CHAPTER THREE

"Peace, Order, and Good Government"

Policelike Powers in Postcolonial Perspective

MARIANA VALVERDE

Like England, Canada officially disavows the specific legal entity known in the United States as the police power. Searching Canadian legal databases for "police power" turns up only decisions on the powers of the uniformed police to detain, search, and seize; and a widely used textbook in Canadian constitutional law, Peter Hogg's *Constitutional Law of Canada*, has no entry for "police power."

The very absence from Canadian law of a specific jurisprudence of the "police power" can be, somewhat paradoxically, a resource both for research and for theory—and not only for Canadians. The fact that one cannot quickly turn to a particular chapter in legal textbooks to obtain an answer to the question, If Canada, like England, does not have a "police power," what does it have instead? is initially frustrating. However, examining the legal and political history of Canada from the standpoint of police science and police power and being forced to go outside black-letter legal doctrine given the dearth of case law has uncovered some stories that, apart from having

S3856.indb 73 6/14/06 12:05:40 PM

some intrinsic interest, shed new light on the perennial historiographical and theoretical questions about power flows in contemporary liberal states and about the not yet fully mapped legacies of colonialism.

The postcolonial theme may seem odd, since police science emerged as a specifically domestic, intrastate knowledge, as Neocleous's contribution to this volume (chapter 1) and other literature clearly show. When beginning to do research for this chapter I certainly did not anticipate being drawn into the field of British colonial law. But colonial technologies for governing colonies, states, provinces, and aboriginal groups turn out to be intertwined in a variety of complex ways with other more or less paternalist legal and political technologies used to promote what eighteenth-century police science called "the general welfare." Thus, while my original aim was to investigate the fortunes of governmental powers to regulate economic and social life in the Canadian polity with a view to providing some comparative insights for this volume, the research showed that much can be learned if one refuses to take the distinction between the domestic and the international as given.

Historians of the British Empire have told us that officials and governors traveled frequently from London to far-flung colonies and then to other colonies: but theorists of legal processes and of national political cultures have yet to fully analyze the significance and the effects, at home and abroad, of this constant flow of legal and political techniques and innovations across oceans and across institutions. To this end, I will take an admittedly partial look at a contemporary non-Canadian case—a lawsuit, decided by an English court of Queen's Bench in 2001, undertaken by the exiled inhabitants of Diego Garcia against the British government. It turns out that, despite the huge geographic and sociolegal differences separating Ottawa from the U.S. military base on the island in the Indian Ocean that is now Diego Garcia, there are only two legal degrees of separation between the exile of the islanders and the development of a distinctly Canadian political culture. Political doctrines and legal technologies presented to Canadians as unique to Canada's "civilized" system of government (especially the peace, order, and good government powers given to the federal government under the British North America Act [BNA Act]) are, unbeknownst to Canadian constitutional experts, flexible colonial technologies with the continuing capacity to perform and justify highly illiberal state actions elsewhere in the world—as well as in Canada. The substantive analysis of what I call "police-type" powers (a deliberately ambiguous but in this context appropriate term) leads me

to some still-tentative general thoughts about the way political and legal powers, including illiberal coercive powers, instead of competing in a zero-sum game, in which power is assumed to go down in one container as an automatic result of the level of power going up in another linked container, sometimes proliferate, multiply, incite, and feed off one another.

Methodologically, this paper is designed to show that one need not abandon research on legal texts to generate nonlegalistic analysis. In the work of mapping police-type knowledges of disorder and risk to the corresponding police-type powers exercised by a variety of state bodies, it is possible to focus on legal texts and to be concerned about such "legalistic" issues as the structure of judicial review, but nevertheless write one's analysis with a view to illuminating not "law" in its formal sense but rather the flows, exchanges, and transformations of knowledge and power that are the lifeblood of both "high" law and everyday law enforcement.[1] Such dynamic analyses hold promise not only for sociolegal scholarship but more generally for those interested in going beyond zero-sum and static models of knowledge and power forms.

Playing Billiards after 7 p.m.: Canadian Federalism and Police Regulations

Despite the somewhat centralist character of the governmental architecture created by the 1867 BNA Act, political scientists have pointed out that Canada is unusual, comparatively, in that the provinces have experienced a growth in autonomy rather than a diminution throughout the twentieth century (Panitch 1977). Health care, education, social assistance, most natural resources, liquor and beer sales, and most importantly, "property and civil rights" are within provincial jurisdiction. While the criminal law is federal, provinces have their own system of private law, with the province of Quebec using a civilian rather than a common-law system. This peculiar bilegalism is rooted in the historic settlement of the long-standing war between England and France in 1763, a settlement by which the British flag was planted in Quebec (formerly the capital of New France) but with assurances that neither the Catholic Church nor French civil law would be replaced.

One of the very few Canadian constitutional cases to explicitly mention the police power concept (*Hodge v. The Queen* 1883) saw the Judicial Committee of the Privy Council (JCPC)—until 1949 the supreme authority on

S3856.indb 75 6/14/06 12:05:41 PM

Canadian constitutional law—uphold provincial liquor licensing law, which at that time gave municipalities control over licenses and over the conditions attached to licenses. The case arose when a tavernkeeper in Toronto, Mr. Hodge, decided to challenge the power of the local license commissioners. The local authorities had not only drawn up detailed liquor sale regulations—in keeping with municipal police regulations everywhere in the Protestant world—but had also decreed that if liquor could not be sold in the tavern after 7 p.m. on a Saturday, then neither could customers play billiards, even though Mr. Hodge had a separate municipal license to operate and rent out a billiard table (just one).

It is perhaps characteristic of the sledgehammer-against-fly logic of the police power, visible in many of the papers in this volume, that the operation, after liquor-selling hours, of a solitary billiard table at the Toronto Saint James Hotel caused legal ripples to travel all the way across the ocean. These ripples resulted in Lord FitzGerald, Sir Barnes Peacock, Sir Robert Collier, Sir Richard Couch, and Sir Arthur Hobhouse gathering as the JCPC to rule on three questions: (1) whether Canadian provinces had the right to regulate liquor sales—given that the federal government had and still has, under the BNA Act, the power to regulate all commerce, including "the liquor traffic"; (2) whether the provinces, if they did have such a power, could delegate it wholly to municipalities; and (3) whether the power to regulate liquor sales, even if legally exercised by municipalities, could be used to regulate not only drinking but also the phenomenologically and legally distinct action of billiard playing.

American scholars familiar with the "slaughterhouse cases" and other police power law (see chapter 4) will recognize the *Hodge* case as a classic police power one. So did the JCPC, despite the absence of specific common-law precedents. The lordships asserted, without any references to previous case law, that "the liquor trade, like all other trades, is subject to local regulation for purposes of police" (120) and that "regulations in the nature of police or municipal regulations of a local character for the good government of taverns etc., licensed for the sale of liquors by retail, are calculated to preserve, in the municipality, peace and public decency" (131). The fact that the federal government has exclusive jurisdiction over intraprovincial trade and international commerce was thus deemed irrelevant. The sale of liquor at the Saint James Hotel was not being regulated qua commerce, the judges

S3856.indb 76 6/14/06 12:05:41 PM

stated, but qua source of potential disorder. It was thus permissible for the license commissioners—a municipal body, but one created by provincial statute—to govern billiard playing indirectly, specifically, through its link to alcohol (cf. Valverde 1998, 2003). Billiard playing elsewhere could perhaps still proceed of a Saturday evening; but at the Saint James Hotel, the playing of billiards was legally hardwired to drinking and its disorders. The license commissioners were thus acting lawfully when using the liquor license as a tool to prohibit the otherwise innocuous—and independently licensed—activity of billiard playing. The court concluded that the commissioners charged with managing liquor and its disorders were not exceeding their jurisdiction, since they "do not attempt to regulate billiard tables; it is as liquor licensee not as billiard licensee that the appellant is required to close his billiard saloon" (120).

The case was then and still is taken to mean that provinces have the kind of jurisdiction, under the "property and civil rights" clause of the 1867 BNA Act that U.S. states have under the doctrine of police power. This was confirmed a few years later by Lord Watson in the *Local Prohibition Case* (1896).[2]

And yet, because the authority being challenged by Mr. Hodge was, on the front line, that of the local license commissioners, not that of the provincial government, the case also sheds light on the way Canadian provinces, like U.S. states, are able to empower and sometimes compel municipalities to undertake the micromanagement of urban spaces and activities considered as potentially disorderly—but without thereby giving up any of their own powers.

