Living *Deadwood*: Imagination, Affect, and the Persistence of the Past

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In this paper, the object of my attention is the HBO television production, *Deadwood*. In this highly acclaimed series, *NYPD Blue*’s creator, David Milch, both drew on and disrupted the genre of the American Western, generating fans in both popular and scholarly circles. The series, part historical, part fictional, takes place in the 1870s, a time explicitly marked by the forward movement of colonial expansion. It is set in the illegal settler camp of Deadwood, in the shadow of the Black Hills of what is now South Dakota, what was long part of Lakota Indian territory.

As historians would remind us, that territory was the subject of a treaty that promised that no white people would enter without the express permission of the tribes, a treaty which promised the Army would remove any settlers who did come, and a treaty, like so many other treaties, whose terms were violated. For the hills held gold, and prospectors came, and gold was taken, and an outlaw town sprung up, providing goods and services to those with gold, and people flooded to it, and fortunes were won and lost, and the illegal settlers

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1. *See Deadwood* (Home Box Office 2004). In choosing a television series rather than a movie for this exploration, I felt a twinge of discomfort. My choice did involve a slight stretching of the symposium’s theme of “Legal Outsiders in American Film.” I am quite conscious of the significant differences between television and film. *See*, e.g., JOHN FISKE, TELEVISION CULTURE (1988); KRISTIN THOMPSON, STORYTELLING IN FILM AND TELEVISION (2003); Sue Turnbull, Teaching Buffy: The Curriculum and the Text in Media Studies, 17 CONTEMPORARY J. OF MEDIA & CULT. STUDIES 19 (2003) (presenting difficulty teaching television, not filmic texts). Even in the face of these differences, I hope the resonances between these two kinds of cultural products will be adequate to induce some level of tolerance in the reader, as I use this particular television series as the vehicle for my reflections on “the outside/outsider” in law, and on the value of law and humanities approaches to those pursuing questions about power and possibility in this supposedly postcolonial time.


were not removed, and the outlaw town was eventually made legitimate. Hundreds of thousands of Indian peoples of course lost their lives or were displaced as the colonizing settler society spread over the land.

The series’s starting place is the camp of Deadwood, a place beyond and outside of the law. It is filmed in what one might call a mode of gritty realism, in the palette of dirt, blood, sweat, and mud. The dialogue balances on the thinnest edge between the exquisitely poetic and the discomfitingly profane, rather like Shakespeare meets *The Sopranos.* Viewers are placed to re-inhabit the camp of Deadwood in this time of change, to consider how it might have been that order was built from chaos. The town is populated by a range of compelling characters, some fictional, others historic, including Calamity Jane, Wild Bill Hickok, and George Hurst. David Milch, creator and executive producer of the series, asserts, however, that the story is less about the people than about the camp itself. It is, he says, “about something larger, about drivers below the surface, moving the characters and the action forward.”

*Deadwood* is, of course, a story about the past. Such stories, Edward Said reminds us, tell us less about that past than about cultural attitudes in the present. Further, such stories participate in creating what Raymond Williams referred to as “structures of feeling.” In this context, I find both *Deadwood*, and Milch’s comments about it illuminating. What does the series assume and presume about those who are inside or outside the legal, and or, social order? What are the “drivers below the surface”? What are we to understand about the relationship of those drivers to law, order, and the economy? What structures of feeling invite certain kinds of emotional investments, certain ways of thinking about the past and its place in laying the sediment for the world in which we now live? These are some of the questions I want to touch upon in this paper. In the spaces of imagination it opens to us, in the pleasures it offers us, what does *Deadwood* suggest about the place of the outside and the outsider in our past, present, and future?

In this discussion of imagination, I do take the question of pleasure quite seriously. In the interest of full disclosure, and with a measured dose of self-mockery, I might confess that, as befits a feminist, the pleasure that most

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5. See generally *The Sopranos* (Home Box Office 1999-2007).
7. See Edward W. Said, *Culture and Imperialism* 17 (First Vintage Books ed. 1994) (theorizing past’s bearing on present cultural attitudes more important than past itself).
8. See Raymond Williams, *Marxism and Literature* 132 (1977) (explaining phrase “structures of feeling”). Williams argued that the material structures of our world condition our culture phenomenon and he used the notion “structures of feeling” to try to capture the “meaning-giving” side of culture. Id.; see also Said, supra note 7, at 14 (commenting on Williams’ use of “structures of feeling”). Edward Said also used the term, arguing that stories of the past can tell us much about cultural attitudes of the present. In Said’s case, the question was about those “structures of feeling” in nineteenth-century novels that gave effective support to continuing practice of Empire. Id.
interests me is indeed my own. I confess myself to be a fan; one episode and I was hooked. Of course, I also acknowledge the variability of people’s experiences of pleasure in the stories, textual or cinematic, that they consume. My love of the series might be matched by others’ equally powerful experiences of revulsion, annoyance, or even disinterest. I am not suggesting here that Deadwood should or must move viewers in specific ways, but rather, that it is important to grapple with the feelings, pleasurable and otherwise, that inhere in the viewing experience. I think it important to acknowledge that my experience of viewing the series, of thinking about the series, of making connections between the series and my other research projects, was marked by enjoyment and pleasure. Pleasure is, of course, far from apolitical. It can and should be open to critique, interrogation, and with a tentative nod in the direction of Stanley Kubrick’s A Clockwork Orange, perhaps even change. The point here is only to assert that, in taking a law-and-film approach to the question of outsiders in law, it is worth asking questions about the place of pleasure in structures of feeling.

