The supersession of Indigenous understandings of justice and morals

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Arguments about the supersession of historic injustice often use the dispossession of Indigenous lands as an example of the sort of injustice in the past that can be superseded in certain circumstances. The aim in this paper is not to directly challenge the content of such arguments when applied to matters of dispossession, but to place them into a larger context, where they are seen playing a role in ongoing efforts to remove Indigenous understandings of law, justice and morals from discussions about Crown-Indigenous histories and interactions. The normative narrowness of these arguments is explored, set alongside developments within Canadian law that purport to respond to the historic denial of substantive Indigenous interests in lands by colonial and Canadian authorities. While the analysis takes a bird's-eye view of the interaction of varied normative systems, the last section reengages with normative concerns, as I speculate about why courts – and academics writing about the passage of time – seem intent on developing arguments and positions that ignore Indigenous understandings.

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1. Introduction

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The bulk of material on the topic of the supersession of historic injustice ('SHI') in relation to Indigenous claims to lands and jurisdictional authority is foundationally buried in the normative worlds of the non-Indigenous scholars working in the field. Arguments within the field of discourse overwhelmingly disregard the existence of worlds of Indigenous understandings of land-people relations, of law, and of normativity. We see, for example, that justice is conceptually constrained to what non-Indigenous scholars understand it to be and that what counts as morally relevant changes over time is likewise narrowly construed. The result is that possibilities of debate are all contained within a single horizon such that engagement with arguments raised within the world of SHI-discourse forces one into a world of normativity that distances the scholar from other worlds of understanding. This is so to the degree I find, as an Indigenous scholar, I cannot productively engage with this material. Besides wasting time and energy on what would be an essentially futile task, I would also risk being pulled into this circumscribed world of normative discourse and I have no interest in going down that rabbit hole.

To avoid tumbling down such a hole I attempt a different project in this paper – to highlight what we in fact witness being attempted in the development and promulgation of such normatively-narrow-minded work. I engage with a form of naturalist analysis of normative discourse, narrowing this down to an examination into what SHI arguments seem to be designed to accomplish and how they accordingly operate, all this set in the context of a world populated by distinct sets of normative understandings. To carry out such an examination I trace out a path through a common set of arguments about SHI, positioning these arguments in relation to ongoing struggles by Indigenous communities in western Canada over lands they have been distanced from over the last century-plus. The general picture I eventually sketch is of Canadian courts crafting

legal positions that destroy or remove alternate Indigenous understandings of law, justice and morals, and of academics doing their part to support these endeavours (whether consciously or not).

Through the first two-thirds of this study while I argue *about* normative matters I do not engage in normative discourse – that is, I do not, for example, hold up Indigenous normative understandings as *better*, or suggest that some other normative (or meta-normative) position *should* be adopted. Rather, this naturalist analysis is simply meant to illuminate why those who propose SHI arguments argue as they do, given the fact they seem intent on presuming their normative groundings are the starting points for argumentation. In the last section I move away from this bird's-eye view of divergent, multiple normative systems to advance a normatively-charged argument about the dangers posed by SHI arguments given our place in the Anthropocene.

2. Standard arguments concerning SHI and questions I ask

In his original 1992 paper Waldron writes that;

> … it seems possible that an act which counted as an injustice when it was committed in circumstances C1 may be transformed, so far as its ongoing effect is concerned, into a just situation if circumstances change in the meantime from C1 to C2. When this happens I shall say the injustice has been superseded.[1]

Shortly after he notes that;

> Of course, from the fact that supersession is a possibility, it does not follow that it always happens. Everything depends on which circumstances are taken to be morally significant and how as a matter of fact circumstances have changed.[2]

It so happens that an example of historic injustice Waldron often turns to is the general case of the dispossession of lands held by Indigenous communities. The picture offered is of land in the possession of an Indigenous community generations ago, of the unjust taking of this land by colonial authorities, and then of the passage of time, this passage marked by morally relevant changes in surrounding circumstances such that the injustice of the taking, as we get to the current situation, is superseded.

The notion a type of injustice is simply there to examine is not, however, as straightforward as SHI theorists seem to presume. In most places where he presents dispossession of Indigenous lands as a type of example of historic injustice Waldron labels these events injustices without specifying what exactly it is about this sort of situation that makes it so. It is not difficult, however, to piece this together, as in other discussions Waldron touches on two common contemporary ways of thinking property is originally acquired and/or justly held. The first emerged from Locke's remarks in *Two Treatises of Government*,[3] the general notion being one acquires and can lay claim to property through the infusion of oneself, through one's labour, into land (or an object), while the second takes land to be something one can make 'in effect a part of her life', so it comes to 'perform a certain role in her life and activity not only now but in the future' (Waldron 1992). Since not all land is considered held indefinitely by its original acquiror, there needs as well be

some sense of how alienability is to be understood, so one can say when property interests have justifiably passed hands. The common approach is by way of consensual exchange (the exception being gifting).

It is with these possible senses of when it is justifiable to hold an Indigenous community might have had (and then potentially released) property in their lands that historic injustice identified by these theorists must be understood. So, we imagine colonial authorities in their acts of dispossession either disregarded entitlements established and/or failed to obtain appropriate consent in transferring the land to their ownership and control. The supersession of these sorts of historic injustice takes place through the passage of time marked by the presence of morally relevant changes. Now, for example, Indigenous peoples might find themselves co-habiting a land with far more numerous non-Indigenous people, in a nation-state governed as a liberal democracy. This is not the world of generations ago, and changes wrought dramatically alter the strength of claims resting on acts of historic injustice that stripped lands away from original possessors.