We shall see later that this is illustrative of a more general feature of contemporary political governance. The empowering of lower levels of government—from Indian bands to municipalities—to govern certain disorders and risks is best described as a multiplication or proliferation of power rather than as a giving up of power by the higher authority. There are important theoretical implications involved in the fact that, in addition to the extensive "power of promoting the public welfare by restraining and regulating the use of liberty and property" (Freund 1904, iii) wielded by the provinces, municipalities in Canada exercise the same kind of regulatory powers enjoyed by local government in the United Kingdom and municipalities in the United States, but that they can do so only as empowered by the provinces. Nuisance law, zoning, business licensing, the granting of permits for use of public

spaces, animal control, urban parks bylaws, public health inspection, trash disposal, and the regulation of both private-vehicle traffic and public transport are only some of myriad municipal functions. And yet, minor changes in the use of municipal legal technologies often require provincial government approval, in many cases involving a change in the provincial statutes constituting and regulating municipal powers.

Thus, any study of the genealogy and current features, in Canada, of the sort of governance undertaken under the banner of the police power in other countries can only begin by noting that the governmental power to ensure the "people's welfare" (Novak 1996), by preemptive coercive measures if necessary, is dispersed and uncoordinated and often shows a logic of multiplication. While most Canadians imagine that provinces have less power if municipalities gain this or that legal power, and they also assume that the federal government is giving up some of its colonial powers if Indian bands obtain the right to govern their own health care, close examination reveals that empowerment is not a zero-sum game. The multiplication and the dispersion of policelike powers are simultaneously facilitated and obscured from view by the fact that the future-oriented government of order and disorder is not named in law as "the police power."

"Some Few Tarzans or Men Fridays": Peace, Order, and Good Government in Canada and in the Empire

One of the keystones of the Canadian constitution, section 91 of the BNA Act—the act that brought into being most of the components of the contemporary postcolonial Canadian state—states that the monarch has the full power to legislate, on the advice and consent of the Canadian Parliament, to ensure "peace, order and good government in Canada." (Interestingly from the police science point of view, some French-language constitutional texts use the term "administration" as a translation of "good government.")

These so-called POGG powers, held exclusively by the federal government, are not specifically enumerated. (In that regard they are similar, in form, to the U.S. police power). Courts have understood these powers as covering (a) extraordinary measures to deal with emergencies, such as "apprehended insurrection"; and (b) areas of regulatory activity not specifically

S3856.indb 78 6/14/06 12:05:43 PM

allocated to the provinces—such as atomic energy, some labor relations, offshore minerals, and illegal drugs.

As is the case with U.S. police powers, POGG powers are largely residual, which means that their specific content has been determined by a combination of case law and federal statutes rather than by explicit constitutional texts. Comparatively, it is very important that the Canadian version of federalism—unlike the U.S. and Australian versions—assigns to the federal government all residual powers: indeed, some commentators have gone as far as to say that Canada is not truly federal because the central government did not arise out of a kind of social contract among the existing colonies, but was created, at the same time that provinces were also created, by an imperial act (Kennedy 1922, 408–9).

The POGG powers granted to the federal government by the constitution are therefore arguably related to the U.S. police power, among other reasons because they are both rooted in the venerable paternalistic logic of governance most famously outlined by Blackstone (Dubber 2005; Novak 1996). For that reason, and because the form of POGG powers is also discretionary and residual rather than specified, they can be said to be policelike. But in internal Canadian legal and political practice, they have been used more to uphold and reconstruct sovereignty than to further the logic of economy, domestic order, and efficiency developed by eighteenth-century writers on police science (Foucault 1991; Pasquino 1991).[3]

For example, wage and price controls imposed by the federal government in 1975 were said by the courts to be constitutional under the POGG clause: but these were presented as temporary measures made necessary by abnormally high inflation construed as a national emergency. The controls were not presented as routine regulatory measures similar to the eighteenth-century assize of bread. And, to cite another key twentieth-century case about how to interpret the POGG clause, the federal government, in its efforts to address the Great Depression, had to fight hard before the JCPC—until 1949 the highest court of appeal for Canada—to obtain the power to institute national unemployment insurance. The 1940 Unemployment Insurance Act was intended by the Mackenzie King government as part of a broad program to create a welfare state (Struthers 1983); but in the end it turned out be an almost unique event, since public health insurance and all other social programs other than veterans' pensions and mothers' allowances

developed and remain under the control of the provinces. Indeed, the 1867 BNA Act had to be amended (in Westminster) to enable Ottawa to put in place unemployment insurance.

The twentieth-century trend favoring provincial governments as key sites of social policy and policelike regulation was partly a matter of internal Canadian politics, but it was also greatly facilitated by the fact that, for reasons of their own, the JCPC, from the 1890s onward, tended to side with the provinces in matters involving jurisdictional disputes. The leading member of the JCPC in the 1910s and 1920s, Lord Haldane, took the position that the POGG powers were in Canada solely national emergency powers. Everyday police powers, the lords insisted, were provincial. While this—as we saw in the case of federal unemployment insurance—changed somewhat during World War II, and while federal governments have been able to wield much regulatory power by waving the carrots and sticks of federal block grants to provinces, nevertheless, we can conclude that the POGG clause has served primarily to transfer some of the imperial government's military logics and emergency powers to Ottawa and only secondarily to exercise what Foucault would call biopolitical power.

If the POGG powers are a central element in Canadian constitutional law, they also lead another life in Canadian political culture. Recently, noted Canadian intellectual Michael Ignatieff, professor of human rights at Harvard University and now a federal Liberal member of parliament (and whose father, George Ignatieff, was a prominent Canadian diplomat), gave a speech for the Department of External Affairs in Ottawa invoking what is a cliché of Canadian political culture: namely, the idea that Americans are devoted to life, liberty, and the pursuit of happiness; the French are devoted to liberty, equality, and fraternity; and Canadians are, by contrast, devoted to peace, order, and good government. Few Canadians can give the exact reference for the POGG phrase, but most are familiar with it and see it as expressing the distinctly Canadian approach to political relations. Acknowledging that the pursuit of happiness is also worthwhile ("but when we want happiness, we go to Florida," he quipped), Ignatieff went on to develop a grandiose rationale for a new international-ordering body that would be led by Canadians and would take peace, order, and good government—rather than either liberty or happiness—as its mission statement. This body of specialized personnel would help failed states build up good institutions, presumably better than

S3856.indb 80 6/14/06 12:05:43 PM

the Americans have been doing. And it would have some real power to bring about good government: elsewhere in the speech he remarked that international aid is worse than useless unless the recipient states have received the Canadian seal of approval, a statement that suggests that this international POGG police or POGG-keepers body would have sticks as well as carrots at its disposal (Ignatieff 2004).

Ignatieff's ambitious plan for a Canadian-led state-ordering force is his own, one that has not been taken up by any arm of the Canadian government as far as I know: but his view of the meaning of the POGG phrase is widely shared. In general, we Canadians think of ourselves as more conciliatory, more orderly, more respectful of authority, and less litigious and less individualist than Americans. That mythical distinction between the two otherwise culturally similar states is often seen as crystallized in the two constitutional phrases highlighted by Ignatieff (liberty and the pursuit of happiness versus peace, order, and good government.)

British colonial law shows, however, that POGG is not, contrary to Ignatieff's claim, distinctively Canadian. It is actually a fixture of British colonial law, found in constitutional documents across the former British Empire. In that broader context, it is a legal technology enabling very great and highly discretionary powers, first for the imperial sovereign and then for the subsequent government—of the colony or of the postcolony—to which the sovereign delegates or grants the POGG power.

According to twentieth-century JCPC decisions (*Ibralebbe v. The Queen* 1964; *Liyanage v. The Queen* 1967; *Winfat Enterprises v. Attorney General of Hong Kong* 1985), "The words 'peace, order, and good government' connote, in British constitutional language, the widest law-making powers appropriate to a sovereign" (*Ibralebbe*, 923). The *Liyanage* case, for instance, had been a challenge to a Ceylon law that removed procedural rights in the case of certain kinds of criminal prosecutions and even abolished that keystone of the common law, the right to be criminally tried by a jury. The JCPC found that trials without jury offended against Ceylon's written constitution: but they upheld the right of the Ceylon parliament to pass pretty much any laws it wanted within the broad parameters of its own constitution. This and the other decisions all speak of POGG in positively Hobbesian terms.

