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SYMPOSIUM ON INFRASTRUCTURING INTERNATIONAL LAW

LAW AS INFRASTRUCTURE OF COLONIAL SPACE: SKETCHES FROM TURTLE ISLAND

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"The people must fight for the law as for city-walls."[1]

Heraclitus's words remind us that law and infrastructure have lived in intimate relation, in practice and thought, for millennia. This intimacy is palpable in the context of settler worldmaking where colonial jurisdiction is enacted by constraining, with an eye to replacing, Indigenous jurisdiction. Here, the authority to have authority is often asserted in practice through violent attempts to control connectivity and movement. To this day, imperial powers assert jurisdiction over space through infrastructures that enhance or inhibit the motion of goods and people, like railroads, pipelines, border walls, and police.[2] This Essay investigates the co-production of colonial law and infrastructure on Turtle Island—an Indigenous name for the continent of North America, which already highlights a different conception of jurisdiction and law through its anchor in creation stories. The brief sketches that follow emphasize the co-constitution of law and infrastructure, yet they also propose a relationship that exceeds proximity or metaphor. Law operates through the ordering of extension, and in this sense, can productively be thought of infrastructurally, as "the movement or patterning of social form."[3] This Essay argues that approaching law infrastructurally foregrounds the contingency of seemingly solid structures, including centrally that of settler jurisdiction.

Jurisdiction as Infrastructure

On the immediate heels of the 1763 Treaty of Paris that divided Turtle Island among slave-trading imperial powers, the British crown asserted the right to virtuously colonize Indigenous peoples through another momentous 1763 act: The Royal Proclamation.[4] The actual practice of crown jurisdiction at a national scale nevertheless took shape through law and infrastructure over a century later. By the 1860s, this extraordinary multinational continent was in the throes of violent genocide and war between settlers, centrally over the right to keep human beings in chains. A new imperial scramble was underway between the United States and Britain for resources, territory, and trade routes. Necropolitical visions of "civilization" materialized in colonial movements

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[1] Diogenes Laërtius, Lives of the Eminent Philosophers (2013).

[2] Scholars have drawn attention to the central role of police and carceral infrastructure in the policing of Black and Indigenous mobilities. *See* Simone Brown, Dark Matters: On the Surveillance of Blackness (2015).

[3] Lauren Berlant, *The Commons: Infrastructures for Troubling Times*, 34 Env't & Planning D: Soc'y & Space 393 (2016).

[4] John Borrows, *Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government*, *in* Aboriginal and Treaty Rights in Canada (Michael Asch ed., 1997); *see also* Melanie J. Newton, *Counterpoints of Conquest: The Royal Proclamation of 1763, the Lesser Antilles, and the Ethnocartography of Genocide*, 79 Wm. & Mary Q. 241 (2022).

westward on both sides of the newly defined U.S.-Canada border. Colonial infrastructure *and* law, and a colonial infrastructure *of* law, made this possible.

As a transcontinental railroad was completed to the south, the British became anxious about their rival's reach to the Pacific. Keen to secure an alternate route to consolidate claims across the continent, the British responded with a momentous spatial fix—*the Dominion of Canada*. Formal discussions regarding its creation through Canadian Confederation excluded Indigenous peoples, even as colonial legality insisted the future would be mapped by treaties between imperial and Indigenous nations. Confederation reordered colonial authority; a newly formed federal government of white men declared jurisdiction *over* Indigenous lands and peoples.

Shiri Pasternak[5] understands jurisdiction as "the power to speak the law," and traces how settler states attempt to replace established Indigenous legal systems with their own. Benjamin Hoy[6] draws direct connections between authority and infrastructure in asking: "What kind of sovereignty did Canada possess if it required American infrastructure?" Indeed, this new body politic was built upon a vast infrastructural skeleton, financed in part through proceeds from the transatlantic slave trade.[7] The first Prime Minister, John A. MacDonald, known to "govern through a philosophy of railroads,"[8] called the transcontinental railroad Canada's "spine." Colonies of British North America joined Canadian confederation on the condition of the construction of rail infrastructure.[9] The Dominion required rail, but rail required legal jurisdiction to be built. Infrastructure materially made the Canadian state possible, but in a circular move, it was the Canadian Constitution that provided the federal government's jurisdiction for building it. Through a mobius strip of colonial law and infrastructure, settlers granted themselves authority to have authority.

(B)ordering Carceral Space

The border that gives physical and legal form to national authority on Turtle Island was not always so singular. In the 1830s, the U.S.-Canada border, "still represented only one border among many and remained a confusing one at that."[10] Settler states transformed the abstract legal geometry of imperial lines into lived material reality of enclosure through the survey. Survey expeditions[11] defined where settler states would recognize limits to each other's authority, and where they would route railroads, anchor grids of propertization, and draw boundaries of reserves —spaces of confinement into which Indigenous nations were forced by starvation.[12] The survey imposed colonial order onto a world it claimed to merely describe.

