INTRODUCTION:
THE PLACE OF JUSTICE

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INTRODUCTION

The essays collected in this book derive from a graduate student essay competition, entitled "The place of justice," which was cosponsored by the Law Commission of Canada, the Canadian Federation for the Humanities and Social Sciences and the Department of Justice Canada. These two nouns — place and justice — are both rich and suggestive. As we shall see, when conjoined, they take us to many sites — from Saskatchewan and Ontario to the courtroom and the street, as well as to racism and equality. However, place and justice are both conceptually slippery and ethically complex terms. Broadly speaking, the theme of this volume has emerged as a response to recent critical legal and social sciences scholarship that has both sought to contextualize the substantive and procedural aspects of law within society and space and, partially as a result of this "spatial turn," questioned and unsettled the equivalency drawn between law and justice in orthodox liberal thought. In this introductory section, we introduce the relationship between place and justice, and offer a few thoughts on the ways in which the essays variously engage this problematic aspect of justice. We also present a summary of the six papers contained in this collection that further situates them within the socio-legal literature relevant to the theoretical and substantive issues raised by the authors.

PLACE AND JUSTICE

Modern law is a social tradition that draws its credibility from its objective deliberation on the facts and the disinterested application of the rule of law. "Place," to the extent that it denotes the messiness of social life and lived contexts, thus appears set apart from the realm of law. Moreover, to the extent that place denotes space, there is an added dimension to this expulsion. For modern thought has long treated space in a particular way: "as the dead, the fixed, the undialectical, the immobile. Time on the contrary was richness, fecundity, life, dialectic" (Foucault 1980: 70). Human geography is one discipline that has responded to this problem by criticizing the marginalization of space and proposing the outlines of a critical geographical imagination. Edward Soja (1990), in particular, highlights the centrality

accorded the historical imagination in modern intellectual thought, both critical and liberal, and the consequent occlusion of a critical spatial sensibility. The political interests maintained in part by the dominant spatial order are obscured, (although perhaps buttressed) in situations where space is unexamined or where it is only thought of as neutral. Thus, in the call for the elaboration of our singular class, gender, and race-specific "geographical imaginations," geographers have proposed a sensitivity to space — for example, nature, landscape, and, quite simply, the role of space in everyday life — through which the practices and representations of the hegemonic spatial order may be critiqued and resisted by those within and beyond academe (Gregory 1994). Edward Said has examined the classic manifestation of the geographical imagination — the West's construction of the Orient (the Middle East) — as a means to reveal the politics inherent in *knowing* the Orient and to reconfigure the West's political and material consciousness of itself (Said 1979). Thinking critically about space is essential not simply for social scientists interested in unpacking spatial representations and practices and getting at the grounds of reality and knowledge, but also for jurists interested in the grounds of law (or the place of justice); jurists need to have an understanding of the law as a social artifact with political force. More generally, thinking critically about the way that space is produced and the way it can potentially be reconfigured and resisted is important for the politics of the everyday.

The concept of justice emerges in the present collection in at least two ways: as a synonym for law and the exercise of judicial authority, and in reference to an ethic of fairness, equality and redress. Frequently, the two combine: thus, for example, in Carmela Murdocca's paper, "National Responsibility and Systemic Racism in Criminal Sentencing," the workings of the legal system are said to produce unfair outcomes. "Place" is also given several meanings, and is used both metaphorically and materially. In most cases, it is used to refer rather generally to space, situation or context. So, for Fiona Kelly, in "Mis-placed Justice: Justice, Care and Reforming the "Best-Interests-of-the-Child" Principle in Canadian Child Custody and Access Law," the problem with liberal legalism is that it is insufficiently attuned to the messy lived realities of parenting. Similarly, for Kirsty Robertson, in "Whose Streets? Our Streets!: Protest, Place and Justice in Canadian Society," the street must be understood as a material site of shared and embodied experience of public demonstration. In Signa Daum Shanks' paper, "Who's the Best Aboriginal? An "Overlap" and Canadian Constitutionalism," place is used in the way that many geographers may recognize it — that is, as a "meaningful location" (Agnew 1987; Cresswell 2004). In this sense, the dense entanglements of human and nonhuman occupants in the traditional territories of the Dene and Inuit are "locales" (that is, material settings for social relations) imbued with a "sense of place," through which people develop subjective and emotional attachments.

