After this, Therefore, Because of This:
Refusing Settler Immunity & Abolishing Indigenous Criminality

by

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Abstract

According to Statistics Canada, in 2016/2017 Indigenous peoples accounted for 28% of admissions to provincial/territorial prisons and 27% for federal prisons, while representing only 4.1% of the Canadian adult population. The majority of analyses drawn from these statistics continue to follow a similar line of interpretation. They begin by pointing out a pattern between the racial make-up of Canadian society and its prison population. Conclusions are then drawn between 'over-representation' and racialization in Canada's prisons and tacit or overt condemnation of this system is offered. The predominant lack of acknowledgement or engagement, however, with the histories and contemporary relations of colonialism is not simply a matter of unintended ignorance or passive forgetfulness. These analyses reinforce dominant national narratives; (mis)represent Canadian governing practices and policies as fair and just embodiments of the democratic will of the people; and suspend the state's culpability in creating and maintaining a criminal (in)justice system that produces such an abhorrently racialized demographic. I counter these narratives by rooting my analysis of the Canadian prison system in its colonial legacy and ongoing settler-colonial project, which is undercut by a certain set of logics that require the obfuscation of Indigenous presence(s). This informs my contention that, contrary to popular belief, the prison system is in fact not broken, but continues to perform the exact function it was designed to perform in the first place: the ongoing dispossession of indigenous bodies and lands, as well as a suppression of their claims to sovereignty. Overall, I am to situate the state, rather than indigeneity, in its criminality, by showing how the universalism of Canada's sovereign ideal is constituted by the particularism in the presumptions it makes about its Self, a Self that depends on an impossible singularity.

Acknowledgments

While I am the only listed author of this thesis, writing a thesis is not a solo project. The words strung across these pages exist because of kinship. All my ideas, thoughts, and arguments have been shaped and reshaped by the people around me. I wouldn't have even arrived at the writing table in the first place had it not been for my supervisor, Catherine Kellogg, who saw an intellectual potential in me that directly contradicted all my previous experiences with the education system. It would also not have been possible without her unique pedagogy and attentive and patient instruction. She emulates all the characteristics of the professor I hope to be when I grow up.

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And, most importantly, to all those who have been imprisoned, are imprisoned now, and will be imprisoned in the future, for their resilience, their will power, and their capacity to not only exist but survive the most precarious environments. You have forced me to question everything I've ever known, and ultimately, have made this work absolutely essential.

If there is a future worthy of the name, your freedom is an imperative.

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1 INTRODUCTION: A SHARED TERRAIN

Jose Moreno-Ocampo knows how difficult his position is. "I'm a stateless prosecutor -- I have 100 states under my jurisdiction and zero policemen," he said when I visited him in The Hague in January. But he does not see his court as a token body. "No. No! Wrong!" he said, swinging his arms one Saturday afternoon as we strolled by The Hague's medieval prison. He recounted how he had explained the court to his 13-year-old son: "My son is studying the Spanish conquerors in Latin America. Yesterday he says to me, 'They killed 90 percent of the Indians, so today you'd put them in jail?' I said: 'Yes. Exactly. What happened to the native populations in the U.S. and Latin America could not happen today with the I.C.C. Absolutely. Absolutely. We are evolving. Humanity is not just sitting. There is a new concept. The history of human beings is war and violence; now we're saying this institution is here to prevent crimes against humanity.

- Rubin, "If Not Peace, Then Justice," *New York Times*

Prisons are haunted by the 'spirit of death'. Irrespective of the physical and material conditions of confinement or levels of security shaping the daily regime, the prison is an institution which deprives human needs and estranges people from their lifeworld. There is a constant presence of death in prison: civil death—death in law; social death—death of social relationships; and corporeal death—the literal death of the body.

- David Scott, *Haunted by the Presence of Death: Prisons, Abolitionism, and the Right to Life*

Intent on preventing the most powerful from getting away with "not wanting to share the earth with a diversity of others", the International Criminal Court (ICC) was created to hold perpetrators of political crimes accountable for their egregious acts of violence. As Jose Moreno-Ocampo expresses to his son in the epigraph, there is a new call to justice in the west[1] today, one that has been proudly distinguished from our[2] violent and unjust history. Unlike in the past, since the ICC was established, colonial bureaucrats would be charged for their crimes. Yet, I look around and see that this is not the case. Although there are no colonial bureaucrats quite literally

[1] Throughout this thesis I will be referring to the 'west' using a lowercase 'w.' This is a strategic choice that is meant to dehierarchize its presumed authority as the arbiter of the earth.
[2] In this case, I use 'our' to refer to those of European descent.

'raping and pillaging' indigenous peoples, there are new, more insidious, forms of violence and they continue to go equally unpunished. The indirect message I read in Moreno-Ocampo's son's question: "they killed 90 percent of the Indians, so today you'd put them in jail?" – points to something much more sinister. Indigenous peoples continue to be colonized. To distinguish just practices used during the colonial period from those employed following the ICC is to draw a distinction without a difference – instead of being killed indigenous peoples are now eradicated through mass incarceration. The object remains the same; only the method has changed.

Today, state violence might hide, but it hides in plain sight. Locating and exposing these insidious practices of violence requires asking after their condition of possibility; their systems of legitimacy, which is where the law comes into view. Law legitimizes state violence through its capacity to neutralize[3], disavow, and occasionally, overcome violence. And, yet, as I will show throughout this thesis, violence is paradoxically the condition of possibility for the law's own legitimation. I contend that the intersection of violence and law– what Walter Benjamin once termed law-making violence and law-preserving violence[4] – is, and always has been, the primary means by which a settler colonial country such as Canada upholds and (re)produces its statehood.

Both 'law-making violence' and 'law-preserving violence' are necessary components in the configuration of state sovereignty. Law-making violence hides behind law-preserving violence, and vice-versa. More specifically, the violence required to establish a place like Canada masks

[3] I use the term 'neutral' and/or 'neutralize' describe how state practices are made to appear as if they are neither good nor bad. Neutral state practices are, or neutralized violence, can be understood as disinterested.
[4] The establishment of colonial borders through war, and subsequent implementation of property, through dispossession are examples of "law-making violence." Comparatively, the use of police force and subsequent reliance on the penal punishment, are examples of "law-preserving violence." For more see Walter Benjamin's *Critique of Violence.*

itself behind its politics of recognition, truth and reconciliation commission, and 'inclusionary' practices of multiculturalism, all of which contribute to the (mis)conception that in Canada today, we have largely overcome violence. To maintain this illusion, it is imperative that the ongoing violence of Canadian settlement be neutralized, and/or disavowed. As I will show, this is done through the law's presupposed legitimacy and universal validity.

1.1 SETTING THE STAGE

According to a Canadian 2017/2018 report from the Office of the Correctional Investigator General:

> In the ten-year period between March 2009 and March 2018, the Indigenous inmate population increased by 42.8% compared to a less than 1% overall growth during the same period. As of March 31, 2018, Indigenous inmates represented 28% of the total federal in-custody population while comprising just 4.3% of the Canadian population. The situation continues to worsen for Indigenous women. Over the last ten years, the number of Indigenous federally sentenced women increased by 60%, growing from 168 in March 2009 to 270 in March 2018. At the end of the reporting period, 40% of incarcerated women in Canada were of Indigenous ancestry[5].

Common explanations for the growing number of Indigenous prisoners housed across Canada cite socio-economic inequality and other problems of social stratification as the root cause. But the numbers just don't add up. While Indigenous folks are more marginalized than their non-indigenous counterparts, for many reasons that all have to do with Canada's colonial legacy, they are also more likely to be put in prison for the same behaviours that non-indigenous peoples also engage in[6]. This is indicative of a disparity in imprisonment practices; one that is connected to

[5] Office of the Correctional Investigator. *Annual Report of the Correctional Investigator 2017/2018,* 2018, https://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20172018-eng.aspx#s4

[6] For more then two decades, Canada's *overall* prison population has been in decline and yet, in only the last decade the population of Indigenous prisoners has increased 8%. Compared to their non-indigenous counterparts, indigenous peoples are also more often criminalized and imprisoned for acts linked to poverty, access to education

the country's sovereignty deficit, which I use to describe the paradoxical nature of Canada's unilateral assertion of sovereignty in the face of Indigenous peoples' pre-existing sovereignty over Turtle Island[7]. Over the course of this thesis, I explore and explain this sovereignty deficit, to expose the (settler)colonial nature of Canada's political and juridical structures. My intent is to question some of our most taken-for-granted beliefs about violence, the state, and its legal systems.

Laws exist and subsequently state sovereignty exists because the majority of people keep believing in them and their ethico-judicial authority. Belief is integral to these state practices. It is what gives them ongoing legitimacy; a legitimacy that stems from establishing a necessary relationship between justness and law. To do this, law must be conflated with what is "right", a conflation that relies on there being a consensus around "Truth." And, establishing a consensus around "Truth", especially in the (settler)colonial context, is dependent on the obfuscation of any conflicting understandings of what is True.

Indigenous peoples and their ways of being and knowing have always, since before Canada's inception, interrupted this consensus around 'Truth.' This is manifested in what is known as the "Indigenous problem," which Canada has sought to deal with through the rule of law[8]. Because when the law is conflated with what is 'right', not only is the state able to establish consensus around truth, it is also able to ensure that any legal response to the 'indigenous problem' – no

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and employment opportunities, substance abuse, and mental health concerns, to name a few. They are also more likely to be subject to some of the most restrictive methods of punishment while in prison.

[7] I elaborate more on Canada's sovereignty deficit in part two. Also see Richard Stacey's article (2018) "Honour in Sovereignty: Can Crown Consultation with Indigenous Peoples Erase Canada's Sovereignty Deficit?" for more on the sovereignty deficit.

[8] See chapter one, section two, where I elaborate on the rule of law as a necessary component of the settler colonial project which operates through the 'cultural politics of representation' to achieve a very obvious white majority population.

matter how violent - appears universal and, correspondingly, neutral, *as if* violence and the law could exist outside of the very structures it proports to legitimate[9].