One might ask, though: where in these calculations are Indigenous understandings of land-people links that might inform alternate concepts of 'property'? Or, where are Indigenous understandings of how connections to lands can be modified over time (that might inform alternate concepts of 'alienability')? Or, where are Indigenous understandings of what might constitute 'morally relevant' changes, understandings which might be brought to bear on analysis of the passage of time and the question of the enduring strength of original claims?[4]

What we see when we reflect on Waldron's argument (and those of most others who engage with SHI) is the *presumption* of a model of justice and morals removed from these sorts of questions, a presumption that acts to try to have discourse *begin* from a point deeply embedded within one presumed world of normative discourse. The notion there might be varied understandings of fundamental normative matters is completely lost, not even mentioned in the development of the argument, superseded if you will by the notion we can simply begin thinking about what to do looking forward by presuming the existence of one world of settled normative discourse.

All this is by way of introduction to my gaze, which falls not on the nature of the content of arguments about the notion of SHI as it applies to such things as the dispossession of Indigenous lands but rather on the presence of these sorts of arguments in the socio-legal worlds we find ourselves living within. My aim is to attempt to speak from a space outside the constructed normative worlds of colonial discourse, focusing on the simple question as to what these varied arguments are doing in the world around us. Specifically, I want to engage with a world taken to be inhabited by varied sets of understandings of such things as law, justice and morals, so we can ask what is happening when one socio-culturally determined community attempts to remove or destroy those other sets of understandings.

I focus on law because the work of SHI theorists can and does interact with policy and law-makers. Theories about how property is acquired and transferred find homes in political philosophy, but they also intersect with social and legal worlds we inhabit through the fact property is essentially a legal tool. Property regimes are defined by and maintained through larger legal systems (typically, in our modern world, systems of the state). I argue theories of justice operative in the

background of SHI arguments work hand-in-hand with the legal system of the state to narrow discourse down to one legal-normative world, one in which Indigenous understandings of law, justice and morals are either removed or destroyed.

3. A naturalist approach to arguments about SHI

I begin with a few words about how I approach these matters – how, that is, I hope to avoid entanglement in copses of specific, varied normative groundings. Elsewhere I explain in much more detail the nature of the specific naturalist approach herein deployed, and defend the sense in using it in the context of the examination of Crown-Indigenous relations (Christie 2019). I propose to begin with a step far back, looking at the sweep of human history in sweeping terms. We begin with the emergence of various hominids on the African continent several hundred thousand years ago. We then skip ahead a few hundred thousand years, plus or minus a few thousand, to arrive at more recent times, noting that in the years we slipped past one of these primates, *homo sapiens*, spread over all the continents save Antarctica, travelling and living in societies, as social animals are wont to do.

The confluence of social existence and language, whereby these primates came to enjoy socio-linguistic powers of a highly sophisticated nature, allowed for the proliferation of worlds of social meaning. By worlds of social meaning I mean to refer to the fact of the social construction of meaning, the many and varied ways groups of people sharing a socio-linguistic background can generate sets of meanings about such things as law, sovereignty, the right, the good, duties, rights, obligations, politics, and so forth.[5] While it may be that some of these groups *aim* at constructing

meaning that aligns with some transcendent set of referents (meanings that capture what these terms purport to refer to in some highly-mysterious sense), this does not deter from the fact of construction.

Having in hand this grand theory of the *natural fact* of the construction of social settings and the understandings embedded within them let us sketch out what we see when we look at those parts of the world in which non-Indigenous societies have entered the physical spaces of Indigenous societies. In much of the discourse of Western non-Indigenous societies we find at the base of normative understandings of what it is to be human, what it is to be in a social grouping, and what it is to relate to the rest of the natural world, commonly deployed notions of individual human flourishing, of inherent goods that all speak to this matter of individual human flourishing, and of value in choice, autonomy and free exercise of the will. These base notions in turn ground understandings of how societies should be structured, which then seemingly accounts for the nature of social institutions built (both grand and mundane).

In contrast, in the many and varied societies that make up the Indigenous world we find at the base of normative understandings of what it is to be human, what it is to be in a social grouping, and what it is to relate to the rest of the natural world, different and varied notions of social embeddedness, of mutually binding webs of responsibilities that define inherent roles in relation to each other (and to all that surrounds us), and of value understood to be spread out in all the natural elements of the world, those countless elements of the world that make possible our meagre and pitiful existences (Atleo 2005, Bastien 2004, Ignace 2017, and Simpson 2011). These notions

in turn ground understandings of how we ought to live together, and in relation to the rest of the natural world, accounting for the different and varied social structures built and lived through.

With this sketch of a naturalist approach to the phenomena under investigation in mind, and with a sense of the very different normative groundings of worldviews of non-Indigenous SHI theorists and Indigenous peoples, let me now spell out in some detail how standard arguments around SHI seem to function in relation to one specific spatial-temporal location, that of Crown-Indigenous relations as they have unfolded over the last few centuries in Canada, specifically on its west coast. This opens up into an exploration into how these arguments actually operate in the world.