Given the multiple meanings of place and justice, we do several distinct

and useful things when we bring these terms together. To enquire into the place of justice, firstly, we explore the often precarious and ambiguous ways in which place (whether as space, context "meaningful location") fits within the world of law. Secondly, we explore the impact of the concept of place on legal deliberation and processes. And finally, we consider what difference place makes to justice. In what follows, we will briefly elaborate on each of these in turn.

Kelly's argument that liberal legalism is predicated on a model of justice that is underpinned by formal equality, objectivity and individualism alerts us to the ways in which law has long defined itself as an essentially closed domain, that is both autonomous from, yet immensely important to, a realm that we can, for want of a better word, term "society." Thus, legal interpretation is understood as distinct from social processes, structured by its own logic and rationality, and governed by what Roberto Unger (1983: 320) terms formalism: a commitment to a method of legal justification that "can be clearly contrasted to open-ended disputes about the basic terms of social life, disputes that people call ideological, philosophical or visionary." Law is also imagined as different to the extent that it constitutes a "defensible scheme of human association" (Unger 1983: 322) distinct from extralegal social orderings. By virtue of its distinctive qualities, law is presented as an "autonomous instrument" (Griffiths 1979: 343) that can be brought to bear on society. In all cases, something called "law" is detached from something called "society."

The aspatiality of modern law has affected the institutional workings of law: according to some writers, the Western legal project is underwritten by an organized forgetting of local places, especially as they may affect core principles, such as the rule of law and legal rationality. Thus, as Berman (1983) reminds us, English common law sought to disembed itself from locality (cf. Blomley 1994: 67–105). When Blackstone (1838: 20) instructed the law teacher to consider his course as "a general map of the law, marking out the shape of the country, its connections and boundaries, its greater divisions and principal cities," he also counselled that "it is not his business to describe minutely the subordinate limits, or to fix the longitude and latitude of every inconsiderable hamlet." In so doing, he neatly expressed the tendency of law to erase spatial specificity and local difference in the name of an ordered and apparently coherent unity. In its very constitution, then, law appears to have an important, if negative, relation to space and place. This disembedding still seems very much with us, at least so far as formal legal discourse is concerned. Wes Pue (1990) goes so far as to argue that law is a profoundly anticontextual faith. "Its god is a decontextualised, highly abstracted and depersonalised rationality. Contexts of all sorts — gender, class, religious, cultural, political, historical or spatial — are the enemies of Law. In all its majesty Law is the antithesis of region, locality, place, community" (566).

Not surprisingly then, as an academic discipline, law has also not

always given place serious consideration. To the extent that legal writers have engaged with social and political questions, the tendency has been to think in historical terms (Gordon 1984). While this has been immensely productive, only recently have legal writers acknowledged the "spatial turn" within social thought: that is, an acknowledgement that space and place are more than disinterested surfaces upon which more important social processes unfold. Rather, they are themselves produced by, and constitutive of social relations, meanings and hierarchies (Lefebvre 1991). If we accept, as we must, that law is also "social" and "political," we ignore space and place at our peril. A growing body of scholarship — including this volume — has begun to map out this relationship: it is studied both in critical legal studies (Stychin 1998; Sarat, Douglas and Umphrey 2003) and in the social sciences (Blomley 1994; Blomley, Delaney and Ford 2001; Mitchell 2003; Razack 2002; Stychin 1998; Holder and Harrison 2003).

This body of work demonstrates that while law may be hostile to place, it is, at the same time, a deeply spatial enterprise. This is its paradox. Law makes space all the time. It draws boundaries, carves out territories, and imbues them with legal meaning. These spaces are more than secondary backdrops to law; they are a crucial materialization that makes law possible as a form of organized force and rule. Thus, jurisdiction and sovereignty rely upon a territorialization of law, producing a powerful set of spatializations that have subtle, yet important, effects for the ways in which law is put to work in the world (Ford 1999). Real property also relies upon, and is incomprehensible without, a territorial grid. While its geographies frequently go unremarked, they benefit from closer and more careful examination (Blomley 2003a). The concept of "overlap," described in this volume by Daum Shanks as instances where the Crown is faced with a conflict of interest in deciding the fate of competing claims made by First Nations, must be understood as an outcome of a legal mapping that imagines native treaty rights as finite and mutually exclusive, rather than fluid and negotiable. "Overlap," then, is a product of a colonial legal cartography rather than extant local relationships (cf. Borrows 1997).