The language of legitimacy and the so-called universal validity of laws "serves to blind us to the dynamic of violence at work in the state[10]." As Zeynep Direk writes: "we fail to reflect on these functions of violence because we are obstructed by the following dogma: Just ends can be attained by justified means, justified means used for just ends[11]." Violent legal apparatuses are made to appear *as if* they are addressing something that comes from the outside; always-already made to appear *as if* they are a response to an external 'Other' who poses a direct threat to the country's supposed national interest.

However, as I show in the course of this thesis, violence does not come after the fact. It is not only instantiated to 'protect' and 'preserve' systems and structures, it is also necessary to "institute law by positing legal ends" and "justify the means that serve to institute and conserve the law[12]" in the first place. In this way, violence originates internally, a priori, in the very fabric of the sovereign nation-state.

Violence founds a state. It presupposes a *particular* 'we' and then calls it into action. The colonial violence necessary to establish a place like Canada is evidence of this. And, when the state's more explicit genocidal practices were no longer possible new methods of control, domination, and elimination were instantiated in law to maintain sovereign legitimacy. At present, Canada's overreliance on the carceral system, which is used to explicitly target (control),

[9] Here I am referring to how laws, although many were created to specifically target indigenous peoples, are made to appear as if they were universally accepted by all Canadian citizens, and equally applied to all citizens in a way that is neutral rather than self-interested.
[10] Zeynep Direk. "Law, Justice, and Politics: Derrida on Deconstruction and Democracy to Come." CR: *The New Centennial Review, 14* no. 2 (2014), 111 – 126.
[11] Zeynep. "Law, Justice, and Politics", 113.
[12] Zeynep. "Law, Justice, and Politics", 117 – 118.

criminalize (dominate), and imprison (eliminate) Indigenous peoples, is an example of these new genocidal practices. Indigenous criminalization is the means by which Canada secures a consensus around 'Truth,' and, subsequently, maintains legitimate sovereignty in the face of the First Nations competing claims to sovereignty.

I begin, then, from the counter-intuitive perspective that the prison system in Canada is *not* broken. In fact, I contend that Canada's prison system has and continues to perform *exactly* the function it was designed to perform in the first place: the ongoing colonial dispossession of Indigenous bodies and lands and suppression of their claims to sovereignty and/or self-determination. While this might seem to be an overstatement of facts, this argument originates in the very facts themselves.

My project proceeds as follows: First, I explore the legal practices used to colonize the 'New World', beginning in the sixteenth century, and expose some of the underlying and taken-for-granted epistemic/discursive strategies established to legitimate these practices. Second, using this colonial legacy as my guide, I zoom in on the context of Canada and examine its legal history and ongoing settler colonial project. Third, I argue that the Canadian government has always, and continues to, rely on the criminal (in)justice system as a means by which it secures its legitimacy as a democratically sovereign nation-state with a unified body politic. Finally, I expose the sovereignty deficit at the heart of the Canadian nation-state in order to link this deficit to the so-called "over-representation" of Indigenous peoples that the country strategically places behind its bars.

Overall, I am interested in outlining the way sovereign violence continues to operate as an integral and necessary component of the 'contemporary' nation-state. While simultaneously exposing *how*, and highlighting *why*, this violence is necessarily and actively denied and

disavowed in the settler-colonial context. My analysis, then, is not interested in seeking a remedy, a solution, to the 'problem of incarceration,' rather it seeks to uncover and undo the point of origin of the prison system itself.

And while this might sound tiredly Foucauldian, I do not mean my analysis of the origin will proceed *only* in the archaeological sense. Although it is crucial to consider the prison project from a historical vantage point, it is not enough to simply reveal its origin. In the interest of not only revealing the origin of the carceral system, my project is to track the logic of the colonial legal tradition with the aim of, on the one hand, exposing its structures (its recursive and tautological logic), especially as this pertains to violence and the law; and, on the other hand, I seek to break down, uncover and undo this scaffolding, and the structures and systems that are informed by its logic. Ultimately, I seek to uncover and undo the *origin* itself, in order to complicate and clarify the utility of criminality in the settler colonial context, as well as contribute to the future of abolitionist discourse.

1.2 DEFINING THE TERMS [OF THE CONVERSATION]:

Before beginning, I will clarify a few crucial terms:

1.2.1 State Sovereignty

I situate state sovereignty in its Judeo-Christian roots, which arguably continues to hold a dominant position today, despite the longstanding process of secularization that has defined the modern period[13]. I contend that the absolute sovereign power of the nation-state follows a similar

[13] The position once assumed by a sovereign God has simply been replaced by the unquestionable domain of the sovereign state. For more see *The Concept of the Political,* by Carl Schmitt; *The Death Penalty: Volume 1 & The*

logic to the logic of the sovereign God[14]. Yet, this does not mean that state sovereignty is a stable, "already settled question[15]." Although I define state sovereignty as the unilateral authority over a given territory, I do so to point to the myth of sovereignty. Following in the footsteps of Cynthia Weber's seminal work *Simulating Sovereignty,* I approach state sovereignty in its (mis)denoted ontological status – as a state of being – paying particular attention to the 'doingness' of this ontological status; with the political practices required to stabilize the concept in the first place[16].

1.2.2 Sovereignty & self-determination

I use the terms sovereignty and/or self-determination recognizing that indigenous practices of sovereignty and/or self-determination are not unanimous across the globe, nor are they identical within a given country. In Canada, there are many different theories and practices of sovereignty and/or self-determination. For example, Leanne Simpson, a Nishnaabeg scholar and activist, thinks and lives sovereignty through *Kina Gchi Nishnaabeg-ogamig*, which she defines in English as "an ecology of intimacy[17]." Kina Gchi Nishnaabeg-ogamig, Simpson explains, "is connectivity based on the sanctity of the land […] a relationship based on deep reciprocity, respect, no-interference, self-determination and freedom[18]."

Beast and the Sovereign: Vol 1, where Jacques Derrida, informed by Carl Schmitt's notion of the sovereign as he who decides on the exceptional case, links absolute sovereignty to the absolute power of God.

[14] My understanding of sovereignty as similar to God is not an attempt to ignore or erase the numerous forms of power that are diffused in the body politic, as Foucault and others (see Brenna Bhandar's (2011) "The Conceit of Sovereignty", for example), show in their work. Instead, I link the logics of state sovereignty to the logics of the sovereign God, in an attempt to draw attention to both a unilateral sovereign authority as well as to the multiple and conflicting forms of power that make up a national sovereign imaginary.

[15] Weber, Cynthia. *Simulating Sovereignty.* (Cambridge University Press, 1995), 3.

[16] Weber, Cynthia. *Simulating Sovereignty,* 3.

[17] Simpson, Leanne. "I am not a nation-state," n.d. https://www.leannesimpson.ca/writings/i-am-not-a-nation-state.

[18] Simpson, Leanne. "I am not a nation-state."

Comparatively, the *Haudenosaunee* confederacy, which is a covenant between multiple pre-contact indigenous nations[19] that have survived settlement and maintain sovereign nationhood today in the United States and Canada informs Mohawk scholar and activist Audra Simpson's writings and practices of sovereignty and/or self-determination. The Mohawks of Kahnawke, Simpson writes, "share a history of participation in the Confederacy and use this experience to construct and maintain their collective identity as a distinct people within the larger political and social geographies of Canada and the US." According to Simpson, Mohawk sovereignty is a process, not an objective; it is an ongoing experience "shaped from social interactions, sensorial deposits, as well as [the] personal and collective desires" of the Mohawk people. One that cannot be separated from past and present external interactions with the 'state', or past and present internal interactions between Mohawk peoples. Subsequently, while I recognize the limits of using sovereignty and/or self-determination as general descriptors for a multitude of different practices, I use them cognizant of all these differences.

1.2.3 Indigenous

Similarly, it is important to highlight the limits of the term Indigenous, which I use both in its lower-case incarnation – to refer to indigenous peoples in the global context – and in its upper-case incarnation – to refer to Indigenous peoples in Canada. Although the terms' capacity to encompass a wide variety of peoples and nations under one heading is what makes the term problematic: By mobilizing one heading to encompass so much diversity and difference, I am implicitly masking the diversity of interests that indigenous peoples have and thus I am always at

[19] The Haudenosaunee Confederacy is an agreement between indigenous nations, including Seneca, Cayuga, Oneida, Onondaga, and Mohawk. For more see Audra Simpsons' *Mohawk Interruptus;* or Taiaiake Alfred's *Wasa'se: indigenous pathways of action and freedom.*

risk of reducing indigenous claims to sovereignty and self-determination[20]. This is also why I have chosen it. Given the scope and focus of my argument, certain sacrifices were made to allow for more depth in other areas. I only wish to explore and deconstruct the practices and structures of colonialism and settler colonialism, which affect all indigenous peoples across the globe, albeit differently. So, despite the term's very real problems and limitations, I mobilize 'indigenous', most simply, as it relates to prior occupancy.

1.2.4 Settlement

Informed by Audra Simpson's description of 'settlement' in "Sovereignty, Sympathy, and Indigeneity," I use the term settlement to refer to [the] "imagined goal of massive demographic and bodily displacement of Indigenous peoples in what is now the United States and Canada and the replacement of those people with others, or the smooth move to a consent-based, multicultural, and liberal society that has settled all of its accounts and has taken, successfully, legally, and ethically the land that it occupies[21]." As I will show over the course of this thesis, the prison system/criminal (in)justice system is an integral part of securing permanent settlement in the settler colonial context.

1.2.5 Colonialism & settler colonialism

[20] For more on the limits of the term 'indigenous' see John Bern and Susan Dodds' chapter, "On the Plurality of Interests: Aboriginal Self-government and Land Rights"; Chris Anderson's lecture, 'Who is Indigenous,' at Western University; and Jeff Corntassel's article "Who Is Indigenous? 'Peoplehood' and Ethnonationalist Approaches to Rearticulating Indigenous Identity." John and Susan Dodds Bern, on the plurality of interests: Aboriginal self-government and Land Rights, in Duncan Ivison, Patt Patton and Will Sanders (eds), *Political Theory and the Rights of Indigenous peoples* (Cambridge: University of Cambridge Press, 2000).