4. Indigenous land interests in British Columbia and SHI

We begin by narrowing focus to one corner of the globe, the northern half of North America. The sweeping narrative now shifts to a focus on the meeting of specific societies, as the French and British arrive and interact with dozens of already present Indigenous collectives, the Mi'kmaq, Huron, Iroquois, Cree, Gitxsan, Inuit and others.[6] In the 1760's, with the French presence now muted through victories of allied British-Indigenous forces, the era of British dominance commences, eventually leading to the emergence of the dominion of Canada in 1867.

I assume on the part of the reader some general knowledge about the impacts of colonialism on the Indigenous peoples of what is now Canada (an overview for non-Canadians can be found in the *Report of the Royal Commission on Aboriginal Peoples* 1996). Domestic British/Canadian law and policy were used to facilitate the dispossession and oppression of all Indigenous

communities, the darkest period extending from the middle of the 1800s up to the middle of the 20th century. For many reasons (principal of which was constant resistance by countless Indigenous individuals from communities across Canada) the picture began to shift in the 1960s and 70s. In 1982, when Canada patriated its constitution, section 35 was introduced, recognizing and affirming 'the existing [A]boriginal and treaty rights of the [A]boriginal peoples of Canada'.[7]

Let me now focus even more tightly, geographically speaking, to the province of British Columbia, in Canada's west. I want to explore roles SHI arguments might play in the modern world, and British Columbia provides a good place on which to focus attention given recent developments related to the law concerning Indigenous interests in lands in an area where these developments might be expected to upset other, more recently established interests.

In British Columbia there were few areas covered by treaties during the historical treaty-making era,[8] and so we find today that most of the province is 'unceded', and so open to claims within Canadian law to Aboriginal title (one kind of Aboriginal right recognized and affirmed in the Constitution). Let me begin unpacking this situation, along the way both clearing up what might be misconceptions about the nature of the legal context and beginning movement toward the form of analysis I hope to develop around what we see happening in the world around us. It should be noted that the discussion over the next few paragraphs proceeds as if all that needs to be considered is contained within the legal and normative systems of Canada. In upcoming sections it is this very matter that is contested.

First, note it is not possible to straightforwardly say (as Hendrix 2018 seems to and as Irlbacher-Fox 2013 forcefully argues) that the notion of SHI does not apply to this sort of situation because the legal claims at issue *exist in the present-day* (and so are not confined to some period in the past, when unjust acts of dispossession and oppression took place).[9] While it is possible to speak as though Aboriginal interests in land continued to exist throughout the colonial era, right up to today, so that the called-for response today is not the movement of land interests from one set of hands to another but simply the alignment of law and practice,[10] the actual situation on the ground has to be approached with care to be properly understood. Once properly understood there is room for the notion of SHI to regain some traction, though once we see how this might be we find ourselves in a position from which we can begin to see how varied concepts of law, justice and morals play complex roles in what is happening in the world around us, and we can begin to think more clearly about why it is that discussions of Indigenous land issues seem to immediately descend into myopia.

Note, again, that the law referred to here is entirely Canadian domestic law. It is important to note that for well over a century this system *denied the existence* of *substantive forms of Indigenous land interests*.[11] This denial extended to both interests as they might be defined within Canadian law and interests as they would be understood within Indigenous legal orders. Those anemic interests that were recognized in state law, that played relatively minor roles in how Canadian law and policy was developed, were deemed 'personal and usufructuary', and determined to have *originated* in the *Royal Proclamation of 1763* (so the picture was of excessively weak Aboriginal interests in the use and occupation of certain areas arising as a result of the largesse of the Crown). This picture only began to change in 1973, in the *Calder* decision at the Supreme Court of

Canada,[12] and was only substantially altered in 1997, with the decision of the high court in *Delgamuukw v. British Columbia.*[13] *Delgamuukw* signaled a fairly radical shift, as the Supreme Court there found that the Gitxsan and Wet'suwet'en claimants could potentially enjoy *substantive property interests* in parts of their traditional territories (those parts for which they could show sufficient, exclusive occupation at the time of the assertion of Crown sovereignty, potentially up to the present-day).[14] Up to this radical rupture, at the twilight of the twentieth century, courts in Canada had been of the opinion that land interests of Indigenous peoples only amounted to 'beneficial interests' on the weak end of the spectrum, so weak as to not amount to actual interests in property, and insufficient to ground such things as arguments about trusts.[15]

What we witness in *Delgamuukw* is a rewriting of legal history. The Supreme Court reached back into the past and said that Aboriginal title (as it *now* defined this legal instrument, as a right to the *exclusive* use and occupation of land, a substantive property interest) *came into being* at the assertion of Crown sovereignty and was present as such in Canada from those points in time onward.[16] The situation in Canada from the later decades of the 1800s until the later decades of the 20th century, the Supreme Court is *now* saying, was one of unjust denial of *existing* legal property interests Aboriginal communities had and continue to have over parts of their respective traditional territories. This puts an interesting gloss on this period of history, as now the understanding is that a legal interest that both Canadian courts and legislatures *consistently refused to accept as substantive* was in fact present, just insufficiently recognized and affirmed.