But law does not only produce space: it is also often attentive to localized difference. Constitutional law, for example, can oscillate between centralization and a recognition of localized contextual conditions and the integrity of community-based forms of law making and interpretation (Brifault 1990). But law must also be conceived as a vital medium and resource for daily life. And given that, generally speaking, we live our lives out in particular places, that process of legal interpretation is localized in some interesting and important ways: this is noted by Robertson in her essay on street protest, when she argues that the embodied experience of protest — the being-together in public space — may generate alternative ethics and legalities. Similarly, in a fascinating series of studies in three U.S. towns, Carol Greenhouse, Barbara Yngvesson and David Engel (1994) reveal "the place of law and the court in the construction of community and hierarchy,"

noting the ways in which local as well as extra-local conceptions of law and rights are central to the ways in which community and place are constructed. Davina Cooper (1996) also explores the way in which an appeal to "place and belonging," as she puts it, is important to legal struggles in particular areas. Thus, an attempt by orthodox Jews in Barnet, London, to build an "eruv," allowing them to conform to Jewish legal obligations concerning activity on the Sabbath, became the spark for conflict. Cooper traces the way in which this struggle turned on legal and spatial understandings of "insiders'" versus "outsiders'" rights to place, and the construction of "Englishness." There are echoes here of Finkler's account, in her chapter, "Re-Placing (In) Justice: Disability-Related Facilities at the Ontario Municipal Board," of the "community integration" of the disabled in Ontario: in her discussion, she critiques the ways that dominant representations of the disabled may operate to frustrate their attempts to secure housing.

Western law is also integrally spatial to the extent that it relies upon a "constitutive outside" against which it defines itself. This entails the creation of boundaries that distinguish it from its negative image (Darian-Smith 1999; Vismann 1997). Peter Fitzpatrick (1992) documents the ways in which the law of the European Enlightenment reduced the world to European universality. Rather than a multiplicity of legal possibilities, difference was positioned relative to the West. European legal identity, he argues, entails the mapping of the colonial subject as purely negative, from which the positivity of Western law is derived (cf. Peake and Ray 2001; Bhandar 2004). Similarly, Murdocca underscores the ways in which Canadian law relies upon a particular construction of the benevolent and inclusive nation (implicitly set against other, less enlightened places) in its dealings with, and continued constitution of, racialized others.

Law, then, not only produces space: it is itself shaped by extra-legal conceptions of space, such as the nation. For example, Richard Ford (2003) considers the ways in which U.S. regulation of the Internet has been structured by prevailing characterizations of the Internet as a place. Ford worries that this has the effect of inappropriately importing conceptions of land, property and sovereignty, developed in the context of material space: "a metaphysics of space threatens to derail sound analysis and to smuggle in, as inevitable or logically compelled, background rules that should be subject to debate" (177). In a similar vein, in his chapter, "Putting Cyberspace in its Place: Law, the Internet and Spatial Metaphors," Michael S. Mopas explores the degree to which spatial metaphors have structured judicial understandings of the Internet.

However, we must be cautious about making metaphysical distinctions between place and justice, or space and law (Mitchell 2002). There is a tendency to rely implicitly upon a tripartite split, where "law" affects "space," both of which have a relation to something called "society." But on closer examination, the relationship may be a closer one: "'law' and 'geography' do not name discrete factors that shape some third pre-legal, aspatial entity

called society. Rather the legal and the spatial are, in significant ways, aspects of each other" (Blomley, Delaney and Ford 2001: xviii). Thus, legal orderings are simultaneously spatial orderings, and vice versa: the "owner" is to "land" as the "citizen" is to "state territory," and so on, such that the two are inseparable. A prison is neither a legal category nor a space, but both simultaneously — a "splice," if you will (Blomley 2003b). This is important when we remember that, unlike many other institutions, the power of law is such that "legal spaces," like Daum Shanks' "overlap," are produced on the ground, having real consequences for social relations and political possibilities.