[21] Simpson, Audra. "Sovereignty, Sympathy, and Indigeneity," *Ethnographies of U.S. Empire.* (Duke University Press, 2018), 72 - 89.

Informed by a growing body of work in settler colonial studies[22], the crucial distinction to be made between colonialism and settler colonialism has to do with the notion of permanent settlement. "Settler colonialism can be differentiated from what one might call exogenous colonialism in that the colonizers arrive at a place ('discovering' it) and make it a permanent home (claiming it)[23]." Exogenous colonialism, on the other hand, is about discovery and extraction on foreign lands that would eventually be vacated. The first few centuries of European colonialism largely followed the logic of exogenous colonialization. Colonizers would 'discover' 'foreign' lands and seize power and control with the intention of extracting from their resources, engaging in commerce, and accumulating wealth. During the colonial period, "a relation of direct, political, social and cultural domination was established by the Europeans over the conquered of all continents[24]." While the distinction between the colonial project and the settler colonial project must be highlighted, it is also important to pay attention to how/why they are linked.

Formally, this Eurocentric colonial domination has been replaced by settler colonial projects: "America was the first stage of that defeat, and afterwards since the Second World War, Asia and Africa[25]." What was once an imposition from the outside – exogenous colonialism – has become an association of social interests between the dominant groups *within* countries – settler colonialism. So, while new intersubjective constructions between 'racial', 'ethnic', 'national' groups are codified in contemporary society, the specific construction of power informing these constructs is a direct product of Eurocentric colonial domination. The power structures that were

[22] For more see Patrick Wolfe (2006); J. Kēhaulani Kauanui (2016); Eve Tuck and K. Wayne Yang (2014).
[23] Tuck, Eve., & Yang, K. Wayne. "R-Words: Refusing Research" in D. Paris and M.T. Winn (Eds.) *Humanizing Research: Decolonizing Qualitative Inquiry with youth and Communities.* (Thousand Oakes, CA: Sage Publications, 2014).
[24] Quijano, Anibal. "Coloniality and Modernity/Rationality." *Cultural Studies 21, no. 2-3 (2007): 168-178.*
[25] Quijano, Anibal. "Coloniality and Modernity/Rationality," *168-178.*

established more than 500 years ago continue to directly inform the formation of our societies today. By intermingling the terms colonialism and settler colonialism I point to both how they are linked as well as distinct concepts.

1.3 CONTEXT: INDIGENEITY AND INCARCERATION:

While I focus almost explicitly on the way the prison system functions as a means of control over indigenous bodies and lands, this is not because Indigenous peoples are the only ones being affected by the criminal (in)justice system in Canada. African Canadians, for example, experience similar discrepancies in incarceration rates, making up approximately 8.6% of the federal prison population, despite only accounting for 3% of Canada's overall population[26]. The intersections of race, gender, class, ability, sexuality and so on all have a significant impact on the likelihood that a person ends up behind bars. These intersections are not beyond the scope of what I am presenting to you here. They are its direct result. So, while this project does not focus on the particulars of incarcerating other racialized/marginalized subjects, my aim is to provide a context from which to understand the phenomenon of incarceration.

For too long now, discourses into prisons have been advancing the claim that if we fix problems of social stratification and/or drug use/abuse, and curb the imprisonment of 'non-violent' offenders, we will ultimately be able to 'fix' mass incarceration. While any effort to minimize the amount of people being put behind bars is a worthy endeavor, these discursive strategies end up explaining away how and why racialized and gendered violence is inherent to the carceral

[26] Morgan, Anthony. "Black Canadians and the justice system." *Policy Options,* 2018, https://policyoptions.irpp.org/magazines/may-2018/black-canadians-justice-system/

state[27]. As a result, they reproduce the very thing they seek to criticize. If what disappears is merely a certain kind of criminality, this does not mean that the legal or state scaffolding that *produces* and *legitimizes* the very existence of criminality has also been undermined. Efforts to 'fix a broken system' have mistaken the very function of the system itself as broken and seek remedy for a symptom, while failing to identify its cause.

My choice, then, to focus specifically on the carceral system as it pertains to indigeneity is a strategic choice. I focus my analysis on Indigenous incarceration because the prison system and its partner in crime, the criminal (in)justice system, cannot be understood separate from the state; and the state cannot be understood separate from the colonization of indigenous peoples bodies and lands, as well as the suppression of their claims to sovereignty. We must then acknowledge and explore these complex and intersecting dynamics before light can be shed on why it is the case that the intersections of race, gender, class, ability, sexuality and so on have such a significant impact on a person's likelihood of ending up behind bars.

1.4 SITUATING THE SELF:

Positions matter; my position matters. As Jeff Corntassel explains, "[h]ow you situate yourself and your level of awareness about colonial occupations of Indigenous homelands brings new responsibilities to the forefront. Awareness of colonial realities requires us to go beyond a simple acknowledgement of the Indigenous nations and peoples of the territories you are visiting. It is a

[27] Informed by Dylan Rodriguez's work on carcerality, I use the term 'carceral state' and 'carceral system' over the course of this thesis to refer to both the statecraft that institutionalizes various forms of human capture and the totalization of state sanctioned and extrastate relations of racial-colonial-gendered dominance.

call for justice […] a responsibility-based ethic of truth telling.[28]" No matter how aware I might be of the history and ongoing project of Indigenous dispossession across Turtle Island, I am still a white settler, a colonizer. This situating is not meant to signal any innocence; I am not innocent.

I situate myself within a particular epistemic and political-juridical tradition I am connected to. This episteme, and its metaphysical and legal scaffolding shape how I came into being and continue to become, but it is also a violent episteme that has always been complicit in the ongoing processes of dispossession and denial of Indigenous nations and lives. So, while it may be that I do not wish to live in a world that requires the un-thinking of Indigenous existence, I also participate every day in this un-thinking process. The formation of my identity, especially my identity as a scholar - what I can know, and how I can know it - is constrained by this epistemic tradition, no matter how much I disagree with it, or wish to resist it.

My position, then, informs what strategy I can take. In an attempt to address and unsettle this violent episteme that informs the settler colonial logics that sustain the prison project, I work from the inside, out. I must uncover and unsettle the scaffolding that make up my own history as I simultaneously uncover and unsettle the scaffolding that informs the logic of the contemporary nation state. In a sense, or, maybe, completely lacking any sense, my project is just as much dedicated to decolonizing the ontological and epistemic tradition that serves the prison system in Canada, as it is committed to decolonizing my own mind. All in all, this is one small contribution to the abolitionist struggle *for* and *of* freedom; to a new ethos of thought that will not rest until

[28] Corntassel, Jeff, Snelgrove, Corey, and Rita Kaur Dhamoon. "Unsettling settler colonialism: The discourse and politics of settlers, and solidarity with Indigenous nation," *Decolonization: Indigeneity, Education & Society.* 3 no. 2 (2014): 1-32.

the carceral system, in all its configurations, is abolished. Until then, there can be no such thing as *decolonization*[29].

2 THE FALLACY OF HISTORY

Unbelief does not destroy either natural law or human law; but ownership and dominion are based either on natural law or human law; therefore they are not destroyed by want of faith.

- Francisco de Vitoria

The story of 'modernity' is of course a story of colonization; and while the means used by Europeans to colonize and settle all over the world, are, and always have been, religious in nature, from the sixteenth century onwards, colonial authority began to incorporate science and law into their religious structures; they moved from the heavenly to the earthly. As more and more Europeans rejected the *authority*[30] of the church and crown, the legitimacy of their structures, institutions, and practices were put into question. Colonizers were confronted with the problem of how they could reasonably and legitimately hold any title in the land of the Americas[31]. No longer could a governing body be justified *only* by and through the power of God; no longer could colonial conquest and the establishment of white imperialism be justified and advanced *only* on religious terms[32]. An alternative grammar was thus required; one that was

[29] Decolonization is taken up in many different ways. Calls to 'decolonize the university' or 'decolonize methods' are invested in the impossible project of 'Indigenizing' inherently colonial institutions. Comparatively, I understand decolonization, informed by Eve Tuck and K Wayne Yang, as separate from and outside of, settler structures and institutions. It is not about 'indigenizing' settler institutions, or reforming the legal paradigm. Decolonization wants something different than those calls for justice. Decolonization is fundamentally about the repatriation of Indigenous land and life at the expense of settler claims to sovereignty.

[30] I italicize 'authority' to emphasize its significance. It was not that Europeans were rejecting religion all together, religion continued to fundamentally shape their reality, but they were rejecting the authority of the Church.

[31] Ashley J. Bohrer. "Color-blind Racism in Early Modernity," *The Journal of Speculative Philosophy, 32* no. 3 (2018): 391.

[32] Religion continued to be part and parcel to colonial structures of authority and rights of property. As Manuel Jimenez Fonseca points out, the European understanding of the process of formation of private property rights

grounded in reason, justice, and law[33], and this alternative grammar – what it is, how it was created, and its ongoing impact on the political realm today – is my focus in this section.

At the time, Francisco de Vitoria, a Spanish jurist at the School of Salamanca, was grappling with these problems and he played a pivotal role in creating this alternative grammar. While European theorists have always been involved in justifying and legitimating the theft and persecution of indigenous peoples, what is particularly significant with the case of Vitoria, as Ashley J. Bohrer points out, is his philosophical strategy. Specifically, the legal doctrine Vitoria constructed to justify the continued enslavement and dispossession of indigenous peoples across Latin America was informed by his belief in universal humanism[34].