Interestingly, from a Canadian perspective, a key precedent for many of these decisions was the 1885 appeal to the JCPC in regard to the treason

conviction of the noted Canadian aboriginal leader Louis Riel. The process involved in Riel's conviction and death sentence was full of arbitrary government action—including the use of a six-person rather than twelve-person jury and the removal of the trial to a more government-friendly town in another province—and Riel's lawyers challenged both the process and the treason law itself. The JCPC denied leave to appeal, stating that both treason law and the procedure used to convict (and later hang) Riel might well be at odds with the common law of England but that the Canadian Parliament had the right to be the sole judge of what is in fact necessary for the "peace, order, and good government" of Canada. The POGG words, Lord Halsbury stated, "are apt to authorize the utmost discretion. . . . They are words under which the widest departure from criminal procedure as it is known and practiced in this country have been authorized in Her Majesty's Indian Empire" (*Riel v. The Queen* 1885). In keeping with this, as recently as 2000 a Queen's Bench judge hearing a colonial-law case (about which more later), who as a regular judge and not a JCPC member could not overturn established colonial law, stated as an unmovable fact that "the authorities demonstrate beyond the possibility of argument that a colonial legislature empowered to make law for the peace, order, and good government of its territory is the sole judge of what those considerations factually require" (*The Queen [Bancoult] v. Foreign and Commonwealth Office* 2001, 1103).

Postcolonial legal scholars have documented at great length how subjects of the British crown in various latitudes were subjected to all manner of coercive mechanisms by imperial officials. What is interesting, however, about the JCPC decisions regarding POGG powers is that they do not involve imperial officials but rather postcolonial national legislatures. In a move in keeping with Nasser Hussain's argument about how English imperial rule, including liberal as well as coercive legal mechanisms, shaped many features of current Pakistani "emergency" law (Hussain 2003), in these texts the illiberal mechanisms of rule associated with Empire are literally transferred to the emerging governments. Of course many local elites were busy trying to accumulate power for themselves under the mantle of nationalism, as the subaltern-studies literature has shown; but what is much less known is that this process of creating new forms of domination was also undertaken, independently, by English judges. The judges no doubt believed that they were helping the "young" nations within the Empire and Commonwealth become

autonomous and mature. But in authorizing the government of Canada to hang Riel without due process, and later using that as precedent to authorize the government of Ceylon to remove the right to trial by jury from certain criminal offenders, English judges were arguably promoting the continued effectiveness of colonial coerciveness by enveloping old colonial legal tools in a more or less nationalist container. In Canada this is not as evident as, say, in Pakistan, given the JCPC's curious regard for provincial powers. But in nonfederal centralized states the POGG powers are not so circumscribed.

The devolution of coercive illiberal powers to postcolonial legislatures did not, however, imply the end of the Colonial Office's reign. Creating new powers in postcolonial parliaments does not by itself reduce the power of Westminster or the power of colonial officials. A striking instance of the continuing existence of the Empire in the 1960s and 1970s is found in the recently revealed story of how officials in London—officials no longer called "colonial"—developed a legal strategy for forcibly removing the whole population of the Chagos archipelago, whose main island is Diego Garcia (see *Bancoult* 2001, 1067; Tomkins 2001; Mahmoud 2003). The officials first split off the archipelago from the newly independent state of Mauritius, paying the government of Mauritius three million pounds (but paying nothing to the inhabitants) and coming up with the name of "British Indian Ocean Territory" (BIOT) for the new entity. The sole purpose of doing this was to hand the new territory over to the United States for military purposes. Then they devised various ways to empty the islands of people over a period of a few years (even though the U.S. military had not explicitly requested that the territory they wanted to lease needed to be *terra nullius*). The island of Diego Garcia not having health and other services, the inhabitants regularly traveled to other islands, and the British government simply cancelled boat service back to the archipelago on a number of occasions—thus stranding people, mainly in Mauritius but some also in the Seychelles. The last remaining inhabitants were forcibly removed from the BIOT in 1971 and dumped in Mauritius, whose government apparently did not object (possibly because Mauritius has made a claim to sovereignty over the archipelago).

The legal basis for this action was said to be found in a section of the BIOT Order (a quasi-constitutional document) that allowed the Commissioner of the BIOT—an official in London—to "make laws for the peace, order, and good government of the territory." This clause meant that the

Commissioner in the Foreign and Commonwealth office had as much power to decide what factually constituted order and good government for the hapless inhabitants of Diego Garcia and the other tiny islands as the Canadian Parliament had to institute a procedure for a treason trial in conflict with the common law. Indeed, the Commissioner had quite a bit more power than the legislature of Canada, or even the legislature and the Canadian federal executive combined. This is because Canada is regarded in colonial law as a "colony of settlement" (despite the historical fact that New France was ceded to England in 1763), not a colony of conquest or what English law calls a "ceded colony." Colonies of settlement—white colonies, basically—are thought to have become permeated with English legal principles and procedures, unlike conquered or ceded colonies, in which more despotic methods for governing the population are taken to be justified.

Some decades after their expulsion, the former Diego Garcia islanders, known as the Ilois people, managed to get a senior English barrister to take the government to court on their behalf, with a Mr. Bancoult being the official complainant. The judge hearing the case in 2000, the aptly named Justice Laws, faced with a mountain of Colonial Office documents showing blatant racism in the British government as well as blatant official disregard both for Parliament and for UN rules applying to colonial powers, was clearly sympathetic to the islanders. His lengthy decision reproduces many excerpts from internal government letters and memos that are absolutely embarrassing for both the Wilson and the Heath governments, excerpts that do not serve much of a legal purpose but which have a rather damning political effect. To cite just one example, Justice Laws quotes from a 1966 note by Permanent Under-Secretary of the Colonial Office, Paul Gore-Booth: "We must surely be very tough about this. The object of the exercise was to get some rocks which will remain ours; there will be no indigenous population except seagulls, who have not yet got a committee (the Status of Women committee does not cover the rights of birds" (*Bancoult*, 1083). Justice Laws then quotes the reply to this note by another official: "Unfortunately along with the birds go some few Tarzans or Men Fridays whose origins are obscure, and who are being hopefully wished on to Mauritius etc."

While distancing himself from the Men-Fridays discourse, Justice Laws was nevertheless obliged to admit that the Magna Carta's section prohibiting governments from exiling their own peoples—one of the few legal texts that the Ilois people could use—did not apply in the BIOT. Few lawyers today

would think of resorting to the Magna Carta; but it so happens that there is a prohibition against monarchs sending their subjects into exile in this hallowed document. However, the judge decided—probably quite correctly—that, like other British constitutional documents and principles, Magna Carta applies only to colonies of settlement, not ceded colonies. (Relevant colonial case law repeats the rather ambiguous statement that the "Magna Carta follows the flag," but in practice this seems to have been taken to mean that the rights of the English apply only in colonies settled by a large number of them.) Thus, the prohibition against exile contained in Magna Carta did not apply. And to make matters worse, one of the very few legally effective phrases in the short text of the BIOT Order was that the Commissioner of the BIOT was empowered to make laws for the "peace, order, and good government" of the BIOT. Therefore, Laws concluded, in a statement I have partially already quoted, that "the authorities demonstrate beyond the possibility of argument that a colonial legislature empowered to make law for the *peace, order, and good government* of its territory is the sole judge of what those considerations factually require. It is not obliged to respect precepts of the common law, or English traditions of fair treatment. This conclusion marches with the cases on the Colonial Laws Validity Act of 1865" (*Bancoult*, 1104).

But in a desperate attempt to distance himself and the English judiciary from the embarrassing comments about Tarzans surreptitiously dispatched to Mauritius, Justice Laws decided that even the despotic rule that English law allows in places like the BIOT—a despotic rule that the Bancoult decision actually confirms—presupposes that there are some subjects to be ruled. He concluded,

> Section 4 of the [BIOT] Ordinance effectively exiles the Ilois from the territory where they are belongers and forbids their return. But the "peace, order, and good government" of any territory means nothing, surely, save by reference to the territory's population. They are to be governed; not removed. . . . The people may be taxed . . . laws will criminalize some of the things they do; maybe they will be tried with no juries, and subject to severe brutal penalties; the laws made for their marriages, their property, and much besides may be far different from what obtains in England. . . . [But] I entertain considerable doubt whether the prerogative power extends so far as to permit the Queen in Council to exile her subjects from the territory where they belong. (1104–5)

However embarrassing to past and present British government officials, then, the *Bancoult* decision is hardly a major statement of equality rights. Indeed, the decision admits, somewhat regretfully, that the hapless ex-inhabitants of the archipelago have extremely limited rights, given that the territory from which they were expelled happened to be a ceded colony, and was, in addition, one without a legislature or a constitution or any other potential resource for rights claimants. In the end, the dispossessed Ilois are said to be unable to exercise most of the rights that British citizens take for granted; the only point granted to Bancoult and his people is that, in a chilling example of English legal understatement, the judge expresses "considerable doubt" about the legality of a government order permanently exiling people who had engaged in no treason or even any misdemeanor.

