Rosenberg,

Critical Enthusiasm: Capital Accumulation and the Transformation of Religious Passion (Oxford: Oxford University Press, 2011), 38–39.

57 John Locke, *The Two Treatises of Government* (Cambridge: Cambridge University Press, 1960), 330, para. 28.

58 Locke, *The Two Treatises of Government*, 332, para. 31, emphasis in original.

59 Locke, *The Two Treatises of Government*, 334, para. 36.

60 Locke, *The Two Treatises of Government*, 341, para. 45.

61 Balibar, " 'Possessive Individualism' Reversed," 303. A fairly standard interpretation of the Lockean subject is that it is abstract, bounded, and nonrelational. For instance, Margaret Davies discusses Macpherson's theory of the possessive individual and asserts that the "self has been defined through the idea of property: in this sense, we are said to be self-owning individuals, bounded, autonomous and distinct." Margaret Davies, *Property: Meanings, Histories, Theories* (Abingdon: Routledge-Cavendish, 2007), 26. Radin notes that self-consciousness for Locke is characterized by memory but argues that a "pure Lockean conception of personhood does not necessarily imply that object-relations . . . are essential to the constitution of persons, because that conception is disembodied enough not to stress our differentiation from one another." For Radin, Locke's concept of the person has "no inherent connection to the material world." Margaret Jane Radin, *Reinterpreting Property* (Chicago: University of Chicago Press, 1993), 42.

62 Locke, *The Two Treatises of Government*, para. 123.

63 Balibar, " 'Possessive Individualism' Reversed," 303.

64 Balibar, " 'Possessive Individualism' Reversed," 302.

65 Balibar, " 'Possessive Individualism' Reversed," 302.

66 Balibar, *Identity and Difference*, 41.

67 Denise Ferreira da Silva, *Towards a Global History of Race* (Minneapolis: University of Minnesota Press, 2007).

68 Ferreira da Silva, *Towards a Global History of Race*, 60–61.

69 John Locke, *An Essay Concerning Human Understanding*, ed. Peter H. Nidditch (Oxford: Oxford University Press, 1998), x, emphasis added.

70 Locke, *An Essay Concerning Human Understanding*, 145.

71 Locke, *The Two Treatises of Government*, 328, 331.

72 Locke, *An Essay Concerning Human Understanding*, 44.

73 Locke, *An Essay Concerning Human Understanding*, 45.

74 We could contrast this with the temporality of recognition evident in First Nations' rights claims. Anne McClintock's term "anachronistic space" comes to mind here, where First Nations' cultural practices and relationships to land have been cast into the prehistory of modern law and sovereignty in the context of section 35 jurisprudence. See Brenna Bhandar, "Anxious Reconciliation(s): Unsettling Foundations and Spatializing History," *Society and Space* 22, no. 6 (2004): 831–45.

75 Balibar, *Identity and Difference*, 87.

76 Balibar, *Identity and Difference*, 87–88.

77 Mahmoud Darwish, *Journal of an Ordinary Grief*, trans. Ibrahim Muhawi (New York: Archipelago, 2010).
78 Indian Act, 1886, section 34.
79 Sections 30 through 32 provide penalties for the sale of "any grain or root crops or other produce" from reserves in the province of Manitoba, the North-West Territories, or the district of Keewatin. People who bought such crops or other produce contrary to the regulations were also liable to a monetary penalty or a short period of incarceration (Indian Act, 1886, section 30(2)). The harvesting and sale of timber, a very valuable natural resource, was strictly controlled by the colonial government. The superintendent general had the power to grant licenses (to anyone) to cut trees on reserves and ungranted Indian lands (section 54). The licensee was granted the right to "take and keep exclusive possession of the land so described subject to such regulations as are made" (section 56).
80 Indian Act, 1886, section 70.
81 Indian Act, 1886, section 73.
82 Status Indians living on reserve were given an annuity (an annual payment) by the federal government in an amount determined by the government.
83 Indian Act, 1886, section 81.
84 *Report of the Royal Commission on Aboriginal Peoples*, vol. 1: *Looking Forward, Looking Back* (Ottawa: Minister of Supply and Services, 1996), 279–86.
85 Indian Act, R.S.C. 1886, section 9–13.
86 The Indian Advancement Act, R.S.C. 1886, ch.44, sections 5 and 6.
87 John Lutz, "After the Fur Trade: The Aboriginal Labouring Class of British Columbia 1849–1890," *Journal of the Canadian Historical Association* 3, no. 1 (1992): 69–93; James K. Burrows, " 'A Much-Needed Class of Labour': The Economy and Income of the Southern Interior Plateau Indians, 1897–1910," *BC Studies* 71 (1986): 27–46.
88 Renisa Mawani, *Colonial Proximities: Crossracial Encounters and Juridical Trusts in British Columbia, 1871–1921* (Vancouver: University of British Columbia Press, 2009), 43; Lutz, "After the Fur Trade," 77.
89 Lutz, "After the Fur Trade," 81.
90 Mawani, *Colonial Proximities*, 46.
91 Lutz, "After the Fur Trade," 91.
92 Elizabeth Furniss, *The Burden of History: Colonialism and the Frontier Myth in a Rural Canadian Community* (Vancouver: University of British Columbia Press, 1999), 42.
93 Coulthard, *Red Skin, White Masks*, 85–88.
94 *The Attorney General of Canada v. Jeanette Lavalle, Richard Isaac et al. v. Ivonne Bedard* [1974] S.C.R. 1349; *Sandra Lovelace v. Canada, Communication No. R.6/24,* U.N. Doc. Supp. No. 40 (A/36/40) at 166 [1981].
95 *Lovelace v. Canada*, para. 13.2. For a much more thorough analysis of these cases as well as *Bédard v. Isaac* (1972), see Lawrence, *Real Indians and Others*, and Coulthard, *Red Skin, White Masks*, who in different ways place these cases in the

longer history of First Nations women's resistance to the effects of the patriarchal settler colonial system.

96 Pamela Palmater, *Beyond Blood: Rethinking Indigenous Identity* (Saskatoon: Purich, 2011), 105.

97 McIvor was successful at trial, but on appeal, the scope of the trial judgment's vindication of her rights was narrowed dramatically. Her leave to appeal to the Supreme Court of Canada was denied.

98 *McIvor v. Canada* [2009] BCCA, 306 DLR (4th) 193, paras. 152–61.

99 See Library of Parliament, Legislative Summary, Bill C-3: Gender Equity in Indian Registration, November 15, 2010, http://www.parl.gc.ca/content/lop/legislativesummaries/40/3/40-3-c3-e.pdf.

100 Huntley and Blaney, *Bill C-31*, 9; James Anaya, "Report of the Special Rapporteur on the Rights of Indigenous Peoples, Addendum: The Situation of Indigenous Peoples in Canada" (New York: United Nations Human Rights Council, 2014), 16, http://www.ohchr.org/Documents/Issues/IPeoples/SR/A.HRC.27.52.Add.2-MissionCanada_AUV.pdf.

101 Minister of Indian and Northern Affairs, *Impacts of the 1985 Amendments to the Indian Act (Bill C-31) Summary Report* (Ottawa: Ministry of Indian Affairs and Northern Development, 1990), iv. For an exemplary instance of the racially discriminatory nature of band membership rules, see *Jacobs v. Mohawk Council of Kahnawake* [1998] Canadian Human Rights Tribunal. Peter Jacobs's biological parents were black and Jewish, but he was adopted by two Mohawk Indians as a baby. He was raised in the Mohawk community and was schooled in Mohawk laws, traditions, and customs. When he was twenty-one, however, he was denied band membership on the basis that he was not racially or ethnically Mohawk.

102 Palmater, *Beyond Blood*.

103 Coulthard, *Red Skin, White Masks*, 95.

104 Lawrence, *"Real" Indians and Others*; Simpson, *Mohawk Interruptus*.

105 Palmater, *Beyond Blood*.

106 See *McIvor v. The Registrar* and *McIvor v. Canada*.

107 David Roediger and Elizabeth Esch, *The Production of Difference: Race and the Management of Labour in U.S. History* (Oxford: Oxford University Press, 2012).

108 Nadia Abu El-Haj, *The Genealogical Science: Genetics, the Origins of the Jews, and the Politics of Epistemology* (Chicago: University of Chicago Press, 2012).

109 Constantine George Caffentzis, *Clipped Coins, Abused Words and Civil Government* (New York: Autonomedia, 1989); Michel Foucault, *The Order of Things: An Archaeology of the Human Sciences* (London: Vintage, 1994).