In her article "Color-Blind Racism in Early Modernity", Bohrer outlines how Vitoria's rejection of the authority of church and crown over the Americas radically shifted the colonial trajectory. At the time, the main rationale used to justify indigenous dispossession and enslavement was that indigenous peoples were not human, and so fell outside of natural law[35]. Comparatively, Vitoria argued against these justifications for conquest; he rejected the claims of church and imperial crown to ownership of the colonies; and defended both the humanity and property rights of the

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directly referenced Genesis 1: "God had conferred the world to humanity as a whole to prove the original regime of common property, [which stated that] under natural law, things remained common during the 'natural state', the historical period that span from the creation to the original sin. After the fall and due to the fact that natural law did not prescribe but just recommended common ownership, things were privately divided through human law and by consensus" (Fonseca, 2017, pp. 130).

[33] As Fonseca further highlights, after the 'fall', it was religiously consistent to use human law, instead of divine natural law, to justify privatization. What was held in common [the world's natural resources] before the fall, was divided up and privatized after the fall, all under the name of *jus gentium.*

[34] The Spanish conquest of the Americas was taking place during a period of reform when humanist scholars within the Church were increasingly influenced by the natural law theories of theologians such as St. Thomas Aquinas. Although the terminology of universal humanism was not used at the time, I use it here to refer to Vitoria's philosophical and ethical stance, which emphasized the equal value and agency of human beings, across differences.

[35] Nancy E. van Deusen. *Global Indios: The Indigenous Struggle for Justice in Sixteenth Century Spain.* (Duke University Press, 2015).

indigenous peoples of the Americas[36]. However, Vitoria did not advocate for colonial conquest to stop. He did not change the conversation; he simply changed the *terms* of the conversation.

As Andrew Fitzmaurice explains, Vitoria had to address "whether the peoples of the Americas had been justly dispossessed of their property, whether they had justly been enslaved and killed, and whether their societies had been justly destroyed[37]." In addressing the first problem, he turned to the law of nations (*jus gentium),* which states that "goods which belong to no owner pass to the occupier[38]." One could not claim discovery under *jus gentium* if the land being claimed had already been discovered by another people. According to Vitoria, this was in fact the case in Latin America. He was thus forced to confront, in a way that did not rely on the authority of the church, whether claims over the public and private dominions of the Americas could be considered just.

2.1 A REMEDY SEEKING A RIGHT

The exercise of jurisdiction over indigenous crime performs the myth of settler sovereignty over and over.

- Lisa Ford

Vitoria explored a number of legal bases intent on constructing an argument that could legitimize European presence. This led to the promulgation of the New Laws issued by Charles V in 1542, regarded as the first human rights laws in the 'New World' that dealt specifically with the status and treatment of indigenous peoples across Latin America[39]. The New Laws stated that

[36] Vitoria, Francisco. *Vitoria: Political Writings.* Eds., Anthony Pagden & Jeremy Lawrence. (Cambridge University Press, 1991).
[37] Fitzmaurice, Andrew. *Sovereignty, Property, and Empire, 1500-2000.* (Cambridge University Press, 2014), 44.
[38] Fitzmaurice. *Sovereignty, Property, and Empire,*44.
[39] Nancy E. van Deusen. *Global Indios,*

indigenous peoples were free persons[40] and were thus subject to the same rights and obligations as any other subject of the crown. The main points were: an end to indigenous enslavement (although there were exceptions[41]); an obligation for Governors to take care of and preserve indigenous life; an end to the 'distribution' of peoples and lands to European settlers without legal recourse; and the subjection of indigenous peoples and lands to the Crown.

The problem then became a question of whether indigenous peoples had been justly enslaved and killed, and their societies destroyed. According to Vitoria and the New Laws, both Europeans and indigenous peoples were considered human, which meant that they were both equally capable of reason. What this conveniently insinuated was that indigenous peoples were equally expected to conduct themselves in accordance with the law of nature, i.e., their rights to natural partnership and communication. Indigenous peoples, however, had resisted European invasion in Latin America, meaning they had failed to conduct themselves according to natural law. And since a just war, according to Vitoria's application of *jus gentium*, "could only have been fought on the grounds that there had been a violation of the Spaniards' natural law rights to natural partnership and communication[42]," he was able to conclude that the enslavement and murder of indigenous peoples, alongside the destruction of their societies was just. It could now be argued that it was, in fact necessary for the betterment of all (both European and indigenous peoples) in the long run.

[40] The problem with this was that you could only be free by European standards. Although indigenous peoples were not treated well before Vitoria's universal humanism, they were at least seen as different from Europeans, meaning there was an implicit recognition of indigenous life and culture in Latin America. Erasing this difference, Vitoria's universal humanism brought them all under the restricted identification of 'personhood' which really means: white European male. This will be further elaborated on in the context of Canada.

[41] Slave owners who had legal documentation to prove legitimate slave possession were allowed to keep their slaves after the New Laws were passed, and indigenous peoples in certain parts of Latin America continued to be enslaved well into the seventeenth century. See Nancy E. va Deusen's book *Global Indios: The Indigenous Struggle for Justice in Sixteenth Century,* for more on this history.

[42] Fitzmaurice. *Sovereignty, Property, and Empire,* 44 – 54.

On the surface the New Laws appeared progressive and humanitarian in nature, however, they mainly worked to obfuscate the asymmetrical power relations between European settlers and indigenous peoples as well as erase indigenous forms of being and knowing in the world. In this way, colonizers could operate under the guise that they were contributing to a more just, economically prosperous, equal, and sustainable society for all; while simultaneously conquering indigenous peoples, dispossessing them of their lands, extracting their resources, and destroying their ways of life.

While formulating the problem he wanted to resolve, Vitoria had already chosen the legal angle from which to look at the matter. This is tautological[43] logic at its finest. Let me elaborate. Vitoria's legal formulation had to somehow prove that colonial violence was necessarily *just* and not simply a matter of legal precedence. To do this, to establish a necessary relationship between 'justness' and 'law', a conflation between 'law' and 'right' was required. And, the only way to do that was to establish a consensus around 'truth.' As such, instead of inquiring into how indigenous peoples related to nature, and their possessions, or asking whether they already had legal regimes and political structures of their own, "Vitoria's query assumed from the outset that *dominium rerum* [private power over the material world] was the institutional arrangement that represented the way in which the inhabitants of Latin America related to their territories[44]."

By using the language of rights to establish a legal, political, and economic system that presumes the parity of both sides, the legal and philosophical strategies deployed at the time were premised

[43]Tautological reasoning is logic that uses the premise as the conclusion. Or, more precisely, the problem that it seeks to resolve, or the premise it uses to deduce its conclusion from, operates under the same pretense as the premise. For example: Vitoria's problem as to whether the conquest of indigenous peoples lands and bodies was just, presumed from the outset that it was just, and thus, while operating under the guise that it could in fact be unjust, sought to prove said justice, regardless.

[44] Bohrer. "Color-blind Racism in Early Modernity," 394.

on the matter-a-fact notion that indigenous peoples ought to reason in the same way that *European's* reasoned. Indeed, by advancing this ipso facto universalism, which assumes from the outset that there is only one 'right' and 'true' way of being and knowing in the world, the new colonial legal framework implicitly advanced the belief that "indigenous people, cultures, and ways of life [were] seen not only as expendable but as 'necessary' sacrifices on the altar of European expansion, colonization and capitalist development[45]." On the surface, what appeared to be the elaboration of a universal law that could be applied equally to both Europeans and the indigenous peoples of Latin America, actually only accounted for a particular self – that of the white man – and a particular way of life – that of the European settler. So, while Vitoria's legal, economic, and political philosophies did not explicitly express racial prejudice, the function and application of these philosophies resulted in the justification of racial and economic domination[46]

'Discovery' negated indigenous ways of life. This marked a pivotal moment in the discourse and project of colonization and modernity: "it became possible at once to speak in putatively universal terms while meaning something particular, while meaning some *people* in particular." Additionally, it situated the language of 'rights' at the center of European legal discourse. More specifically, while so-called 'rights' and 'freedoms' were given to indigenous peoples across the Americas to use, these 'rights' and 'freedoms' came from a specific vantage point – that of the colonizers - and remained in their control. Indeed, the construction of such a legal doctrine was

[45] Bohrer. "Color-blind Racism in Early Modernity," 394.
[46] Bohrer. "Color-blind Racism in Early Modernity," 392- 396.

used to propagate a stages view of history that purposefully placed indigenous peoples on a linear path from 'savagery' towards 'development' and 'modernity'[47].

The powers of the colonial period actively delegitimized other ways of life until their way of life could appear natural and authentic. From the sixteenth century onwards, the transfer of legal ideas, institutions, and technologies was unprecedented. European rule stretched across the world, gaining greater economic, cultural and political power the more homogenous of an entity it became. Ways of life considered distinct from the European way of life were washed away by the tides of 'civilization', 'development', and 'modernity.' It was through this transformation that a newly established juridical-political framework was able to cover up the violent epistemic and ontological erasure required to legitimately and absolutely dispossess indigenous peoples from their bodies and lands and establish itself as the universal standard[48].

The claiming of European universalism has always been about masking the reality of difference (difference in experience, history, and knowledge systems), while at the same time claiming to account for difference in order to establish a system of self-legitimation that over time appears to be natural, objective, and 'True'. The colonial project has, and continues to, rely on specific and tactful discursive apparatuses that obfuscate differences between races, cultures, and nations, all under the guise of equality and universality. As it is through the obscuring of power relations that colonial discourse successfully excludes dissenting discourse, while simultaneously legitimating the ontological violence these exclusions require. Further, by explicitly (and implicitly) rejecting

[47] The stages view of history influenced many 'modern' political theoretical texts – from Hegel to Constant – and has directly informed colonialism and settler-colonialism's so-called 'civilizing' mission and the central features of liberalism and multiculturalism.

[48] For more on dispossession and the recursive VS unilinear relations and logics between theft and property, see Robert Nichols (2017) "Theft is Property! The Recursive Logic of Dispossession"; Catherine Kellogg's (2017) "'You be my body for me': Dispossession in two valences";

alternative opinions, views, and representations, deeming them inauthentic, inaccurate, or irrelevant[49], together, these universalizing tactics are used to justify and legitimate sovereignty and statehood, and the legal apparatuses that are necessary to establish and maintain control.