In thinking about Deadwood, and about the pleasures the series offers, I have come to see and appreciate lines of connection between what I might once have described as three independent research projects—projects I will call Colonialism, Affect, and Dissent. Before returning in more detail to the television series itself, I want to make a few comments on two of those projects, Colonialism and Affect, to make visible some of the questions and theoretical resources that have been shaping my experience and understanding of Deadwood. After the discussion of the television series, I will comment on the relationship of Deadwood to my third project, Dissent.

I. COLONIALISM AND AFFECT

Let me begin with the observation that, in Canada, colonialism is neither an arcane concept nor a function of the distant past. Canada continues to bear the

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9. I did not anticipate becoming a fan. Indeed, I did not watch my first episode until after the final episode had aired. I was, frankly, busy with other research projects and did not feel like spending my free time watching yet another Western, as my interests at the time leaned more in the direction of sci-fi. In the end, however, I bent to peer-pressure and gave in to the persistent encouragement of others who, knowing of my somewhat obsessive interest in Clint Eastwood’s Unforgiven, had been persistent in their demands that I look at the series. Thanks to Drew Mildon, among others, for that. See generally Unforgiven (Malpaso Productions 1992). On the academic side of my obsession with Unforgiven, see Ruth Buchanan & Rebecca Johnson, The ‘Unforgiven’ Sources of International Law: Nation-Building, Violence, and Gender in the West(ern), in INT’L LAW: MOD. FEMINIST APPROACHES, 131-58 (Doris Buss & Ambreena Manji eds., 2005) (discussing Unforgiven’s insights into modern law); Rebecca Johnson, Law and the Leaky Woman: The Saloon, the Liquor Licence, and Narratives of Containment, 19 CONTINUUM: J. MEDIA AND CULT. STUD. 181-99 (2005) (analyzing Unforgiven’s participation in creating gendered space). On teaching criminal law with the film, see the upcoming issue of the CANADIAN JOURNAL OF WOMEN AND THE LAW on Law, Film and Feminism (volume 21:1 (2009)).

marks of its particular colonial past—one marked not simply by conflicts between French and English colonizing superpowers, but also by multiple and complicated histories of Aboriginal/settler encounters. Though there are undoubtedly continuities in the U.S. and Canadian experiences, I am conscious of Robert Young’s reminder that histories of colonialism are not monolithic. It is important to attend to the details of particular histories, even where the histories, for settlers and indigenous peoples alike, are unpleasant to hear or tell.

Certainly, for those of us living on the far west coast of British Columbia, the colonial is an unavoidable reality. Here on “the edge of Empire,” colonialism came late, and a great diversity of First Nations communities already populated the territory into which settlers flowed. Though the federal and provincial governments asserted their sovereignty over the land, such claims have always rested on tenuous grounds: the government negotiated very few treaties, and the doctrines of conquest and terra nullius were not possible grounds for government claims to sovereignty over British Columbia’s land and resources. As it is, the government of British Columbia is currently in ongoing treaty negotiations over the status of well over 75 percent of the land in the province.


15. See First Peoples’ Language Map of British Columbia, http://maps.phlcc.ca (last visited Apr. 10, 2009). The Nootka, Coast Salish, and Kwak’wala speaking peoples have been three of the prominent First Nations groups in the Pacific Northwest. British Columbia is home to Kootenay, Carrier, Tsimshian, Tlingit, Sekani, Beaver, Haida, and Shuswap peoples. Id. Indeed, British Columbia is home to 203 First Nations communities and a rich diversity of indigenous languages. Id. In Canadian discourse, the term “First Nations” has generally displaced the term “Indian” and is often preferred to Aboriginal.” Id. The term “First Nations” (or “First Peoples”) has the advantage of more clearly acknowledging the wide diversity of differing indigenous peoples, each with their own languages, cultures, and legal orderings. Id.

16. See Andrew Woolford, Negotiating Affirmative Repair: Symbolic Violence in the British Columbia Treaty Process, 29 CAN. J. SOC. 111, at 114 (2004); BC Treaty Commission, http://www.bctreaty.net (last visited Apr. 10, 2009) [hereinafter BC Treaty Commission]. Indeed, efforts are still ongoing to complete treaties between the government and the many First Nations in the province. Following an agreement between the federal government, provincial government, and the First Nations Summit in 1992, the Treaty Commission was established to deal with conflicts over the land through an ongoing treaty process. Id. at 112-14. One might query whether these negotiations are truly informed by “treaty” or “colonial” patterns. See generally JAMES TULLY, PUBLIC PHILOSOPHY IN A NEW KEY, VOLUME 1: DEMOCRACY AND CIVIC FREEDOM, 225-28 (2008) [hereinafter TULLY, VOLUME 1].
These treaty negotiations, of course, are taking place against the background of a pattern of colonial encounters marked by the practices of disrespect and assimilative laws and policies that were imposed on Aboriginal peoples across the nation. Laws prohibited Aboriginal cultural practices such as the potlatch, restricted traditional hunting and fishing practices and prevented Aboriginal people from taking legal action to pursue their land claims. Some communities were moved to reservations, while others were relocated to far distant places where they experienced starvation and death. Policies forcibly removed Aboriginal children from their families, sometimes placing them in residential schools that attempted to train the indigenous culture out of them. These attempts to break intergenerational connections had devastating effects on Aboriginal communities, the results of which are still felt today.


20. See generally Frank J. Tester & Peter Keith Kulchyski, TAMMARNIIT (MISTAKES): INUIT RELOCATION IN THE EASTERN ARCTIC 1939-63 (1994). For a moving documentary treatment of one of these forced displacements, see also KIKKIK-E1-472 (Telefilm Canada 2002), directed by Elisapiee Karatek. The film situates the trial of an Inuk woman “Kikkik” (the director’s mother) for murder and criminal negligence not only against the context of the 1950s famine, but against the interventions of the government in the north and the forced relocations that produced starvation. The film’s focus on colonial relations is painful and powerful.