If we wish to have SHI continue to have some traction in unceded parts of modern Canada we need to shift, then, to a second sort of injustice, focusing on the historic denial of Aboriginal title

within the Canadian/provincial legal and political systems. We now have trouble thinking that lands were *legally* dispossessed (in the full sense of the term), as what purportedly happened was simply that Indigenous communities, clans and families were prevented from levels of access, use and control formerly enjoyed (that is, they were *physically* dispossessed), the result of not just simply unjust but rather illegal activities of the Crown. These Indigenous communities, clans and families were in fact *during these generations rightful* property rights holders.

If we accept that the historic injustice was that Indigenous interests should have been more fully legally recognized within state/domestic law, we still run up into the sort of problem Hendrix and Irlbacher-Fox note – that Indigenous dispossession exists as an event in the present, not just the past – though this challenge to SHI-type arguments now comes in a slightly different flavour. It helps to take cognizance of a core implication of the SHI thesis, namely that more careful thought needs to go into what needs to be done today (under the mantle of justice), the specific invocation to jurists and law and policy-makers in the Crown-Indigenous context being to not rush into responding to the historic dispossession of Indigenous lands with action that may not be necessary. We couple this with disambiguation of the term 'dispossession' in this context, separating out (a) a sense that refers to nothing other than the *physical* removal of Indigenous peoples from their lands (thereby preventing their ability to continue to access lands and to control how these lands are used by all), from (b) a sense that refers specifically to a failure by the legal system of the state to recognize property rights of Indigenous peoples (or to the taking away of any such rights that might have otherwise been recognized), such that Indigenous peoples' *legal* rights are removed (thereby facilitating the opening up their lands for others to settle and for the legal rights of these others to become established in state law). The result in the SHI context as it relates to unceded

lands in British Columbia is that focus falls on a SHI-argument that while there may be call to respond to historic and ongoing physical dispossession, any such response must be done in light of the possibility of changing moral circumstances.

SHI theorists may argue that one change relates to the fact that generations of physical dispossession may have dramatically weakened the strength of the legal rights of Indigenous peoples, those rights that were disregarded by the state. The fact is, the SHI theorist can argue, in British Columbia today Indigenous peoples today do not physically possess much of their traditional territories – acts of physical dispossession tied to state denial of legal interests persist up to the present day. In this situation SHI theorists can continue to warn of mistakes that might be made should some unreflectively suppose the proper response to this ongoing physical dispossession is simply the return of lands. The argument would be that through generations of colonial oppression and physical dispossession Indigenous peoples may have enjoyed property rights that went unrecognized, but that with changes in surrounding circumstances the right thing to do today is not to work to simply align law and practice but to ascertain the strength of these property rights in changing circumstances. One can see in Waldron's work, for example, arguments about the potential weakening of Indigenous normative claims to property given long periods of time during which their physical connections to the lands have been severed, as well as arguments about the need to be cognizant of the presence today of many other valid interests.

But with all this in hand setting the stage we now need to examine carefully the actual situation unfolding before us. Are there signs Canada and its courts might be misreading the situation – is there the possibility momentous mistakes might be made, or that the conditions for making them

have been established? Do we see in the world around us movement that seems overly-rushed, that seems to indicate a failure to see how the historic injustice of dispossession has been substantially superseded?

When we look at what is unfolding, when we observe the world around us, we do not see in British Columbia today anything substantive that might fit as an *outcome* of an inability to appreciate the fact of SHI – that is, we do not in fact witness any set of redistributive actions (reparations, compensation, land transfers, etc.) seemingly predicated on a felt need to remedy the continued existence of an historic injustice.

Hasn't the groundwork, however, been laid? While lands have not changed hands, is it not the case that with today's recognition of Aboriginal title the stage is set for radical redistributive action? But couldn't one, pace Hendrix and Irlbacher-Fox, argue that while we might not yet witness radical redistributive activities, to the extent they do come to pass all we would see is the unfolding of efforts to pull practice into alignment with the law (which has 'always' had a place within it for a set of substantive Indigenous property interests)?

What this does, however, is simply pull us deeply into a debate, one that centers on whether we accept that Indigenous land interests that persisted (we are now told) from the assertion of Crown sovereignty up to the present-day remained in full strength through those generations or whether we should come to see they were weakened as surrounding circumstances changed. We seem at this juncture to arrive at something of a deadlock. SHI theorists could argue that after Aboriginal rights were recognized and affirmed in 1982 in an open-ended provision of the new *Constitution*

the Supreme Court felt it needed to respond to injustices formerly wrought and so suddenly began to act *as if* Aboriginal title had survived. In doing so the Court failed to realize that morally relevant circumstances had changed, something that should have led them to believe the injustices were no longer so, that in fact there was no longer anything substantive to which there was a need to respond. Others can well argue, however, that the injustice of physical dispossession was duly formally resolved with the recognition of Aboriginal title, and that in British Columbia we find ourselves tracking nothing more than the consequences of Aboriginal title being properly reinstated to its rightful place.

5. Mistake(s) made, being made, or about to be made

We seem to arrive at a basic debate about the requirements of justice, one that hinges on differing notions about the effect of the passage of time on rights that should have been fully recognized by the state system but that were not. This is the sort of situation awaiting should an Indigenous scholar fall down the rabbit hole. Ultimately, there is little value in engaging fully and entirely with this sort of debate, as its contours are entirely contained within the legal-normative world of non-Indigenous society and its institutions. It is more interesting and worthwhile to wonder how SHI arguments actually operate in the world around us, a matter we can explore by asking about what has actually been transpiring in Canada through the deployment of the law concerning Aboriginal title.