The essays in this collection are not merely descriptive. To varying degrees, they point out that the place of justice can have ethical consequences. So, for example, Kelly criticizes prevailing conceptions of justice in relation to child-custody law for their detachment from an ethic of care that better accords with the lived and contextual realities of childrearing and parenting. Yet Murdocca condemns programs of restorative justice, which consciously embrace context and difference, as unjust. So what, then, *should* the place of justice be? We will not attempt an answer here, for, as noted above, place and justice are themselves ambivalent and multivalent terms. It is, of course, tempting to criticize law for its failure to recognize context and difference. Thus, Pue (1990) argues that an attention to place can challenge the authoritarian hierarchies of law within the courtroom, legal education and everyday life, and offer a more socially rooted, and thus humane, set of legal possibilities. Pue argues for the critical importance of what he terms "geo-jurisprudence," arguing that the contributions of space are simultaneously ethical, political and analytic. Selznick (2003) argues that if law is to be effective and responsive, it should (and, in fact, often does) maintain a "fidelity to context," responding to the particular norms and constraints of specific contexts. So, for example, rights can take on different meanings and intensity, depending on context. Rights associated with expression clearly vary according to who, or what, is engaged in communication, and within which settings, he notes. An attention to context, he argues, need not mean the abandonment of principles, such as fairness, freedom or empowerment. However, as Murdocca notes, law can be attentive to difference, yet still productive of hierarchy.

Further, law can produce places and spaces that can have political effects. The territory of the sovereign state is one such legal space. The assumed uniformity of rule within the sovereign territory, and the associated distinctions between inside and outside thus produced, can have problematic consequences (Whitaker 1999). Thus, the territorialization of the law in the container of the sovereign state makes possible and helps sustain a distinction between a domestic realm of politics, governed by procedural justice and a search for the common good, and an international realm (that is beyond the territory of any state), characterized by anarchy, force and disorder (Agnew and Corbridge 1995). This distinction can have insidious

effects, as exemplified in the history of colonialism in territories "beyond the line" of European public law (Schmitt 2003). Yet, the geographies inscribed in law that close down political possibilities can also be turned on their head. For example, Fran Klodawsky (2001) notes the ways in which the mismatch between international human rights codes, and the diminished realities of domestic social and economic rights protections, has been used by Canadian anti-poverty activists to powerful effect (cf. Pratt 2004).

However conceived, to ask what the place of justice is, and what it should be, is to ask a series of important and productive questions. As these essays reveal, the analytical lens of "place" can unsettle certain core conceptions of law, revealing the ways in which legal practice and interpretation frequently eschew the messy, fleshy contexts of social life. At the same time, however, law is revealed as produced by, and productive of, extra-legal concepts of space and place, including their attendant metaphors. Notably, the law plays a critical role in boundary making and nation building and, by extension, in the determination of insider/outsider status. The place of justice, then, is an uncertain, yet analytically and politically important one.

OVERVIEW OF CHAPTERS

In "'Whose Streets? Our Streets!': Protest, Place and Justice in Canadian Society," Robertson turns our attention to civic protest and investigates the abandonment of public space as the evacuation of the "place" of justice. Robertson questions the current sentiment of anti-globalization protesters that "the future of protest is in litigation," as opposed to the public space of the streets. In view of the chilling effects of the arrests of protest organizers and the potential threat to freedom of expression in anti-terrorism security legislation, such as the *Anti-Terrorism Act* (2001) (formerly Bill C-36), she laments the impending demise of public protest for two main reasons. First, the mass public demonstrations that characterized the meetings of the World Trade Organization at Seattle, Quebec City and Genoa have been instrumental in raising awareness and politicizing the issues surrounding global justice. More important for the purposes of her paper, however, is the latent potential for the embodied experience of protest to inspire an ethics commensurate with redressing global inequities. With the turn away from public space, Robertson fears the abandonment of a space generative of an anti-capitalist ethics. Instead of justice, the body, and unscripted experience being sites for negotiation and responsiveness in the ethical sphere, the retreat from the space of protest signals the stratification of law, visuality, and recorded experience in ways that do not challenge the current distribution of resources in our society.

With reference to post-structuralist thinkers on the body, affect and resistance (notably Brian Massumi, see References, Chapter 1), Robertson describes public protest as an effective methodology of change. In this analysis, public protest is cast as an interruption of the regime of visuality