110 In addition to the legal cases discussed above, Palmater notes that the Native Women's Association of Canada, for instance, has called outright for the repeal of section 6(2)'s second generation cutoff. Palmater, *Beyond Blood*, 128.

111 See Monture-Angus, *Journeying Forward*; Coulthard, *Red Skin, White Masks*; and Lawrence, *"Real" Indians and Others*, among others.

1 For example, see Joseph Singer, "Foreclosure and the Failures of Formality, or Subprime Mortgage Conundrums and How to Fix Them," *Connecticut Law Review* 46, no. 2 (2013): 497–559, for analysis of the Mortgage Electronic Registration System and its dire effects on people affected by the subprime mortgage crisis.

2 Avery F. Gordon, *Ghostly Matters: Haunting and the Sociological Imagination* (Minneapolis: University of Minnesota Press, 1997).

3 Heather Laird, for instance, in *Subversive Law in Ireland, 1879–1920: From "Unwritten Law" to the Dáil Courts* (Dublin: Four Courts, 2005), argues that Irish resistance to the imposition of agrarian capitalist property relations led to the creation of counterlegalities. Also see Peter Linebaugh, *Stop Thief! The Commons, Enclosures and Resistance* (Oakland, CA: PM Press, 2014).

4 Roderick Ferguson, *The Reorder of Things: The University and Its Pedagogies of Minority Difference* (Minneapolis: University of Minnesota Press, 2012); David Roediger and Elizabeth Esch, *The Production of Difference: Race and the Management of Labour in U.S. History* (Oxford: Oxford University Press, 2012); Miguel de Oliver, "Gentrification as the Appropriation of Therapeutic 'Diversity': A Model and Case Study of the Multicultural Amenity of Contemporary Urban Renewal," *Urban Studies* 53, no. 6 (2016): 1299–1316.

5 Nicholas Blomley, *Unsettling the City: Urban Land and the Politics of Property* (London: Routledge, 2003), 114.

6 Blomley, *Unsettling the City*, 114.

7 André van der Walt, *Property in the Margins* (Oxford: Hart, 2009), 15.

8 Van der Walt, *Property in the Margins*, 22.

9 Van der Walt, *Property in the Margins*, 43. This question could also be posed to other antieviction movements such as the Plataforma de Afectados por la Hipoteca in Spain, who have in some places halted evictions, taken over empty residential buildings to provide homes for the evicted, and started to negotiate with banks on how to formalize the rights of those in occupancy of residential buildings where they currently have no formal tenancy rights.

10 Examples, enumerated by Blomley among others, include "nuisance law (empowering the state to access private property in the interests of public aesthetics and hygiene, for example); the law of adverse possession (placing a time limit on the owners' right to exclude); the doctrine of public or private necessity (requiring an owner to allows others onto their property in moments of extreme need); the law of airplane over-flights . . . and the right to roam (allowing recreational access to certain wilderness areas)." Nicholas Blomley, "The Territory of Property," *Progress in Human Geography* 40, no. 5 (2016): 593–609.

11 Van der Walt, *Property in the Margins*, 161.

12 Van der Walt, *Property in the Margins*, 159.

13 Laurine Platzky and Cherryl Walker, *The Surplus People Project* (Johannesburg: Ravan, 1985), 80–83.

14 On labor requirements, see Platzky and Walker, *The Surplus People Project*, 83.
15 Gilbert Marcus, "Section 5 of the Black Administration Act: The Case of the Bakwena ba Mogopa," in *No Place to Rest: Forced Removals and the Law in South Africa*, ed. Christina Murray and Catherine O'Regan (Oxford: Oxford University Press, 1990), 13.
16 Platzky and Walker, *The Surplus People Project*, 74.
17 Platzky and Walker, *The Surplus People Project*, 80–81.
18 Platzky and Walker, *The Surplus People Project*, 81.
19 Platzky and Walker, *The Surplus People Project*, 83–84; Colin Bundy, "Land, Law and Power: Forced Removals in Historical Context," in *No Place to Rest: Forced Removals and the Law in South Africa*, ed. C. Murray and C. O'Regan (Oxford: Oxford University Press, 1990), 6.
20 Section 5(1)(b), Native Administration Act of 1927, as quoted in Marcus, "Section 5 of the Black Administration Act," 18.
21 Marcus, "Section 5 of the Black Administration Act," 19.
22 Platzky and Walker, *The Surplus People Project*, 92.
23 Platzky and Walker, *The Surplus People Project*, 89.
24 Platzky and Walker, *The Surplus People Project*, 90.
25 Michael Sutcliffe, Alison Todes, and Norah Walker, "State Urbanisation Strategies since 1986," in *No Place to Rest: Forced Removals and the Law in South Africa*, ed. C. Murray and C. O'Regan (Oxford: Oxford University Press, 1990), 98.
26 Van der Walt, *Property in the Margins*, 54.
27 Van der Walt, *Property in the Margins*, 56.
28 Van der Walt, *Property in the Margins*, 74.
29 Van der Walt puts the constitutional and legislative changes in South Africa into a comparative perspective with the political squatting movements of the 1970s and 1980s in the Netherlands, Germany, and England, and also makes brief reference to civil rights activism in the United States, in order to evaluate some of the political successes gained in housing and tenancy laws in the Netherlands and Germany, and the end of legalized racial segregation in the United States. Van der Walt, *Property in the Margins*, 146.
30 Constitution of the Republic of South Africa, Act no. 108 of 1996, section 26(3); see van der Walt, *Property in the Margins*, 147.
31 *Port Elizabeth Municipality v. Various Occupiers* [2005] 1 (SA) 217 (CC), para. 9.
32 *Port Elizabeth Municipality v. Various Occupiers*, para. 2.
33 *Port Elizabeth Municipality v. Various Occupiers*, para. 2.
34 *Port Elizabeth Municipality v. Various Occupiers*, para. 3.
35 *Port Elizabeth Municipality v. Various Occupiers*, para. 59.
36 *Port Elizabeth Municipality v. Various Occupiers*, para. 15.
37 *Port Elizabeth Municipality v. Various Occupiers*, para. 23.
38 Van der Walt, *Property in the Margins*, 158–59.
39 Van der Walt, *Property in the Margins*, 161.

40 Bradley Bryan, "Property as Ontology: Aboriginal and English Understandings of Ownership," *Canadian Journal of Law and Jurisprudence* 13, no. 1 (January 2000): 3–31.
41 Leanne Simpson, "Land as Pedagogy: Nishnaabeg Intelligence and Rebellious Transformation," *Decolonisation: Indigeneity, Education and Society* 3, no. 3 (2014), http://decolonization.org/index.php/des/article/view/22170.
42 Simpson, "Land as Pedagogy," 6.
43 Simpson, "Land as Pedagogy," 6.
44 Simpson, "Land as Pedagogy," 7.
45 Brenna Bhandar, "Anxious Reconciliation(s): Unsettling Foundations and Spatializing History," *Environment and Planning D: Society and Space* 22 (2004): 831–45.
46 See Patricia J. Williams, *The Alchemy of Race and Rights: The Diary of a Law Professor* (Cambridge, MA: Harvard University Press, 1991), 164–65.
47 Eva Mackey, *Unsettled Expectations: Uncertainty, Land and Settler Decolonization* (Halifax: Fernwood, 2016), 127.
48 Mackey, *Unsettled Expectations*, 125–27.
49 Avery Gordon, *The Hawthorn Archives: Letters from the Utopian Margins* (New York: Fordham University Press, 2017), 112, manuscript on file with author.
50 Cedric J. Robinson, *Black Movements in America* (London: Routledge, 1997), 13.
51 Robin D. G. Kelley, *Freedom Dreams: The Black Radical Imagination* (Boston: Beacon, 2003), 101.
52 Kelley, *Freedom Dreams*, 101.
53 Gordon, *The Hawthorn Archives*, 52.
54 Gordon, *The Hawthorn Archives*, 52.
55 Gordon, *The Hawthorn Archives*, 184.
56 Gordon, *The Hawthorn Archives*, 184.
57 Frederick Douglass, *Narrative of the Life of Frederick Douglass* (Oxford: Oxford University Press, 2009), 81.
58 Douglass, *Narrative of the Life of Frederick Douglass*, 82.
59 Richard Wright, *Twelve Million Black Voices* (New York: Basic Books, 2008), 33.

Bibliography

Abu El-Haj, Nadia. *The Genealogical Science: Genetics, the Origins of the Jews, and the Politics of Epistemology*. Chicago: University of Chicago Press, 2012.

Abu Hussein, Hussein, and Fiona McKay. *Access Denied: Palestinian Land Rights in Israel*. London: Zed, 1993.

