Interventions: International Journal of Postcolonial Studies
Publication details, including instructions for authors and subscription information:
http://www.tandfonline.com/loi/riij20

THE GOVERNANCE OF THE PRIOR

Elizabeth A. Povinelli [a]
[a] Columbia University, USA

Available online: 23 Feb 2011

To cite this article: Elizabeth A. Povinelli (2011): THE GOVERNANCE OF THE PRIOR, Interventions: International Journal of Postcolonial Studies, 13:1, 13-30

To link to this article: http://dx.doi.org/10.1080/1369801X.2011.545575

articles

THE GOVERNANCE OF THE PRIOR

Elizabeth A. Povinelli
Columbia University, USA

critical theory

indigeneity

nationalism

settler colonialism

sovereignty

This essay asks how critical indigenous theory might intervene in the field of critical theory. What originates here that does not in other disciplinary phrasings and phases and cannot without doing some violence to the tasks indigenous critical theory sets for itself? It begins to answer this question by introducing a form of liberal governance – the governance of the prior – that critical indigenous theory illuminates. And it argues that rather than referencing a specific social content or context, social identity or movement, critical indigenous theory disrupts a network of presuppositions underpinning political theory, social theory and humanist ethics (obligation) which are themselves built upon this form of liberal governance.

Indigenous: 'Originating or occurring naturally in a given place; native.'
Critical: 'Having the potential to become disastrous; at a point of crisis.'
Theory: 'A supposition or a system of ideas intended to explain something, esp. one based on general principles independent of the thing to be explained.'

Routledge
Taylor & Francis Group

interventions Vol. 13(1) 13–30 (ISSN 1369-801X print/1469-929X online)
 DOI: 10.1080/1369801X.2011.545575

Introduction

What is indigenous critical theory? What and who are referred to and enclosed by this disciplinary phrasing–phasing? What originates here that does not in other disciplinary phrasings and phases and cannot without doing some violence to the tasks indigenous critical theory sets for itself? Fourth world studies, indigenous studies, postcolonial studies, settler colonialism or subaltern theory – why aren't these adequate phrasings? Is indigenous critical theory a new domain for theory, a different way of doing theory or a different necessity of theory? That is, is indigenous critical theory an argument that there is a territory or estate over which it claims sovereignty; the kind of spatial or temporal region over which, or through which, it exercises this sovereignty demands a new way of doing theory; or, because indigenous critical theory only has applicability in this realm, there is a necessity to think of all theory in a restricted economy? In other words, before we practise indigenous critical theory, or critical indigenous theory as differing from, perhaps, critical theory, critical cultural theory or critical social theory, we might ask what is the difference that this new theoretical, social and academic enclosure seeks to capture, highlight and elaborate.

In this essay I want to suggest that there is a difference that indigenous critical theory makes, but that it makes this difference without being able to enclose a determinate content of social difference. There is a phenomenon to which the explanatory framework of indigenous critical theory is bound. But the difference between this phenomenon and any determinate content of social difference is vital to what indigenous critical theory is and might be. Indigenous critical theory's inability to surround a social space, circumscribe a social unity, or seal off a social area even as it remains bound to phenomenal worlds is paradoxically exactly the difference that indigenous critical theory makes – what makes this critical spacing so vital. Indigenous critical theory's difference lies in its inability to guarantee the content of its difference in such a way that it infects broader issues of political theory, social theory and humanist ethics (obligation).

To the end of suggesting how, I want to look at three sites in which indigenous critical theory defines a field without specifying its content: (1) the *governance of the prior* as a mode of political imaginary and manoeuvre in which priorness is not a problem but a problematic that implicates settler and indigenous subjects; (2) the *tense of the other* in which social belonging is divided between the autological subject and genealogical society such that, though mutually implicated, settler and indigenous subject are not implicated in the same way or to the same ends; and (3) the *obligation of worlds* as a location for building a home in the space between justice and law.

Indigenous (the Priority of the Prior)

Why is it that just as we begin to think about indigenous critical theory, about the criticality of what was prior to and what persists in the settler state, the sovereign authority of the settler state immediately monopolizes our attention? A couple of answers appear near to hand. One answer takes us to what doing indigenous critical theory, rather than any other mode of theory, reveals about a certain aspect of theoretical exercise itself, namely, that the practice of theory is always a claim about sovereignty over territories, districts and regions and thus is a performative technique of making territories, districts and regions. The 'territory' of theory may be a specific and particular region of thought, society, ethics or politics. Or it might claim a kind of general economy of sovereignty – an ability to be untouched by the demands or obligations of any specifiable sphere, boundary or scope producing in its wake a new type of universal lordship.

A second answer presupposes these meta-theoretical issues but moves them in a more sociological direction. Here, the indigenous sharply confronts the sovereign power of the settler state over its territory as well as the means and application of violence that constitutes the settler state's sovereignty *per se*. And the indigenous challenge to the settler state's sovereignty may not merely be confronting the state with an equal and opposing sovereignty; that is, the indigenous may not be merely another sovereign in a global game of competing sovereignties. Rather, the sociological figure of the indigenous (the first or prior) person is necessary to produce the modern western form of nation-state sovereignty even as it continually undermines this same form. This performative destabilization ramifies across epistemological, ontological and deontological grounds – the techniques of knowing who has a sovereign claim and how that claim is or is not restricted; the theories and practices of being that subtend human–human and human–non-human relations, say western ontologies of land and various indigenous geontologies; and the ethical obligations these ways of knowing and being entail (Ingold 2005; Coulthard 2007). Thus when indigenous critical theory examines practices such as Native American tax-free cigarette sales, it is doing more than merely challenging the settler state's sovereignty over indigenous lives. It is also challenging what kinds of entities and relations can be the basis of a sovereign claim; how these kinds of entities territorialize space and time; and subsequent to this what obligations are incumbent on those who claim to belong to these spacings and temporal orderings.