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volume report of the Federal Government’s Royal Commission on Aboriginal Peoples was clear in its conclusions: in Canada, colonialism is not a thing of the past, but persists into the present.  

This persistence of the past into the present is not only a Canadian phenomenon, but is also visible when one shifts attention from North America to the global context. Decolonization has been the order of the day for many years. We speak in the language of “former colonies,” and yet, activists, theorists, and politicians alike speak to the persistence of informal colonization, and to its puzzles. How is it that, in the face of formal decolonization both at home and abroad, the same pattern of deprivation and exploitation remains largely in place? How is it that “Empire” continues to persist?

Here, I just want to draw in a few insights from three theorists whose work focuses attention on continuing colonial patterns, and who I have found helpful in thinking through the challenges of postcolonial activism: political philosopher Jim Tully, economic geographers Katherine Gibson and Julie Graham, collectively known as J.K. Gibson-Graham, and cultural theorist Edward Said. Though each theorist works in a different domain, each focuses attention on the place of the imagination in the politics of thinking otherwise.

First is the approach taken by political philosopher James Tully, in his work on imperialism and civic freedom. Tully, focusing on global or imperial relations of dependency, would of course remind us that Empire was and is economic. It was never just a set of beliefs about more or less desirable/savage peoples, but was also a system of wealth generation, for some, at the expense of others. Tully also attends to the significance of the languages and processes that sustain Empire. These languages, he notes, describe and legitimate European imperialism and colonization as irresistible processes of development. These languages suggest that “no one is in control,” that life is just like this, and that there is “no reasonable alternative.” The languages make it difficult for us to imagine otherwise, and difficult for individuals to resist. His work emphasizes the importance of resisting these ways of describing the world, of finding alternative practices of what he would call “civic freedom.”

Tully’s position aligns with that taken in J.K. Gibson-Graham’s work, Postcapitalist Politics. They suggest that current global distributions of the formation of a Truth and Reconciliation Commission to understand how people were affected by the residential school experience, create a historical account, help people heal, and encourage reconciliation. See Indian Residential Schools Settlement Agreement, Schedule “N”. Mandate for the Truth and Reconciliation Commission, http://www.residentialschoolsettlement.ca/SCHEDULE_N.pdf (last visited Apr. 10, 2009).

25. See REPORT OF ROYAL COMMISSION, supra note 13 (describing The Royal Commission on Aboriginal Peoples final report).
26. See generally TULLY, VOLUME 1, supra note 16; JAMES TULLY, PUBLIC PHILOSOPHY IN A NEW KEY, VOLUME 2: IMPERIALISM AND CIVIC FREEDOM (2008) [hereinafter TULLY, VOLUME 2].
27. See TULLY, VOLUME 2, supra note 26, pt. 2 (discussing Imperialism).
power, or what I would describe as the persistence of Empire and colony, are held in place in part by a tendency to represent the economy “as a space of invariant logics and automatic unfolding that offered no field for intervention.” Alternative languages of economy, they say, have been subordinated to languages of capitalism through naturalizing what were historically specific instances of competitive capitalism, and theorizing those instances as if they were universal logics. In their work with community economies and alternative economic development, Gibson-Graham address the need for a politics of possibility, for a space of hope for making change. The problem, they argue, is not simply “the (discursive) dominance of capitalism,” but is also a culture of thinking that makes capitalism very difficult to sidestep, a culture of thinking marked by “the emotional and affective dispositions of paranoia, melancholia, and moralism,” a culture that “undermines efforts toward imagining and enacting noncapitalist futures.” Here, they argue for a politics of hope, possibility, and generosity, one that accounts for pleasure and accepts fragmentary incoherence and disarray as a part of a politics of experimentation and imagining otherwise. Their work asks us to attend to the ways we speak of economic practices and organization.

Edward Said extends this analysis, asking us to consider not only politics and the economy, but also culture. Literature, particularly stories about our past, may tell us less about that past than about cultural attitudes in the present. In Culture and Imperialism, Said asserts that such stories also participate in creating what Raymond Williams referred to as “structures of feeling.” In thinking through the persistence of British Empire, and focusing on the English canon, Said argues that the “structures of feeling” in this literature supported, elaborated, and consolidated the “practice of [E]mpire.” His focus is, again, on the centrality of the imagination. Culture may, Said argues, predispose a society for domination of another, or prepare it to relinquish that domination. But such changes do not happen without the willingness of men and women to imagine otherwise. And such re-imaginings fail, he reminds us, “unless the idea of [E]mpire and the cost of colonial rule are challenged publicly, unless the representations of imperialism begin to lose their justification and

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29. See Gibson-Graham, Postcapitalist, supra note 28, at xxi.
30. See id. at 193.
32. See Gibson-Graham, Postcapitalist, supra note 28, at xxxiv.
33. See id. at 4-5.
34. See Said, supra note 7, at 14 (describing goal to provide cultural analysis).
35. See id. at 14 (referencing Raymond Williams and “structures of feeling”); Williams, supra note 8 and accompanying text, at 132.
legitimacy . . .” 37

So where, one might ask, are we as American and Canadian peoples, with respect to our imaginations and our justifications of the past? How do the stories we tell—political, economic, and cultural—consume, celebrate, and participate in structures of feeling that affirm the roots of persisting Empire, imperialism, and colonial rule? Of course, Said’s argument was sketched out against the context of the nineteenth-century novel. How does his argument look when sketched against twenty-first century forms of storytelling, storytelling done largely through visual media? What might we see about Empire when taking Deadwood as our point of entry? This question leads me to take a brief detour to my second research project, one located firmly in the field of law and film.