Abu Sitta, Salman. *An Atlas of Palestine, 1917–1966*. London: Palestine Land Society, 2010.

Agamben, Giorgio. *The Highest Poverty: Monastic Rules and Forms of Life*. Stanford, CA: Stanford University Press, 2013.

Aguilar, Delia. "From Triple Jeopardy to Intersectionality: The Feminist Perplex." *Comparative Studies of South Asia, Africa and the Middle East* 32, no. 2 (2012): 415–48.

Alemany, Adrià, and Ada Colau. *Mortgaged Lives*. Los Angeles: Journal of Aesthetics and Protest Press, 2014.

Alexander, Gregory. *Commodity and Propriety: Competing Visions of Property in American Legal Thought, 1776–1970*. Chicago: University of Chicago Press, 1997.

Althusser, Louis. *For Marx*. London: Verso, 2005.

Altman, J. C., C. Linkhorn, and J. Clarke. "Land Rights and Development Reform in Remote Australia." Discussion paper no. 276/2005. Canberra: Centre for Aboriginal Economic Policy Research, 2005.

Amara, Ahmad, Ismael Abu-Saad, and Oren Yiftachel, eds. *Indigenous (In)Justice: Human Rights Law and Bedouin Arabs in the Naqab/Negev*. Cambridge, MA: Harvard University Press, 2013.

Anaya, James. "Report of the Special Rapporteur on the Rights of Indigenous People." New York: United Nations Human Rights Council, 27th session, May 7, 2014.

Anderson, J. Stuart. *Lawyers and the Making of English Land Law, 1832–1940*. Oxford: Clarendon, 1992.
Anderson, Warwick. *The Cultivation of Whiteness: Science, Health and Racial Destiny in Australia*. Melbourne: Melbourne University Press, 2002.
Arneil, Barbara. *John Locke and America: The Defence of English Colonialism*. Oxford: Clarendon, 1996.
Athanasiou, Athena, and Judith Butler. *Dispossession: The Performative in the Political*. London: Polity, 2013.
Avineri, Shlomo. *Arlosoroff*. London: Peter Halban, 1989.
Bacon, Francis. *Novum Organum: Or, A True Guide to the Interpretation of Nature*. London: Bell and Daldy, 1859.
Bakan, Joel, et al., eds. *Canadian Constitutional Law*, 3rd ed. Toronto: Emond Montgomery, 2003.
Balibar, Étienne. *Cinq études de matérialisme historique*. Paris: Francois Maspéro, 1974.
Balibar, Étienne. *Identity and Difference: John Locke and the Invention of Consciousness*. Translated by Warren Montag. London: Verso, 2013.
Balibar, Étienne. "'Possessive Individualism' Reversed: From Locke to Derrida." *Constellations* 9, no. 3 (2002): 299–317.
Banner, Stuart. "Conquest by Contract: Wealth Transfer and Land Market Structure in Colonial New Zealand." *Law and Society Review* 34, no. 1 (2000): 47–96.
Barker, Joanne. *Native Acts: Law, Recognition and Cultural Authenticity*. Durham, NC: Duke University Press, 2011.
Barnard, T. C. "Sir William Petty as Kerry Ironmaster." *Proceedings of the Royal Irish Academy Section C: Archeology, Celtic Studies, History, Linguistics, Literature* 82C (1982): 1–32.
Bein, Alex, ed. *Arthur Ruppin: Memoirs, Diaries, Letters*. Translated by Karen Gershon. London: Weidenfeld and Nicolson, 1971.
Bentham, Jeremy. *Theory of Legislation*. London: Kegan Paul, Trench, Trübner, 1896.
Bernier, François. "The Division of the Earth According to the Different Types of Races of Men Who Inhabit It." *History Workshop*, no. 51 (spring 2001): 247–50 (originally published 1684).
Bhandar, Brenna. "Anxious Reconciliation(s): Unsettling Foundations and Spatializing History." *Environment and Planning D: Society and Space* 22, no. 6 (2004): 831–45.
Bhandar, Brenna. "Resisting the Reproduction of the Proper Subject of Rights: Recognition, Property Relations and the Movement towards Post-colonialism in Canada." PhD diss., University of London, 2007.
Bhandar, Brenna, and Davina Bhandar. "Cultures of Dispossession: Rights, Status and Identities." *Darkmatter* 14 (2016). http://www.darkmatter101.org/site/2016/05/16/cultures-of-dispossession/.
Bhandar, Brenna, and Alberto Toscano. "Race, Real Estate and Real Abstraction." *Radical Philosophy* 194 (November/December 2015): 8–17.

Bhandar, Brenna, and Rafeef Ziadah. "Acts and Omissions: Framing Settler Colonialism in Palestine Studies." *Jadaliyya*, January 14, 2016. http://www.jadaliyya.com/pages/index/23569/acts-and-omissions_framing-settler-colonialism-in-.

Bhandar, Davina. "Decolonising the Politics of Status: When the Border Crosses Us." *Darkmatter* 14 (2016). http://www.darkmatter101.org/site/2016/05/16/decolonising-the-politics-of-status-when-the-border-crosses-us/.

The Bill on London: Or, the Finance of Trade by Bills of Exchange. London: Gillett Brothers Discount Company Ltd., 1952.

Birge, Silma, and Patricia Hill Collins. *Intersectionality*. London: Polity, 2016.

Birla, Ritu. *Stages of Capital: Law, Culture, and Market Governance in Late Colonial India*. Durham, NC: Duke University Press, 2009.

Bishara, Suahd, and Haneen Naamnih. *Nomads against Their Will: The Attempted Expulsion of the Arab Bedouin in the Naqab: The Example of Atir-Umm al-Hieran*. Haifa: Adalah, Arab Centre for Minority Rights, 2011.

Bisharat, George. "Land, Law and Legitimacy and the Occupied Territories." *American University Law Review* 43 (1994): 467–561.

Blackstone, William. *Commentaries on the Laws of England*. London: Routledge, 2001.

Blomley, Nicholas. "The Boundaries of Property: Complexity, Relationality, and Spatiality." *Law and Society Review* 50, no. 1 (2016): 224–55.

Blomley, Nicholas. "The Territory of Property." *Progress in Human Geography* 40, no. 5 (2016): 593–609.

Blomley, Nicholas. *Unsettling the City: Urban Land and the Politics of Property*. London: Routledge, 2003.

Bolaria, B. Singh, and Peter S. Li. *Racial Oppression in Canada*. Toronto: Garamond, 1988.

Borrows, John. *Nookomis' Constitution: Revitalizing Law in Canada*. Toronto: University of Toronto Press, forthcoming.

Borrows, John. *Recovering Canada: The Resurgence of Indigenous Law*. Toronto: University of Toronto Press, 2007.

Boylan, Thomas A., and Timothy P. Foley. *Political Economy and Colonial Ireland: The Propagation and Ideological Function of Economic Discourse in the Nineteenth Century*. London: Routledge, 1992.

Brace, Laura. "Colonisation, Civilisation and Cultivation: Early Victorians' Theories of Property Rights and Sovereignty." In *Land and Freedom: Law, Property Rights and the British Diaspora*, edited by A. R. Buck, John McLaren, and Nancy E. Wright, 23–38. Aldershot: Ashgate, 2001.

Brace, Laura. *The Politics of Property: Labour, Freedom and Belonging*. Edinburgh: Edinburgh University Press, 2004.

Brah, Avtar. *Cartographies of Diaspora: Contesting Identities*. London: Routledge, 1996.

Bryan, Bradley. "Property as Ontology: Aboriginal and English Understandings of Ownership." *Canadian Journal of Law and Jurisprudence* 13, no. 1 (2000): 3–31.