And indeed, when Bancoult and his friends tried to follow up on Justice Laws's decision striking down the original exile order to seek monetary compensation and the right to at least visit their former home, they were unsuccessful. As of this writing, the U.S. government has stated that they will allow the Ilois to visit, only temporarily, the minor islands in the archipelago but not Diego Garcia, the one that most of them came from, which is currently a U.S. military base on land leased from the British government. The British government seems unwilling to reconsider the lease or otherwise press the matter (Harwood, 2002).[4]

Colonial Governmentality and the Queen in Right of Canada

If the police power is, as Dubber's work has shown, intimately connected with the monarch's power to order his kingdom as fathers order their households, it makes sense in a collection on the police power to reflect on how devolving the paternal power to order the national household to emerging democratic nation-states has not necessarily brought about an end to monarchical rule, in Canada at any rate. Now, the royal prerogative that was used to bring into being the BIOT as an illiberally governed colony and was then used to empty that territory of people takes a different form in Canada. This is mainly because Canada has its own legislature and its own courts. But just as the POGG phrase has been shown to link situations and polities that seem worlds apart, so too the monarch, specifically the English monarch,

continues to link and bond a variety of despotic and democratic regimes and to exercise certain ordering effects not only in those territories that are still colonies but even in independent states such as Canada.

American and French visitors to Canada often ask, "Why is Canada still a monarchy?" And Australians ask, "Why is there no republican movement in Canada?" In response, most Canadians speak about respect for authority, deference, and so forth, along the lines of the Ignatieff speech previously mentioned.

But instead of invoking a Canadian deferential culture to explain paternalist legal and political techniques, I think it is much more useful to continue the sketch of colonial governmentality and its fortunes on Canadian soil.

Why colonial "governmentality"? "Governmentality" here refers not to a set of beliefs but to a toolbox of governing technologies and institutional habits that emerged in the context of modern state formation but that are not monopolized or even invented by state actors (Foucault 1991; Dean 1999; Rose 1999). To speak of a "colonial governmentality" thus refers to certain techniques of governance—some liberal, some illiberal—that, whether invented by colonial officials or by extrastate actors, became part of the toolbox of governing tools available for the governance of European empires. The fact that London constantly transferred officials and governors from India to Jamaica to Canada, and from the colonial service to other state bodies, facilitated the rapid recycling of a whole range of governmental techniques. Legal techniques used to govern both white and nonwhite colonial populations proved to be mobile and very flexible (e.g., Hussain 2003; Karsten 2003). More studies of particular colonial and postcolonial settings are necessary before one can generalize about the effects of colonialism on the legal systems of various Anglophone nations; but provisionally, the brief historical sketch that follows concludes that although multiculturalism and liberal rights are certainly very important features of the Canadian state, multicultural liberalism[5] has not displaced, but has been added on top of, a governing structure that is still colonial both internally and externally. To summarize briefly the key findings of the historical sketch that follows, it can be said that, internally, Ottawa (a) succeeded to the imperial government's paternal power over aboriginal peoples, and also (b) inherited other colonial mechanisms, e.g., the power of "disallowing" provincial statutes.

These two legal avenues for internal colonialism are connected to and supported by the more visible remnants of Empire—the most visible of these being of course the monarch, whose face is featured on every coin and banknote in Canada, on most stamps, and in every post office and school. While in official discourse the head of state is known as the Queen of Canada (or the Queen "in right of Canada," as federal government documents obscurely put it), she is nevertheless the same person—though possibly not the same sole corporation, to use Frederick Maitland's categories (Maitland 2003, 45)—as the Queen of England. This is worth reflecting upon, however briefly.

The persistence of the monarchy into the present is an indication of something more than Anglo-Saxon nostalgia. There are many reasons for the notable lack of republican agitation in Canada (by contrast with Australia). But part of the answer lies in something that is geographically specific to the North American continent, something that worried British colonial authorities in the 1830s and worries Canadian cultural nationalists today: the ever-recurring fear that a geographically absurd state, the vast majority of whose population is much closer to U.S. markets than to the rest of Canada, may cease to exist, given a continent utterly dominated by a superpower. That this superpower happens to be a republic is more crucial for the preservation of the monarchy in Canada than any internal factor, in my view. It is notable in this regard that Canadian left-wing nationalists who are not particularly keen on the monarchy also share the English view about the evils of U.S.-style republicanism and are more likely to denounce reform proposals that seem to copy the United States (e.g., parliamentary oversight of Supreme Court appointments) than to raise the issue of the monarchy. Thus, the multipronged project to distinguish Canada from the United States—a project shared historically by London and by conservative Canadian advocates of Empire and, today, by progressive nationalists—acts as a powerful, multistrand governmental sinew connecting the more visible legacy of Empire (the ubiquitous face of the Queen) to the less visible but more powerful mechanisms for internal rule that are based on colonial ruling technologies.

HISTORICAL SKETCH OF A COLONIAL GOVERNMENTALITY

The usual story of Canadian nation building is a perfect Whig narrative of the slow and peaceful development of a national federalist sovereignty.

Like all Whig stories, this narrative assumes that power is a zero-sum game. Thus, if the government in Ottawa is acquiring more powers, this is regarded as automatically proving that the Empire's force is diminishing; and the division of powers between Ottawa and the provinces is also regarded as a zero-sum game in which one side's political or judicial win automatically means that the other side has less power.

Here I will trace a brief sketch of some key events, rereading the story of political power without making the zero-sum assumption that is foundational to liberal thought and liberal governance. In this light, it becomes apparent that the colonial governmentality of early nineteenth-century Canada did not depart the scene, to be replaced by autonomy and self-government. At one level, colonialism simply *continued*: acts of the Canadian Parliament still need royal assent, to this day, and new Canadian citizens have to swear allegiance to "the Queen and her heirs," not to the Canadian state or the constitution. But more importantly, colonial governmentality was *transformed* by being folded into the inner fabric of the colony, as Gilles Deleuze might say.[6]

Through this infolding, the federal government created in 1867 was given neocolonial powers (a) over the aboriginal peoples of Canada, many of whom had signed treaties with the Crown (unlike the situation in Australia), that Ottawa now inherited; and (b) over the provinces. The provinces did eventually gain more autonomy and power. But aboriginal peoples remain colonial subjects, now of the Canadian government rather than of the British Crown.

Municipalities are part of the story too, even though they are not considered a level of government but rather "creatures of the province." The Whig (and English) narrative that tells of backward French Canadian peasants being liberated from feudal relations by the enlightened proponents of liberal colonialism is usually read as a tale in which municipalities became a key tool of popular "self-government." But it is plausible to read the story of municipal government in Canada as one in which, to use Engin Isin's words, colonial authorities and Canadian state authorities did not give up any power but simply chose to govern "through" cities (Isin 1992). Despotic government was regarded from the 1830s onward as an impossible option for Canada, for many reasons, the key one being that the main conquered population—the French colonists—were white. But the much-touted

S3856.indb 89 6/14/06 12:05:48 PM

self-government imposed on localities in the mid-nineteenth century, while in part a response both to local Reform agitation and to Reform in England, cannot be regarded as basically a concession to democratic aspirations; on the contrary, it was a technology for effecting central-government objectives "at a distance" (to use Jeremy Bentham's famous phrase).

The story of Canada's political machinery is one in which central state authority certainly shifted and moved around—from the Colonial Office to Ottawa, and from there, in some respects, to the provincial capitals (though much of that was facilitated by the JCPC rather than by democratic movements). Municipal self-government was also a key building block of the overall colonial and postcolonial structure. But neither democracy nor individual rights were major characters in this story. Individual rights were entrenched only in the 1982 Charter of Rights and Freedoms. Let us now go over a few of the key steps in this story.