Over the past ten years, I have been teaching a seminar in legal theory using film as the primary text. In general, the concern has been with the construction of gender and justice through popular narrative, primarily film. We study texts that are concerned with murder, gender, law, and justice. In each case, we explore the theories which are embedded in our readings of each of the cultural texts, and about the visions of justice that are advanced by those theories, asking who and how we are invited to judge. 38

Discussion of each film occurs on three axes. One focuses on the narrative structure of the text. That is, we discuss “the story,” and how it is set up. Second, we explore questions of “reader response”—approaches to make visible the ways that meaning is inevitably constructed in the spaces between a text and its many readers. The third axis, one exerting a particular pull on me at the moment, is the question of “affect”—the place of “brute perception” in the constitution of our visions of justice. Put another way, we come to “know” not only through what we read, but through what we see, hear, smell, and feel. As Augusto Boal might put it, “the whole body thinks.” 39 But the question is then to put this insight to work in the exploration of film, asking how it is that film, with its ability to use sound, image, editing, time, and space, works more explicitly with the world of affect? What is the place of affect—of how we come to feel—in filmic texts that bring us to judge the world?

The question of how it is that we come “to feel” is an important question for law. I share Robert Gordon’s view that law’s power lies partly in its operations of force, but more powerfully, in its ability to persuade us that the world described in its categories and images is the only world in which a sane person would want to live. 40 For all of law’s assertions about the importance of reason

37. See id. at 200.
in the face of unchecked passion, it is clear that emotion and feeling matter to law. Justice is not simply “an idea.” It is something felt deeply. And, as Raymond Williams might remind us, “structures of feeling” are important to the ways that cultures—in both their aspirational and discriminatory faces—are held intact. As I said earlier, pleasure is open to critique. So too is affect. But critique is best done in the context of attention to the processes in which affect is birthed. Critical race theorists, feminists, and neuropsychiatry come together in alerting us to the ways in which thinking and feeling align. Thus, in thinking about structures of feeling, as they emerge in the context of cinematic storytelling, it may be important to ask more questions about how it is that film brings us to know and feel not only through narrative, but also through auditory and visual resources.

II. RETURNING TO DEADWOOD

How then have these pieces been pulled together in the context of Deadwood? Deadwood is the performance of an imaginative return to one particular moment in the American colonial experience. Though “the government” is ostensibly absent in the outlaw camp of Deadwood, we see the implantation of American/European settlers in territory that is not “theirs.” Many of the settlers are immigrants: Seth is from Canada; Sol, from Austria; and Al, from England. Yet, they are shown to bring with them common ideas about law and economy, ideas that are the product of “Western” ideals. They lay their own version of “law” over the law of the indigenous peoples on whose territory they stand, and wait them out; wait for them to be gradually exterminated, or put in reserves, or bargained with through unequal, and broken, treaties. This is an example of what Tully refers to as replication imperialism.

41. See generally THE PASSIONS OF LAW (Susan A. Bandes ed., 2001). In my own work, I have found Bill Miller’s various meditations on the place of emotions like vengeance, humiliation, and disgust to be particularly productive. See generally WILLIAM IAN MILLER, BLOODTAKING AND PEACEMAKING: FEUD, LAW, AND SOCIETY IN SAGA ICELAND (1990); WILLIAM IAN MILLER, HUMILIATION: AND OTHER ESSAYS ON HONOR, SOCIAL DISCOMFORT, AND VIOLENCE (1993); WILLIAM IAN MILLER, THE ANATOMY OF DISGUST (1998).

42. See generally MALCOLM GLADWELL, BLINK: THE POWER OF THINKING WITHOUT THINKING (2005) (discussing how we make choices in the blink of any eye). But the influence of Anthony D’Amasio’s work on neurocognitive behaviour is increasingly present in political and legal theory. See generally WILLIAM E. CONNOLLY, NEUROPOLITICS: THINKING, CULTURE, SPEED (2002); JENNIFER NEDELSKY, LAW, AUTONOMY AND THE RELATIONAL SELF: A FEMINIST REVISIONING OF THE FOUNDATIONS OF LAW (OXFORD UNIVERSITY PRESS, FORTHCOMING); Jennifer Nedelsky, Meditations on Embodied Autonomy, 2 GRAVEN IMAGES 159 (1995).

43. See TULLY, VOLUME 1, supra note 15, at 211. There is an argument to be made that this can also be seen as inflected by “informal or free trade imperialism.” Id. at 212. Here, the imperial power permits self-rule to induce the people to open their resources, labor, and markets to free trade. Id. This might be a better explanation of the logic that eventually brings the town of Deadwood back under the control of the sovereign U.S., as we move to season 3, and annexation to the Dakotas. Of course, by this time, the indigenous peoples are completely out of the frame of the series, or the imagination of the viewers. See DVD: Deadwood, The Complete Third Season (Home Box Office 2006).
Indeed, Deadwood is an illegal town, on Indian land, involving the very typical “western” rape of the land. It is that very rape of the land that constitutes the town because without the moment of illegal foundations, it would not exist. The series thus echoes easily one of the primary themes of the Western, that of the violent and illegal moment which founds the society.\textsuperscript{44} And, taking Milch at his word, it is the life of this illegally-founded community which is the object of our study, the object of our attention. For this is a tale of community-building, of nation-building, and provides a structure of feeling that allows us to erase that initial act of colonization, to accept the inevitable logic of the myth of progress and economic development.