Think of what a SHI theorist would have called for leading up to the release of *Delgamuukw*: that law and policy makers avoid substantially readjusting the property landscape when this would

likely to be based on a mistaken belief that the historic injustice of physical dispossession of Indigenous lands requires such a radical response. When the Supreme Court then determined that Aboriginal peoples could enjoy rights to the exclusive use and occupation of some of their lands did this in fact needlessly alter or threaten the interests of non-Indigenous society? Did this decision needlessly tie the hands of Canadian society (represented by its governments in its actions vis-à-vis Indigenous peoples)? Did the Supreme Court fail to realize as they crafted their decision in *Delgamuukw* that morally relevant circumstances had changed in ways that meant there was no longer present the sort of injustice they might have supposed needed to be responded to? This would be to imagine the Court rushed headlong into reinstating Aboriginal title in radically substantive form, with insufficient attention paid to the possibility this might lead to other forms of injustice arising (as when, for example, other established property interests are disrupted in processes of redistribution).

But even if we were to concede to a vision of the Supreme Court rewriting legal history, introducing a *new* legal instrument in *Delgamuukw*, we need to look closely at what has transpired, as it is not a simple matter of an instrument appearing full-blown in some disruptive fashion onto the landscape. The fact is that with the release of *Delgamuukw* we did not suddenly find fully recognized in Canada areas of land now held by Indigenous communities under Aboriginal title – there has been no radical redistribution of land and property. In 2019 we find in all of Canada just one piece of land held under Aboriginal title, in fairly-remote Tsilhqot'in territory.[17] Aboriginal title, which (we are now told) has existed within Canadian law since the assertion of Crown sovereignty, which was fully articulated as a legal instrument over 20 years ago, has had practically no effect on the property-landscape of Canada. For it to fully appear in any specific locale it must

be proven or established (which can only happen at present through fantastically expensive and time-consuming litigation or by way of a modern treaty).[18]

One might suggest, however, that the concern at the moment is not with established Aboriginal title but with the threat of such title being established when its nature is as robust as is indicated in *Delgamuukw* and *Tsilhqot'in Nation*. We should think of the current situation, a SHI theorist could interject, as one of *risk*, thinking that an initial miscalculation has been made that opens up the world to potentially larger and more troubling developments.

Several matters cast doubt on this picture of impending doom set loose by a reckless court. First, while Aboriginal title has not yet appeared on the landscape to disrupt other, valid property interests, the fact is its nature *has* been fleshed out, and in a manner that undercuts its supposed element of danger. Second, there is the fact all the developments we can imagine are under the complete control of the state and its courts. Finally, behind these two factors is the larger sense of what is actually transpiring through the appearance and development of Aboriginal title on the Canadian landscape, which is the encasement of Indigenous claims within a world foundationally-built on non-Indigenous normative grounds.

Given where we are in the unfolding drama we can combine the first two matters: how Aboriginal title looks has been and continues to be entirely in the hands of non-Indigenous authorities, and how it will slowly emerge onto the Canadian legal landscape is very carefully controlled by Canadian courts. Aboriginal title is emerging on the landscape as a property interest defined within the Canadian regime, one subject to 'justifiable infringement' by Canadian legislatures. Both these

points are vitally important, as they separately and together speak to the taming of Indigenous understandings of land-people relations.

It might seem having Indigenous relations to land translate into modern property rights is unquestionably a good thing, especially when set against the denial of any substantive form of property right up to the end of the twentieth century. But (a) these Indigenous sets of relations are many and varied, but end up homogenized within the state system, (b) they all emerge as *rights* – that is to say, as social instruments radically different from what any Indigenous community understood its relations to its lands could be conceptualized as, and (c) the end-product is a key element in the transformation of Indigenous communities into 'stake-holders', parties with sets of interests to be balanced by the state as it goes about making ultimate decisions about how lands are used (and abused). The second matter – the continued ability of the state to infringe upon title – is equally important, as it preserves in the hands of non-Indigenous authorities the ability to contain the expansion of Aboriginal title on the ground. There is no real threat of disruption of other, valid interests, as the Crown can continue to act as it has for the last century-plus, determining just how it will slide Indigenous property interests (which it controls) into the landscape.[19]

We need not go more deeply into details around what is happening in courtrooms and around negotiating tables in Canada. What is important to note is how *control* over how the landscape unfolds is still *entirely* within the courts and governments of settler society. We now need to place all that is happening into its proper context, which is one bounded by Canadian law and sovereignty. As I noted earlier, once we do so the entire matter becomes truly murky and we find

ourselves ultimately driven to wonder why arguments about supersession might be emerging, what functions they actually serve in the current environment, and what might motivate those who advance them.

6. Attempts to supersede Indigenous understandings

The test for Aboriginal title has been developed entirely by settler-jurists, and it is within the courts of settler-society that Indigenous peoples must try to succeed in their claims if they are to one day possess land under this instrument, an instrument that exists entirely within the legal system of Canada. Tremendous points of pressure and persuasion have been put in place to channel efforts of Indigenous communities down very tightly controlled channels, the end of the game being these communities finding themselves entirely embedded within the legal-normative worlds of settler society.