The universalization of ontology and epistemology is part and parcel of the ongoing colonial project. By linking political freedom, for example, to a universal concept of human nature, indigenous peoples become comparatively the same as European settlers, despite being slightly less developed, and this puts them, and their ways of life, and forms of knowledge, on a linear path towards 'development' and 'modernity' (i.e., westernization). Only one discourse, that of the Europeans, was allowed and able to dominate[50]. And, those practices and people who differ from this universal colonial discourse[51], as Dipesh Chakrabarty puts it, are claimed to have 'not yet' arrived, 'not yet' reached full development, as "Europe remains the sovereign, theoretical subject of all histories[52]."

The dominant articulation of sovereignty, as it is recognized today, originated from this history. Beginning in the sixteenth century is justified, then, for the following reasons: it was the beginning of the establishment of the centralized sovereignty we see today; it marks a pivotal transition from the authority of religion to the authority of science and law; it began the process of establishing western ways of life as the universal standard by which all other forms of life must meet.

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[49] Nayar, Pramod K. *Colonial Voices: The Discourses of Empire.* (Chichester, West Sussex: Wiley-Blackwell, 2012).
[50]Nayar. *Colonial Voices: The Discourses of Empire.*
[51]I use colonial discourse here to refer to the context in which meaning itself is produced. Colonial discourse is produced about an object by an authority possessing the power to make assertions and judgements about this object.
[52] Chakrabarty, Dipesh. *Provincializing Europe: Postcolonial Thought and Historical Difference.* (Princeton, N.J.: Princeton University Press, 2000).

Establishing sovereignty and statehood is about more than just about physical conquest and recursive legal apparatuses. Something smaller and more insidious is also required. As Paul Berne Burow, Samara Brock and Michael R. Dove explain in their article "Indigeneity, Ontology, and Hybridity in Settler Colonialism", in order to manage and conceal differences "[s]ettler colonialism operates through a reworking of not just physical landscape but also the ontological landscape[53]." The 'discovery' of the 'New World', then, is also a story of the development of Europe, as the silent referent, in knowledge, *as such*, and this has played a major role in the management of racialized imperial/colonial relations[54] and the establishment of the nation-state as *the* global political order.

2.2 THE RECURSIVE LOGIC OF SETTLER LAW

For such settler sovereignties in the Pacific and the Americas, the frontier was not so much lawless as it was in need of law to seize sovereignty and jurisdiction from indigenous peoples and conscript their lands and nations into settler territoriality, an alchemy of empire that helped to conflate indigenous peoples with land to be violated, razed, and cultivated.

- Jodi A. Byrd

We are at a critical juncture, a historical moment that sends us into our inheritances to find sources and references for the struggle ahead.

- Francoise Verges

In the previous sections, I outlined Vitoria's formulation of his recursive legal doctrine in which a justification for a necessary outcome paradoxically precedes the law's implementation[55]. According to Vitoria's application of *jus gentium*, it was unjust to invade land that was already occupied; however, invasion would be considered *just if* indigenous communities failed to

[53] Burow, Paul Berne, Brock, Samara, and Dove, Michael R. "Unsettling the Land"," *Environment and Society: Advances in Research* 9, (2018): 57-74.
[54] Nayar. *Colonial Voices.*
[55] For more on recursive logic see Robert Nichols article "Theft is Property! The Recursive Logic of Dispossession."

cooperate with 'settler-invaders[56]'. Because of the legal and moral prohibition against 'invasion', the native was forced to *make way* for the settler, and even if they didn't, the law had been formulated in such a way as to justify invasion regardless. No matter the circumstance, invasion would be considered legally just; this is the fallacy of colonial and settler colonial law. Since the sixteenth century, the rule of law has been used, not only to force compliance from Indigenous communities, but also to provide the 'settler-invader' project with an air of legitimacy and universality, both legally and otherwise.

The primary purpose of the rule of law in the colonial and settler colonial context is to transform the colonized to conform with the colonizers, which is necessary for the law to become analogous with what is considered 'right' and 'just', all the while extracting indigenous labour, land, and resources. The rule of law is especially necessary in the case of 'settler' colonies[57] because 'settler' colonies operate through the cultural politics of representation, a term that Anna Johnston and Alan Lawson use to refer to the physical violence and representational erasure done to Indigenous communities by "settler-invaders [to achieve] a very obvious majority white population[58]." As Andrea Smith outlines:

> In Johnson v. M'Intosh (1823), the Supreme Court held that, while Indigenous people had a right to occupancy, they could not hold title to land on the basis of the doctrine of discovery. The European nation that "discovered" the land had the right to legal title. Native peoples were disqualified from being "discoverers" because they did not properly work: "The tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in

[56] Informed by Anna Johnston and Alan Lawson's use of the term in "Settler Colonies" (2000), I use 'settler-invaders' to emphasize the violence that the term 'settler' conceals.
[57] For more on the characteristics of settler colonialism see Patrick Wolfe's seminal work *Settler Colonialism and the Transformation of Anthropology* (1998); Anna Johnston and Alan Lawson's chapter "Settler Colonies" (2000); Lorenzo Veracini's book *Settler Colonialism (2010)* and *The Settler Colonial Present;*
[58] Johnston, Anna., & Lawson, Alan. "Settler Colonies." *A Companion to Postcolonial Studies.* Eds., Henry Schwarz & Sangeeta Ray. (Blackwell Publishing Ltd, 2000).

> possession of their country, was to leave the country a wilderness." As they did not work, Native peoples had the ontological status of things to be discovered – the status of nature[59].

Establishing 'whiteness[60]' as the only legitimate and authentic way of relating to the land they were [and continue to] occupy is part and parcel of the 'settler' project, a project that requires the literal and symbolic erasure of Indigenous peoples and their ways of life. In this way, Europe operates as a silent-referent in not only historical knowledge, but in all dominant articulations, categories and concepts, as well as institutions, past, present, and (possibly) future.

Jacqueline Lasky argues, through a reading of Antony Anghie, that "the west's fundamental sovereignty doctrine emerges through [Vitoria's] attempt to address the problem of cultural difference and the discursive production of a new framework of universal law to deal with the novel problems of encounter between two different cultural systems[61]." Vitoria had to not only create an entirely new jurisprudence to resolve the unique legal problems that indigenous presences posed to the colonial project in the 'New World.' He also had to erase the multitude of competing political, cultural, social interests that encompassed indigenous identities as these differences posed a fundamental threat to the project of absolute dominion.

To help facilitate this project, indigenous socio-political and cultural structures were made monolithic through a process of homogenization that purposefully erased any differences

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[59] Smith, Andrea. "The Colonialism That Is Settled and the Colonialism That Never Happened," *Decolonization: Indigeneity, Education & Society,* (2014), https://decolonization.wordpress.com/2014/06/20/the-colonialism-that-is-settled-and-the-colonialism-that-never-happened/

[60] Following many whiteness scholars, I advance the term 'white' and/or 'whiteness' to refer not to an absolute identity, per say, but to reference a contextually specific practice, a contradictory discursive form of consciousness and ignorance, a form of property and a position of power and status vis a vis racialized groups constructed through modernist discourses of so-called 'racial purity', 'moral authenticity', and legal entitlement to naturalize white ethnicity as an authoritative and neutral/unmarked norm.

[61] Lasky, Jacqueline. "Indigenism, Anarchism, Feminism: An Emerging Framework for Exploring Post-Imperial Futures," in Glen Coulthard, Jacqueline Lasky, Adam Lewis, and Vanessa Watts (Eds.). *Affinities: A Journal of Radical Theory, Culture, and Action, Special Issue on Anarch@Indigenism* 5 no. 1 (2011): 3-36.

between indigenous identities. Colonizers had to establish, sustain, and control the standard of measurement between them and the colonized. To do this, indigeneity was made to encompass all those prior occupants whom were being subjected to colonial rule. This was most effectively done through unilateral lawmaking. It was necessary to construct a legal framework that included indigeneity [as the signifier for all those being colonized] within its system as a method of control and discipline. And, it is this that has informed the form of jurisprudence that the west has used ever since.

As was the case with Vitoria in the sixteenth century, subsuming Indigenous peoples under colonial law would be used throughout the seventeenth, eighteenth and into the nineteenth century, as a way to consolidate decision-making power in the hands of the colonizers and erase any differences between different indigenous identities. Colonial aims had to be met without delegitimizing colonialism's so-called 'civilizing' mission or tarnishing the colonizers self-proclaimed image as 'benevolent'. As R.D. Laing writes:

> "The colonists not only mystify the natives, in the ways that Fanon so clearly shows, they have to mystify themselves. We in Europe and North America are the colonists, and in order to sustain our amazing images of ourselves as God's gift to the vast majority of the starving human species, we have to interiorize our violence upon ourselves and our children and to employ the rhetoric of morality to describe this process[62]."

Vitoria's legal juridical philosophy exists like a phantom limb in the settler states' of today. In this way, the conquest of Turtle Island, and subsequent formation of what is now known as Canada, is the archetypal case study of this approach to settler colonialism[63].

[62] Laing, R.D. *The Politics of Experience and The Bird of Paradise.* United Kingdom, Penguin Books, 1967, 49.
[63] For more in-depth analyses, see Ford, Lisa. (2010). *Settler Sovereignty" Jurisdiction and Indigenous People in America and Australia, 1788-1836.* Harvard University Press & McHugh, P.G. (2004). *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination.* Oxford Scholarship Online.

The condition of possibility for the formation and ongoing settlement across Canada follow a logic that closely resembles Vitoria's recursive legal framework. During the seventeenth and eighteenth century, settler practices in Upper and Lower Canada – while not without violence and asymmetrical power relations – were based around an acceptance that indigenous communities were separate from and unique to Europeans. More precisely, British juridical authority did not include dominion over 'non-Christians.' Instead, the relations between British rule and indigenous communities were expressed rather ambiguously through treaty and protocol[64].