But this series is designed for “sophisticated modern viewers.” It does not seek to hide any of those elements of the initial violence. It is up-front with the themes of its time, including colonization, racism, and gender issues. Milch makes no attempt to hide the flaws of the characters. Instead, we are enabled to return to that past with the more politically correct eyes of the present—to live in it in a way that allows us the pleasures of vicarious identification with suitable distance. \textit{Deadwood}, like the novels Said speaks of, adopts a realistic format: the streets of Deadwood are full of mud, shit, piss, and vomit. Throats are cut, blood is spilled; the language is coarse but coupled with a sense of the poetic that invites one to hold the coarseness in new esteem. Further, as I noted already, it runs the line between fact and fiction. The series plays at the margins of an explicitly re-imagined vision of how things might have been, giving the series both the “authenticating” power of “the real,” but also the truth valences that can sometimes be better delivered through fiction.\textsuperscript{45} And yet, I argue, it also reveals, or produces, a structure of feeling that justifies and legitimizes a certain view of progress, of colonization, and of imperialism.

How does the story, through its truths and its pleasures, in its narrative and affective modes, participate in creating this “structure of feeling”? Here, I will focus on three things: “no law in Deadwood”; Indians and land reserved for Indians; and “the drivers below the surface.”

\textbf{A. "No Law in Deadwood"?}

The first episode begins by making explicit the colonial character of the past. It opens not in the Black Hills, but in Montana with a brief interchange between Sheriff Seth Bullock and prisoner Clell Watson.

\textsuperscript{44} See generally Buchanan & Johnson, supra note 9 (discussing the Western and its portrayal of the origins of law and the nation).

\textsuperscript{45} See generally David R. Dow, \textit{Fictional Documentaries and Truthful Fictions: The Death Penalty in Recent American Film}, 17 CONST. COMMENT 511 (2000).
Clell: No law at all in Deadwood? Is that true?
Seth: Bein’ on Indian land.
Clell: So then you won’t be a marshal?
Seth: Takin’ goods there to open a hardware business. Me and my partner.
Clell: If I’d a got there, I’d a been prospectin’. Jesus Christ Almighty. No law at all. Gold you can scoop from the streams with your bare hands.46

In this interchange, the colonial ground is laid. There is no law in Deadwood because Deadwood is Indian land. The show does not pull its punches, or erase the reality of the illegal foundations of the town. That illegality is placed front and center. Deadwood is an illegal settler camp. In such a place there is “no law.” But what does this mean? For Clell, the notion of a place with no law is the stuff of fantasy: with no law, all a man need do is reach out and scoop wealth from the land. Seth, who will be one of our moral compasses in the series, is about to remove his badge and become a settler in Indian territory. He is going, however, not to take from the land. He is a step removed from direct exploitation of the land. Here, the dream is to be part of the service economy, providing goods to others. He is leaving law for business. Justice there will be, but justice will be tethered to an economic rather than a judicial order. But we do get some sense of what “law” means in this context as Seth performs his last job as sheriff before leaving—he ensures that Clell is hung “under color of law” rather than by the lynch mob coming to do the job. There is a certain sense of formality in this understanding of law, if not straight-out irony.

Within the next few minutes of the episode, we also see that the description of Deadwood as a place with “no law at all” requires some elaboration. For the first thing we see Seth and Sol do upon arrival in the camp is enter into a rental agreement. And then, Trixie authorizes Jewel, in an agency arrangement, to sell some jewelry in order to purchase a gun. Brom negotiates the sale of a claim with spit and a handshake, and the words “Done, witnessed.” No law in Deadwood? Not quite. Indeed, law does rule; it is the law of power, economy, and the law of the market. Deadwood may be an illegal camp on Indian land, but the people of Deadwood clearly function in the shadow of a binding economic order in which settler-society understandings of exchange, property, and contract continue to operate. The economic order has its own laws. There may be no sheriff, but the town has its ways of ensuring compliance. It is Al Swearengen, the owner of the Gem Saloon, who decides whether or not space on the street will be rented. It is he who decides whether violators of “his” law will receive mercy or a trip to Mr. Wu’s pig farm. It is Al, the man of business, who is effectively “the law.” Far from “no law in Deadwood,” questions of law run everywhere and deeply touch two central characters, each a foil to the

46. Deadwood (Home Box Office Television Broadcast Mar. 21, 2004).
other. Seth, formerly the man of law, is now a man of business. Al Swearengen, formally the man of business, is informally the man of law.

James Tully might add that what we see in Deadwood is a performance of the system as “interactive.” Though the Army is featured in the series, they are not in control. This form of colonialism is one in which the great powers govern through freedom—the freedom of the settlers who displace the local populations. It is, he might add, a more sophisticated form of rule, and one much harder to theorize. But there are elements in the series that show us how self-government works, using the languages of world processes. What we see appears as irresistible processes of development. Deadwood appears as “the culmination of anonymous world historical processes”; “no one is in control”; “life is just like this.” This language is an achievement, one that tells us to respond to these processes by getting on side, even though we see the injustices and inequalities that come along side.

B. “Indians, and Lands Reserved for the Indians”47

Again, the series makes visible the injustice of this colonial appropriation of Indian land. However, as Milch tells us, the series is also a tale of community-building, of nation-building, and it provides a structure of feeling that allows the viewers if not to erase the initial act of colonization, to accept the inevitable logic of the myth of progress and economic development that is built on this act of colonial appropriation. One of the strategies is language, which displaces the savagery of the settler appropriation of the land onto the figure of the mythical red man. In spite of the fact that it is the settlers who are acting in a lawless fashion, they speak always of the Indians as lawless or heathen.