[5] Shiri Pasternak, *Jurisdiction and Settler Colonialism: Where Do Laws Meet?*, 29 Canadian J. L. & Soc'y 145 (2014).

[6] Benjamin Hoy, A Line of Blood and Dirt: Creating the Canada-United States Border Across Indigenous Lands 171 (2021).

[7] Deborah Cowen, *Following the Infrastructures of Empire: Notes on Cities, Settler Colonialism, and Method*, 41 Urban Geography 469 (2020).

[8] A. A. den Otter, The Philosophy of Railways: The Transcontinental Railway Idea in British North America (1997).

[9] Section X (145) of the Constitution Act of 1867 (Can.) states: "in order to give effect to that Agreement," the rail must be complete "with all practicable speed." Section 92(10a) specifically asserts national jurisdiction over "Lines of Steam or other Ships, Railways, Roads, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province," while section 92(10c) extends to "Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada."

[10] Hoy, *supra* note 6, at 119.

[11] The Canadian Pacific Survey (1871–1873) established the transcontinental railroad route. Also in 1871, the International Boundary Commission—a joint expedition with the United States—fixed the border line, while the Dominion Survey anchored the system of propertization.

[12] James Daschuk, Clearing the Plains: Disease, Politics of Starvation, and the Loss of Indigenous Life (2013).

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The making of colonial surveys was neither simple nor seamless—they required security. Colonial archives trace Indigenous refusal of the survey, their interruption of its assembly as assertion of jurisdiction. Police archives report "large bodies of Indians roaming over this section of the country. . . laying black mail on Surveyors, and seriously impeding the progress of surveys."[13] In 1881, one Cree chief stopped surveyors to insist "a Treaty should be made with his people before the Railway Survey through his country is commenced."[14] When the people of Whitefish Lake blocked surveyors in 1884, police warned, "the survey would assuredly be carried out under the protection of the police."[15]

Refusal could take more subtle forms. If the colonial survey is "an arrayed geometry of infrastructural points,"[16] then individual survey posts were essential to the system of measuring and marking that would radically transform continental ecologies. Meticulously distributed across the vast prairie lands, these 36-inch wood or iron stakes were the constituent parts of a material and legal infrastructure of land theft. Survey posts were purportedly taken by Indigenous peoples and repurposed as fuel, tools, or tent posts. Imperial panic at the disappearance of posts was resolved through agreements among colonial officers to expand criminalization. Confirming the expansion of punishment for theft or possession of posts, the police comptroller informed the surveyor general that he was "glad that it has been decided to amend the law in such a manner as to strengthen the hands of the police," and reassured him that surveyors would "receive every possible assistances from the Mounted Police in the matter."[17] The "theft" of the posts took shape in the context of the theft of a continent. Heidi Stark[18] shows how casting Indigenous resistance as a crime was an assertion of colonial jurisdiction, creating "an environment where Indigenous lands could be legally stolen and Indigenous leaders could be legally murdered under the dominion of settler laws."

Surveys invested colonial borders with geographical specificity, but without the capacity to control movement they remained an ambition.[19] Settler jurisdiction relies on curtailing the natural right to movement that Gerald Vizenor sees as fundamental to the "visionary sovereignty" of Indigenous people.[20] To control sovereign movement, colonial borders required security infrastructure. The Dominion government created the North-West Mounted Police to move Indigenous people into reserves and away from the national border, the railroad, and the "civilization" they would anchor.[21] Modeled on the Irish Constabulary and the Indian Imperial Police, "Mounties" acted simultaneously as police, magistrates, soldiers, and diplomats,[22] and inspired the U.S. Congress to create police forces.[23] Yet, despite the violence of colonial infrastructures of enclosure and enforcement, Indigenous people continued to move. Hogue sees this refusal to be contained as a profound rejection of

[13] Letter from Chief Inspector of Survey, Chas. Aylen, and W.H. King, Inspector of Surveys, Concerning Indian Affairs, RG18-B-1, Vol. 1008, File No. 501,1883, Library & Archives Canada.

[14] Letter to the Chief Inspector of Surveys, Indian Affairs, RG 10, Vol. 3610, File No. 3461, Library & Archives Canada.

[15] Annual Report from Fort Saskatchewan, North West Mounted Police Annual Reports, RG18-B-1, Vol. 1020, File No. 2482, Library & Archives Canada.

[16] Zannah Mae Matson, *A Geometry of Borders: The Infrastructural Points that Construct the Line*, Soc'y & Space (Oct. 9, 2017).