that underpins capitalist society. Drawing from Michel Foucault, Massumi suggests that this regime operates at levels of institutions and the body throughout society. The knowledge produced and circulated therein frames a subjectivity through which the individual comes into being. The regime is so all-encompassing that any revolutionary action or thought finds itself always-already enclosed, appropriated and re-territorialized by its discourse. On the other hand, public protest evokes a broader affect or sensibility that excites hitherto uncharted points of the body/mind and provides opportunities for unscripted acts and thought along the edges of the regime of visuality. During a protest, the sights of the multitude and the police, the smell of tear gas, and the cacophony of drums, music, and chanting stimulate both a confusing disconnect from the everyday and a republican resonance with the other protesters. According to Massumi, this moment of disorientation holds the potential for individuals to form a transitory connectivity across the crowd. Robertson asserts that the prioritization of the rights of the individual and private property rights in the liberal framework of the law sets the terms of a discourse within which the claims of justice of anti-globalizers are incomprehensible. Thus, any retreat from street protest as a methodology of change would represent the truncating of the potential to think about global justice in ways beyond those delimited by conventional judicial and moral discourses. Robertson concludes by suggesting the role that art plays in providing a space for affect and a place for justice through an examination of *Templates for Activism*, a set of art projects that attempts to represent, via non-traditional means of representation, ideas about a range of topics of concern to feminists, such as rape, from outside the dominant frameworks of interpretation.

In "(Mis)Placed Justice: Justice, Care and Reforming the "Best-Interests-of-the-Child" Principle in Canadian Child Custody and Access Law," Kelly takes issue with the rhetoric of justice as an objective in Canadian family law and suggests that it needs to be re-aligned given the exigencies of family disputes. In an argument similar to that used by Robertson, Kelly suggests that justice is currently defined not by an attempt to resolve disputes and address inequality through a holistic appraisal of reality but rather by a liberal framework of rights and obligations that impedes the struggle for substantive equality. The liberal model of justice is underpinned by three assumptions that serve to provide predictability and efficiency in the law. It first assumes that the parties to any dispute are formally equal, irrespective of the actual power that either party holds. Second, the liberal model assumes that decisions can be made by neutral decision makers using objective criteria. Finally, it assumes that justice is best furthered in situations where it promotes each party's individual rights. According to Kelly, when this "ethic of justice" universalizes, abstracts, and depersonalizes legal disputes, a discourse is produced that prioritizes formal equality over substantive equality. This obfuscation of the messiness of reality is of critical importance in the instance of family law, as these disputes are invariably infused with

the complexities of relationships, child-care responsibilities, and everyday life. With reference to changes in other common law jurisdictions and feminist legal approaches, Kelly proposes a decision making process that could accommodate greater discretion and subjectivity in reconciling the intricacies of family disputes within the functional requirements of the law. Kelly concludes by looking to three legislative models that illustrate the ways an ethic of care could augment the static and unresponsive ethic of justice. The ethic of care is capable of addressing the actual relationships between parents and children, as well as the realities of the work of care-giving (as opposed to simply "caring for"), and dealing with child abuse and domestic violence.

Kelly focuses on the "best-interests-of-the-child" principle as the site from which to analyze the ethic of care. Recently, fathers' rights organizations have structured their legal arguments for child access and custody within a rights discourse. This rhetoric of formal equality has been well-received by the judicial system. Fathers' rights advocates' claims for equality have arguably resulted in a presumption in favour of shared parenting. It may be further asserted that a rights discourse promoting shared parenting as synonymous with the principle of the "best interests of the child" has emerged. As Kelly argues, the best interests of the child are paradoxically characterized by a decision that treats the parents equally, as opposed to a decision that looks to the rights and needs of the child. The ethic of care is proposed to correct the excessive reliance on formal equality in the pursuit of justice. Carol Gilligan (1982) has identified three elements of an ethic of care supportive of this objective: it arises out of the realities of relationships as opposed to rules; it is contextual; and, it is tied to material relationships, as opposed to abstract notions of the ideal family (i.e., white, middle-class, nuclear, heterosexual). Despite the deep roots of the best-interests-of-the-child principle in Canadian law, Kelly opines that it must be abandoned in order to promote the more nuanced decision making afforded by a "principle of care." Drafting such a broad concept into legislative form necessitates striking a balance between rules and discretion. While acknowledging the importance of the best-interests principle, Kelly concludes by reviewing three legislative formulations of the principle of care; she suggests that a more responsive and interactive justice would be the result.

Whereas Robertson and Kelly optimistically propose a broader notion of justice through the pursuit of an ethics outside the law, in "National Responsibility and Systemic Racism in Criminal Sentencing," Murdocca situates the epistemic position of the disenfranchised and describes how it functions to frustrate any expression beyond the liberal framework. Murdocca queries the efficacy of attempting to redress the systemic racism of the liberal state by considering discrimination as a factor in the sentencing of individuals. Even in circumstances of apparent reconciliation, Murdocca reveals that the voices of the subaltern are nevertheless gendered and racialized as they are re-mobilized by the state's mythology of nation-building.