1763

As mentioned in the Diego Garcia context, British colonial jurisprudence creates an opposition dividing largely white "colonies of settlement" from largely nonwhite colonies acquired through conquest or through horse-trading among imperial powers. The British Settlements Act of 1887 states that a "'British settlement' means any British possession which has not been acquired by cession or conquest," a negative definition explained in the preamble: "Whereas divers of Her Majesty's subjects have resorted to and settled in, and may hereafter resort to and settle in, divers places where there is no civilized government, and such settlements have become or may hereafter become possessions of Her Majesty, and it is expedient to extend the power of Her Majesty to provide for the government of such settlements."

Australia and Canada are the most important colonies of settlement. The fates of both countries were bound together in numerous imperial legal events, such as the Colonial Laws Validity Act of 1865 and the Statute of Westminster of 1931. The status of both states in international law is premised on the alleged "fact" that British subjects went to "divers places where there is no civilized government" (as the 1887 Settlements Act puts it).

Western Canada was indeed settled in a manner not dissimilar from Australia, that is, through the repression and marginalization of aboriginal peoples and their land claims. But Eastern Canada became British by the

S3856.indb 90 6/14/06 12:05:49 PM

conquest and cession of an existing European settlement: New France. In existence since the mid-seventeenth century, New France came to an abrupt end with the 1763 Treaty of Paris, which confirmed the English military conquest of Quebec City and of various French forts and settlements in the Atlantic colonies. This should have made Eastern Canada into a "ceded" or "conquered" colony—which would have meant that neither British constitutional principles nor the words of the Magna Carta would have applied (Tomkins 2001). But for reasons that are not made apparent in the standard texts on Canadian constitutional history, there seems to have been a consensus to pretend that Canada was a single colony—rather than an assemblage of sites and peoples with very different legal statuses—and to furthermore pretend that it could be regarded as a "colony of settlement" on the same lines as Australia. (One additional and related difference is that in the late eighteenth century and up to the American-British war of 1812, many Indian nations—Mohawk, Iroquois, etc.—were recognized by the British crown as sovereign in various bilateral treaties and in war-related alliances, in contrast to the *terra nullius* approach taken in Australia.)

In the years after 1763, British governors in Canada and colonial officials in London alternated between using the more liberal but still paternal legal tools used in "settlement colonies" and using the harsher tools, including martial law, that make up that important dimension of British law recently characterized as "the jurisprudence of emergency" (Hussain 2003). The British political decision to restore Quebec's civil law in the 1770s, after the French military defeat, is often cited as exemplifying the more benevolent governmentality of "settlement" in relation to the French colonists. Constitutional law texts, however, neglect to mention the wholesale expulsion of the Francophone Acadians that took place in 1755, a key moment in Canadian jurisprudence of emergency in keeping with the methods deployed in nonsettler colonies.

Eventually, the harsher tools of ceded and conquered colony law were shelved. This was not because English rulers had learned to appreciate Francophone culture and politics, but (to oversimplify for a moment) for the pragmatic and entirely nonlocal reason that they had decided that it was best for the British Empire to not alienate the United States. Lord Durham, whose famous 1839 report is universally taken as the founding document of both liberal colonialism *and* Canadian nationhood (those two rather different

S3856.indb 91 6/14/06 12:05:49 PM

entities being reduced to the same thing in standard Canadian political historiography) stated as a fact that, if the governance of Quebec and Canada were to be based on local factors, French Canadians would be governed "despotically"—as J. S. Mill recommended in regard to backward nations. But despotism, while appropriate for the irrevocably superstitious and unprogressive French population,[7] would not suit imperial objectives in North America, Durham added. If they saw despotic monarchical rule just over their northern border, the United States would stir up trouble against the Empire.[8] This would not do: "I rate the preservation of the present general sympathy of the United States with the policy of our government in Lower Canada [Quebec] as a matter of the greatest importance" (Durham 1912, 2:297). That imperial authorities did not repeat the ethnic cleansing imposed upon the Acadians, or the martial law imposed throughout Quebec after the 1837 Rebellion, was thus not necessarily due to the relentless march of enlightenment that Canadian liberal historiography deploys and celebrates (cf. Isin 1992).

1839

As part of the process of bringing "responsible" government to Canada—"responsible government" meaning not "democracy" but ministerial responsibility to the House of Commons on the Westminster model—Lord Durham promoted municipal government institutions. These existed to varying degrees in English Canada but not in French Canada. The anti-English and anti-Empire movement that had culminated in the Rebellion of 1837 (the immediate reason Lord Durham was sent off on his colonial reform mission) was not interested in municipal self-government; in French Canada parish priests performed most of the functions associated with clerks and town authorities elsewhere, and there were few if any municipal taxes. The French Canadians' main political vehicle had been, and remained, the provincial legislature—today known as the National Assembly of Quebec.[9]

Lord Durham envisaged his task as assembling governing technologies that would undercut the provincial legislature without quite effecting despotism. First, he proposed—successfully—merging Upper Canada (Ontario) with Lower Canada and Quebec. While in the short run French Canadians would still be the majority in the new, united province, immigration from the United Kingdom would produce Anglicization and the complete assimila-

S3856.indb 92 6/14/06 12:05:50 PM

tion of the French in the medium term (Louisiana was his model). Second, he insisted that municipal self-government be forced onto the reluctant French Canadians.[10] And, last but not least, he advised future colonial officials and governors that continued use of the royal prerogative be maintained:

> The establishment of a good system of municipal institutions throughout these Provinces is a matter of vital importance. A general legislature, which manages the private business of every parish, in addition to the common business of the country, wields a power that no single body, however popular in its constitution, ought to have. . . . *The true principle of limiting popular power* is that apportionment of it in many different depositaries which has been adopted in all the most free and stable States of the Union. . . . The establishment of municipal institutions for the whole country should be made a part of every colonial institution; and *the prerogative of the Crown* should be constantly interposed to check any encroachment on the functions of the local bodies, until the people should become alive . . . to the necessity of protecting their local privileges." (Durham 1912, 2:287; emphases added)

Pursuant to Lord Durham's plan to use municipal government to "limit popular power" (which mainstream political scientists insist on reading as giving Canada local democracy), the government of the United Province of Canada formed in 1840 passed a District Councils Act, in 1841. But this was simply ignored in French Canada. Bruce Curtis's book on the rise of Canadian state science tells us that the all-Canada Census of 1841 failed miserably precisely because its fate was tied to that of "the larger liberal project of local representative self-government" (Curtis 2001, 56). The whole project was refused by French Canadians, who wanted a strong legislature instead and who saw the new local councils as "taxation machines" rooted in English ideas about locality.

1867

Most Canadians think that July 1, 1867, is the birthday of Canada as an independent country. But the by no means radical constitutional legal scholar Peter Hogg states that the BNA Act of 1867 "did not mark any break with the colonial past. Independence from the United Kingdom was not desired or even contemplated for the future" (Hogg 1985, 2). Hogg goes on, "The best-known example of the colonists' reliance on the old regime is the

absence of any general amending clause in the BNA Act . . . the framers must have known that the absence of an amending clause would mean that amendments would have to be enacted by the imperial Parliament" (3).

The ritual fireworks lit every year on July 1 disguise the fact that the BNA Act strictly avoided not only the language of "independence" that constantly threatened to seep into Canada from the United States (and from the few but vocal Irish nationalists in Canada), but even the less strident language of state formation. The BNA Act is precisely *not* the "Canada" Act. "British North America" is one constitutional name for the entity that is elsewhere in the document called "The Dominion of Canada."

"Dominion" was a clever neologism whose effect was and is simultaneously to travel and to erase the considerable distance between a Crown colony, on the one hand, and an independent state on the other. It is a performative, as the linguists say, that performs colonialism but simultaneously differentiates the self-governing white settler colonies from the Other, the despotically ruled white-minority colonies. It is notable that, like Lord Durham's views of the French as a race unsuited for liberal governance, the term "dominion" was quickly and happily reproduced in and by Canadian ruling circles. Indeed, July 1 was known until the 1970s as "Dominion Day," not "Canada Day," even in popular speech.

The BNA Act, among other things, maintained for the imperial parliament not only the power to amend the Canadian constitution (the BNA Act and its successors), but also the powers of "reservation and disallowance." "Reservation" is the practice whereby a colonial governor neither signs a bill nor refuses assent, but refers it to the imperial government for decision. "Disallowance," a power that was used more frequently, is the practice by which a dominion bill is declared null and void by the imperial government, even though the governor (representing the Crown) had given royal assent. (Disallowance is found in other colonial and postcolonial founding laws, incidentally; it is not specifically Canadian).