At the time, Britain had been able to maintain global power on an unprecedented scale[65] - until the Seven Year War and the Treaty of Paris (1757)[66]. As shown in P.G. McHugh's *Aboriginal Societies and the Common Law* "with the French threat considerably diminished, emigration to British North America increased significantly […] [an] influx that aggravated the already heavy westward pressure on land for settlement.[67]" Increased European emigration to the Americas not only resulted in an "ever-growing and unquenchable[68]" demand by settlers for land, it also started to blur what was once a seemingly stable and fixed British imperial identity. By the end of the eighteenth century, these crisis conditions resulted in a growing need to establish clearer juridical practices, ones that included 'non-Christian' people[69].

How these conditions affected British rule is why McHugh refers to two British Empires and emphasizes a distinct difference in the conception of sovereignty and the rule of law between the

[64] McHugh, P.G. *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination.* (Oxford Scholarship Online, 2004).
[65] Marshall, P. J. Presidential Address: Britain and the World in the Eighteenth Century: I, Reshaping the Empire. *Transactions of the Royal Historical Society* 8 (1998): 1-18.
[66] McHugh. *Aboriginal Societies and the Common Law,* 118.
[67] McHugh. *Aboriginal Societies and the Common Law*, 118.
[68] McHugh. *Aboriginal Societies and the Common Law,* 118.
[69] McHugh, *Aboriginal Societies and the Common Law,* 119.

'First' and 'Second' British Empire[70]. During the First Empire it is difficult to speak of sovereignty as any clearly formed or crystalized legal concept." Up until the beginning of the nineteenth century, relations between British rule and indigenous peoples in Upper and Lower Canada can be described as "personalized [and] jurisdictionally-oriented[71]." By the mid-nineteenth century "more absolutist notions of sovereignty appeared in British practice which was now beginning to think more consciously and protractedly about the legal foundations of its relations with non-Christian societies[72]." In 1822, for example, at a criminal court in 'Upper Canada', a decision to give British law legal authority over a conflict between the Indigenous peoples that resided there was granted on the grounds that the British had territorial jurisdiction in the area[73]. This case, and the others that proceeded it, were formative in the creation of the settler sovereignty that Canada understands itself to be today; as singular, absolute, and indivisible.

As Lisa Ford suggests in *Settler Sovereignty:*

> "By exercising criminal jurisdiction over violence between indigenous people, settler courts asserted that sovereignty was a territorial measure of authority to be performed through the trial and punishment of every person who transgressed settler law in settler territory. Perfect settler sovereignty rested on the conflation of sovereignty, territory, and jurisdiction. Their synthesis was both innovative and uniquely destructive of indigenous rights. After 1820, courts in North America and Australasia redefined indigenous theft and violence as crime, and in the process, they pitted settler sovereignty against the rights of indigenous people.[74]"

The transition from First to Second Empire was marked by a change in the nature of imperial design, a transition that was influenced by its new focus: *land* – the acquisition of it for white

[70] McHugh, *Aboriginal Societies and the Common Law,* 120.
[71] McHugh. *Aboriginal Societies and the Common Law,* 63.
[72] McHugh. *Aboriginal Societies and the Common Law*, 63.
[73] Ford, Lisa. *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788-1836.* (Harvard University Press, 2010).
[74] Ford, *Settler Sovereignty,* 2.

settlement. While the First Empire was unconcerned with acquiring sovereign legal authority over the indigenous peoples of North America; the inception of the Second Empire, which was marked by the Crown's acquisition of sovereignty over large swaths of indigenous populations, put the extent of the Crown's juridical authority under review. As British imperialism gained more and more momentum, tribal nations were being "drawn into closer-quarter relations with the settlers and their economy.[75]" This changed the nature of settler polities' impression of its authority dramatically, especially across Turtle Island. Indeed, it quickly became apparent that juridical dominion was part and parcel of achieving the design and outcome of permanent white settlement. As a result, from the nineteenth century onwards, the operationalization of Crown sovereignty across Turtle Island took on a much more dogmatic and absolutist approach.

Similarly, during the initial stages of constructing Canadian sovereignty (post-confederation), discursive legal strategies were employed by 'settler-invaders' to transform treaties from relationships into land cessation contracts[76]. This transformation of treaties from relationships to contracts helped secure the universal application of colonial law and in the process was used, not only to grant settlers legal access to Indigenous lands for the purpose of commerce, but also to grant them unfettered access to Indigenous lands for permanent white settlement. The transformation of treaties into cessation contracts also helped foster the Dominion's subsequent legislation of the British North America Act[77] implemented at the time of Confederation, which stated that all underlying title for land goes to the sovereign, ie., Canada, who was now seen to have full proprietary ownership.

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[75] McHugh. *Aboriginal Societies and the Common Law*, 119.
[76] Stark, Heidi Kiiwetinepinesiik. "Criminal Empire: The Making of the Savage in a Lawless Land," *Theory & Event* 19 no. 4 (2016): John Hopkins University Press.
[77] Harring, Sidney. *White Man's Law: Native People in Nineteenth Century Canadian Jurisprudence,* (University of Toronto Press, 1998), 125 -126.

However, while some groups had signed treaties agreeing to cede their land to the Crown, others had not, and yet, still, at the time of Confederation, absolute territorial, juridical, and sovereign control was given to a newly formed Canadian nation-state. Such a blatant lack of care for the theft of those lands that remained unceded was perhaps due, in part, to the fact that perfect settler sovereignty rested on the conflation between sovereignty, territory, and jurisdiction. In this way, Canadian sovereignty and independence in the nineteenth century was dependent on the establishment of one legal regime – the Canadian legal regime – which would hold absolute and unfettered control over every square inch of the territory it claimed as its own. All the while, unceded land continued to be recognized as bound to its prior Indigenous occupants, but this recognition was mainly symbolic. It has thus always been overridden by the absolute recognition of the Canadian Crown's claims to unilateral sovereignty.

An example of how the imposition of colonial law at the end of the nineteenth century would have lasting effects on Indigenous peoples and their claims to land is represented through *Attorney General of Ontario v. St. Catherine's Milling and Lumber Company.* This case would go on to define the nature of Indigenous land rights across the land that is now known as Canada, despite Indigenous peoples having no say or role in the case[78]. At the core of the dispute was the question of provincial versus federal control of land, specifically the question of who had control over the vast lands of Ontario. The complexity of this problem resided in the question of who held the underlying title to Indian lands. As Sidney L. Harring outlines:

> Under the British North America Act that created Canada, Indian lands (and Indians) were under dominion jurisdiction. Crown lands within the existing provinces, including Ontario in this case, were under provincial ownership. This division, between Indians and Indian lands under crown control on the one hand, and provincial control of most other crown

[78] Harring. *White Man's Law*, 125 - 126.

> lands on the other hand, was at the core of the federalist arrangement that was to be the political foundation of Canada[79].

The conclusions drawn from *St Catherine's Milling* stated simply that "Indian lands were indistinguishable from crown lands generally." A decision that secured the crown's capacity to hold jurisdictional control over indigenous lands and bodies[80].

The problem is, there are two seemingly irreconcilable facts inherent to Canadian jurisprudence. First, that indigenous peoples pre-date Europeans and governed themselves as sovereign nations before their arrival. Second, that the unilateral imposition of Canadian law onto those pre-existing Indigenous sovereign structures is what constitutes the establishment of Crown sovereignty. In an attempt to erase the nature of this imposition, Canadian courts and lawmakers apply colonial law to Indigenous peoples through the lens of cooperation and reconciliation – be it through common law language, the Indian Act, Aboriginal rights, or Aboriginal title. These discursive strategies have been long since used as an ongoing attempt to construct Canadian sovereignty in such a way as to appear democratically legitimate and thus formed through the cooperation and collective agreements between sovereign entities.

And yet, at the same time, the notion of 'commons' was [and continues to be] strategically deployed so that any and every recognition of Indigenous peoples served to remake the foreign (indigenous nations) into domestic (individual Indigenous subjects). Indeed, as I have shown throughout this chapter, the colonial and settler colonial project have relied on a sort of legal gymnastics – that is always tautological; always recursive – in order to create and maintain legitimacy. 'Settler-invaders' establish and legitimate their way of life through laws – "crafting their contests and cooperations with indigenous people to fit the shifting parameters of colonial,

[79] Harring. *White Man's Law,* 125 -126.
[80] Stark. "Criminal Empire"

state, and indigenous jurisdictional practice[81].” The *very* imposition of Canadian law on Indigenous peoples is what constitutes the establishment of Crown sovereignty, and yet, the establishment of Crown sovereignty is premised on the legal recognition of pre-existing Indigenous sovereignties, which means that *any* application of Canadian law onto Indigenous peoples brings these two incompatible facts into conflict[82].

Canada’s sovereign aim of inclusion and erasure is undeniably linked to the ongoing assertion of criminal jurisdiction over Indigenous peoples; Indigenous peoples are included in the system only to be disciplined and/or removed. This is because, since Canada’s inception, its governing policies and legal practices have operated under this premise: the system must be constructed in such a way as to appear legitimate by establishing itself as singular and universal. All of this inevitably results in a deeply unequal scene of articulation. This is ‘the ruse of consent’ – what Audra Simpson uses to describe the “particular way in which law, in the colonial and settler colonial context, enforced indigenous dispossession and then granted freedom through the legal tricks of consent and citizenship[83]”. The so-called ‘freedom’ that was granted, however, was actually just another form of theft used to secure Canada’s position as legitimately and democratically sovereign.

Next, I explore the structures and contours of Canada’s settler identity; examine the reasons why indigenous political collectives pose a fundamental and ongoing threat to this identity, and advance the claim that Canada, as a settler entity, requires the ongoing death, displacement and so-called discipline of Indigenous peoples to harness unilateral sovereign control over the land

[81] Ford, Lisa. *Settler Sovereignty,* 85.
[82] Stacey, Richard. “Honour in Sovereignty: Can Crown Consultation with Indigenous Peoples Erase Canada’s Sovereignty Deficit?” *University of Toronto Law Journal,* (2018).
[83] Simpson, Audra. “The Ruse of Consent.” *Postcolonial Studies* 20 no. 1, (2017): 18-33.

that is now known as Canada. Paradoxically, however, the country can only come into being and continue to appear democratically [and thus legitimately] sovereign through a radical and active repression and disavowal of its violent origins and ongoing practices of sovereign/state violence. Hence the country's overt reliance on the criminal (in)justice system, which I will explore in more depth in the subsequent chapter.