The embedded claim within the SHI argument is that while all this might be the case, still a mistake has been made (or may be about to be made) by those in control over all this, as they mistakenly fail to realize there is no longer the sort of historic injustice to respond to that they may believe to be the case. One must wonder, however, at all the effort that has gone into crafting the law and its associated matters of process such that Indigenous peoples are forced into very narrow channels, all with one very narrow outcome promised should they succeed. Has all this been done without anyone on the court wondering about whether it needs to be done in the form in which it is being carried out?

Perhaps, one might suspect, the Supreme Court was entirely aware of the concern they might over-react to activism by Indigenous peoples and respond in ways that were not required. Perhaps they carefully crafted their response to Indigenous peoples in light of this concern. Perhaps they even had another goal in mind, the taming of Indigenous peoples' activism. Perhaps they meant all along to try to supersede threats posed by Indigenous peoples' claims to have not just ownership rights over their territories but also a significant measure of jurisdictional authority. Perhaps they were ultimately only really concerned with the notion that alternate authoritative understandings of Indigenous interests in lands and waters (those emanating from Indigenous communities) might exist as competitors, as sources of other ways of thinking of such things as law, justice and morals, ways of thinking that might potentially conflict with deeply connected mechanisms of Canadian law, liberalism and capitalism. Perhaps, one might suspect, the aim is to supersede these other understandings.

Let me now pull together arguments questioning common forms of the SHI argument. On the one hand, there is the fact of other Indigenous legal systems at play in the historic relationship we are contemplating, the presence of which call into question the placing of all this into the Canadian legal order. On the other hand, attached to (and underlying) these separate, independent legal orders are different ways of understanding such things as law, justice and morals. Both these facts call into question the myopia of common arguments around SHI (both those for and against), arguments that narrow things down to workings within one legal system and to the normative understandings of the one socio-cultural community responsible for one domestic system.

Return to the wide-angle view of human history sketched out earlier. We find ourselves living in a world populated by many and varied socio-culturally determined societies. Each is capable of generating its own meanings concerning such things as law, justice and morals, and together with generated systems of meaning emerge systems of law and politics. Some inhabitants of some of these normatively-bounded worlds come to believe *their* specific understandings – things their community created over time – should underscore the legal and political systems of *other* socio-culturally determined societies. This activity – of believing one's own narrow view of what it is to be human in the world *should* be adopted by all individuals and peoples around oneself – is a defining feature of the imperial and colonial eras and is arguably what we witness informing both recent activities of the courts of Canada and the activities of many scholars working in the area of Crown-Indigenous relations.

At the core of the standard argument for SHI is the matter of 'morally relevant' changing circumstances, where engagement with specific situations would require that we enter into specific theories of social and political morality. We noted earlier as well that in identifying the injustice that marks dispossession of Indigenous lands normative theories of the acquisition and transfer of property are required. We just finished noting that concerns animating SHI arguments – that mistakes can be made in law and policy should the supersession of historic injustices not be properly acknowledged – rest on presumptions about the place of all these arguments within a normative world controlled by the state and its courts. Might it be, though, that the attempt in all this activity is to displace and replace the legal-normative worlds of Indigenous peoples, a presumption being they have been superseded by surrounding circumstances? What we would be witnessing, then, are repeated and ongoing attempts to supersede alternate Indigenous visions

through the presumption of a world solely occupied by the legal-normative world of the non-Indigenous state and that society intimately tied to it.

In the Crown-Indigenous context as it plays out in Canada a SHI theorist might suggest thinking, for example, of the passage of time marking the demise of other 'valid' systems of law and authority, those Indigenous systems that may have existed at the time of contact or when the Crown asserted sovereignty. These systems, this argument would go, are no longer sufficiently active, or are no longer viable and/or valid.[20] The stronger form of such an argument, of course, is that there never were sufficiently robust Indigenous systems to enjoy the label 'law', which suggests there never were *Indigenous* property interests to be concerned with at any point in time (Flanagan 2000).

Once again, however, all this is premised on settler notions of what is viable or valid. These settler notions, grounded on narrow normative footing, suffuse ongoing discussions of SHI, by both those who accept or buttress Waldron's original articulation of the thesis and most who react against it. Those who react against seem most often do so on the basis that when we think more carefully about what might be morally relevant, or unjust, or legally-valid we broaden out our thinking on what grounds property claims, or what might constitute proper ends for the liberal state. This all too, however, is reflective of myopia. On the one hand, it unreflectively accepts a narrow set of possible understandings of law, justice and morals. On the other hand, relatedly, it begins with the presumption Indigenous understandings play little or no role in all this, presuming everything is already contained within one socio-political umbrella.

I begin, however, with the fact of continuing Indigenous meaning-generating social structures. This grounds the continuing ability of these communities to construct their own understandings of law, justice and morals. This stands up against the presumption all this discussion of SHI can take place within one normative world, grounded in one set of fundamental normative beliefs.

At the end of the day what is deeply problematic about the use of SHI in thinking of Crown-Indigenous relations is that such a narrow approach to a complex situation functions to further the colonial ends of the state. It might be useful to deploy in situations in which all parties concerned are all in fact already immersed within one given socio-political world, when all parties concerned share a horizon of possible understandings of law, justice and morals. But this is not the situation to which it is being applied when we consider Crown-Indigenous (or Indigenous-settler) relations, and there *it should not be used*.