Both ways of answering the question of why sovereignty comes to the foreground whenever indigenous critical theory appears on the scene suggest a formation of power that subtends and articulates modern notions of state sovereignty and the indigenous difference – that is, a formation of power on

which state and indigenous sovereignty rest but is not itself equivalent to sovereignty. I am calling this formation of power the *governance of the prior*. From the point of view of the governance of the prior – the priority of the prior across political, market and social relations – the indigenous does not confront the state, nor does the state confront the indigenous. Both are caught in strategic manoeuvres of temporalization and territorialization around this problematic because the nation-state and the indigenous share a set of vital organs originating in a history that pre-dates their emergence even as this history of the present, and in the present, continually foregrounds that these organic transplants are subject to an intense and complex immunity crisis. We should not be surprised by this mutual implication and rejection. If the indigenous challenge to the sovereignty of the settler state is to register at the level of state legitimacy or as an anxiety of public reflexivity, then state and indigenous, and the publics that support them, must feel addressed, animated and aggravated by some ethical or political bind inherent in their being and relation. A formation of power must be in place that cannot avoid the problem that the indigenous poses to the state and stands for – or stands as – implicating both sides of the confrontation.

Understanding the governance of the prior as a formation of power stands in contrast to Jeremy Waldron's argument that the general duty of a government to do justice to all citizens within its territorial jurisdiction is trumped by any special duty to indigenous people based on the claims of first and prior occupancy. Choking on the 'mouthful' of the term 'indigeneity', Waldron tries to swallow its significance by differentiating two foundations of indigenous claims – first occupancy and the claim of prior occupancy – both of which he believes fail to past a basic test of Rawlsian justice.[1] Indigenous claims made on the foundation of first occupancy face two problems, according to Waldron. The first is evidentiary (first occupancy is nearly impossible to prove because its truth stretches into pre-recorded history); the second is the hierarchies of justice (the fact of being first, even if it could be proved, is only one of a set of values which must be assessed when deciding issues of justice). According to Waldron, indigenous claims made on the basis of prior occupancy gain moral force from 'the human interest in stability, security, certainty, and peace, and for the sake of those values it prohibits overturning existing arrangements irrespective of how they were arrived at.' But they also suffer from an ever decreasing moral weight as the event of dispossession recedes into historical time.

In a brilliant critique, Robert Nichols slowly unpacks the assumptions built into Waldron's model and analysis. Nichols notes that in order to divide indigenous claims into the categories of first and prior occupancy, Waldron must assume that contract theory, the principles of personhood it presupposes, and the ontological categories of being it projects are also *indigenous* categories – that is, universal, general, epistemological and

1 'I want to begin by apologizing for the title that I have given this lecture. The term 'indigeneity' is something of a mouthful' (Waldron 2003: 55).

ontological categories. Numerous indigenous studies scholars, from Deloria (2006) to Turner (2009) in the US and Rose (2000) to Irene Watson (2008) in Australia, have decisively demonstrated this not to be the case. Moreover, scholars such as Coulthard (2007) and Kauanui (2008) have shown dispossession is not a historical event but an ongoing process, a point that Waldron would be well aware of, given that his assessment of indigenous claims is situated within the ongoing conflict between the Palestinian and Israeli states.

When I speak of the governance of the prior, I am specifically interested in the social genealogies of the kinds of political theoretical abstractions on which assessments like Waldron's are made and are made sensible. There is not enough space here to discuss at length the genealogical conditions that gave rise to the governance of the prior in the modern settler nation-state, the nation-state system more generally, and the indigenous as a specific and general formation within the history of colonial settlement. This much I can say, if all too briefly. The conditions of the governance of the prior were in place before the emergence of the settler colonial nation-state. And this is true whether we believe that the modern nation-state emerged in the eighteenth-century Americas, as does Anderson (1991), or only after the Second World War, as do Kelly and Kaplan (2001). Long before the 'creole nationalisms' of the Americas reinvented themselves as settler nation-states and long before the United Nations enunciated the prevailing principles of a post-Second World War nation-state system, the governance of the prior was already a central concern of English common law, continental property rights and rules of warfare. In foundational texts such as William Blackstone's *Commentaries of the Laws of England* the legitimacy of a wide range of seizures was decisively anchored in a way of thinking about the jurisdiction of laws pertaining to the rights of the prior. The seizure of persons (*habeas corpus*), property (as an intra-territorial relationship between the sovereign and citizen) and territory (as an inter-territorial relations between two sovereigns) were all articulated through the still emergent notion that what held must hold until it is purchased (or gotten by treaty), forced to give way (through conquest or genocide) or characterized as never having actually existed (such as in the concept of *terra nullius*).