Most of these colonial legal technologies acquired a more made-in-Canada look over time, but without being actually repealed. By the time the 1931 statute of Westminster limited the Empire's power to strike down Canadian laws or impose imperial laws, London had not exercised the powers of reservation and disallowance for some time. Along the same lines, the Canadian Department of Indian Affairs took over the work of paternally

governing Canada's aboriginal peoples—even though First Nations that signed treaties with the Crown before 1867, and that did not consent to the infolding of colonial governmentality carried out through the 1867 BNA Act and the 1875 Indian Act, insist that the Crown in London is still a valid interlocutor and a potential defender of their interests vis-à-vis Ottawa.

The infolding of colonial governmentality had another dimension. Besides assuming responsibility for the governance of aboriginal peoples and lands, Ottawa also acquired the colonial power to declare provincial statutes invalid, invoking the same power of "reservation" that was previously a strictly imperial legal tool. A constitutional law text tells us that "early Lieutenant Governors of various provinces often reserved bills for a final decision by the federal government. Although the practice was controversial, and soon became unnecessary as communications improved between Ottawa and the provincial capitals, a Saskatchewan bill was unexpectedly reserved as late as 1961" (Stevenson 2004).

The imperial legal tool that was the twin of "reservation," namely "disallowance," was also extended to Ottawa, without being thereby taken out of the imperial relationship. Federal disallowance was used extensively immediately after Confederation and through the early twentieth century (see Kennedy 1922, 415–22). This did not escape the notice of A. V. Dicey, who, when contrasting Ottawa's powers to the much more restricted powers of Congress in Washington, stated, "In nothing is this more noticeable than in the authority given to the Dominion Government to disallow provincial Acts" (Dicey 1910, 166). The last provincial statute disallowed by the federal government was the 1943 Alberta Act. However, there is no reason to think that the federal government would never dust off this tempting legal tool, perhaps if Quebec were to decide to secede from the federation.

These quasi-colonial powers are admittedly marginal in the general scheme of federal-provincial relations in Canada. But the key point is that the creation of these internal-colonial powers in Ottawa did not mean the end—or even the automatic diminishment—of Westminster's continuing ability to override Canadian statutes or the end of the JCPC's continuing ability to hear appeals not only from the Supreme Court of Canada but also from provincial governments.

Colonial governmentality can thus change shape, give birth to new offspring without itself dying, and unexpectedly proliferate, through processes

understood by liberal thinkers of zero-sum power as "progress toward national autonomy." More generally, techniques of governance (such as the highly illiberal practice of disallowance) could and did acquire a new life in a new space, while continuing, as formally available techniques at any rate, in their original space. This process seems to have taken place not only in federal-provincial relations but also in regard to aboriginal First Nations, which have over the years received some new powers (through court decisions as well as amendments to the Indian Act), but without these new powers being necessarily accompanied by a corresponding decrease in Ottawa's paternalist powers.

1931

The Statute of Westminster, which declared that no statute of the United Kingdom would extend to a Dominion unless that Dominion explicitly requested and consented to the enactment, largely decolonialized the Australian political system—but not the Canadian one. The Statute gave all Dominions the power to repeal or amend those imperial statutes that were also part of the law of the Dominion in question; and, more importantly, it stated that no Dominion statute would be found to be void because it contradicted any existing or future act of the imperial parliament. However, the Statute of Westminster contained an exception: Canada's constitution, the BNA Act, was explicitly excluded from its reach. It seems that the Canadian federal government was unable to obtain provincial consent for anything like an amending formula, and since Ottawa was unable to present a replacement mechanism for Westminster approval, Westminster's power to amend the Canadian constitution had to continue. As a result, the Canadian government would continue to go cap in hand to request Westminster to amend the BNA Act.

1982

In the 1970s Prime Minister Trudeau undertook a campaign to complete what the Statute of Westminster had left undone—in part because he felt that a more postcolonial, more modern Canadian state (including an entrenched Charter of Rights) was the only real answer to the growing threat of Quebec separatism. Trudeau had recently become Prime Minister when the Front de Liberation de Quebec (FLQ) provoked an unprecedented

S3856.indb 96 6/14/06 12:05:52 PM

political crisis in 1970, with a British diplomat being kidnapped and murdered and a Quebec cabinet minister being also kidnapped. Invoking the World War I War Measures Act (passed during the Red Scare pursuant to the federal POGG powers), he caused hundreds of people—very few of whom were FLQ members—to be detained without charges and without legal counsel, something that had the predictable effect of increasing support for separatism, though more for the mainstream, nonviolent Parti Quebecois, not for the FLQ's revolutionary project.

The Parti Quebecois came to power provincially in 1976. When Trudeau and his cabinet devised the idea of "patriating the Constitution," the project was as much—or more—a response to Quebec complaints about the lingering effects of *English-Canadian* dominance within Canada as a nationalist attack upon London. Trudeau was never able to obtain Quebec approval for his particular approach to what he called patriating the constitution, however, and so ended up, ironically, increasing Quebec's marginalization, constitutionally at any rate.[11] To make a very long story short, Westminster was asked to pass the 1982 Constitution Act by the federal government and by nine out of ten provinces. And this Westminster did—despite the fact that an appeal to the Supreme Court of Canada from the Quebec government was still pending.

Despite several changes in government both in Ottawa and in Quebec, Quebec has still not formally agreed to the Constitution Act. The act contains a formula for amending the constitution requiring the approval of more than two thirds of the provinces, with those provinces having more than half the population among them. This formula means that Quebec—with close to a third of the population of Canada—does not have to be included. This flies in the face of previous constitutional history. The United Province of Canada, for example, created in 1840, had two premiers and two attorneys general, one English and one French. Along similar lines, the Supreme Court Act requires that three out of the nine Justices of the Supreme Court be from Quebec. Other regional quotas are merely conventional, but the Quebec representation is enshrined in statute. A host of other governmental practices also treat the Francophone population—and the province of Quebec, the distinction between these two being often fudged—as a special and essential component, rather than as merely another province or an important minority.

S3856.indb 97 6/14/06 12:05:52 PM

Thus, the province of Quebec has been forced into constitutional arrangements not of their own making and has thus become differentiated, to its disadvantage, from the other, largely Anglophone, provinces.

The other dimension of Ottawa internal colonialism has not undergone any basic change in form. While Trudeau was proclaiming that "today, at long last, Canada is acquiring full and complete national sovereignty" (Trudeau 1982), aboriginal leaders had this to say:

> April 17, 1982 was proclaimed as a day of mourning for the aboriginal peoples of Canada. It was the day the British crown irreversibly betrayed every treaty, proclamation agreement, trust and promise made with the Indian Nations of Canada. . . .[12] For the last three years, Chiefs, Indian organizations and leaders, and ordinary Indians have written to the Queen to inform her that the treaties were endangered by a new settler government constitution. ("The patriation of the Canadian Constitution" 1982)

The Constitution Act has a phrase stating that "existing aboriginal rights" will be maintained and recognized; but the problem lies precisely in determining just what "existing" rights amount to. Subsequent federal governments have not remedied the glaring omission of aboriginal representatives from the "patriation" process: the regular federal-provincial conferences on constitutional issues include only the Prime Minister and the ten premiers, not aboriginal representatives. The federal government did attempt to modernize the colonial Indian Act in 1985, by devolving many responsibilities and powers to local Indian bands and ending the overtly colonial institution of the "Indian agent," the white personage who for many decades exercised proconsul power over Indian bands. This responsibilization of status Indians for their own problems has met with mixed reviews, but the only point that need be mentioned here is that many aboriginal organizations continue to call for the wholesale repeal of the Indian Act.

Comparative Parenthesis

Constitutional litigation was for most of Canada's history limited to fights between the federal government and the provinces. It was only in 1982 that a Charter of Rights was added to Canada's constitutional documents (there

was a Bill of Rights from the 1960s on, but this was an ordinary statute). Jennifer Nedelsky, whose expertise is comparative U.S.-Canadian constitutional law, addresses this question in a detailed study of nuisance cases, from 1880–1930, which led her to a conclusion that sheds much light on the issue of police-type powers: “Canadians do not seem to have shared the long-standing American distrust of democratic legislatures as threats to private property” (Nedelsky 1981, 310). One example of this is that in the early 1900s there was a major split among the ruling classes that, in the United States, could have led to constitutional challenges to the police power: internationally oriented financiers in Ontario wanted to be exempt from certain provincial regulatory mechanisms that applied to the finance sector. The financiers tried a twofold, typically Canadian route. First they made an unsuccessful attempt to persuade the federal government to use its power of disallowance against the Ontario rules, then they resorted to the courts. But the “challenge was dismissed with Justice Riddell’s remark that ‘The prohibition “Thou shalt not steal” has no legal force against a sovereign body’” (310). A starker statement of the police power of the state could scarcely be imagined.