[17] Dominion Lands Survey Posts; Removal of, RG18-B-1, Vol. 1401, File No. 238-1897, Library & Archives Canada.

[18] Heidi Kiiwetinepinesiik Stark, *Criminal Empire: The Making of the Savage in a Lawless Land*, 19 Theory & Event 53 (2016).

[19] Hoy, *supra* note 6, at 20.

[20] Gerald Vizenor, Manifest Manners: Narratives on Postindian Survivance ix (1999).

[21] Lorne Browne & Caroline Brown, An Unauthorized History of the RCMP (1973).

[22] Sidney L. Harring, White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence 263–71 (1998).

[23] Stark, *supra* note 18.

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their newly prescribed status as "internal subjects" rather than sovereign peoples, and an affirmation that colonial jurisdiction was a "central fiction" of settler state geographies.[24]

Infrastructures of White Supremacy

Winona LaDuke and I insist that, "the laying of the railroad tracks was also the laying of white supremacy."[25] Racism is not just *like* a system, where "system" is invoked as a metaphor for its reproduction. The "system" in systemic racism is socio-technical. Decolonization is not a metaphor,[26] because settler colonization is reproduced by material systems, including or especially legal ones. White supremacy is organized by racialized deficits of life-giving infrastructures and surpluses of toxic ones. Yet, infrastructures of white supremacy organize not only life and death, but intimacy and affect.

The survey post, for example, was not only part of a system of propertization and exclusion, but it was also an "infrastructure of feeling" that became the object of white women's affection, anchoring a settler sense of place. In a prize-winning essay for the Women's Canadian Club from the 1930s entitled "Poundmaker's Old Stamping Ground," Mrs. John Douglas describes the long journey from Britain to Treaty 6 territory (Saskatchewan), and the pleasure she took "looking into the welcoming face of the little iron stake in the centre of four cut-sod survey diamonds at the claim-corner. 'So this is home' was the invariable exclamation."[27] The iron stake could signal the comfort of home for Douglas, not despite but because it was an infrastructure of dispossession.

Black, Indigenous, and feminist scholars have powerfully reframed the problem of property—a system that relied on the survey—through conceptions of race. Patricia Williams explores the afterlives of humans who were governed as objects of property under slavery.[28] Cheryl Harris considers how whiteness operates as property within legal frameworks forged through anti-Blackness.[29] Harris's classic work is one of legal geography, where transgressing racial boundaries involves "crossing borders, spinning on margins."[30] Whiteness as property meant these acts were, "not merely passing, but trespassing."[31] Harris contemplates how white co-workers, "remained oblivious to the worlds within worlds that existed just beyond the edge of their awareness and yet were present in their very midst."[32] W.E.B. Dubois wrote of the "worlds within worlds" that white people cannot see. His "double vision" suggests not only capacity in the forced creativity of Black people to survive, but *otherwise* ways of ordering movement and connectivity.[33] This tradition insists that property operates as the law and infrastructure of racial feeling,[34] that orders social worlds, territories, and ecologies. Brenna Bhandar sees property law as the "primary means of realizing this desire" for the possession of land, as the "ultimate objective of colonial power,"[35] while

[24] Michel Hogue, Metis and the Medicine Line: Creating a Border and Dividing a People 6 (2015).

[25] Winona LaDuke & Deborah Cowen, *Beyond Wiindigo Infrastructure*, 119 S. Atlantic Q. 243, 249 (2020).

[26] Eve Tuck & K. Wayne Yang, *Decolonization Is Not a Metaphor*, 1 Decolonization: Indigeneity, Educ. & Soc'y 1 (2012).

[27] Poundmaker's Old Stamping Ground, XLVIII-328-Poundmakers (Box 49a), University of Saskatchewan Libraries, Canadiana Pamphlets Collection.

[28] Patricia J. Williams, *On Being the Object of Property*, 14 Signs: J. Women in Culture & Soc'y 5 (1988).

[29] Cheryl I. Harris, *Whiteness as Property*, 106 Harv. L. Rev. 1707 (1993).

[30] *Id.* at 1711.

[31] *Id.*

[32] *Id.*

[33] W.E.B. Du Bois, The Souls of Black Folk (1903).

[34] *See* Ruth Gilmore on "infrastructures of feeling" in *Abolition Geography and the Problem of Innocence*, 28 Tabula Rasa (2018).

[35] Brenna Bhandar, Colonial Lives of Property: Law, Land, and Racial Regimes of Ownership 3 (2018).

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Heather Dorries shows how whiteness as property becomes settler jurisdiction over land.[36] In Indigenous legal traditions, "the land does not signify an object that is merely taken away,"[37] yet possession defines colonial law.