The priority of the prior person (or people) as a natural right of all persons and the people as such emerged as an impediment to the previous logics of kingly seizure and to the emergent logic of colonial governance. This emergent form of governance increasingly narrowed and restricted kingly and foreign seizures at home and in the known world. It also presented a problem for the seizure of territories in the so-called 'discovered world'. If what held in the past had a preeminent hold on rights – the simple fact of their being prior, possessing the quality of the prior, gave them priority in law – the expansion of British empire put particular pressure on jurisprudential

thought to articulate how the rights of various kinds of prior persons would be brought into an ideologically coherent framework. Thus Blackstone's famous formulation:

> For it is held, that if an uninhabited country be discovered and planted by English subjects, all the English laws are immediately there in force. For as the law is the birthright of every subject, so wherever they go they carry their laws with them. But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but, till he does actually change them, the ancient laws of the country remain, unless such as are against the law of God, as in the case of an infidel country. (Blackstone 2004: Sec. 4)

Wherever the British went they carried the governance of the prior with them. And this governmental form was conserved in the settler nation-states that emerged from British colonialism. Thus the governance of the prior cannot be neutralized or evacuated because it is sewn into the preconditions of the settler state across various levels and domains of social life – the juridical properties of the person, the personal property of the market and the territorial properties of the state and its colonial holdings. To be sure, in neither colonial nor national contexts did the governance of the prior foreclose the possibility of violent seizure. Rather, the priority of the prior forced, and forces, states to account for such seizures in such a way that their authority as sovereign is not undermined.

The governance of the prior presented a general problem to the British colonial expansion, but it did not have a uniform application across the major British settler colonies – North America, Australia and New Zealand. In the British Americas, for example, the priority of the prior was acknowledged and then annulled through treaty, land seizure and passive and active genocide. The newly constituted United States of America anchored its subsequent legitimacy on a similar toolbox of acknowledgement and annulment in its relations with Native Americans. But the ever-expanding United States also incorporated the logic of the governance of the prior into its own sovereign national identity by crafting a creole form of nationalism. As Anderson (2001) has put it, 'One of the justifications, sooner or later, for these creole nationalisms was also their distinctive history, and especially their demographic blending of settler and indigenous peoples, to say nothing of local traditions, geographies, climates, and so forth' (33). This manner of strategically claiming a priority of inhabitation in the continent against a foreign colonial homeland became the modular form of national sovereignty.

Articulating itself as a 'creole state', a negative projection of the metropolitan state, Americans could claim and experience themselves as the prior occupant of the Americas: projecting itself *against* the metropole, the settler state constituted itself as *prior* to it. But in acceding to the logic

of the priority of the prior as the legitimate foundation of governance, the settler state projected the previous inhabitants as spatially, socially and temporally *before* it as the ultimate horizon of its own legitimacy. Susan Scheckel examined this dynamic in the American literary nationalisms of the early nineteenth century. Anxious that the Revolutionary War would lead not to a new and lasting peace but an endless series of subsequent revolutions, 'many literary nationalists of the early nineteenth century suggested that the history and myths of American Indians could provide the new nation with a sense of "primitive" origins' (Scheckel 1998: 16). But while solving one problem, this tactic of literary creolization created another, namely the governance of the prior: 'who had the right to own and govern the land originally possessed by Indians and inherited through the Revolution?' (17).

The complexity, and thus possibility, immanent in this new formation of power is evident in the uneven ways in which this formation emerged across Spanish, English and other colonial empires as these empires encountered different lifeworlds (say, the Spanish and English confrontation with the Comanche Empire; see Hamalainen 2008). In the US, this creole logic coiled around the Jacksonian concept of manifest destiny in such a way that foreign invaders (settlers) were transformed into autochthonous domestics (nationals), the former inhabitants (empty set) into domestic dependent sovereignties (natives). But the logic of creole nationalism did not merely allow the creole state to claim a form of priorness in relation to the newly foreign metropole and foreign domestics (natives). It also allowed the creole state to make numerous other internal and external sovereign distinctions. For instance, the Marshall trilogy that coined the notion of domestic dependent nationalism was as much about the relationship between federal and state governments as it was the federal government and tribes.[2] These decisions about the status of the natives were extended into other jurisdictions such as the US seizure of Puerto Rico (see Kaplan 2005: 10; see also Borneman 1995).

2 The infamous notion of domestic dependent nationalism was elaborated across the so-called Marshall Trilogy: *Johnson v. MacIntosh* (1823), *Cherokee Nation v. Georgia* (1831) and *Worcester v. Georgia* (1832).