In *R.* v. *Gladue* (1999) (see References, Chapter 3), the Supreme Court of Canada construed the alternative sentencing provisions of Section 718.2(e) of the *Criminal Code* (see References, Chapter 3) as follows: In respect of First Nations, it held that the court must consider the impact of discrimination in structuring the social conditions under which the accused committed their crime. In these circumstances, a traditional punitive sentence would potentially exacerbate the conditions of inequality and, therefore, fall short of the principles underpinning sentencing. Section 718.2(e) requires the court to place emphasis on the restorative or remedial possibilities of sentencing, thereby encouraging alternative sentencing, such as conditional sentences served in the community. Although Murdocca recognizes this provision as an attempt at restorative justice, she argues that the court can only recognize the legal personhood of the accused from a perspective that perpetuates the system of discrimination it aims to redress. In other words, while these narratives of racism serve to establish national culpability for discrimination, they also constitute a discourse of a racialized accused and the benevolent nation. Instead of achieving its goal of substantive equality, as Murdocca points out, the law enacts a project of nation-building that continues to rely on the narratives of gendered and racialized others. In this context, Murdocca seeks to explore "the embodied effects of law."

Murdocca's chapter contemplates whether the consideration of systemic discrimination through the optic of class, race, and gender in sentencing not only does not promote restorative justice, but also whether, through the requirements of identity, it insidiously buttresses discrimination. In order for the law to approximate its objectives of fairness and equality, it must examine the effects and meanings produced through its classificatory practices. To be sure, an accused is made comprehensible as a legal person deserving of alternative sentencing only when they present a narrative of race, gender or poverty that is understandable in a liberal rights framework. While this framework moves from formal toward substantial equality in the provision of alternative sentencing, racist and gendered narratives remain essential to the discourse. As Murdocca asserts with reference to the recent sentencing decision of the Ontario Superior Court of Justice in *R.* v. *Hamilton* (2003, see References Chapter 3), the desired national accountability resulting from the use of a restorative justice framework nevertheless remains limited as an effort by the state to redress systemic discrimination. The law continues to "function as a locus of racialization," as it both perpetuates dominant narratives of citizenship and leaves unquestioned the culpability of the mythology of the state in producing discrimination. We are led to consider the limits of the capacity of the law in a democratic society to redress systemic discrimination.

In Lilith Finkler's chapter, "Re-Placing (In) Justice: Disability-Related Facilities at the Ontario Municipal Board," the resistance to planning applications for housing for the disabled is mapped and evaluated as an illustration of justice, which does not rest in the hands of the judiciary,

but lies in the hands of the public. Based on a textual analysis of thirty-two administrative decisions of the Ontario Municipal Board (OMB), the appellate body for planning decisions in Ontario, Finkler outlines the arguments raised by advocates of the disabled and by neighbours resistant to establishing residences for the disabled in their communities. Despite Not-In-My-Back-Yard (NIMBY) opposition to the siting of residences for the disabled, the OMB generally made its decisions in favour of the opposition, declining to approve all but four applications for disability-related housing and services. Finkler critiques the absence of the voices of the disabled and the rhetoric about their putatively broad supervisory requirements contained in the written reasons of the OMB as serving to further stereotypes about the disabled. This is in contrast to the findings of a review of OMB decisions in respect to places of worship: there the perspectives of worshippers were extensively cited in the decisions.

Finkler locates fifteen themes in her analysis of OMB decisions and she critiques their operative assumptions about the disabled. The most popular theme is community integration. The integration of the disabled into the community has faced its greatest challenge in a NIMBYism fuelled by a fear of declining property values. In North America, this fear is related to a strong stigma associated with the disabled, including the inaccurate belief that they present a physical danger to the community. While not one opponent opposed the integration in general of the disabled into communities, they all argued that the disabled not be integrated into *their* community. Another theme isolated by Finkler involves the decisions regarding *minimum separation distances* between group homes or similar types of community facilities. Because group homes are generally intended for use by the disabled, such by-laws effectively limit the number of disabled persons living in a particular neighbourhood. These "people zoning" regulations obfuscate the discriminatory treatment of the disabled in planning.