This is not to say that Canadians are so respectful of authority that they never thought to challenge takings and similar practices. Nedelsky may be exaggerating the famous “deferential culture” of Canada as an explanatory factor and underestimating the importance of the political structure. When challenges to regulatory provincial legislation interfering with property and other rights were launched, in the long period up to 1982, the challengers either convinced the federal government to use its illiberal power to disallow provincial statutes (as happened many times in the early twentieth century, in regard to provincial regulatory statutes) or else took their case to a judicial system whose ultimate authority was not the Supreme Court of Canada but—until 1949—the JCPC. Neither federal disallowance nor Law Lords judgments were suitable vehicles for the kind of rights consciousness (especially property rights consciousness) and the kind of legal doctrines that emerged in the United States in and around police power cases, since disallowance is a transparently colonial paternalistic and illiberal political tool, and the Law Lords in England, whatever their views on property rights, were not empowered to make substantive decisions about Canadian property law but only to solve federal-provincial disputes. Thus, against Nedelsky’s culturalist perspective, it could be argued that property owners in Canada

did not play the individual-rights game simply because it was not available to them. They had to play the game of trying to take advantage of federal-provincial disputes to pursue their goals.

CONCLUDING REMARKS: TOWARD A NON-ZERO SUM THEORY OF POLICE POWERS AND POLICE KNOWLEDGES

The Infolding of a Colonial Governmentality

As against the usual liberal and Anglo-centric account of the inexorable march of the Canadian state toward full autonomy, I have suggested here that we can better understand the particular genealogy of the Canadian constitutional framework by highlighting that the monarchy and other techniques of old-fashioned Empire are not anachronisms that are tolerated for sentimental reasons but are the visible tips of a rather large iceberg, an iceberg that includes a series of often-ignored tools of internal colonialism. Ottawa's frankly colonial rule over "Indians" and its quasi-colonial relationship with the provinces—in evidence in the disallowance cases and, today, in the continuing absence of both Quebec and First Nations representatives from the constitutional table—has been historically produced and maintained by means of legal mechanisms borrowed from the Empire's toolbox and adapted for new uses. The historical connections between Canada and other colonies have been disavowed and obscured by nationalist constitutional law scholars who have failed to investigate such issues as the fate of POGG powers in other climates. To understand the infolding of colonial governmental techniques, we need to first clear the mistaken assumptions about power as a zero-sum game that are integral to liberal thought generally. Ottawa's power has not been and is not now in a zero-sum relation with powers held in London, in Quebec City, or in First Nations' band councils. The zero-sum model is not adequate. Power relations can multiply through the borrowing and adapting of governmental techniques, an activity that does not necessarily mean they are not still in force in their original setting.

Colonial and Postcolonial Governmentality and the Paternal Model of Government

Blackstone's famous discussion of the police power features the benevolent but all-powerful father as the key metaphor of government. This same

S3856.indb 100 6/14/06 12:05:54 PM

diagram of paternal power was very important in the spread—and the legitimation—of British imperial relations around the world. While from the legal point of view one can locate police-type powers in various parts of the Canadian political-legal system, and mainly in the provinces' control over property and civil rights and in certain statutory and common-law municipal technologies for governing disorder and guarding against risks, from a nonlegal perspective one could speak of a generalized Canadian paternalism that flows all through the system, including through and in the federal government's POGG powers. The POGG powers are supposed to be used only to deal with emergencies, but their logic is the same as that embedded in the Indian Act, as revealed in such contexts as the 1964 *Ibralebbe* decision of the JCPC, in which the removal of juries from criminal trials in Ceylon was thought to be well within the POGG powers of the Ceylon government (and in which the Law Lords took the time to chastise the Chief Justice of Ceylon for daring to opine that having Ceylon constitutional law decided by the Law Lords was inconsistent with independence).

Once constructed, in part by analogy with paternal power, the colonial relation could and did in turn serve as model for other illiberal relations. To give but one example: research I have carried out on the twentieth-century process of "interdicting" chronic alcoholics shows that, just as Indians were once denied the right to drink because they were thought to be like children, so too, in the 1950s and 1960s, chronic alcoholics in Ontario were banned from possessing alcohol in their own homes by the legal mechanism of being placed on what was popularly known as "the Indian list." This was not a list of Indians but a list of people not allowed to buy or possess alcohol. Turned into symbolic Indians, violent husbands and street winos could be denied rights with legal tools seldom found outside "ceded or conquered colonies" (Valverde 2004). Other examples could undoubtedly be produced of this creative recycling of colonial paternal technologies for governing problem people and problem activities.

Toward a Dynamic Analysis of Knowledge Processes in Law

Political science, like law, privileges static structures, e.g., of federal-provincial relations, rather than trying to map recurring moves—that is, more or less habitual ways of getting from one set of claims or resources to another place, to another configuration of power and knowledge. In static

S3856.indb 101 6/14/06 12:05:54 PM

models, struggles appear only as little stories about how the structure developed or changed. In standard English Canadian political history, struggles such as that waged by the people of Quebec in the years after the conquest appear only as evanescent video clips that disappear as one focuses on the resulting fixed structure. There was the 1837 Rebellion, but then the British brought in responsible government, which is what we have now—that's the type of account to which we are accustomed.

My approach, however, privileges the struggles (in keeping with the Nietzsche- Foucault thesis that peace is what has to be explained, not struggle). In this way more dynamic analyses are encouraged. A fully dynamic analysis of struggles in their open-endedness is not possible, given that the very act of writing forces life into a more or less static format. But certain analytic tools—governmentality (the less structuralist versions of it) and Actor-Network analytic tools (Latour 1987, 1993, 2002) can help to make our analyses more dynamic.

In such analyses, the goal is not to generate better, more refined typologies of government structures or legal tools. The goal is rather to show how methodological insights from a variety of fields can be creatively used to understand the workings of law in ways that are always site-specific. This is what I understand by "doing the history of the present," a task which necessarily includes the past.

Notes

I could not have ventured into Canadian constitutional history without help and guidance from David Schneidermann, to whom I am very grateful. Tayyab Mahmoud's important work in progress on the Diego Garcia cases and colonial governmentality has also been a crucial resource, and I am grateful for conversations and the exchange of papers.

1. Ron Levi and I are developing a methodological argument that deconstructs the usual law-and-society split between lawyers who study texts and social scientists who study people, using analytic resources from Actor Network Theory. We will develop this in a book titled *Legal Labs*, now in the preliminary stages.

2. European readers might wonder whether my own interest in liquor laws is affecting my choice of cases here; but the fact is that liquor licensing and prohibition figure very largely in constitutional history because in no other field did the

Canadian state interfere so harshly with property rights, in the late nineteenth and early twentieth century at any rate. Today zoning and environmental law are much more powerful tools to exercise police-type regulatory power, but these did not exist until well into the twentieth century.

3. I do not mean here to invoke a binary opposition between "sovereignty" and "discipline," as if government could be reduced to a simple binary and as if analytic tools (like the idea of sovereignty) were more real than the practices that we ultimately seek to understand. I prefer to use "sovereign" and "disciplinary" as adjectives modifying nouns, and preferably, historically concrete nouns. Compulsory military service, just to take a random example, acts upon the subjectivity of the relevant population in ways that evoke and inscribe the sovereign dimensions of state power: but in modern times, when random physical seizures of young men by press-gangs would look like a failure of state capacities, classic disciplinary techniques, from censuses and compulsory birth registration to medical inspection, are necessary to carry out the sovereign goal of building up the army. Conscription, then, like most other techniques of governance, is not properly analyzed if it is merely put in a pigeonhole marked "sovereignty." Concrete analyses of actually existing techniques of governance usually reveal a mix of logics.

4. *The Guardian* has covered the continuing saga of the Ilois after the Bancoult decision quite regularly, and many of the relevant articles can be found online.