Like other settler colonies, Australia articulated a creole form of nationalism which stretched from early celebrations of the bushman to more recent Olympic characterizations of the Dreaming. But the Australian settler colony had a different strategy for addressing the claims of the prior; or what Lisa Ford, in a comparative study of the legacies of British empire in the US and Australia, calls the 'legal trinity of nation-statehood – sovereignty, jurisdiction and territory' (2010: 1). By 1788 the British found it more convenient to bracket the presence of prior inhabitants through the doctrine of *terra nullius*, then to negotiate treaties with the variety of inhabitants they confronted. The 1901 Federal Constitution, which established Australia as an independent Commonwealth, for the most part continued to treat the 'aboriginal native' population as a spectral presence,

referring to the indigenous population in just two sections. Section 51(xxvi) gave the federal parliament the power to make 'laws for the peace, order, and good government ... with respect to people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws'. Section 127 prohibited the parliament from counting 'aboriginal natives' in the consensus. To be sure, the frontier was rife with organized and disorganized violence, seizures, resistances and informal land agreements. In other words, in Australia the problem of the priority of the prior was confronted through a variety of tactics – warfare, genocide, property transfer. But all of these huddled under the cover of the doctrine of *terra nullius*. And, as in the US, in Australia this specific tactic for manoeuvring around the governance of the prior was not merely about the problem that the indigenous posed to the state but about internal state dynamics played out through indigenous policy. Sections 51(xxvi) and 127 were less about 'the state' and 'the indigenous' than about struggles between Commonwealth and state powers. The strength of the states against the federal government was equally more at stake in the 1967 referendum that struck down these limits on Commonwealth power and gave rise to modern land rights.

The divergent histories of specific nation-states can dramatically alter the experience of the governance of the prior. For instance, the scholarly public within the US often finds it hard to conceive of the centrality of the indigenous–settler division, so palpable and unavoidable in Canada, New Zealand and Australia, outside theories of race as race has been defined by the histories of African enslavement. This historicity of race, internal to US nationalism, is taken as universal to all nationalisms and secretly subtending the social relations between indigenous and settler societies. Put differently, the specific double dispossession of US sovereignty – the indigenous and enslaved – often operates discursively to figure the former as merely another version of the latter, making it difficult for critical race theory to open itself adequately to indigenous critical theory. A similar argument could be made for subaltern studies.

The trouble with creole nationalism is that the prior person remains, destabilizing and displacing state sovereignty. The prior person remains in the concrete sociological sense that the prior people were never extinguished even though the logic of elimination, as Wolfe (1999) has described colonial settlement, included physical, social and cultural tactics from the massacre of entire social groups to the removal of mixed-raced children from their families. These prior people remain factually, phenomenologically present in the modality of *descendents* – thus various past and recent state attempts to sever the chain of antecedent and descendent in order to exorcize this hybrid spectral–factual presence. The politics of liberal cultural recognition wherein the state controls, through the mechanics of state recognition, what part of

those who have no part can be incorporated safely into the national lifeworld, can be understood as a strategy for strategically intervening in the antecedent–descendent chain. More recently, the Australian state, under the pretense of protecting indigenous children from child sexual abuse, has revived many of these assimilation policies and discourses of the early twentieth century, channelled through new neoliberal discourses.

But there are other ways the prior remains as a palpable spectre haunting state sovereignty. The prior person remains even when no actual person claims to be the present manifestation of the surviving prior, that is, even if the prior person is no more than an entry in a historical record. As historical citation this prior person is constantly called upon to do all sorts of cultural, social and legal work – from playing mascot for sports teams to repatriating remains. And even where the historical other appears only as an empty horizon, the prior person remains as a logical presence in the movement of law, justice and violence. We can see what is at stake here by turning to Walter Benjamin's (1986) distinction between law-making and law-preserving violence. This quintessential dialectic of violence continually presupposes, and projects, the problem of the priority of the prior into the space of the law by disrupting a prior law to establish the priority of the law.

However, the settler state is not alone in being caught in strategic manoeuvres around the governance of the prior. The indigenous is also constantly displaced by the same governing logic. It is without question that there was a human way of life, outside the emergent onto-theologies of liberal humanism and yet not its antithesis, that inhabited the lands which would be labelled the Americas, Australia and New Zealand and on which a political formation would be imposed. But once legitimate sovereign power is grounded in a discourse that what held must hold until it gives way, the 'indigenous' emerged as the name for prior being devoid of any specified content. Subsequently, the referent of the indigenous begins to wander as far afield as Blackstone's English subject. A kind of set-theory problem arises – or the law of genre disperses as much as it gathers. Who is the indigenous? Is the indigenous bound to the settler state? Is 'the indigenous' a unique historical permutation of the nation-state system or is it a permanent possibility within the general economy of the nation-state? Hawaii, Zapitistoas, Bolivia, Israel, Basque, Zimbabwe, Northern Italy, KwaZulu, New Zealand farmers – the priority of the prior once set free begins to trouble every state organized on the basis of the homogenous space-time of modern nationalism. As a result, the 'indigenous movement' can lose all social and political specificity, crowding its home with unwanted bedfellows – conservative, progressive, reactionary, Marxist, populist socialist, traditional. These are the arguments Waldron (2003) mobilizes against the rights of indigenous peoples even as he treats their specific and ongoing histories as if they were abstract principles.