Bundy, Colin. "Land, Law and Power: Forced Removals in Historical Context." In *No Place to Rest: Forced Removals and the Law in South Africa*, edited by C. Murray and C. O'Regan, 3–13. Oxford: Oxford University Press, 1990.
Bunton, Martin. " 'Home,' 'Colony,' 'Vilayet': Frames of Reference for the Study of Land in Mandate Palestine." Paper presented at workshop, Brown University, March 2014.
Bunton, Martin. *Land Legislation in Palestine*. Cambridge: Cambridge University Press, 2009.
Burrows, James K. " 'A Much-Needed Class of Labour': The Economy and Income of the Southern Interior Plateau Indians, 1897–1910." *BC Studies*, no. 71 (1986): 27–46.
Byrd, Jodi. *The Transit of Empire: Indigenous Critiques of Colonialism*. Minneapolis: University of Minnesota Press, 2011.
Caffentzis, George G. *Clipped Coins, Abused Words and Civil Government: John Locke's Philosophy of Money*. New York: Autonomedia, 1989.
Carter, Sarah. *Capturing Women: The Manipulation of Cultural Imagery in Canada's Prairie West*. Montreal: McGill-Queen's University Press, 1997.
Chakrabarty, Dipesh. *Provincialising Europe: Postcolonial Thought and Historical Difference*. Princeton, NJ: Princeton University Press, 2007.
Cotterrell, Roger. "Power, Property and the Law of Trusts: A Partial Agenda for Critical Legal Scholarship." *Journal of Law and Society* 14, no. 1 (1987): 77–85.
Coulthard, Glen. *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition*. Minneapolis: University of Minnesota Press, 2014.
Crosby, A. W. *The Measure of Reality: Quantification and Western Society, 1250–1600*. Cambridge: Cambridge University Press, 2007.
Cunningham, Frank. "Could Canada Turn into Bosnia?" In *Cultural Identity and the Nation-State*, edited by Carol C. Gould and Pasquale Pasquino. Lanham, MD: Rowman and Littlefield, 2001.
Curran, Andrew S. *The Anatomy of Blackness: Science and Slavery in an Age of Enlightenment*. Baltimore, MD: Johns Hopkins University Press, 2011.
Darwish, Mahmoud. *Journal of an Ordinary Grief*. Translated by Ibrahim Muhawi. New York: Archipelago, 2010.
Davies, Margaret. *Property: Meanings, Histories, Theories*. Abingdon: Routledge-Cavendish, 2007.
Day, Shelagh. "The Charter and Family Law." In *Family in Canada: New Directions*, edited by E. Sloss, 27–61. Ottawa: Canadian Advisory Council on the Status of Women, 1985.
Dayan, Colin. *The Law Is a White Dog: How Legal Rituals Make and Unmake Persons*. Princeton, NJ: Princeton University Press, 2011.
de Oliver, Miguel. "Gentrification as the Appropriation of Therapeutic 'Diversity': A Model and Case Study of the Multicultural Amenity of Contemporary Urban Renewal." *Urban Studies* 53, no. 6 (2016): 1299–316.
de Soto, Hernando. *The Mystery of Capital*. Reading: Bantam Press, 2000.

Douglass, Frederick. *Narrative of the Life of Frederick Douglass*. Oxford: Oxford University Press, 2009.
Dyal-Chand, Rashmi. "Leaving the Body of Property Law? Meltdowns, Land Rushes, and Failed Economic Development." In *Hernando de Soto and Property in a Market Economy*, edited by D. Benjamin Barros, 83–96. Surrey: Ashgate, 2010.
Elden, Stuart. *The Birth of Territory*. Chicago: University of Chicago Press, 2013.
Fanon, Frantz. *The Wretched of the Earth*. London: Penguin, 2001.
Federici, Silvia. *Revolution at Point Zero: Housework, Reproduction, and Feminist Struggle*. Oakland, CA: PM Press / Common Notions, 2012.
Ferguson, Roderick. *The Reorder of Things: The University and Its Pedagogies of Minority Difference*. Minneapolis: University of Minnesota Press, 2012.
Ferreira da Silva, Denise. *Towards a Global History of Race*. Minneapolis: University of Minnesota Press, 2007.
Fisher, Robin. *Contact and Conflict: Indian-European Relations in British Columbia, 1774–1890*. 2nd ed. Vancouver: University of British Columbia Press, 1992.
Fisher, Robin. "Joseph Trutch and Indian land Policy." *BC Studies*, no. 12 (winter 1971–72): 12–16.
Fitzmaurice, Edmond. *The Life of Sir William Petty, 1623–1687*. London: Murray, 1895.
Fitzpatrick, Peter. *Modernism and the Grounds of Law*. Cambridge: Cambridge University Press, 2001.
Fitzpatrick, Peter. *The Mythology of Modern Law*. London: Routledge, 1992.
Fitzpatrick, Peter. "'No Higher Duty': *Mabo* and the Failure of Legal Foundation." *Law and Critique* 13, no. 3 (2002): 233–52.
Fletcher, Ruth. "Legal Form, Commodities and Reproduction: Reading Pashukanis." In *Feminist Encounters with Legal Philosophy*, edited by Maria Drakopoulou, 138–57. London: Routledge, 2013.
Forman, Geremy. "Settlement of the Title in the Galilee: Dowson's Colonial Guiding Principles." *Israel Studies* 7, no. 3 (2002): 63.
Foucault, Michel. *The Order of Things: An Archaeology of the Human Sciences*. New York: Vintage, 1994.
Foucault, Michel. *Power/Knowledge: Selected Interviews and Other Writings, 1972–1977*. Edited by Colin Gordon. New York: Pantheon, 1980.
Foucault, Michel. *The Punitive Society*. Basingstoke: Palgrave Macmillan, 2015.
Fox, Adam. "Sir William Petty, Ireland, and the Making of a Political Economist, 1653–87." *Economic History Review*, New Series, 62, no. 2 (May 2009): 388–404.
Fraenkl, Josef. *Herzl: A Biography*. Jerusalem: Ararat, 1946.
Frank, Thomas. "Exploring the Boundaries of Law in the Middle Ages: Franciscan Debates on Poverty, and Inheritance." *Law and Literature* 20, no. 2 (summer 2008): 243–60.
Franklin, Sarah. *Dolly Mixtures: The Remaking of Genealogy*. Durham, NC: Duke University Press, 2007.
Furniss, Elizabeth. *The Burden of History: Colonialism and the Frontier Myth in a Rural Canadian Community*. Vancouver: University of British Columbia Press, 1999.

Ghandour, Zeina. *A Discourse on Domination in Mandate Palestine: Imperialism, Property and Insurgency*. London: Routledge, 2009.
Gilmore, Ruth Wilson. "Fatal Couplings of Power and Difference: Notes on Racism and Geography." *Professional Geographer* 54, no. 1 (2002): 15–24.
Gilmore, Ruth Wilson. *The Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California*. Berkeley: University of California Press, 2007.
Gilroy, Paul. *After Empire: Melancholia or Convivial Culture?* London: Routledge, 2004.
Girard, Philip. "Land Law, Liberalism, and the Agrarian Ideal: British North America, 1750–1920." In *Despotic Dominion: Property Rights in British Settler Societies*, edited by John MacLaren, Andrew R. Buck, and Nancy E. Wright, 120–43. Vancouver: University of British Columbia Press, 2005.
Godden, Lee. "Grounding Law as Cultural Memory: A 'Proper' Account of Property and Native Title in Australian Law and Land." *Australian Feminist Law Journal* 19, no. 1 (2003): 61–80.
Godden, Lee. "The Invention of Tradition: Property Law as a Knowledge Space for the Appropriation of the South." *Griffith Law Review* 16, no. 2 (2007): 375–410.
Gordon, Avery F. *Ghostly Matters: Haunting and the Sociological Imagination*. Minneapolis: University of Minnesota Press, 1997.
Gordon, Avery F. *The Hawthorn Archives: Letters from the Utopian Margins*. New York: Fordham University Press, 2017.
Gordon, Avery F. " 'I'm Already in a Sort of Tomb': A Reply to Philip Scheffner's *The Halmoon Files*." *South Atlantic Quarterly* 110, no. 1 (winter 2011): 121–54.
Gordon, Avery F. "The Prisoner's Curse." In *Towards a Sociology of the Trace*, 17–57. Minneapolis: University of Minnesota Press, 2010.
Gould, Stephen J. "The Geometer of Race." *Discover*, November 1, 1994.
Gould, Stephen J. *The Mismeasure of Man*. New York: Norton, 1996.
Gray, Kevin, and Susan Gray. *Elements of Land Law*. Oxford: Oxford University Press, 2005.
Gross, Ariela J. *What Blood Won't Tell: A History of Race on Trial in America*. Cambridge, MA: Harvard University Press, 2008.
Guha, Ranajit. *A Rule of Property for Bengal: An Essay on the Idea of Permanent Settlement*. Durham, NC: Duke University Press, 1996.
Hadawi, Sami. *Land Ownership in Palestine*. New York: Palestine Arab Refugee Office, 1957.
Haldar, Piyel. *Law, Orientalism and Postcolonialism: The Jurisdiction of the Lotus Eaters*. London: Routledge, 2007.
Hall, Stuart. "Gramsci's Relevance for the Study of Race and Ethnicity." *Journal of Communication Inquiry* 10, no. 5 (1986): 5–27.
Hall, Stuart. "Race, Articulation and Societies Structured in Dominance." In *Sociological Theories: Race and Colonialism*, edited by UNESCO, 305–45. Paris: UNESCO, 1980.
Hall, Stuart. "Signification, Representation, Ideology: Althusser and Post-structuralist Debates." *Critical Studies in Mass Communication* 2, no. 2 (June 1985): 91–114.