3 CANADA'S SOVEREIGNTY DEFICIT

In order [...] that the state should come into existence as the self-knowing, moral reality of the mind, its distraction from the form of authority and faith is essential. But this distinction emerges only insofar as the ecclesiastical aspect arrives at a separation within itself. It is only in this way that the state, above the particular churches, has achieved and brought into existence universality of thought, which is the principle of its form.

- Georg Wilhelm Friedrich Hegel, *Philosophy of Right*, 1st edition

Before fleshing out the purpose and function of Canada's criminal (in)justice system, a characterization of the state and its contradictory, and thus fragile, nature, is necessary. A country's statehood must be recognized by the international community to be considered a legitimate sovereign authority, a distinction that requires something tangible to exist that can be recognized, in the first place. Notions like 'common history' and 'cultural identity' are used as tools to establish this national identity. Countries try to fit emerging, changing and far-from universal entities into a framework of permanence and universality. Identifiable symbols – a flag, a national anthem, a 'common history' – are established in an effort to contribute to the citizenry's shared understanding of itself as belonging to a unified nation-state. All of this is supposed to contribute to the belief that the nation state is a singular sovereign entity that naturally emerged to govern over a unified body politic.

Belief in the nation-state is thus tautological. Countries claim sovereign legitimacy through the presupposition of a singular universal essence – an enduring a priori presence – one that is said to exist outside the political, historical, cultural, and discursive apparatuses that make it up. This is why the discursive logics of settler colonialism, which operate through a particular epistemological and ontological framework, must be made to appear universal in order to be considered legitimate. As I outlined in the previous sections, the colonial and settler colonial project requires the strategic deployment of its particular interests through legal, political, and discursive structures that are enforced on all, under the guise of universality.

As Hegel states in the epigraph, the principle of the state's form (its condition of possibility) is the universality of thought. It is no coincidence then that the unprecedented transfer of European ideas and discourse across the world – which led to the universalization of European thought – necessarily coincided with the rise of the nation-state as the *only* legitimate form of political organization. The tactful deployment of particularism disguised as universalism make up the logics and legitimation techniques of the sovereign nation-state, which rely on different forms of ontological violence that suppress and silence indigenous ways of conceptualizing and experiencing the world. And, *Canada is no exception.* As Jobb Arnold puts it: "Canada has always been and continues to be shaped by European forms of sovereign violence" that are upheld through sovereign boundaries that are "ostensibly legitimated and practically facilitated[84]," under the name of Canada's national interest.

Belonging to a state, then, also means belonging to a people who make up a nation. As Roxanne Lyn Doty puts it: "Unitary claims to national identity permit the convergence of the state and the

[84] Arnold, Jobb. "Canada's Three Sovereignties and the Hope of Indigenous-Led Populism. In, Kiera L. Ladner and Myra J. Tait (eds.) *Surviving Canada: Indigenous Peoples Celebrate 150 Years of Betrayal,* (Arbeiter Ring Press, Winnipeg, 2017): 308-332.

people[85].” Canada’s national identity must be understood as an extension of its people, one that is emulated through its people; it is said that ‘we’ all share a supposedly common experience – the Canadian experience. As such, the establishment and legitimation of the Canadian nation-state gives rise to the belief that an authentic Canadian essence can be discovered through empirical and unproblematic criteria. In this way, the people that make up this body politic must simultaneously be presumed as given, while at the same time, must be continually reproduced. Especially because state sovereignty is not always accepted by its people.

Canadian sovereign legitimacy has run up against Indigenous claims to sovereignty since before its inception in 1867. In fact, Indigenous peoples very existence has always posed a direct threat to the singularity and indivisibility of Canadian sovereignty. The problem is that this ‘not-yet’ or ‘not-quite’ (not-white) always produces a lack, or a rupture of sorts. One that displaces the objective, true, and singular nature of Canadian sovereignty, threatening it from within, and rendering it precarious. That is why settler colonialism requires a fundamentally all-encompassing approach.

In what follows, I explore the inherently problematic nature of the Canadian nation-state in an attempt to expose the necessary violence that is required to sustain its myth of singularity and appear universal. Indeed, I aim to show that the violence and harm that has long since been imposed onto Indigenous peoples through the criminal (in)justice system originates in Canada’s governing practices. It does not result because of the ‘Other’, but, is in fact, necessary for ‘the One’, the indivisible, to appear as such; to be itself.

[85] Doty, Roxanne Lynn. “Sovereignty and the nation: construction the boundaries of national identity.” In., *State Sovereignty as Social Construct.* Eds., Thomas J. Biersteker and Cynthia Weber. (Cambridge University Press, 2011).

3.1 THE SOVEREIGN SELF, AND ITS CORRELATE – THE OTHER

The state can't live with us and it can't live without us. Its violence is a reaction to that condition. The state is nothing other than a war against its own condition.

- Fred Moten & Stefano Harney

Canadian democratic sovereignty is inherently untenable, an untenability that flows from its unilateral assertion of sovereignty in the face of Indigenous peoples' pre-existing sovereignty over Turtle Island. As Richard Stacey puts it, "the Crown's historical failure since contact to recognize Indigenous sovereignty in any politically meaningful way has perpetuated a sovereignty deficit in Canada[86]." Specifically, Stacey examines how Canada's sovereignty deficit is created and perpetuated by an inherent tension between, on the one hand, the jurisprudence setting out the Crown's constitutional duty to consult Indigenous peoples, which flows from a "commitment to recognizing and creating space for the exercise of political sovereignty by Indigenous peoples[87]" and, on the other hand, the Crown's ongoing failure to allow Indigenous sovereignty any politically meaningful role in Canada. Elaborating on his claim, I expand the frame of Canada's sovereignty deficit to suggest that it is (re)produced in the very notion of sovereignty itself, especially democratic sovereignty, which is always- already caught up in a democratic paradox.

Jean-Jacques Rousseau was the first to identify the democratic paradox when he drew a distinction between the general will and the will of all[88]. While the will of all is simply the aggregation of all the subjective wills in a polis, the general will is the universalisation of these

[86]Stacey. "Honour in Sovereignty"
[87] Stacey. "Honour in Sovereignty"
[88]Rousseau, Jean Jacques. *The Social Contract and Discourses,* trans with an Introduction by G.D. H. Cole, London and Toronto: J.M. Dent and Sons, 1923.

wills in relation to what is 'good' for all. So, while, on the one hand, democracy is premised on the representation of a diversity of interests, perspectives, and ways of life. On the other hand, the sovereign nation-state is fundamentally about acquiescing and sustaining unilateral power over a unified body politic. Accordingly, a democratic society is democratically just and therefore representatively 'good', in an absolute sense, only *if* it presupposes an original consensus on the founding law that unifies society. The general will is 'good' for all, not simply because of the particular interests it establishes, but also, and perhaps more significantly, because it is considered constituted by free and equal citizens who have agreed upon its universal validity.

I have shown; however, that Canadian democratic sovereignty is not founded through an original consensus, nor are its so-called universal structures consistent with all of its people. Consequently, given that Indigenous peoples are not just different from 'settler-invaders' on ethnic or cultural lines, but also represent different and pre-existing judicial-political structures, they have always posed a significant threat to Canada's democratic legitimacy. What does it mean then to recognize Canada as legitimately and democratically sovereign? And what was/is required to establish this singular and unilateral Canadian sovereignty in the face of such a clear and problematic conflict?

On the one hand, as Jodi Byrd puts it, to establish settler-sovereignty in Canada, the law was required "to seize sovereignty and jurisdiction from indigenous peoples and conscript their lands and nations into settler territoriality." The enforcement of law in this context can be understood through Derrida's notion of *ipseity. Ipseity,* Derrida suggests, is "at the very least the power that

gives itself its own law, its force of law[89]," and thus its self-representation, or sovereign gathering of self into an assemblage or assembly, which must be able to think together, at the same time. In this way, the force of law, or *ipseity*, which is an always-already established legitimacy, presupposes the formation of political domination, i.e., the nation-state.

Ipseity, in a democracy "names a principle of legitimate sovereignty, the accredited or recognized supremacy of a power or a force[90]" that is required before any sovereignty of the state has even been established. Indeed, in the context of Canadian settler-sovereignty, *ipseity* names the reductive reasoning used to justify settler-colonialism's necessary outcome of permanent white settlement, which paradoxically must precede the law's implementation of it. Further, it is the force of law that instantiates the establishment of a government that poses, presupposes, and also imposes itself as the 'democratic will of the people.' Establishing legal loopholes and exceptions around state violence, while simultaneously criminalizing those that this violence is designed to target, is how the state protects itself; secure itself as *ipseity* and thus grants only itself absolute immunity.

Ipseity is thus also integral to understanding the circularity of democratic force in Canadian society. Democracy is a force "in the form of a sovereign authority […] and thus the power and ipseity of the people[91]." In this way, the element of *thinking together, at the same time*, is crucial to this notion of democratic legitimacy. Canada's democratic sovereignty, then, rests on more than just an initial conflation of sovereignty, territory, and jurisdiction. It also rests on its

[89] Derrida, Jacques. "Force of Law: The metaphysical foundation of authority." In., *Deconstruction and the Possibility of Justice.,* Eds., Drucilla Cornell, Michel Rosenfeld & David Carlson, (Routledge, 1992).
[90] Derrida, Jacques. *Rogues: Two Essays on Reason,* trans. Pascale-Anne Brault and Michael Naas. Stanford University Press, 2005.
[91] Mercier, T.C. *Phantasms of Sovereignty, and Unconditional Resistance: Legitimacy Beyond Performative Powers.* n.d.

capacity to establish itself as a homogenous entity, a sovereign *ipseity,* that is indivisible and thus completely 'whole.' *Ipseity* is the sovereign dream; the yet to be contaminated [by the other] ideal that comes into being in and through itself. And, democratic state sovereignty is an attempt to secure this sovereign dream through the concentration of the 'general' into a single point of indivisible singularity – hence the links between state sovereignty and God.