If it seems difficult to stabilize the category of the indigenous from the point of view of all the possibilities that emerge from the governing logic of the prior, it is equally difficult to stabilize who is indigenous from the perspective of internal group dynamics. This takes us back to the dominant way in which the prior indigenous person remains phenomenologically in the world, namely, the chain of antecedent–descendent. This chain moves in two directions – back to the first human and forward to the last. And because the logic of descent, internal to the ability to claim to be a descendent of the prior person, can be reversed, every group faces an infinitely regressive set of prior beings. As the Kennewick Man controversy made clear, notions of 'descent from' can extend into the Pleistocene. Critics of indigenous heritage claims on museum property can undercut indigenous ontologies by pointing out that native people are also migrants who walked and floated into the Americas and Australia or navigated across the Pacific to New Zealand. Indigenous groups may have a post-migration origin point – say, how though from elsewhere in a strict genealogical sense, a group came to be ontologically differentiated through its interactions with the spiritual geontological forces of the land. But these narrations of geontological formation are often quickly absorbed into the divisions of reason implicit in the divisions of history and myth.[3] Origin-histories are interpreted as origin-myths, and these origin-myths are used in liberal politics of cultural recognition to differentiate the practices of the present from the practices of the past.

Proposition 1: If we accept the hypothesis that the governance of the prior subtends settler states and indigenous claims then the critical task of indigenous theory is to become something otherwise than prior. The notion of the naturally occurring within place must escape the governance of the prior by making a new spacing.

3 In the Kennewick Man controversy the court found that the Umatilla tribe, who claimed rights to the remains under the Native American Graves Protection and Repatriation Act, had not legally established a link to the remains. Critical legal scholars believe that this ruling established a precedent by which the epistemologies of western science would trump the epistemologies of indigenous knowledge – the former truth-based, the latter mythologically based ways of knowing the world.

Critical (the Tense of the Other)

If the governance of the prior mutually implicates the nation-state and indigenous, it does not implicate them in the same way or to the same end. In order to understand how a mutually implicating structure differentially assigns truth-values, we need to understand how the sequential logic of the prior is transformed into the narrative tense of the other. We need to understand the implicit and explicit ways in which the settler nation figures the narrative events of competing prior persons across the domains of law, public and market. If in creole nationalisms the preeminent question is how a settler can claim the right to own and govern the land, then the answer isn't found in the governance of the prior *per se*, but in how the prior is split across two narrative formations of truth-value: the tense of the

settler and the tense of the indigenous. The truth-value of the indigenous–aboriginal–native (genealogical) voice is figured in the past perfect, while the truth-value of the settler (autological) is figured in the unmarked present or future anterior. This division of the tense of the nation bifurcates the sources and grounds of social belonging in such a way that the mutually implicated (the settler colonial and indigenous as dialectical characters) are transformed into differentially valued and assessed past and future truth-values.

To see what is at stake here let us return to Anderson's argument in *Imagined Communities* that nationalism emerged as a new political imaginary and that the political community it imagined reorganized previous forms of state sovereignty. According to Anderson, the emergence of the print media broke with previous socialities organized around face-to-face relations vertically oriented to kingly authority. The territory of kingly authority was radial in its logic and expanded through warfare and sexual politics, bringing together diverse populations through dynastic marriages. Print-nationalism installed a new horizontally oriented homogeneous people-hood as the sovereignty authority, a people whose internal integrity was defined in relation to the border. The homogeneous space-time written against state borders, institutionalized in market, public-sphere, and state function, displaced the older imaginary of radial monarchical sovereignty. Numerous refinements and critiques of Anderson have been written since the publication of *Imagined Communities*, many of them quite incisive. But Anderson's basic point remains quite important: the diffuse imaginaries of stranger sociability, value abstraction and social objectification came to provide a meta-framework within which the discussion of sovereignty persists.

The problem with Anderson's account of the imagined political community of nationalism is not that it locates the origin of the nation-state at the wrong moment or in the wrong place. Rather, the problem is that Anderson doesn't account for the differential narrative structures of belonging within the nation-state. When we look at these differential narrative structures we find that not all people are located in the same narrative tense of social belonging, even if all people are absorbed into the same political logic of the governance of the prior. In other words, the temporality of social belonging that emerged with democracy, colonialism and capitalism emerged not merely as a dialectic but also as a division. In the first mode of social belonging, glossed by the phrase 'the autological subject', the human is staged as an individuated subject struggling to author her own life and destiny against and within broader human social and historical determinations, an agency and force situated against a horizon of open possibilities. Every given utterance–action of the autological subject is narrated in the progressive present or redemptive future (written in the future anterior or perfect) – national narrations of the autological subject mark (and market) in one of a variety of present and future tenses. When it comes to the success

and failure of the market, the tense of the autological voice is usually figured in the future progressive. When it comes to the violence of the juridical order, evaluative judgements are often written in the tense of present perfect understanding. But across these eddies of narrative tense is a larger narrative order in which the autological subject is written against a perfecting or perfected horizon.

In the second mode of social belonging, glossed by the phrase 'the genealogical society', some sort of human supraindividual force is imagined as constraining this individual struggle to author life and destiny, fixing the subject's place in a past perfect social order, and inflecting every personal and social obligation with the spectre of individual determination. All claims spoken by the governed and spoken in the present tense are renarrativized as indexing their relation to the inhumanity (because radically constrained) of the past perfect coherent. The roots of this narrative organization of tense lie in the same history as the governance of the prior. The same Blackstone who reflected on the priority of the prior also noted the four criteria for legally valid customs in British-influenced settler colonies:

- CUSTOMS must be reasonable; or rather, taken negatively, they must not be unreasonable.
- CUSTOMS ought to be certain.
- CUSTOMS, though established by consent, must be (when established) compulsory and not left to the option of very man, whether he will use them or no.
- LASTLY, customs must be consistent with each other: one custom cannot be set up in opposition to another. (Blackstone 2004: Sec. 4)

From Blackstone onwards this version of custom as an all but inhumanly coherent and backwards looking constraint would dominate legal, social and public evaluations of the governed.