5. "Multicultural liberalism" is the term I use to gesture not only toward governmental moves that recognize the importance of minority cultures—e.g., multilingual education in public schools—but a broader mentality of governance through which minority communities are seen as making up Canada rather than (as in many U.S. state mechanisms) being threats to it. Most recently, multicultural-type agitation has resulted in the federal government's reluctant agreement to change federal marriage law to allow gays and lesbians to marry, despite the Prime Minister at the time and a very large number of members of parliament being Catholic.

6. Inspired by Foucault's genealogy of modern subjectivity, Deleuze argued that rather than counterpose inner psychic identity to observable behavior, it is more useful to think of subjectivity as a process of "infolding," a process through which inside and outside turn into one another (Deleuze 1988).

7. "They clung to ancient prejudices, ancient customs and ancient laws, not from any strong sense of their beneficial effects, but with the unreasoning tenacity of an uneducated and unprogressive people" (Durham 1912, 2:30).

8. W. M. Kennedy quotes colonial official dispatches showing that the decision to reintroduce French civil law (*la coutume de Paris*) into Quebec in the mid-1770s was mainly a bit of political advertising aimed at showing Boston audiences that the British Empire could be liberal (Kennedy 1922).

9. Translations into English often conceal the nationalist claims embedded in Quebec political terminology; just to cite one example that illustrates, literally,

S3856.indb 103 6/14/06 12:05:55 PM

Bruno Latour's point about the importance of translations, the leader of the Quebec provincial government is known in English as "the premier," but French-language newscasts, including those on the federally funded CBC, describe him as "le premier ministre du Quebec."

10. Lord Durham's views were by no means exclusive to colonial authorities. The leading political scientist of late nineteenth-century Canada, John G. Bourinot, reiterated the English tale about childlike French peasants unable and unwilling to exercise local self-government—despite his French last name. Explaining Canada to the United States in the important series on Local Government sponsored in the 1880s by Johns Hopkins University, Bourinot wrote that "when the French Canadian became a subject of the British crown, he was, literally, a child who had never been taught to think for himself in public affairs," who lacked the "spirit of self-reliance and free action" found in—as a matter of essence—"peoples brought up under Teutonic and English institutions" (Bourinot 1887, 29).

11. On other fronts the Trudeau government made many important steps to remedy the internal colonialism of English Canadians over French Canadians, official bilingualism being the key tool of this project.

12. There is somewhat of a split among Canadian aboriginal peoples between "Treaty Indians," on the one hand, whose voice is heard in the excerpt cited here, and those aboriginal people who are Métis or belong to nations that never signed treaties with the Crown. The word "Indian" is used to indicate persons who are recognized members of recognized "bands"—"status Indian" is the term used, in popular as well as government discourse, for this smaller group, which is entitled to a variety of benefits. Nonstatus aboriginal peoples are not official Indians; their legal status varies widely. The term "First Nations" includes both treaty and nontreaty aboriginal peoples.

References

Bourinot, John G. 1887. *Local government in Canada: An historical study*. Baltimore: Johns Hopkins University Press.

Dean, Mitchell M. 1999. *Governmentality: Power and rule in modern society*. London: Sage.

Deleuze, Gilles. 1988. *Foucault*. Minneapolis: University of Minnesota Press.

Dicey, Albert V. 1910. *The law of the constitution: A digest of the law of England with reference to the conflict of laws*. Boston: Boston Book Co.

Dubber, Markus Dirk. 2005. *The police power: Patriarchy and the foundations of American government*. New York: Columbia University Press.

Durham, John G. L. 1912. *Lord Durham's report on the affairs of British North America*, ed. C. P. Lucas. Oxford: Clarendon Press.

Foucault, Michel. 1991. Governmentality. In *The Foucault effect: Studies in governmentality*, ed. G. Burchell, C. Graham, and P. Miller. Chicago: University of Chicago Press.

Freund, Ernst. 1904. *The police power: Public policy and constitutional rights*. Chicago: Callaghan & Company.

Harwood, Charles J., Jr. 2002. *Diego Garcia: The "criminal question" doctrine*. http://homepage.ntlworld.com/jksonc/5_DiegoGarcia.html.

Hodge v. The Queen 1883. 9 App Cas 117.

Hogg, Peter W. 1985. *Constitutional law of Canada*, 2d ed. Toronto: Carswell.

Hussain, Nasser. 2003. *The jurisprudence of emergency: Colonialism and the rule of law*. Ann Arbor: University of Michigan Press.

Ignatieff, Michael. 2004. Peace, order and good government: A foreign policy for Canada. OD Skelton Lecture, Department of Foreign Affairs and International Trade, Ottawa, March 12.

Ibralebbe v. The Queen 1964. [1964] AC 900.

Isin, Engin F. 1992. *Cities without citizens: Modernity of the city as corporation*. Montreal: Black Rose Books.

Karsten, Peter. 2003. *Between law and custom: "High" and "low" legal cultures in the lands of the British diaspora—the United States, Canada, Australia, and New Zealand, 1600–1900*. Cambridge, UK: Cambridge University Press.

Kennedy, W. M. 1922. *The constitution of Canada: An introduction to its development and law*. London: Oxford University Press.

Latour, Bruno. 1987. *Science in action: How to follow scientists and engineers*. Cambridge, MA: Harvard University Press.

———. 1993. *We have never been modern*. Cambridge, MA: Harvard University Press.

———. 2002. *La fabrique du droit: Une ethnologie du Conseil d'Etat*. Paris: La Découverte.

Liyanage v. The Queen 1967. 1 AC 259.

Local Prohibition Case 1896. [1896] AC 348.

Mahmoud, Tayyab. 2003. Exceptionalism as the norm. Paper presented at Sovereignty and the Right of Death Conference, Cleveland-Marshall College of Law, Cleveland, Ohio, October 2003.

Maitland, Frederick W. 2003. *State, trust, and corporation*, ed. D. Runciman and M. Ryan. Cambridge, UK: Cambridge University Press.

Nedelsky, Jennifer. 1981. Judicial conservatism in an age of innovation: Comparative perspectives on Canadian nuisance law, 1880–1930. In *Essays in the history of Canadian law*, ed. D. Flaherty. Toronto: University of Toronto Press.

Novak, William J. 1996. *The people's welfare: Law and regulation in nineteenth-century America*. Chapel Hill: University of North Carolina Press.

Panitch, Leo. 1977. *The Canadian state: Political economy and political power*. Toronto: University of Toronto Press.

S3856.indb 105 6/14/06 12:05:56 PM

Pasquino, Pasquale. 1991. Theatrum Politicum: The Genealogy of Capital—Police and the State of Prosperity. In *The Foucault effect: Studies in governmentality*, ed. G. Burchell, C. Graham, and P. Miller. Chicago: University of Chicago Press.

"The patriation of the Canadian Constitution: Not an auspicious occasion." 1982. *Saskatchewan Indian* 12, no. 4: 10. http://collections.ic.gc.ca/saskindian/a82may10.htm.

The Queen [Bancoult] v. Foreign and Commonwealth Office 2001. [2001] QB 1067.

Riel v. The Queen 1885. 10 App Cas 675.

Rose, Nikolas S. 1999. *Powers of freedom: Reframing political thought*. Cambridge, UK: Cambridge University Press.

Stevenson, Garth. 2004. Reservation and disallowance, *Constitutional keywords*. http://www.law.ualberta.ca/ccskeywords/reservation_dis.html.

Struthers, James. 1983. *No fault of their own: Unemployment and the Canadian welfare state 1914–1941*. Toronto: University of Toronto Press.

Tomkins, Adam. 2001. Magna Carta, crown and colonies. *Public Law*, Autumn 2001, 571–85.

Trudeau, Pierre Elliott. 1982. Patriation of constitution. Remarks at Proclamation Ceremony, Ottawa, April 17. http://northernblue.ca/canchan/cantext/speech3/1982trco.html.

Valverde. Mariana. 1998. *Diseases of the will: Alcohol and the dilemmas of freedom*. Cambridge, UK: Cambridge University Press.

———. 2003. Police science, British style: Pub licensing and knowledges of urban disorder. *Economy and Society* 32, no. 2: 234–53.

———. 2004. A postcolonial women's law? Domestic violence and the Ontario Liquor Board's "Indian list", 1950s–1980. *Feminist Studies* 30, no. 3: 566–88.

Winfat Enterprises v. Attorney General of Hong Kong 1985. [1985] AC 733.

S3856.indb 106 6/14/06 12:05:57 PM