7. Musings about the use of SHI in the contemporary settler-Indigenous context

It might be suspected I slipped in that last sentence, importing a strong normative claim to the effect that not only is SHI a conceptually-inappropriate tool but that it should not be used at all in this context. Recall I began this naturalist analysis with the claim I would endeavour to remain above the normative fray, looking from a birds-eye perspective at multiple meaning-generating peoples and at how their constructed normative worlds function around us (and upon us). At this point, however, my move to a normative stance is intentional.

When we step back to see inter-acting social groups, each deploying its own generated understandings of fundamental normative matters, we see one group attempting to remove – to supersede – all others. Advancing beyond descriptive analysis of the construction of normativity, as a normative matter I would go so far as to say this attempted removal and destruction is wrong-headed.

This assessment is made within and issues from a naturalized sense of morals, one constructed around an instrumentalist understanding. We begin with what is truly valuable in the world, basing this on biological necessity and not beginning with such things as super-natural presumptions of the exceptionalism of one primate species. We can point – in the actual world we all co-inhabit – to fundamental value residing in the continued existence of rich, diverse sets of overlapping biospheres. We then determine that *if a singular telos can be set around this one thing of value* (an end we ourselves fix, that is not handed to us from some mysterious transcendent realm), *then* we ought to think *this*, and hold *this* of value over *that*, and act in *these* ways and not *those* ways, and so forth. Thinking of our moral universe in this manner we see the narrow-mindedness of beginning discourse on morals with fixation on the human, a narrower fixation on the isolated human, and a truly unhealthy obsession with the will of the isolated human. These fixations are leading us, step by step, to creation of a fundamentally unhealthy home.

This brings me to two final brief set of remarks, more by way of open-ended thought than analysis. Why, one might wonder, do we see Canadian courts assiduously working to destroy alternate Indigenous meaning-generating communities, to have them all absorbed into the one bland,

homogenous system of liberal-capitalism? Why, as well, do academics so blithely go along with – indeed provide fuel for – this activity?

Let us presume we have moved away from supposing the Supreme Court of Canada might have made a mistake premised on a failure to note that morally relevant changes in the circumstances removed the need to respond to what might have been injustices in the past. Rather, let us accept they are instead working to complete the project of removing Indigenous understandings of law, justice and morals, undercutting separate and independent Indigenous forms of legal and political authority. Why might they be concerned to do this, when it might seem to run counter to enlightened notions of justice and fairness, and when it leaves us with narrow normative understandings from which we can draw clear, straight lines to the destruction of a healthy global biosphere?

We should begin noting it is not at all clear that what counts as 'enlightened' notions of justice and fairness, when these are expected to grow from the roots of narrow normative visions operative in the non-Indigenous world, would locate harm in the destruction of Indigenous forms of understanding. This is to say the Supreme Court of Canada could well believe its fundamental vision is correct, and that it cannot tolerate what it takes to be erroneous (and morally dangerous) competing systems of authority. The Court might be continuing in the tradition of colonial masters, thinking that Indigenous peoples must be saved from themselves, that they need the assistance of dominant society as it goes about generously granting civilization to heathens.

A second possibility is that the Court is concerned to protect established non-Indigenous interests. This need not entail denial of the claims of Indigenous peoples, so long as these interests can be brought into alignment, on the level of how interests are conceptualized, with forms of discourse operative in general society. This, of course, is what I have been arguing the Court is attempting to do, to carefully craft legal instruments within Canadian law they then hold out to Indigenous communities as the *only* way to substantively advance interests of any sort. With Indigenous and non-Indigenous interests conceived of according to the same underlying normative vision the state and its courts can manage matters relating to the distribution of property in ways that will not be radically opposed by any party.

Finally, the Court may be intent on constructing, maintaining and/or enhancing systems that continue to facilitate various forms of exploitation (of lands, peoples, etc.). This exploitation could include, of course, manipulation of the bulk of the non-Indigenous populace, as non-Indigenous masses are led to believe that having all people within the state fall under state control works to generate a degree of wealth that 'trickles down' to the general populace (when the system of norms actually functions, when put into the building of social structures, to concentrate wealth and power in the hands of the few).

What might we reasonably think, then, about the work of academics who raise fears about reactions to historic injustices? What are they putting into the world, and why would they be doing as they do? Our initial musing parallels what we first put out as a possibility for why the Supreme Court might be doing as it does, that academics believe in the correctness of liberal capitalism. A difficult matter to address if we go down this path has to do with what is expected, respectively, of these

two groups. First, jurists have responsibilities to the state and to societal understandings of justice and to law and the rule of law, while academics (for the most part) are not in defined positions with such set expectations. Second, while we do not expect jurists to exhaustively search out ways their views on morals may be too narrow or parochial, we can and do expect this of academics – we would expect their intellectual horizons are broad and that they are in a lifelong quest to broaden these further.

So, while it may still be the case that academics write about SHI believing in the correctness of moral views animating their specific socio-cultural world, we would expect (at the very least) some footnotes that touch on their reasons for being so narrow-minded. Why do they believe, for example, in such mystical things as 'inherent value', 'absolute goods', or an a-causal free will, or hold such odd pictures of the moral being that are so divorced from actual human existence? It might suffice (academically, though likely not normatively) to at least consciously and openly position one's work within the socio-cultural setting one inhabits (as the elder Rawls seemed content to do). Could we not expect the non-Indigenous scholar to at least note that he believes in mystical creatures and processes because they are the products of his upbringing within one socio-cultural setting? The Indigenous reader could then appreciate that the non-Indigenous scholar is at least self-aware, that the non-Indigenous scholar knows he is only speaking of *his* life, *his* intuitions, *his* modes or reasoning, and *his* spiritual groundings (that he seems to want to pass off as secular).