In sum, in the general governance of the prior, one prior – the governed prior – would be the customary. The other prior – the governing prior – would be free. This division would seep into and reshape every aspect of social life, including those aspects of indigenous social life claimed to be confronting settler society. Take, for instance, stranger sociability, kinship and the family within the governance of the prior. Since Simmel, the stranger as a phenomenon of modernity has been opposed to older premodern kin-based socialities, a point that Anderson also assumes. But this division – the claim that the modern shattered the premodern enclosure of the social by the family – already partakes in the narrative organization of tense and voice as defined by the politics of the governed. Remember, the modern is said to consist of voices freed from the constraints of kinship, the premodern to consist of those constrained by kinship. The one is said to confront the other

as two different ways of life. But this claim is false in this sense: kinship and family are not modes of sociality that constrain or are constrained. Kinship and the family are not things at all, but systems of social relations and their imaginary resources.

This is something indigenous movements have long known. Take, for instance, the gestures of social inclusion within the politics of recognition in Australia. From the 1970s through the turn of the twenty-first century, Australian law and publics were seen to be newly inclusive of a variety of local modes of gender, kinship and the family. Indigenous forms of kinship and the family were allowed to be the basis for land and property claims. But stranger sociality quickly absorbed local and regional imaginaries and practices of kinship. To be recognized by state and public, indigenous forms of kinship and the family had to conform to the social imaginaries of stranger sociability mentioned above. It had to be based on rules and norms that persons outside the group and independent of immanent group dynamics could apply to the group as logical principles of inclusion and exclusion. In the parlance of social anthropology, kinship had to become a matter of descent rules viewed from the position of nowhere rather than densely situated and emergent social affiliations. Indigenous people had to say how the descent (inclusion and exclusion) worked rather than say how they decided who 'picked up' the negotiated obligations and possibilities within the general field of local social belonging. In other words, kinship and the family, by being defined by abstracted rules of descent rather than immanent practices of affiliation, were made to conform to the tense of the other within the governance of the prior. Affiliation is after all oriented to the present emergent, whereas abstracted rules of descent are oriented to the past perfect. The governed would never be allowed to sever its relation to the past without negating its claim on the customary and thus its difference with the governance of the prior.

To be sure, this division of social belonging is a normative assertion about the self and other as well as a figuration of the tense of the self and other. Neither is true in the sense of referential truth. But both do huge work nevertheless in the sense of interpretation and power. This difference makes a huge difference in how indigenous sovereignty is articulated and apprehended in the double sense of apprehension, an understanding and arresting, a moment of perception and criminalization. To be customarily prior within the governance of the prior, all aspects of one's social life and imaginary must be apprehensible within a specific, seamlessly coherent narrative tense – or, that is the norm against which deviations are read.

This does not mean that the internal dynamics of kinship and family within the diverse socialities of the indigenous–native–aboriginal simply conform to this tense of the other. Indeed, the question of how to constitute local principles of social inclusion and exclusion is one of the most heated

fields of debate within and across indigenous communities – dispersing in the process the very notion of a community as such. Those indigenous men and women who understand practices of obligation as more primary than abstract rights of inclusion are constantly confronted by a variety of laws in a variety of state contexts that demand some abstract principle of kinship and descent as the basis for organizing legally productive difference. But every principle of inclusion is a social division that opens the group at the very moment its borders are sealed. This sealing as opening was dramatically witnessed in Seminole and Cherokee debates about the indigenous status of black Freedman and the politicization of these debates and decisions within the US Congress. Thus when the Cherokee Nation of Oklahoma voted to limit tribal citizenship to those who could trace their heritage to the Dawes Rolls of 1906 (and thus thereby automatically disenfranchising most Freedmen who were placed on separate rolls irrespective of their kinship and descent), members of the Black Congressional Caucus led by Diane Watson sought to deny federal funds to the Oklahoma Cherokee. Her office petitioned to withhold funding under the Native American Housing Assistance and Self-Determination Reorganization Act of 2007 until it reinstated the black Freedman (D. Watson 2008).

> *Proposition 2*: One spacing in which indigenous critical theory makes its difference is narrative tense. If we accept the working hypothesis that the governance of the prior is a colonial formation that, while logically affecting both settler state and indigenous society, narratively distributes the sources and grounds of social belonging, then the critical task of indigenous theory is to foreground the crisis of obligation and belonging in the narratives of freedom and constraint.