Finkler concludes by outlining the potential for human rights arguments in disputes with opponents to disability-related facilities. In *Deveau* v. *Toronto (City)* (2003) (see References OMB cases, Chapter 4), a decision involving minimum separation distances, the advocates for the disabled argued that disability was an analogous ground to the extensive list in the equality provision of the *Charter*, Section 15 (1982). However, the Chair of the OMB held that the minimum separation distances were based in sound city planning and, therefore, were not discriminatory. By drawing an analogy with homeless shelters as emergency facilities, the Chair was able to reframe residences for the disabled as a type of temporary accommodation that the city has a legitimate interest in controlling. This decision ignored the fact that homeless shelters, which are often used by disabled people, frequently house their residents for extended periods of time. Finkler cautions that moves to strengthen the OHRC (Ontario Human Rights Commission) provisions as a means to open the decisions of the ORB (Ontario Review Board) to greater appellate scrutiny may be ill-founded as the costs of litigation

render the appeal process an unlikely avenue for economically-disadvantaged groups, such as the disabled.

The discursive analysis of the metaphorical use of space as a means to conceptualize the Internet in Mopas' chapter, "Putting Cyberspace in its Place: Law, the Internet and Spatial Metaphors," sets it apart from the other works in this collection. A discourse has emerged that both describes and constitutes our socio-legal understanding of the World Wide Web (or the Internet) as territory. Although it is essentially a medium for the exchange of data, not unlike the telephone or snail mail, users of the Internet avail themselves of a decidedly spatial vocabulary: they operate (Netscape) Navigator software that permits them to "surf" the "information commons," "visiting" innumerable web pages, or constructing their own "home" page. Mopas traces the cultural phenomenon of thinking about the exchange of data on the Internet as "cyberspace" from its everyday usage to contemporary discussions in Canadian jurisprudence. Rather than take this metaphor for granted, he interrogates the social and legal implications that inhere in its assumptions. Specifically, he explores the ways that spatial metaphors have enabled the privatization of the Internet and posed significant jurisdictional issues before the courts.

The chapter begins with a historical account of the rise of the Internet and the concomitant emergence of geographic metaphors used to describe it. Mopas draws our attention to the ways that metaphor allows us to conceive of something complex in a familiar form. The horizontal, networked "packet-switching" materiality of the World Wide Web is reduced to a more user-friendly lexicon, as a "virtual reality" or "space." Subsequent to the opening-up of the Internet from its academic and military clientele to the general public, it was heralded as the "electronic equivalent of the Western Frontier; it was 'open, free, and replete with endless possibilities.'" Citing the work of Dan Hunter and Mark Lemley, Mopas draws our attention to the ways that spatial metaphors have furthered the commodification of the Internet.

While Mopas is quick to point out that the spatial metaphor does not go unexamined by the public, he nevertheless argues that metaphors also operate to socially construct technology. The establishment of a normative language, or knowledge, about society's relationship to technology enables policy makers, journalists, judges, and commercial actors to deploy meanings about the Internet that further their interests. More than just a shorthand for the technicalities of a system, metaphor plays a central role in a society's regime of signification and understanding. Mopas draws from Actor Network Theory (ANT), and the work of scholars such as Bruno Latour and Michel Callon to further elucidate the way that metaphors and technology perform in culture: he concludes that they should be seen less as self-evident achievements and more as both part of a network and as actors in that network. Following Marianna Valverde's work on incorporating ANT into legal theory, Mopas disassembles the ways that cyberspace is translated

into legal reasoning; instead of the law simply absorbing this knowledge, he observes the interactive and heterogeneous relationship between legal and extra-legal (technological) discourses.

Mopas documents the prevalence of the "cyberspace" metaphor in Canadian jurisprudence in order to assess its effects on legal thought. By conceptualizing the Internet as a physical environment, the courts have been willing to classify and enclose cyberspace. The spatial metaphor plays a critical role in the judicial determination of legal fora. If accessing a web site in a particular physical location is understood as being synonymous with publication at that location, the Internet presents the dilemma of exposing its users to the possibility of litigation from around the world. In this instance, the courts' departure from the spatial metaphor signals a sensitivity to the particularities of the Internet. In the decision of the U.S. District Court, *Zippo Manufacturing Co.* v. *Zippo Dot Com Inc*. (1997) (see References, Chapter 5), it was held that jurisdictional analyses should be based on a determination of whether the web site performs an active or passive role. In *Pro-C Ltd.* v. *Computer City*, a decision of the Ontario Superior Court, the approach of the American court was followed. Here, the court considered whether the website remains "out there" in cyberspace or whether there is "a connection established with a particular geographical entity… in the absence of other traditional indicia, for example a physical presence in the state" (2000, para. 117, see References, Chapter 5). The interactivity test was fashioned to clarify whether or not on-line material crosses international boundaries and, thus, whether personal jurisdiction over a non-resident can be established. Rather than being linguistic shorthand, metaphors are a form of knowledge which themselves affect how judges conceptualize property rights and on-line jurisdiction.