Hanieh, Adam. *Lineages of Revolt: Issues of Contemporary Capitalism in the Middle East*. London: Haymarket, 2013.
Hannaford, Ivan. *Race: The History of an Idea in the West*. Baltimore, MD: Johns Hopkins University Press, 1996.
Harris, Cheryl. "Whiteness as Property." *Harvard Law Review* 106, no. 8 (June 1993): 1707–91.
Harris, Cole. *Making Native Space: Resistance, Colonialism and Reserves in British Columbia*. Vancouver: UBC Press, 2002.
Hartman, Saidiya. *Scenes of Subjection: Terror, Slavery and Self-Making in Nineteenth-Century America*. Oxford: Oxford University Press, 1997.
Hayton, David J. *Registered Land*. London: Sweet and Maxwell, 1981.
Herzl, Theodor. *The Jewish State* (1896). Translated by Sylvie D'Avigdo. MidEastWeb. http://www.mideastweb.org/jewishstate.pdf.
Hirst, Paul. *On Law and Ideology*. London: Macmillan, 1979.
Hogg, Peter. *Constitutional Law of Canada*. Toronto: Thompson Reuters, 2000.
Holdsworth, William Searle. *The History of English Law*, vol. 2. London: Sweet and Maxwell, 1936.
Hooykaas, R. "The Rise of Modern Science: When and Why?" In *The Scientific Revolution*, edited by Marcus Hellyer, 19–43. Oxford: Blackwell, 2003.
Hunter, William Alexander. *Introduction to Roman Law*. London: W. Maxwell and Son, 1897.
Huntley, Audrey, and Fay Blaney. *Bill C-31: Its Impact, Implications and Recommendations for Change in British Columbia—Final Report*. Vancouver: Aboriginal Women's Action Network, 1999.
Hussain, Nasser. *The Jurisprudence of Emergency: Colonialism and the Rule of Law*. Ann Arbor: University of Michigan Press, 2003.
Imai, Shin. *Aboriginal Law Handbook*. Toronto: Carswell, 1999.
Isac, Jac, and Fida' Abdul-Latif. *Jerusalem and the Geopolitics of De-Palestinianisation*. Jerusalem: Arab League Educational, Cultural and Scientific Organisation, 2007.
Jickling, Nicholas (Customs Officer). *A Digest of the Laws of the Customs Comprising a Summary of the Statutes in Force in Great Britain and Its Foreign Dependencies Relating to Shipping, Navigation, Revenue and other matters within the cognizance of the officers of the Customs, from the earliest Period to the 53 Geo. III inclusive, Part II*. London: No. 41, Pall Mall, 1815.
Johnson, Walter. *River of Dark Dreams: Slavery and Empire in the Cotton Kingdom*. Cambridge, MA: Harvard University Press, 2013.
Kedar, Alexandre (Sandy). "The Legal Transformation of Ethnic Geography: Israeli Law and the Palestinian Landholder 1948–1967." *NYU Journal of International Law and Politics* 33, no. 4 (2001): 923–1000.
Kēhaulani Kauanui, J. *Hawaiian Blood: Colonialism and the Politics of Sovereignty and Indigeneity*. Durham, NC: Duke University Press, 2008.
Kelley, Robin D. G. *Freedom Dreams: The Black Radical Imagination*. Boston: Beacon, 2003.

Kelley, Robin D. G. "What Did Cedric Robinson Mean by Racial Capitalism?" *Boston Review*, January 12, 2017.
Khalidi, R., and S. Samour. "Neoliberalism as Liberation: The Statehood Programme and the Remaking of the Palestinian National Movement." *Journal of Palestine Studies* 40, no. 2 (2011): 6–25.
Khalidi, Walid. "The Jewish-Ottoman Land Company: Herzl's Blueprint for the Colonisation of Palestine." *Journal of Palestine Studies* 22, no. 2 (winter 1993): 30–47.
Laird, Heather. *Subversive Law in Ireland, 1879–1920: From "Unwritten Law" to the Dáil Courts*. Dublin: Four Courts, 2005.
La Roque, Emma. "The Colonisation of a Native Woman Scholar." In *Women of the First Nations: Power, Wisdom, and Strength*, edited by Christine Miller and Patricia Chuchryk. Winnipeg: University of Manitoba Press, 1996.
Lawrence, Bonita. *"Real" Indians and Others: Mixed-Blood Urban Native Peoples and Indigenous Nationhood*. Lincoln: University of Nebraska Press, 2004.
Lefebvre, Henri. *State, Space, World: Selected Essays*. Edited by N. Brenner and S. Elden. Translated by G. Moore, N. Brenner, and S. Elden. Minneapolis: University of Minnesota Press, 2009.
Levy, Jonathan. *Freaks of Fortune: The Emerging World of Capitalism and Risk in America*. Cambridge, MA: Harvard University Press, 2012.
Linebaugh, Peter. *Stop Thief! The Commons, Enclosures and Resistance*. Oakland, CA: PM Press, 2014.
Lloyd, David. *Irish Culture and Colonial Modernity, 1800–2000*. Cambridge: Cambridge University Press, 2011.
Lloyd, David. *Irish Times: Temporalities of Modernity*. Dublin: Field Day, 2008.
Lloyd, David, and Patrick Wolfe. "Settler Colonial Logics and the Neoliberal Regime." *Settler Colonial Studies* 6, no. 2 (2016): 109–18.
Locke, John. *An Essay Concerning Human Understanding*. Edited by Peter H. Nidditch. Oxford: Oxford University Press, 1998.
Locke, John. *The Two Treatises of Government*. Cambridge: Cambridge University Press, 1960.
Lowe, Lisa. *The Intimacy of Four Continents*. Durham, NC: Duke University Press, 2015.
Lutz, John. "After the Fur Trade: The Aboriginal Labouring Class of British Columbia 1849–1890." *Journal of the Canadian Historical Association* 3, no. 1 (1992): 69–93.
Lynch, Hollis R. "Sir Joseph William Trutch, a British-American Pioneer on the Pacific Coast." *Pacific Historical Review* 30, no. 3 (August 1961): 243–55.
Mackey, Eva. *Unsettled Expectations: Uncertainty, Land and Settler Decolonization*. Halifax: Fernwood, 2016.
Mackey, Eva. "(Un)Settling Expectations: (Un)Certainty, Settler States of Feeling, Law and Decolonization." *Canadian Journal of Law and Society* 29, no. 2 (2014): 235–52.
Macklem, Patrick. *Indigenous Difference and the Constitution of Canada*. Toronto: University of Toronto Press, 2001.

Macpherson, C. B. *The Political Theory of Possessive Individualism: Hobbes to Locke*. Oxford: Oxford University Press, 1962.
Mamdani, Mahmood. *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*. Princeton, NJ: Princeton University Press, 1996.
Mamdani, Mahmood. *Define and Rule: Native as Political Identity*. W. E. B. Du Bois Lectures. Cambridge, MA: Harvard University Press, 2012.
Mamdani, Mahmood. *Saviours and Survivors: Darfur, Politics, and the War on Terror*. New York: Pantheon, 2009.
Mamdani, Mahmood. *When Victims Become Killers: Colonialism, Nativism and the Genocide in Rwanda*. Princeton, NJ: Princeton University Press, 2002.
Marcus, Gilbert. "Section 5 of the Black Administration Act: The Case of the Bakwena ba Mogopa." In *No Place to Rest: Forced Removals and the Law in South Africa*, edited by Christina Murray and Catherine O'Regan. Oxford: Oxford University Press, 1990.
Marx, Karl. *Capital*, vol. 1. London: Penguin, 1990.
Marx, Karl. *Grundrisse: Foundations of the Critique of Political Economy*. Translated by Martin Nicolaus. London: Penguin, 1993.
Marx, Karl. "On the Jewish Question." In *Early Writings*, translated by D. McLellan. London: Penguin, 1972.
Maurer, Bill, and Gabriele Schwab. *Accelerating Possession: Global Futures of Property and Personhood*. New York: Columbia University Press, 2006.
Maurer, Sara L. *The Dispossessed State: Narratives of Ownership in 19th-Century Britain and Ireland*. Baltimore, MD: Johns Hopkins University Press, 2012.
Mawani, Renisa. *Colonial Proximities: Crossracial Encounters and Juridical Trusts in British Columbia, 1871–1921*. Vancouver: University of British Columbia Press, 2009.
Mbembe, Achille. *On the Postcolony*. Los Angeles: University of California Press, 2001.
McAuslan, Patrick. *Bringing the Law Back In: Essays in Land, Law and Development*. Abingdon: Ashgate, 2003.
McLaren, John, Andrew R. Buck, and Nancy E. Wright, eds. *Despotic Dominion: Property Rights in British Settler Societies*. Vancouver: University of British Columbia Press, 2005.
McNeil, Kent. *Common Law Aboriginal Title*. Oxford: Clarendon, 1989.
Meiksins Wood, Ellen. *Liberty and Property: A Social History of Western Political Thought from the Renaissance to Enlightenment*. London: Verso, 2011.
Mendyk, Stanley G. *Speculum Britanniae: Regional Study, Antiquarianism, and Science in Britain to 1700*. Toronto: University of Toronto Press, 1989.
Miéville, China. *Between Equal Rights: A Marxist Theory of International Law*. London: Pluto, 2005.
Miller, J. R. *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada*. Toronto: University of Toronto Press, 2000.
Milloy, John. "Indian Act Colonialism: A Century of Dishonour, 1869–1969." Ottawa: National Centre for First Nations Governance, 2008.