In the first episode, although Al is aware that it was most likely road agents rather than Indians who were responsible for the brutal murder and scalping of a settler family, he participates in the collective attribution of the act to the Indians—“them heathens, bloodthirsty savages.”48 Indeed, Al, worried that people will spend the evening hunting down those responsible—rather than spending their gold on drink and women—gives a rousing speech in which he offers a bounty of fifty dollars for the “decapitated head of as many of these godless heathen cocksuckers anyone can bring in. Tomorrow. With no upper limit!”49

We see this semiotic violence enacted not only in obviously racist characters, but also in characters that viewers will become strongly attached to over the seasons. Ellsworth, for example, uses similar language in articulating

47. See generally Constitution Act, 1867, 30 & 31 Vict., c. 3, § 91(24) (U.K.). This is a gentle nod in the direction of the Canadian Constitution Act, which places all things Indian within federal constitutional jurisdiction.
49. See id.
his relationship to both the Indians and others on the land. He sees himself as finally working a paying gold claim and will not be stopped by government assertions that he is trespassing, nor by the red man, nor by settlers who would try to cheat him. This is finally his chance to work by the labor of his own hands, to have success.\footnote{See id.}

A different but related articulation—an articulation in language possible of reproduction within the mainstream press—comes from A. W. Merrick, the editor of the town’s newspaper. Here, the facts of the illegal acts of colonial settlement are framed in the language of “paradox.” In his language, Merrick shows no linguistic disrespect to the Indians. He acknowledges the violence done to them, but situates it in the flow of a paradoxical history that eventually legitimates those violent actions as inevitable, if not strictly speaking necessary to the founding of a new state. He states:

Paradoxes, the massacre at Little Big Horn signalled the Indians’ death throes, Mr. Utter. History has overtaken the treaty which gave them this land. Well, the gold we found has overtaken it. I believe within a year, Congress will rescind the Fort Laramie Treaty, Deadwood and these hills we be annexed to the Dakota Territory, and we, who have pursued our destiny outside law or statute, will be restored to the bosom of the nation. And, that’s what I believe.\footnote{See id.}

Here, we see the weight of James Tully’s arguments about languages supporting colonialism. History overtakes them all, the fact of the gold overtakes the treaty and erases the presence of the Indians. Of course, the series also performs this erasure for us. Here, there are deeply profound erasures, of the kind most significant for a discussion of colonialism. For in the entire series, we catch a glimpse of only two Indians. One is linked to Al, the other to Seth, and in neither case do we have a character with a name or history.

The first “sighting” is partial and fragmentary. It is the severed head of a native man we never meet, one who was “scalped” in response to Al’s offer of a bounty. Al, angered at having had to pay out on his offer, keeps the head in a box in his office, referring to the head inside as “The Chief.” Though we do not see the head, the box appears from time to time throughout the series, a point I will return to momentarily.

\footnote{See id.}
The second encounter involves our other central character, Seth. This time, we have a living Indian. While riding after Jack McCall, who shot Wild Bill Hickok in the back, Seth accidently crosses the path of an Indian brave. The Indian shoots Seth’s horse and engages Seth in hand-to-hand combat. In what is a bloody and adrenaline-inducing encounter, we watch Seth beat the Indian to death. But the scene comes with a twist, as we later discover that the Indian had been in the process of burying a friend of his, laying headless on a burial platform. With the one Indian in the process of burying his decapitated friend, Al is clearly implicated in both deaths. But Seth’s involvement is direct. If we as viewers are positioned partly to identify with Seth as our hero, we are also positioned to see his killing of the Indian as self-defense, as justified, as unavoidable. Even if we are still appalled at the beheading of the other Indian, we see no way out for Seth other than through killing. And yet Seth, like the others, is lawlessly occupying Indian land. He is implicated both indirectly and directly in the genocide of the Indians. And it happens at a moment in the series when Seth is moving through Indian territory in order to bring a murderer to justice. The killing of the Indian is just an accident of fate and chance while riding to do justice; an unavoidable tragedy in the “savage wars of peace.”52 The affect-laden power of the scene, one that draws the viewer closer to Seth, also draws the viewer into colonial complicity.

In his work on Disney, Henry Giroux reminds us that U.S. film is often preoccupied with “what it means to be an American” and that the very idea of America is tied up with the “mythic march of progress and prosperity.”53 And this is what we have in Deadwood. From the first episode on, the series shows us the inexorable forward movement of imperial power and the felt entitlement of the settlers to move into Indian land, in violation of the law, knowing of their lawlessness, but not caring. The series is inflected by reminders of an imperative to move forward and adapt to the great march of civilization. Indeed, that is the indictment that Al hurls against the head of the Chief in one of his later season soliloquies—that their failure was a failure to adapt. Again, in a Darwinian mode, the problem was not race, but the failure of the Indians to get with the colonial capitalist program, to move forward.

C. “The Drivers Below the Surface”

One of the questions is, how does it happen that the story works hypnotically to both allow us to “know,” and “not know”—to see the damage of the past, and yet to accept it as inevitable, to feel its violence less actively? For if Deadwood is the central character, as Milch states, it is the character of the nation in the process of being birthed. It is a story of nation, and of a national

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identity whose basis is its economy. The inexorable drive for more, to provide what the people need—or, in the voice of Al, what you want them to need. In the world of Deadwood, those needs are presented as simple, albeit very deeply gendered. The primary needs are of white men, men with money, men who need to drink, to gamble, and to fuck. There is less said on the question of what women might need (not to be beaten?), or of the Chinese (at best, the need to be buried appropriately?), or the Cornish (to unionize?) or the blacks (not to be lynched, and to be acknowledged as honorable?). The town does move from outlaw space, towards one of law, democracy, and civilization. But what are the drivers below the surface that move us there? In whose actions are those drivers made manifest?