Finally, in "Who's the Best Aboriginal? An "Overlap" and Canadian Constitutionalism," Daum Shanks explores the challenges faced by Aboriginal peoples and the Crown in respect to overlapping claims to Aboriginal title, treaty and rights. As an emerging issue in Canadian Aboriginal Law, overlap has thus far received limited treatment in case law. Overlap involves the competing interests of at least two Aboriginal groups pursuing their rights as enshrined in the *Constitution Act* (1982), Section 35. An issue of overlap arises when legislation in favour of one Aboriginal group impinges on the title, treaty rights or activity of another. Since any resolution to a dispute would tend to favour one Aboriginal group over the other, overlap inevitably compromises the Crown's ability to execute its constitutional obligation to protect Aboriginal peoples. Daum Shanks uses the contemporary claims over the Beverly caribou herd along the boundary between the Dene of northern Saskatchewan and the Inuit in (southern) Nunavut as an illustrative place from which to define overlap, outline its historical and constitutional context, speculate on possible outcomes of litigation, and suggest alternative means of resolving overlap disputes. Instead of the territory of either being characterized by exclusive rights to the land, each

Aboriginal group holds a claim over the shifting movements of the main economic and cultural resource, the Beverly herd. However, the founding of Nunavut presents a challenge to this sharing of resources. In this case, the exclusion of the Dene from the land north of the sixtieth parallel, the northern boundary of Saskatchewan, was brought about with the establishment of Nunavut and the conferring of a "right to exclude" by the Federal government.

Daum Shanks explores the "place" of justice where a fluid Aboriginal right is challenged by the fixed constitutional classification of the territory of Nunavut. Daum Shanks locates three legal arguments available to the Dene in order to redress the trumping of their constitutionally entrenched rights by those of the Inuit. First, the performance of the Crown's fiduciary obligation to Aboriginals is analyzed in respect of the government's provision of the Indian Claims Commission (ICC) to address the dispute. Based on case-law, Daum Shanks argues that, although this non-judicial body owed some degree of fiduciary duty to the Dene, it failed in this regard. Second, in the signing of Aboriginal treaties with the Dene, Canada promised that their lifestyle would not change and was not limited to the metes and bounds of the treaties. When cast against the Crown's provision of the territory of Nunavut to the Inuit, we can see that the obligation to protect the patterns of Dene life has not been fulfilled. Finally, recent jurisprudence on Aboriginal rights affords the Dene a line of argument unavailable during the establishment of Nunavut in the 1990s. Rather than arguing for title to the land of the Beverly herd or for a right flowing from a treaty, it may be argued that the hunt is integral to the survival of the Dene and is thus deserving of constitutional status. Faced with the prospect of burgeoning overlap claims and the potential for burdensome litigation, Daum Shanks proposes a number of alternative means to resolving competing claims, such as the joint management of resources and the establishment of an independent tribunal capable of making legally binding decisions based upon traditional indigenous legal norms.

CONCLUSION

This volume focuses on the spatial turn in critical legal and social sciences scholarship. It seeks to problematize the separation of place and justice as analytically distinct categories. Not only is this separation seen as an act of hegemony; the concrete transactions between place and justice have been revealed as hotbeds for political struggle. While it is readily accepted that "justice" is a normatively complex category, capable of many conflicting meanings, "place" can easily appear as inert and pre-political — as something prior to law and justice. These essays alert us to the fact that place is itself produced, in part, through legal and political praxis. As such, place is not simply a backdrop to justice, but can equally be a crucial site — both metaphorically and practically — in which justice is produced, denied and

reconstituted: ultimately it becomes a site of struggle. These accounts of place and justice remind us that the law is always-already implicit in the dominant spatial order whether at the scale of the home, region, nation or globe. Thus, the "place" of justice, as a crucial space of law, demands careful and considered attention.

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