Theory (the Obligation of Worlds)

If indigenous critical theory presents us with a crisis of obligation and belonging, how might this crisis create a new space for a theory of justice and law? Let us answer this by way of one of the most subtle and profound readings of justice and law within critical theory, Jacques Derrida's account of the aporia of law and justice. For Derrida, justice is written in the future imperfect; it is yet to come, a horizon toward which we walk without end. And this tense of justice emerges from the non-passage of the singular and general address of law. As he put it in his essay 'The Force of Law':

> An address is always singular, idiomatic, and justice, as law [*droit*], seems always to suppose the generality of a rule, a norm or a universal imperative. How are we to reconcile the act of justice that must always concern singularity, individuals,

> irreplaceable groups and lives, the other or myself as other, in a unique situation, with rule, norm, value or the imperative of justice which necessarily have a general form, even if this generality prescribes a singular application in each case? (Derrida 1990: 949)

In a subsequent series of essays and books, Derrida would elaborate the terrifying obligation – the demands and debts – this mode of justice placed on the West (Derrida 1995, 2007). Those who have been the subjects of indigenous land or heritage claims, or have worked beside those subjects, have a deep intuition of this excess – what Lyotard called the *differend*. While the justice of an indigenous claim always seems to confront the law with a specific face, the law of recognition always demands that this specific face speak its difference within a legislated norm. In Canada, ten years before the landmark *Mabo* decision in the Australian High Court, Section 35 of the Constitution Act (1982) enshrined the concept of aboriginal title, and the rights that go along with it, independent of any actual treaty relation. But it enshrined the 'concept of aboriginal title', importing with this concept the specific philosophies of concept, title and the aboriginal with it (Coulthard 2007). And within these specific histories it further specified, through the disciplines of evidence, that the survival of contemporary aboriginal title was dependent on claimants proving an unbroken and unchanged adherence to practices, traditions and customs of First Nation cultures as practised prior to European contact. In this light, the Australian High Court decision in *Eddie Mabo v. the State of Queensland* appears as a mimetic repetition of this increasingly modular form. In *Mabo*, the court also finally recognized native title, but recognized it as a feature of Australian common law rather than a concept foreign to it. In so far as native title was never allowed to be native it never disturbed Australian sovereignty. As Stewart Motha has put it, '"postcolonial" law and society in Australia is determined by preserving and disavowing the colonial sovereign "event" that founded the colony' (2005: 108). Specific constitutional amendments and legal decisions practically universalize the enclosure of the indigenous within a normative order of global law.

In actual postcolonial hearings where this aporia must be faced, the irreducible obligation to law and justice is felt and expressed on both sides of the table. Justices speak of the mourning of justice as an unreachable horizon, of the necessity of split decisions, of making the best of an imperfect world. Indigenous claimants speak movingly of failing to be addressed in their singularity. And I would hardly be the first to note this. Among others, Elisabeth Weber has written insightfully on the ethical nature of 'infinite finitude', which she sees as 'the excess of the call within the institution (the institution of language as well as the institution of laws and rights)' (2005: 40). But, once again, the fact that the demands of mourning equally

encompass the governed and governing does not mean that the demands of mourning have the same social value or outcome. And the intervention that indigenous critical theory might make is precisely in this theoretical reading of law and justice and what mourning demands. It does so because indigenous critical theory interferes with the difference between the singular and general on which this practice of mourning rests – a practice that is at one and the same time a necessary condition of the world that is and a historical condition of a world that need not have been.

Thus, one of the pressing concerns of indigenous critical theory has been to demonstrate that the interval of justice that emerges as an excess – a horizon – in every act of positive law-making has a history. In other words, not only does every specific configuration of a juridical, legislative and executive norm create the movement of justice as a deferred end much like Lacanian desire moves away from every specified object, but also the interval created in this movement emerged out of the specific history: the governance of the prior and the tense of social belonging. Indigenous critical theory opens and presses precisely on the singularity of the individual and her finitudes as this singularity is written within the stranger socialities of the liberal settler nation-state. Several tactics are emerging. On the one hand we see some of the possibilities of this space in various attempts to practise a human affiliation within immanently perceived kinship ties but outside kinship determination as written from the view-from-nowhere; and to practise a post-/pre-humanist affiliation outside a mythological determination and the divisions of reason it inscribes (Povinelli 2006). These efforts are incoherent from the point of view of the customary as written from within the governance of the prior. And they resist the distinction of the singular and the universal by being at the threshold of a process of human and non-human invaginated and invaginating being. On the other hand, indigenous critical theory is seeking to discover what happens when law and justice are placed in a different geontology: the irreducible unity of earth and people *vis-à-vis* a concept like reoccupation and return rather than redemption, or another, such as persistence rather than departure or arrival?[4]

4 Irene Watson has been developing such a framework (e.g. Watson 2008).

In both cases something like an immanent obligation confronts other forms of adjudication of rights to belong and to belong in a specific way. By 'immanent obligation' I am referring to a form of relationality that one finds oneself drawn to and finds oneself nurturing or caring for. This being 'drawn to' is often initially a very fragile connection, a sense of an immanent connectivity. Choices are then made to enrich and intensify these connections. But even these choices need to be understood as retrospective and the subject choosing as herself continually deferred by the choice. I might be able to describe why I am drawn to a particular space and I may try to nurture this obligation or to brake away from it, but still I have very little that can be described as 'choice' or determination in the original orientation.

As a result, adjudication arises not via some transcendental gesture, no matter how fragile, but from a continual reflexively practised dwelling within the worlds to be adjudicated. Thus adjudication is not merely internally tethered to ethical commitment and desubjugating obligation, but also to the capacitating of potential life in settler colonies. This demand to capacitate foregrounds without side-stepping the queasy and uncertain terrain between epistemology and deontology and the constant uncertainty of capacitating life at the threshold of being and not-being.