Is it Seth Bullock? Seth, our man of law, is a bit like the iconic Western hero. He is laconic; a man of integrity, but of few words; kind to people around him, but harsh in the face of injustice. He is, in many ways, like John Wayne, or indeed, Dirty Harry Callaghan. Though he has “taken off” the badge—leaving behind the job of justice, to take up instead the job of commerce—he carries himself like a sheriff, even telling Wyatt Earp in one episode that taking off the badge does not take away the desire to beat on those who would do injustice. Although he is a compelling character, we have minimal, if any, access into his inner psyche. We interpret his character through his actions and minimal words. There is very little in the way of text to interpret him, and he is thus more difficult to inhabit.

What of Al Swearengen? In many ways he is an unappealing character—violent and murderous. And yet, he is a man of words, and it is in his tongue that we hear articulated the “drivers below the surface,” the tensions, the paradoxes. He is an imperfect character. He is, in short, at the heart of America. He is from elsewhere, but has made himself in it. At the center is a will to stabilize, to democratize, to tolerate, and to do what is ugly but necessary in the interests of stability. He is also honest, when not lying, and loyal to those who deserve it. The series shows us Al as the dark underbelly of the inevitable. It is Al who can do what is ugly but necessary—who knows when the innocent must be sacrificed in the interest of saving others. While it is not clear that Al changes through the series, it is certain that our orientations as viewers change with respect to Al’s character. We are increasingly drawn towards him, seeing him suffer, and seeing him do violence that is justified.54

We are drawn to Al not only through what we see him do, but also through what we hear him say. While Al is most certainly our “bad” character, he is also the one into whose psyche and internal world we most penetrate. What is significant is the way that this happens. Milch has given Al a number of

54. See Deadwood: Sold Under Sin (Home Box Office television broadcast June 13, 2004). For example, when the reverend is sick with a brain tumor, it is Al who smothers him, delivering the justice that all others in the camp where insufficiently brave to deliver. Id.
powerful monologues—moments of profound exposure—where he speaks of truth, and suffering, and the past. In these monologues, we see the pain of the abandoned child, of love lost, of sorrow and sickness. In these monologues, experienced as moments of truthful disclosure, we draw closer to Al in understanding and affiliation. What is striking, however, is the context for these moments of proximity. Invariantly, these moments occur in two upsetting contexts. One of these involves discussions between Al and The Chief—that is, the severed head of the Indian that Al carries around in a box. The other site for these intimate monologues occurs when Al is in the process of having one of the prostitutes perform fellatio on him while he discourses on his contemporary travails. The interruption of his thoughts to correct issues of technique, or to barrage and insult the girl, foreground some troubling gaps between what we see and what we hear. Further, to the extent that much of the monologue draws us closer to Al, we are also made to grapple with our response to the exploitation going on at the other end. At the same moment that we are getting deeper into Al’s soul, we are also made to see a form of exploitation. This technique is one of the ways in which we are hypnotized. We see the violence before us—sexual violence to women and colonial violence and murder of the Indians—but it is playing out at the same moment that we have the pleasures of drawing closer to the man who articulates “the drivers below.”

Giroux reminds us that there is a “politics of forgetting that erases how disparate social identities have been produced, legitimated, and marginalized within different relations of power.”55 This politics of forgetting is certainly visible against the pleasures of Deadwood. What might we make of this politics? Where are we, as American and Canadian peoples, with respect to our imaginations, and our justifications? How do the stories we tell, consume, and celebrate participate in structures of feeling that affirm the roots of persisting Empire, imperialism, and colonial rule? How might those stories be contested and engaged so that we do more than respond to them, as Rustom Bharachua puts it, “with a hallucinatory delight”?56

III. JUDICIAL DISSENT

In closing, I want to draw a link between Deadwood and my third project, one that seems furthest from the world of Deadwood and closest to traditional legal studies. It is a study of judicial dissent at the Supreme Court of Canada.57

56. See id. at 109 (citing Rustom Bharachua, Around Ayodhya: Aberrations, Enigmas, and Moments of Violence, 7 Third Text 51 (1993)).
57. This project, “Dissent, Concurrence, and Other Judicial Opinions: Reason(s) and Passion in the Production of Law,” was done in collaboration with Professor Marie-Claire Belleau of the Faculté de droit at Université Laval, and was generously funded by the Social Sciences and Humanities Research Council of Canada.
By 1989, three of Canada’s nine Supreme Court Justices were women.58 Canadian court watchers observed that these first three women showed the highest rates of dissent.59 However, court watchers also pointed out that the first three women did not appear to be dissenting “together”; they were as likely to disagree with each other as with their male colleagues.60 What they seemed to share was less a common point of view, or “a different voice,”61 than a heightened propensity to see something different from the majority and to express that difference in the form of written reasons.62

But the pioneer women were of course not always or only on the outside. All judges find themselves sometimes in dissent, and dissent is a thoroughly relational concept. Whether or not any given judge is in dissent depends on the positions of the other judges sharing the bench: the “dissent” is not something “in” the judge, but is “in” the relations between judges. What could dissent do to help us think about those relations? Here, taking up Dorothy Smith’s observations about the role of texts in co-ordinating relations of power,63 we turned our focus from judicial identity to the space of judicial dissent and to the actual texts produced in dissenting space.64

Though one might treat all dissent as equivalent for the purpose of certain statistical measures, it is useful to distinguish between different kinds of dissent.65 We were interested in judicial dissents that drew deeply on the persuasive resources of language, that seemed most clearly to “appeal to the
future,” capture “the brooding spirit,” or “sow seeds for future harvest.” We were particularly interested in dissents that articulated an alternative vision of “the real,” re-described the facts, re-drew the boundary between the legal and the social, and challenged how we think about law itself. Such texts could be explored using Anthony Amsterdam and Jerome Bruner’s concept of “noetic space.”