Let me end by slipping to the third reason suggested for why jurists might do as they do. It seems this is at least as likely a reason why, as well, so many academics present such narrowly-construed

SHI arguments in the Indigenous context. It seems the moral universe so many of these scholars work in is defined by and serves to express trumped-up notions of self-interest. As beneficiaries of colonialism, as beneficiaries today of the dispossession of Indigenous peoples, as non-experts in – even lacking in any sense at all of – Indigenous normative universes, they may well revel in pushing non-Indigenous states and their legal machines to work ever more assiduously to ensure that other ways of thinking of how societies should be built and function are swept off the table. How else to explain why, in the face of the fact Indigenous claims do not pose substantive threats to non-Indigenous interests, they put so much energy into irrational fear-mongering?

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Notes

[1] Waldron (1992, at 24).
[2] Waldron (1992, at 25).
[3] Locke (1689).
[4] An anonymous reviewer felt the arguments in this section contained an implicit appeal to a normative position, namely that there should be some form of dialogue between the normative worlds of the settler and of varied Indigenous communities. I am not, however, arguing on a normative level in this stage of the analysis – my point in indicating that SHI theorists do not bring into their ruminations Indigenous normative understandings is not to indicate a normative failing but to simply indicate something about the nature of their bounded discourse.
[5] Searle has set out a model for the mechanics of how worlds of social meaning might be constructed, arguing they arise from the repeated use of a very small number of socio-linguistic instruments, what he refers to as Declarations and status functions: see Searle (2010). The general sketch I set out does not rest on this model. There is no need to do so in this text, with its focus on how jurists in one colonial state might function in light of appreciation of arguments concerning supersession of SHI. I am aware Searle is focused on the creation of social institutions (like those of promising, or money) and on explaining how powers parties come to enjoy make possible ways of thinking and acting in social settings, while I am focused principally on the creation of sets of meanings behind structuring elements of society, such as concepts of justice. I would say, though, that something along the lines of what Searle has been working toward explains the emergence of societal understandings of various concepts and ideas, where instruments captured in these society-specific concepts function to structure specific societies.
[6] A good overview of this history can be found in Volume 1 ('Looking Forward, Looking Back') of the *Report of the Royal Commission on Aboriginal Peoples* (1996).
[7] *Constitution Act, 1982*. Note that section 35 appears in Part II, and so lies outside the *Charter of Rights and Freedoms*.

[8] There were dozens of peace-and-friendship and ad hoc agreements reached between the French and British Crowns and Indigenous peoples in the eastern third of Canada in the 1700s and first half of the 1800s, and then large 'land surrender' treaties from 1850 to 1921 (the Robinson-Huron and Robinson-Superior treaties followed by the numbered treaties). These later treaties covered central and northern Ontario, the prairie provinces, part of the Northwest Territories, and the northeast corner of British Columbia. I put 'land surrender' in scare-quotes to signify disagreement by many Indigenous people (and many academics) that there was actually a common understanding between the parties that these historic treaties were meant to be full and final surrenders of land interests.

[9] Both Hendrix (2018) and Sanderson (2011) make this sort of argument. It does have some merit in this context, just not in the straightforward way set out by these two scholars.

[10] Hendrix (2018).

[11] The first full articulation of this position appeared in the Privy Council decision in *St. Catherine's Milling and Lumber Co. v. The Queen*, (1888) 14 A.C. 46 (P.C.).

[12] *Calder v. British Columbia*, (1973) S.C.R. 313.

[13] *Delgamuukw v. British Columbia*, (1997) 3 S.C.R. 1010.

[14] It should be noted that the Court developed a test for Aboriginal title in *Delgamuukw* but did not apply it to the voluminous evidence presented by the plaintiffs, finding instead that procedural defects in the case meant it should be sent back to trial (which never happened).

[15] *Guerin v. The Queen*, (1984) 2 S.C.R. 335.

[16] This point in time varies across Canada, with 1846 being generally accepted as the magic moment in British Columbia history as the border between the British colonies and the United States was then settled in the Oregon Treaty. In current litigation the Crown is attempting to push this date back to the 1790s.

[17] This is the result of (mostly) successful litigation in *Tsilhqot'in Nation v. British Columbia*, (2014) 2 S.C.R. 256, a case that cost the Tsilhqot'in Nation tens of millions of dollars to pursue. Most likely all reserve lands are actually Aboriginal title lands, but (a) that is not entirely settled, and (b) the land of all 600+ reserves adds up to about 1/5 of 1% of Canada's land mass.

[18] While as of the summer of 2019 there are quite a few actions underway in British Columbia, each is extremely expensive and time-intensive, and it will likely be a decade or more before we see a noticeable number of Aboriginal nations enjoying Aboriginal title.

[19] In *Delgamuukw* (1997, at paragraph 165), the Supreme Court held that 'the settlement of foreign populations' on Aboriginal title lands is a 'sufficiently compelling and substantial objective' a legislature can have in mind in *justifiably* infringing upon existing Aboriginal title.

[20] Waldron makes these sorts of arguments in Waldron (2006).

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