Mitchell, Timothy. *Rule of Experts: Egypt, Techno-politics, Modernity*. Berkeley: University of California Press, 2002.
Mitchell, Timothy. "The Work of Economics: How a Discipline Makes Its World." *European Journal of Sociology* 46, no. 2 (2005): 297–320.
Mogel, Lize, and Alexis Bhagat. *An Atlas of Radical Cartography*. Los Angeles: Journal of Aesthetics and Protest Press, 2009.
Moloney, Pat. " 'Strangers in Their Own Land': Capitalism, Dispossession and the Law." In *Land and Freedom: Law, Property Rights and the British Diaspora*, edited by A. R. Buck, John McLaren, and Nancy E. Wright. Aldershot: Ashgate, 2001.
Monture-Angus, Patricia. *Journeying Forward: Dreaming First Nations' Independence*. Winnipeg: Fernwood, 1997.
Moreton-Robinson, Aileen. *The White Possessive: Property, Power, and Indigenous Sovereignty*. Minneapolis: University of Minnesota Press, 2015.
Morris-Reich, Amos. "Arthur Ruppin's Concept of Race." *Israel Studies* 11, no. 3 (fall 2006): 1–30.
Mundy, Martha, and Richard Saumarez Smith. *Governing Property, Making the Modern State: Law, Administration and Production in Ottoman Syria*. London: I. B. Tauris, 2007.
Nedelsky, Jennifer. "Law, Boundaries, and the Bounded Self." *Representations*, no. 30 (spring 1990): 162–89.
Nedelsky, Jennifer. *Private Property and the Limits of American Constitutionalism*. Chicago: University of Chicago Press, 1990.
Nedelsky, Jennifer. "Should Property Be Constitutionalized? A Relational and Comparative Approach." In *Property on the Threshold of the 21st Century*, edited by G. E. van Maanen and A. J. van der Walt. Antwerp: Maklu, Blackstone, Nomos, Jurdik and Samhaelle, Schulthess, 1996.
Nichols, Robert. "Contract and Usurpation: Enfranchisement and Racial Governance in Settler-Colonial Contexts." In *Theorizing Native Studies*, edited by Audra Simpson and Andrea Smith, 99–121. Durham, NC: Duke University Press, 2014.
Nichols, Robert. "Disaggregating Primitive Accumulation." *Radical Philosophy*, no. 194 (November/December 2015): 18–28.
Noked, Orit. *Israel's Agriculture*. Tel Aviv: The Israel Export and International Cooperation Institute. http://www.a-id.org/pdf/israel-s-agriculture.pdf.
Offer, Avner. *Property and Politics, 1870–1914: Land Ownership, Law, Ideology and Urban Development in England*. Cambridge: Cambridge University Press, 1981.
O'Malley, Michael. *Face Value: The Entwined Histories of Money and Race in America*. Chicago: University of Chicago Press, 2012.
Palgi, Michael. "Organization in Kibbutz Industry." In *Crisis in the Israeli Kibbutz: Meeting the Challenge of Changing Times*, edited by U. Leviatan, H. Oliver, and J. Quarter. New York: Praeger, 1998.
Palmater, Pamela. *Beyond Blood: Rethinking Indigenous Identity*. Saskatoon: Purich, 2011.
Pashukanis, Evgeny. *Law and Marxism: A General Theory*. London: Pluto, 1989.

Pasternak, Shiri. "How Capitalism Will Save Colonialism: The Privatization of Reserve Lands in Canada." *Antipode* 47, no. 1 (January 2015): 179–96.
Patterson, Orlando. *Slavery and Social Death: A Comparative Study*. Cambridge, MA: Harvard University Press, 1982.
Perrin, Colin, and Kay Anderson. "Reframing Craniometry: Human Exceptionalism and the Production of Racial Knowledge." *Social Identities: Journal of Race, Nation and Culture* 19, no. 1 (2013): 90–103.
Petty, William. *The Economic Writings of Sir William Petty*. Edited by Charles Henry Hull. Cambridge: Cambridge University Press, 1899.
Petty, William. *Political Anatomy of Ireland with the establishment for that kingdom when the late Duke of Ormond was Lord Lieutenant: to which is added Verbum sapienti, or, An account of the wealth and expences of England, and the method of raising taxes in the most equal manner*. London: D. Brown and W. Rogers, 1691.
Pietz, William. "Material Considerations: On the Historical Forensics of Contract." *Theory, Culture and Society* 19, no. 5/6 (2002): 35.
Piterberg, Gabriel. *Returns of Zionism: Myths, Politics and Scholarship in Israel*. New York: Verso, 2008.
Platzky, Laurine, and Cherryl Walker. *The Surplus People Project*. Johannesburg: Ravan, 1985.
Poovey, Mary. *A History of the Modern Fact: Problems of Knowledge in the Sciences of Wealth and Society*. Chicago: University of Chicago Press, 1998.
Pottage, Alain. "Conflict of Laws: Comparing Autochthonous Legal Cultures." In *Territorial Conflicts in World Society: Modern Systems Theory, International Relations and Conflict Studies*, edited by Stephan Stetter. New York: Routledge, 2007.
Pottage, Alain. "Introduction: The Fabrication of Persons and Things." In *Law, Anthropology and the Constitution of the Social: Making Persons and Things*, edited by Alain Pottage and Martha Mundy. Cambridge: Cambridge University Press, 2004.
Pottage, Alain. "Law after Anthropology: Object and Technique in Roman Law." *Theory, Culture and Society* 31, no. 2–3 (March–May 2014): 147–66.
Pottage, Alain. "The Measure of Land." *Modern Law Review* 57, no. 3 (May 1994): 361–84.
Pottage, Alain. "The Originality of Registration." *Oxford Journal of Legal Studies* 15, no. 3 (1995): 371–401.
Pottage, Alain, and Brad Sherman. *Figures of Invention: A History of Modern Patent Law*. New York: Oxford University Press, 2010.
Povinelli, Elizabeth. "The Governance of the Prior." *interventions* 13, no. 1 (2011): 13–30.
Pratt, Mary Louise. *Imperial Eyes: Travel Writing and Transculturation*. London: Routledge, 1992.
Quio, Shitong. "Planting Houses in Shenzhen: A Real Estate Market without Legal Titles." *Canadian Journal of Law and Society*, no. 29 (2013): 253–72.
Radin, Margaret Jane. *Reinterpreting Property*. Chicago: University of Chicago Press, 1993.