Infrastructure Otherwise: Towards Alimentary Forms

If colonial jurisdiction is normalized, then international law is understood to pertain to relations between nation states, facing "outwards" from "domestic" national space. But the settler state remains an "internal" landscape of multinational legal jurisdiction. Colonial jurisdiction "holds us captive"[38] but never fully erases "the multiplicity of Indigenous legal orders exercised daily across the land."[39] Replacement of Indigenous orders with colonial ones is at the core of settler space-making, and yet it is far from a fait accompli. Audra Simpson explains how in this settler colonial context, multiple sovereignties persist but "cannot proliferate equally or robustly."[40]

The survivance[41] of Indigenous sovereignties haunts settler authority. In sharp contrast to the assumed exclusivity of Euro-western jurisdiction, the question of how to share and care for lands and ecologies and with whom, is often at the center of Indigenous treaties. Leanne Simpson describes the Dish with One Spoon treaty between the Nishnaabeg and Haudenosaunee nations in this way: "recorded with a wampum belt, as an agreement of mutual responsibility in respecting and caring for shared hunting territory. Neither nation demanded a relinquishing of sovereignty from the other."[42] Treaties that Indigenous people made with settlers also assumed persistent multinationalism; they engineered consent to preserve autonomy. The Haudenosaunee refused early Dutch proposals for a paternalistic relation where one nation proliferates more robustly, and instead insisted on a Two Row Wampum that "makes manifest the joint decision by two parties to remain independent together."[43] Haudenosaunee people work endlessly to remind settler governments of that joint decision to this day.

Today, across Turtle Island, colonial infrastructure is under fire. Blockades proliferate at sites of invasive extraction and circulation, but so do actions like the Treaty Alliance Against Tar Sands Expansion, "an expression of Indigenous Law prohibiting the pipelines/trains/tankers that will feed the expansion of the Alberta Tar Sands," signed by over fifty Nations and Tribes from both sides of the border.[44] The Alliance explains their work as "part of an Indigenous Sovereignty resurgence taking place all over Turtle Island where Indigenous Peoples are reasserting themselves as the legitimate governments and caretakers of their territories."[45] Anne Spice highlights how the protection of Indigenous peoples' "critical infrastructures" spurs the refusal of invasive colonial ones.[46] Settler states have organized violence through law as infrastructure, but they hold no monopoly on either constituent concept.

[36] Heather Dorries, *Planning as Property: Uncovering the Hidden Racial Logic of a Municipal Nuisance By-law*, 27 J. L. & Soc. Pol'y 72, 77 (2017).

[37] Gina Starblanket & Elaine Coburn, *"This Country Has Another Story": Colonial Crisis, Treaty Relationships and Indigenous Women's Futurities*, *in* Canadian Political Economy (Heather Whiteside ed., 2020).

[38] Pasternak, *supra* note 5, at 148; *see also* Hoy, *supra* note 6, at 2, who insists that borders "are drawn on top of a territorial tapestry already established, the new form never vivid enough to block out what came before."

[39] Pasternak, *supra* note 5, at 149.

[40] Audra Simpson, Mohawk Interruptus: Political Life Across the Border of Settler States 12 (2014).

[41] Vizenor, *supra* note 20.

[42] Leanne Simpson, *Looking After Gdoo-naaganinaa: Precolonial Nishnaabeg Diplomatic and Treaty Relationships*, 23 Wicazo Sa Rev. 29 (2008).

[43] Jon Parmenter, *The Meaning of Kaswentha and the Two Row Wampum Belt in Haudenosaunee (Iroquois) History: Can Indigenous Oral Tradition Be Reconciled with the Documentary Record?*, 3 J. Early Am. Hist. 82, 85 (2013).

[44] Treaty Alliance Against Tar Sands Expansion, The Treaty.

[45] *Id.*

[46] Anne Spice, *Fighting Invasive Infrastructures: Indigenous Relations Against Pipelines*, 9 Env't & Soc'y 40 (2018).

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Concluding Thoughts

When Lauren Berlant asks how social formations can reproduce while also transforming themselves and the worlds they are part of, they find an answer in infrastructure. LaDuke and I follow suit, calling infrastructure "alimentary" when it nourishes projects and peoples working for justice, decolonization, and planetary survival.[47] Experiments are underway across the continent to build decolonized systems of making and moving. These approaches, like the sketches above, proceed from a recognition that law is a system shaping relations with lands, elements, and creatures. Implicitly or explicitly, they recognize that law and infrastructure are not simply strange bedfellows, but that law is infrastructure for transforming material and affective systems assembled to order or extend life.

[47] LaDuke & Cowen, *supra* note 25, at 245.

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