Noetic space is the term they use to describe the distinctive imaginative space maintained in every culture. It is the space linked to “a distinctively human mental capacity that compels us to project our imaginations beyond the ordinary, the expectable, the legitimate—and to involve others in our imaginings.” The noetic, they argue, “includes not only the deliberations of the rational mind but [also] its appetites and affections . . . its beliefs, desires, feelings, hopes, intentions.” Noetic space is a space of the mind that integrates emotions and passions. Amsterdam and Bruner tell us that noetic space is specialized for testing the limits of the possible; as such, it is a pragmatic place that “must honor the limits of lifelikeness—the limits beyond which [it] cannot go without losing the imaginative engagement of the audience.” Dissenting imagination not only sketches out fantasy space, or utopic strivings; it is a purposefully pragmatic space that attempts to persuade the reader that an alternative is within reach.

As a first step in turning our attention toward noetic dissent, we picked up the tools of empirical legal studies and began looking at dissent across topics and over time. As one might expect, there were topics that generated significant dissent and those which generated less. At the low end of the scale were topics like banking, business associations, and corporations. Indeed, in these areas, the court was frequently unanimous and the women were not dissenting. How did it come to be that the persistent disagreements we had come across in certain important areas, such as equality, expression, and family law, did not emerge in the context of the structure of the economy? Why was there such a paucity of imagination in legal judgements dealing with business and corporations? Given that our concern was in part with the fact of dissent—rather than with the substance of a particular dissenting opinion—what was to be made of the lack of noetic dissent in those areas of law related to the commercial structuring of our economic order?

This absence brought to mind a passage in Madame Justice Bertha Wilson’s

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68. See id. at 235.

69. See id. at 237-38.

70. See id. at 238. See generally Marie-Clair Belleau & Rebecca Johnson, I Beg to Differ: Interdisciplinary Questions About Law, Language, and Dissent, in Law, Mystery & the Humanities: Collected Essays, 145 (Logan Atkinson & Diana Majury eds., 2008) (providing fuller discussion).
famous speech “Will Women Judges Really Make a Difference?” She said:

Taking from my own experience as a judge of fourteen years’ standing, working closely with my male colleagues on the bench, there are probably whole areas of the law on which there is no uniquely feminine perspective. This is not to say that the development of the law in these areas has not been influenced by the fact that lawyers and judges have all been men. Rather, the principles and the underlying premises are so firmly entrenched and so fundamentally sound that no good would be achieved by attempting to re-invent the wheel, even if the revised version did have a few more spokes in it. I have in mind areas such as the law of contract, the law of real property, and the law applicable to corporations.\(^71\)

Madame Justice Bertha Wilson’s passage brought two observations to mind. The first is that her assessment of the areas of law showing no uniquely feminine perspective seemed to be descriptively accurate. The first three pioneer women judges did not show a heightened propensity to dissent in these areas. What struck us, however, was not the absence of \textit{female} dissent in these areas, but the absent of dissent \textit{in general}.\(^72\) A second observation was that the areas of law Wilson suggests are “fundamentally sound”—contract, real property, corporations—are precisely the areas that have been of great concern to Aboriginal peoples around the world and to postcolonial critics. Contract, real property, and corporations are the vehicles through which Empire has spread and through which people have been dispossessed of land.

Some might say that the absence of dissent here is a reflection of judicial ideology, or of judicial class bias. As Joel Bakan said, “Business corporations have not been given everything that they have asked for under the Charter, but the Supreme Court of Canada has consistently met them part-way.”\(^73\) This, however, seems incomplete as an explanation; judicial ideology is arguably operating in other topics of law as well, but does not generally serve to erase dissent altogether. Or, were we seeing something more about “the power and pervasiveness of . . . dominant ideology in the wider society,” rather than by individual prejudice on the part of judges?\(^74\) But if the point is that spaces of judicial imagination matter, then the absence of such a space at the juncture of “the economic” should give us pause. It should also lead us to reflect on the ways that that absence is echoed in our larger culture.


\(^{72}\) This is not to say that there was not dissent. However, dissent was more frequently to be found where the case intersected with tort, insurance, or contract law—areas where the concern seemed more closely tied to debates about labor law, or contract, etc.

\(^{73}\) See Joel Bakan, Just Words: Constitutional Rights and Social Wrongs 88 (1997).

A trip through Deadwood suggests that the place of a certain economic vision in the ideology of colonial Empire remains culturally as well as legally dominant. *Deadwood* does share much with the nineteenth-century novels that were the object of Said’s attention. When it comes to questions of the economy, *Deadwood* does not offer much in terms of imagining things otherwise. The economy is the driver, it tells us. Colonial rule can be justified. It is the economy that brings civilization, and capitalism will persist even in the absence of law. It cannot be stopped. It is the inevitable result of world processes. Perhaps it is not, then, so strange to see little in the way of noetic dissent in the areas of banking, business, and corporations. But perhaps this tells us only about the importance of attention to that space, of the importance of thinking about law and culture in tandem. Said serves an important reminder. That is, culture may prepare a society to relinquish or modify the idea of domination. But such changes do not happen without the willingness of men and women to imagine otherwise. And such re-imaginings fail, unless “the idea of [E]mpire and the costs of colonial rule are challenged publicly, unless the representations of imperialism begin to lose their justification and legitimacy.”75

The humanities are one tool for those who wish to take seriously the claim that “it can be otherwise.” *Deadwood* offers us an opportunity to think about the ways we imagine our past and to interrogate why it is that we have certain persistent ways of understanding gender, economy, violence, dispossession, and erasure. Even if it does not itself contest continuing colonial relations, *Deadwood* opens space for us to interrogate the “structures of feeling” that sustain a “politics of forgetting”—a politics that disrupts our ability and indeed our will to test the limits of the possible. It is time to participate in imagining otherwise.

75. See *Said*, supra note 7, at 200.