Razack, Sherene. *Dying from Improvement: Inquests and Inquiries into Indigenous Deaths in Custody*. Toronto: University of Toronto Press, 2015.
Razack, Sherene. "Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George." In *Race, Space and the Law: Unmapping a White Settler Society*, edited by Sherene Razack. Toronto: Between the Lines, 2002.
Raz-Krakotzkin, Amnon. "Exile, History and the Nationalisation of Jewish Memory: Some Reflections on the Zionist Notion of History and Return." *Journal of Levantine Studies* 3, no. 2 (winter 2013): 37–70.
Raz-Krakotzkin, Amnon. *Exil et Souveraineté: Judaïsme, sionisme, et pensée binationale*. Paris: La Fabrique, 2007.
Reilly, Alex. "From a Jurisprudence of Regret to a Regrettable Jurisprudence: Shaping Native Title from *Mabo* to *Ward*." *Murdoch University Electronic Journal of Law* 9, no. 4 (December 2002). http://www.austlii.edu.au/au/journals/MurUEJL/2002/50.html.
Robinson, Cedric J. *Black Marxism: The Making of the Black Radical Tradition*. Chapel Hill: University of North Carolina Press, 1983.
Robinson, Cedric J. *Black Movements in America*. London: Routledge, 1997.
Robinson, Cedric J. *Forgeries of Memory and Meaning: Blacks and the Regimes of Race in American Theater and Film before World War II*. Chapel Hill: University of North Carolina Press, 2007.
Roediger, David, and Elizabeth Esch. *The Production of Difference: Race and the Management of Labour in U.S. History*. Oxford: Oxford University Press, 2012.
Rose, Carol. *Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership*. Boulder, CO: Westview, 1994.
Rosenberg, Jordana. *Critical Enthusiasm: Capital Accumulation and the Transformation of Religious Passion*. Oxford: Oxford University Press, 2011.
Rosser, Ezra. "Anticipating de Soto: Allotment of Indian Reservations and the Dangers of Land-Titling." In *Hernando de Soto and Property in a Market Economy*, edited by D. Benjamin Barros, 61–81. Surrey: Ashgate, 2010.
Ruppin, Arthur. *The Agricultural Colonisation of the Zionist Organisation in Palestine*. London: M. Hopkinson, 1926.
Ruppin, Arthur. *Three Decades of Palestine: Speeches and Papers on the Upbuilding of the Jewish National Home*. Jerusalem: Schocken, 1936.
Said, Edward. *After the Last Sky*. Somerset: Butler and Tanner, 1986.
Said, Edward. *Culture and Imperialism*. New York: Vintage, 1993.
Sanyal, Kalyan. *Rethinking Capitalist Development: Primitive Accumulation, Governmentality and Post-Colonial Capitalism*. New Delhi: Routledge, 2013.
Sayer, Derek. *The Violence of Abstraction: The Analytical Foundations of Historical Materialism*. London: Basil Blackwell, 1987.
Sayigh, Rosemary. *The Palestinians: From Peasants to Revolutionaries*. Chicago: University of Chicago Press, 2007.
Schiebinger, Londa, and Claudia Swan, eds. *Colonial Botany: Science, Commerce, and Politics in the Early Modern World*. Philadelphia: University of Pennsylvania Press, 2007.

Schmitt, Carl. *Constitutional Theory*. Edited and translated by J. Seitzer. Durham, NC: Duke University Press, 2008.
Scott, James. *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed*. New Haven, CT: Yale University Press, 1998.
Shafir, Gershon. *Land, Labor and the Origins of the Israeli-Palestinian Conflict, 1882–1914*. Cambridge: Cambridge University Press, 1989.
Shalhoub Kevorkian, Nadera. "Stolen Childhood: Palestinian Children and the Structure of Genocidal Dispossession." *Settler Colonial Studies* 6, no. 2 (2016): 142–52.
Shamir, Ronen. "Suspended in Space: Bedouins under the Law of Israel." *Law and Society Review* 30, no. 2 (1996): 231–57.
Shehadeh, Raja. *Occupier's Law: Israel and the West Bank*. Beirut: Institute for Palestine Studies, 1988.
Shohat, Ella. "The Narrative of the Nation and the Discourse of the Modernization: The Case of the Mizrahim." *Critique: Critical Middle Eastern Studies* 6, no. 10 (1997): 3–18.
Silva, Noenoe K. *Aloha Betrayed: Native Hawaiian Resistance to American Colonialism*. Durham, NC: Duke University Press, 2004.
Simpson, Alfred William Brian. *An Introduction to the History of Land Law*. Oxford: Oxford University Press, 1961.
Simpson, Audra. *Mohawk Interruptus: Political Life across the Borders of Settler States*. Durham, NC: Duke University Press, 2014.
Simpson, Leanne. "Land as Pedagogy: Nishnaabeg Intelligence and Rebellious Transformation." *Decolonisation: Indigeneity, Education and Society* 3, no. 3 (2014). http://decolonization.org/index.php/des/article/view/22170.
Simpson, Stanhope Rowton. *Land Law and Registration*. London: HMSO, 1986.
Singer, Joseph W. *Entitlement: The Paradoxes of Property*. New Haven, CT: Yale University Press, 2000.
Singer, Joseph W. "Foreclosure and the Failures of Formality, or Subprime Mortgage Conundrums and How to Fix Them." *Connecticut Law Review* 46, no. 2 (2013): 497–559.
Slack, Paul. "Material Progress and the Challenge of Affluence in Seventeenth-Century England." *Economic History Review*, New Series, 62, no. 3 (August 2009): 576–603.
Smith, Andrea. *Conquest: Sexual Violence and the American Indian Genocide*. Boston: South End, 2005.
Spivak, Gayatri. *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present*. Cambridge, MA: Harvard University Press, 1999.
Stark, David. "Recombinant Property in East European Capitalism." In *Laws of the Market*, edited by Michel Callon, 117–46. Oxford: Blackwell, 1998.
Stein, Robert T. J., and Margaret A. Stone. *Torrens Title*. London: Butterworths, 1991.
Stepan, Nancy. *The Idea of Race in Science: Great Britain, 1800–1960*. London: Macmillan, 1982.

Stuckey, Sterling. *Slave Culture: Nationalist Theory and the Foundations of Black America*. Oxford: Oxford University Press, 1987.
Stuurman, Siep. "François Bernier and the Invention of Racial Classification." *History Workshop*, no. 50 (autumn 2000): 1–21.
Sugarman, David, and Ronnie Warrington. "Land Law, Citizenship, and the Invention of Englishness: The Strange World of the Equity of Redemption." In *Early Modern Conceptions of Property*, edited by John Brewer and Susan Staves, 111–43. London: Routledge, 1996.
Sutcliffe, Michael, Alison Todes, and Norah Walker. "State Urbanisation Strategies since 1986." In *No Place to Rest: Forced Removals and the Law in South Africa*, edited by C. Murray and C. O'Regan, 86–106. Oxford: Oxford University Press, 1990.
Taylor, Greg. *The Law of the Land: The Advent of the Torrens System in Canada*. Toronto: University of Toronto Press, 2008.
Tennant, Paul. *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849–1989*. Vancouver: University of British Columbia Press, 1990.
Thompson, E. P. *Customs in Common*. London: New Press, 1992.
Thring, Henry. *A Memorandum of the Merchant Shipping Law Consolidation Bill; Pointing Out and Explaining the Points in Which the Existing Acts Are Altered*. London: George E. Eyre and William Spottoswoode (HM Stationery Office), 1854.
Tomlins, Christopher. "The Legalities of English Colonising: Discourses of European Intrusion upon the Americas, c. 1490–1830." In *Law and Politics in British Colonial Thought: Transpositions of Empire*, edited by Shaunnagh Dorsett and Ian Hunter, 51–70. New York: Palgrave Macmillan, 2010.
Torrens, Richard Robert. *Notes on a System of Conveyancing by Registration of Title (with instructions for the guidance of parties dealing, illustrated by copies of the books and forms in use in the land titles office)*. Adelaide: Register and Observer General Printing Office, 1859.
Toscano, Alberto. "The Culture of Abstraction." *Theory, Culture and Society* 25, no. 4 (2008): 57–75.
Toscano, Alberto. "The Open Secret of Real Abstraction." *Rethinking Marxism: A Journal of Economics, Culture and Society* 20, no. 2 (2008): 273–87.
Tucker, William H. *The Science and Politics of Racial Research*. Chicago: University of Illinois Press, 1994.
Tully, James. *An Approach to Political Philosophy: Locke in Contexts*. Cambridge: Cambridge University Press, 1993.
Underkuffler, Laura. *The Idea of Property*. Oxford: Oxford University Press, 2003.
Vallier, Ivan. "Social Change in the Kibbutz Economy." *Economic Development and Cultural Change* 10, no. 4 (July 1962): 337–52.
van der Walt, André J. *Property in the Margins*. Oxford: Hart, 2009.
van der Walt, André J. "Un-doing Things with Words: The Colonization of the Public Sphere by Private Property Discourse." *Acta Juridica* (1998): 235–81.