But whatever tactics are deployed, the ends of indigenous critical theory are to make this spacing practical in a world in such a way that they make the content of statements and practices practical and sane rather than impractical and mad – or if not mad, then mythological. This is not to say that the goal is to make this spacing normative. Rather, indigenous critical theory seeks to make, reoccupy and persist rather than to explain or account for something in general terms independent of the thing to be explained. As a result, whatever indigenous social belonging will become it will depend on two critical interventions in the extant organization of the nation-state. First, the native must be something other than the prior – something other than the internal semantic disciplines imposed on it before the emergence of the settler nation-state – even as it stands before the settler nation-state. Second, whatever stands before the settler nation-state must make discursive space for a narrative tense that refuses the divisions of the past perfect and the future redemptive. There is not one way of standing before and narrating outside the governance of the prior. Because of this, indigenous critical theory's difference lies in its inability to guarantee the content of its difference in such a way that it infects broader issues of political theory, social theory and humanist ethics.

Proposition 3: Indigenous critical theory intervenes in something rather than explains something, not because it is located within the existing aporia of law and justice but because it lies in a particular spacing at once inside and outside of it.

References

Anderson, Benedict (1991) [1983] *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, London: Verso.

Anderson, Benedict (2001) 'Western nationalism and eastern nationalism: is there a difference that matters?', *New Left Review* 9: 31–42.

Benjamin, Walter (1986) 'Critique of violence', in Peter Demetz (ed.) *Reflections: Essays, Aphorisms, Autobiographical Writings*, trans. Edmund Jephcott, New York: Schocken Books, pp. 277–300.

Blackstone, William (2004) *Commentaries on the Laws of England*, New York: Kensington Publishing.

Borneman, John (1995) 'American anthropology as foreign policy', *American Anthropologist* 97(4): 663–72.

Coulthard, Glen S. (2007) 'Subjects of empire: indigenous peoples and the "politics of recognition" in Canada', *Contemporary Political Theory* 6(4): 437–60.

Deloria, Vine, Jr (2006) *The World We Used to Live In: Remembering the Powers of the Medicine Man*, Golden, CO: Fulcrom Publishing.
Derrida, Jacques (1990) 'Force of law', trans. Mary Quaintance, *Cardozo Law Review* 11: 919–1045.
Derrida, Jacques (1995) *The Gift of Death,* trans. David Willis, Chicago: University of Chicago Press.
Derrida, Jacques (2007) *The Politics of Friendship,* trans. George Collins, London: Verso.
Ford, Lisa (2010) *Settler Soveriegnty: Jurisdiction and Indigenous People in America and Australia 1788–1836*, Cambridge, MA: Harvard University Press.
Hamalainen, Pekka (2008) *The Comanche Empire*, New Haven: Yale University Press.
Ingold, Tim (2005) *The Perception of Life*, New York: Routledge.
Kaplan, Amy (2005) *The Anarchy of Empire in the Making of US Culture*, Cambridge, MA: Harvard University Press.
Kauanui, J. Kehaulani (2008) *Hawaiian Blood: Colonialism and the Politics of Sovereignty and Indigeneity*, Durham, NC: Duke University Press.
Kelly, John D. and Kaplan, Martha (2001) *Represented Communities: Fiji and World Decolonization*, Chicago: University of Chicago Press.
Motha, Stewart (2005) 'The failure of "postcolonial" sovereignty in Australia', *Australian Feminist Law Journal* 22: 107–25.
Povinelli, Elizabeth A. (2006) *The Empire of Love: Toward a Theory of Intimacy, Genealogy, and Carnality*, Durham, NC: Duke University Press.
Rose, Deborah Bird (2000) *Dingo Makes Us Human: Life and Land in an Australian Aboriginal Culture*, Cambridge: Cambridge University Press.
Scheckel, Susan (1998) *The Insistence of the Indian: Race and Nationalism in Nineteenth-Century American Culture*, Princeton: Princeton University Press.
Simpson, Audra (2008) 'Subjects of sovereignty: indigeneity, the revenue rule, and juridics of failed consent', *Law and Contemporary Problems* 71: 191–216.
Turner, Dale (2009) *This is Not a Peace Pipe: Towards a Critical Indigenous Philosophy*, Toronto: University of Toronto Press.
Waldron, Jeremy (2003) 'Indigeneity? First peoples and last occupancy', *New Zealand Journal of Public and International Law* 1(1): 55–82.
Watson, Diane (2008) 'Sen. Barack Obama and the Cherokee Freedmen: politics as usual', OpEd, *The Hill* 13 May; online at http://thehill.com/op-eds/sen.-barack-obama-and-the-cherokee-freedmen-politics-as-usual-2008-05-13.html (accessed 5 February 2009).
Watson, Irene (2005) 'Aboriginal sovereignties: past, present and future (im)possibilities', in Suvendrini Perera (ed.) *Our Patch: Enacting Australian Sovereignty Post-2001*, Perth: API Network, pp. 26–7.
Watson, Irene (2008) 'Sovereign spaces, caring for country, and the homeless position of aboriginal people', *South Atlantic Quarterly* 108(1): 27–51.
Weber, Elisabeth (2005) 'Deconstruction is justice', *SubStance* 34(1): 38–43.
Wolfe, Patrick (1999) *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Enthnographic Event*, London: Continuum.