Watson, Irene. "Aboriginal Laws and the Sovereignty of Terra Nullius." *borderlands* 1, no. 2 (2002). http://www.borderlands.net.au/vol1no2_2002/watson_laws.html.
Watson, Irene. "Aboriginal Women's Laws and Lives: How Might We Keep Growing the Law?" *Australian Feminist Law Journal* 26, no. 1 (2007): 95–109.
Weaver, John. "Concepts of Economic Improvement and the Social Construction of Property Rights: Highlights from the English-Speaking World." In *Despotic Dominion: Property Rights in British Settler Societies*, edited by Andrew R. Buck, John MacLaren, and Nancy E. Wright, 79–102. Vancouver: UBC Press, 2004.
Weizman, Eyal, and Fazal Sheikh. *The Conflict Shoreline: Colonization as Climate Change in the Negev Desert*. New York: Steidl, 2015.
West, Cornel. "Race and Social Theory: Towards a Genealogical Materialist Analysis." In *The Year Left: Toward a Rainbow Socialism*, vol. 2, edited by Mike Davis, Manning Marable, Fred Pfeil, and Michael Sprinkler. London: Verso, 1987.
Williams, Eric. *Capitalism and Slavery*. Chapel Hill: University of North Carolina Press, 1944.
Williams, Patricia J. *The Alchemy of Race and Rights*. Cambridge, MA: Harvard University Press, 1991.
Wolfe, Patrick. "Purchase by Other Means: The Palestine *Nakba* and Zionism's Conquest of Economics." *Settler Colonial Studies* 2, no. 1 (2012): 133–71.
Wolfe, Patrick. "Settler Colonialism and the Elimination of the Native." *Journal of Genocide Research* 8, no. 4 (December 2006): 387–409.
Wolfe, Patrick. *Traces of History: Elementary Structures of Race*. London: Verso, 2016.
Wood, Neal. *John Locke and Agrarian Capitalism*. Berkeley: University of California Press, 1984.
Wright, Richard. *Twelve Million Black Voices*. New York: Basic Books, 2008.
Yiftachel, Oren. "'Ethnocracy' and Its Discontents: Minorities, Protests and the Israeli Polity." *Critical Inquiry* 26, no. 4 (summer 2000): 725–56.
Yiftachel, Oren. *Ethnocracy: Land and Identity Politics in Israel/Palestine*. Philadelphia: University of Pennsylvania Press, 2006.
Yiftachel, Oren, Alexandre (Sandy) Kedar, and Ahmad Amara. "Questioning the 'Dead (*Mewat*) Negev Doctrine': Property Rights in Arab Bedouin Space." Paper prepared for "Socio-Legal Perspectives on the Passage to Modernity in the Middle East," Ben Gurion University, Be'er Sheba, June 2012.

TABLE OF CASES

The Attorney General of Canada v. Jeanette Lavalle, Richard Isaac et al. v. Ivonne Bedard [1974] S.C.R. 1349.
C.A. 518/61. *The State of Israel v. Tzalach Badaran*, 16(3) P.D. 1717.
Calder v. Attorney General of British Columbia [1973] S.C.R. 313.
Civil Appeal No. 218/74. *Selim 'Ali Agdi'a al-Huashela et al. v. State of Israel* [1984].
Civil Appeal 4220/12. *Suliman Mohammed El-Uqbi v. the State of Israel* [2015].
Civil Case File nos. 7161/06 . . . *El-Uqbi v. the State of Israel*.
Delgamuukw v. British Columbia [1997] 3 S.C.R. 1010.

el-Okbi v. the State of Israel (June 2, 2014, Case 4220/12).
Haida Nation v. British Columbia (Minister of Forests) [2004] 3 S.C.R. 511.
Jackson et al. v. MERS Inc 770 N.W.2d 487 [Minn. 2009].
Jacobs v. Mohawk Council of Kahnawake [1998] Canadian Human Rights Tribunal.
Mabo v. Queensland (No.2) [1992] 175 CLR 1.
McIvor v. Canada [2009] BCCA, 306 DLR (4th) 193.
McIvor v. The Registrar, Indian and Northern Affairs, Canada [2007] BCSC 827.
Mitchell v. M.N.R. [2001] 1 S.C.R. 911.
Musqueam Indian Band v. Glass [2000] 2 S.C.R. 633.
Port Elizabeth Municipality v. Various Occupiers [2005] 1 (SA) 217 (CC).
R. v. Bernard [2000] 3 C.N.L.R. 184 [2003] 262, N.B.R. (2d) 1.
R. v. Gladstone [1996] 2 S.C.R. 723.
R. v. Marshall [1993] 3 S.C.R. 456.
R. v. Marshall [1999] 3 S.C.R. 566.
R. v. Marshall [2001], 191 N.S.R. (2d) 323, [2003], 218 N.S.R. (2d) 78.
R. v. Marshall; *R. v. Bernard* [2005] 2 S.C.R. 220.
R. v. Oakes [1986] 1 S.C.R. 103.
R. v. Secretary of State for Foreign and Commonwealth Affairs [1981], 4 C.N.L.R. 86 [1982] 2 All E.R. 118.
R. v. Sparrow [1990] 1 S.C.R. 1075.
R. v. Van der Peet [1996] 2 S.C.R. 507.
Sandra Lovelace v. Canada, Communication No. R.6/24, U.N. Doc. Supp. No. 40 (A/36/40) at 166 [1981].
The State of Israel v. Tzalach Badaran, P.D. 16(3) 1717 [1962].
St. Catherine's Milling and Lumber Co. v. The Queen [1888] 14 App. Cas.46.
Tsilhqot'in Nation v. British Columbia [2014] 2 S.C.R. 256.

REPORTS, COMMISSIONS, AND GOVERNMENT PAPERS

Copy of the Second Report made to His Majesty by the Commissioners appointed to inquire into the Law of England respecting Real Property. 1830.
Fourth Annual Report of the Colonization Commissioners for South Australia. 1839. London: House of Commons, 1836–40.
Minister of Indian and Northern Affairs. *Guide to Understanding Bill C-7, the First Nations Governance Act*. Ottawa: Ministry of Indian Affairs and Northern Development, 2003.
Minister of Indian and Northern Affairs. *Impacts of the 1985 Amendments to the Indian Act (Bill C-31) Summary Report*. Ottawa: Ministry of Indian Affairs and Northern Development, 1990.
Papers Connected with the Indian Land Question 1850–1875. Victoria: Government Printing Office, 1875.
Report of the Royal Commission on Aboriginal Peoples. Vol. 1: *Looking Forward, Looking Back*. Ottawa: Minister of Supply and Services, 1996.

Report of the Royal Commission on Aboriginal Peoples. Vol. 3: *Gathering Strength*. Ottawa: Supply and Services Canada, 1996.
South Australia Parliamentary Debates, January 27, 1858.
South Australia Parliamentary Debates, June 4, 1857.
Sproat, Gilbert Malcolm. "Sir Joseph William Trutch, K.C.M.G." Provincial Archives of British Columbia (PABC).
Tithe Commission and Ordnance Survey. *First Report of the Registration and Conveyancing Commission* PP. London: House of Commons, 1850.
Trutch Archives. University of British Columbia Library, Vancouver, BC.

STATUTES AND BILLS

Act for the Gradual Civilization of the Indian Tribes in the Canadas, 1857.
An Act for Gradual Enfranchisement of Indians, the Better Management of Indian Affairs, and to Extend the Provisions of the Act 31st of Victoria, Chapter 42, S.C. 1869, c.6.
An Act Further to Amend the "Dominion Lands Act, 1883," 1886 R.S.C. ch.27.
An Act Providing for the Organisation of the Department of the Secretary of State of Canada, and for the Management of Indian and Ordinance Lands, S.C. 1868, c.42 (31 Vict.).
An Act Respecting the Land of the Crown, RSBC, 1911, vol. 2, ch.128.
An Act to Amend and Consolidate the Laws Affecting Crown Lands in British Columbia, Statutes of the Province of British Columbia, 4th Session of First Parliament of BC, 1875.
An Act to Amend and Consolidate the Laws Respecting Indians, S.C. 1876, c.18.
An Act to Amend the Indian Act (Bill C-31).
An Act to Amend the "Land Act, 1875" Statues of the Province of British Columbia, 1879.
An Act to Consolidate and Amend the Acts Respecting the Public Lands of the Dominion ("The Dominion Lands Act"), 1908, ch.20, 7–8.
An Act Respecting Indians ("The Indian Act") R.S.C. 1886, ch.43.
Canada Act 1982 (including "The Constitution Act 1982") c.11 (U.K.).
Constitution Act 1867 ("The British North America Act"), 31 & 31 Victoria, c.6.
Constitution of the Republic of South Africa, Act No. 108 of 1996.
First Nations Governance Act (Bill C-7).
First Nations Land Management Act, S.C. 1999, c.24.
Indian Act, R.S.C. 1985, c.32.
Indian Advancement Act, R.S.C. 1886, ch.44.
Law of Property Act, 15 Geo. V ch.20.
Mewat Land Ordinance of 1921.
Native Title Act, No. 110, 1993.