As Schaap puts it, "at stake in the political conflict between the settler society and indigenous peoples is precisely the sovereignty of the people, the terms of inclusion in the demos[92]." The idea of popular sovereignty then, as Schaap continues, is "indispensable for modern law since it provides the basis on which the law's claim to validity might be redeemed[93]." Indeed, for the law to remain 'valid' and for the state to appear complete, Canada must 'solve' the contradictory nature at the heart of settler identity; it must establish some sort of consensus around 'Truth.' And yet, Canada also requires that it extend some sort of recognition to Indigenous sovereignty, given that its own legitimacy as a nation-state "is constituted through the treaties that are intended to at least provide the perception of legality[94]."

Hence the sovereignty deficit, which is caused by two irreconcilable facets of Canadian sovereignty. On the one hand, it is dependent on the settler-colonial system as a means to an end; the end being the "complete disappearance of the indigenous problem, that is, the disappearance of Indigenous peoples as free peoples with the right to their territories and governments[95]." On the other hand, to uphold democratic legitimacy, the state must pose, presuppose, and also impose itself as the 'democratic will of the people' by advancing the claim that Indigenous

[92] Schaap, Andrew. "Aboriginal Sovereignty and the Democratic Paradox." In., *The Politics of Radical Democracy.* Eds., Moya Loyd and Adrian Little. (Edinburgh University Press, 2009): 52 – 72.
[93] Schaap. "Aboriginal Sovereignty and the Democratic Paradox," 52 – 72.
[94] Stark. "Criminal Empire"
[95] Schaap. "Aboriginal Sovereignty and the Democratic Paradox," 52 – 72.

peoples were themselves co-authors of the originary law that brought Canadian society together in the first place.

Audra Simpson succinctly points out:

> Settler states do not narrate themselves in the following manner: 'as settler states we are: founded upon Native dispossession, outright and unambiguous enslavement, we are tethered to capitalist modes of production that allow for the deep social and economic differences that takes the shape in the contemporary of "unequal" social relations. We now seek to repair these unequal social relations through invigorated forms of economic liberalism that further dispossess and some would say consensually enslave those who do not own their means of production or opt out or fall out of this form of economic life[96].

Instead, they narrate themselves as the multicultural, democratic, egalitarian, general will of the people because they "are deeply concerned with a perception of legality (which is coded to mean just and humane) that requires them to traverse the boundaries of law (and indeed stretch and reconfigure law so as not to step outside its bounds) in order to reconfigure Indigenous nations through this logic that is not so much eliminatory as it is concomitantly reductive and productive[97]." The Canadian government must work tirelessly to suppress Indigenous claims to sovereignty/self-determination without undercutting its own national identity.

Those that either refuse (in different ways) to be incorporated into the system, or pose a threat to the system's legitimacy, must become the problem. A reason - the Indigenous as the criminal – is thus needed to solve the paradox at the heart of Canada's national identity, an identity that understands itself as an already settled 'post-colonial' nation-state, while simultaneously continuing to depend on the ongoing dispossession of Indigenous bodies and lands and suppression of their claims to sovereignty. The law is thus designed to protect this oppressive

[96] Simpson, Audra. The State is a Man: Theresa Spence, Loretta Saunders, and the Gender of Settler Sovereignty. *Theory & Event.* 19 no. 4 (2016).
[97] Stark. "Criminal Empire."

system; to protect a system of control that is fueled by what Audra Simpson refers to as its sovereign death drive, which, unlike the Freudian death drive where an organism is driven towards its own death, is instead a drive towards the death of the Other.

Robert Williams, Heidi Stark, and others, contend that the "law was and remains the West's most vital and effective instrument of empire[98]." The framing of Indigenous peoples as criminals was not only necessary to establish perfect settler sovereignty in Canada, but their criminalization is also what made this blurring possible, in the first place. As Harring writes, when Indigenous peoples were 'given' "full access to the 'privileges of British law' [this] more often meant the opposite of legal protection of their land rights: they went to prison." Indeed, it is documented that Prime Minister John A. Macdonald expressed that: "[t]he execution [and imprisonment] of the Indians […] ought to convince the Red man that the White man governs[99]." Thus, the ongoing criminalization and subsequent violence done to Indigenous bodies and lands are both necessary for the Canadian state to uphold the myth it constructs about itself.

The criminal (in)justice system is necessary to legitimize settler presence on stolen lands and paper over the use of force and violence that was [and still is] required to establish and secure sovereign control. Subsuming Indigenous peoples under Canadian law allows the state to harness control, not only over Indigenous lands and resources, but also over their governing standards and epistemic and ontological practices. By designing the law in such a way as to devalue and delegitimize Indigenous forms of life and collective organizing, which I will explore in more detail later on, Canada is able to secure its position, as the universal standard, in all dominant articulations, legal systems, and political structures.

[98] Stark. "Criminal Empire."
[99] Harring. *White Man's Law.*

Stark puts it nicely when she points out how "the construction of indigenous criminality and subsequent imposition of colonial law enabled the United States and Canada to not just *imagine* but *actively produce* their claims of sovereignty[100]" [italics added]. All of this informs my contention that today, the primary means by which Indigenous peoples are made to disappear is through the criminal (in)justice system, which also happens to be the primary way Canada navigates its sovereignty deficit. Indeed, the framing of Indigenous peoples as criminals' is, most significantly, a mechanism of distraction; a way to avert attention from the state's own illegal and illegitimate existence. This is because, although perfect settler sovereignty is founded in violence, and sustained through violence, it must nonetheless be representable by its relative lack of violence.

4 INDIGENEITY AS CRIMINALITY

The state reinforces a system that produces criminals out of those it has dispossessed.

- Macarena Gómez-Barris

According to Statistics Canada, in 2016/2017 Indigenous peoples accounted for 28% of admissions to provincial/territorial prisons and 27% for federal prisons, while representing only 4.1% of the Canadian adult population[101]. These statistics are not an anamoly. Although the so-called 'over-representation' of indigenous peoples in Canada's criminal (in)justice system was "first documented in 1967 by the Canadian Correction Association's Report *Indians and the Law*[102]" it is not a far cry to suggest that this has been an 'issue' since the country's inception.

[100] Stark. "Criminal Empire."
[101] Malakieh, Jamil. "Adult and youth correctional statistics in Canada, 2016/2017." *Statistics Canada,* 2018. Web access: https://www150.statcan.gc.ca/n1/pub/85-002-x/2018001/article/54972-eng.htm
[102] Jackson, Michael. "In Search of the Pathways to Justice: Alternative Dispute Resolution in Aboriginal Communities." *UBC Law Review,* (1992).

Indeed, Harring's research asserts that although there are no published reports, the legal documents show that "criminal law cases came to be the dominant Indian cases by the middle of the nineteenth century[103]."

Given the consistency of Indigenous 'over-representation' in the Canadian prison system over the course of its history, it seems fair to argue that the criminalization of Indigeneity is part and parcel to the construction of state sovereignty. The majority of analyses drawn from these statistics, however, continue to follow a similar line of interpretation. They begin by pointing out a pattern between the racial make-up of Canadian society and its prison population. Conclusions are then drawn between 'over-representation' and racialization in Canada's prisons and tacit or overt condemnation of this system is offered. As Robert Nichols puts it, while these interpretations are useful to an extent, they stop short of making any real contributions about the political purpose and function of the prison system itself, and almost always serve to "propagate a certain occlusion of its colonial dimensions[104]."

The predominant lack of acknowledgement or engagement with the logics of sovereignty and its history and contemporary relations to colonialism, is not simply a matter of unintended ignorance or passive forgetfulness. These analyses reinforce dominant national narratives, (mis)represent Canadian governing practices and policies as fair and just embodiments of the democratic will of the people, and suspend the state's culpability in creating and maintaining a criminal (in)justice system that produces such an abhorrently racialized demographic. I counter these narratives by rooting my analysis of the Canadian prison system in its colonial legacy and ongoing settler-colonial project.

[103] Harring. *White Man's Law.*
[104] Nichols, Robert. "The Colonialism of Incarceration." *Radical Philosophy Review,* 17 no. 2, (2014): 435– 455.

In Audra Simpsons' article, "The State is a Man: Theresa Spence, Loretta Saunders and the Gender of Settler Sovereignty" she advances two claims: "First: Canada requires the death and so-called 'disappearance of Indigenous women in order to secure its sovereignty. Second: that this sovereign death drive then requires that we think about the ways in which we imagine not only nations and states but what counts as governance itself[105]." In order to explain the so-called 'overrepresentation' of Indigenous peoples in Canadian prisons, I have reworked her line of argumentation. I suggest: First, that Canada requires the death, displacement, and so-called discipline of Indigenous peoples to secure its sovereignty; and second, that Indigenous peoples are painted as contravening, or as a threat to, the system in order to simultaneously repress, disavow and thus legitimize this sovereign death drive. This informs my contention that, contrary to popular belief, the prison system is in fact not broken, but continues to perform the exact function it was designed to perform in the first place: the ongoing dispossession of indigenous bodies and lands, as well as a suppression of their claims to sovereignty.

4.1 THE THREAT TO SOVEREIGNTY

... the state has many hands and can place those hands around many necks at once

- Hanif Abdurraqib, *Go Ahead in the Rain: Notes to a Tribe Called Quest*

The reach of the carceral state extends far beyond its literal imprisonment of Indigenous and other racialized peoples. The intrusive reach of this punitive culture is transcarceral, it extends its control into the everyday lives and onto the marked bodies of the perpetually criminalized[106]. And this *trans*carceral continuum blurs the boundaries between the marked 'inside' of the prison,

[105] Simpson. "The State is a Man."
[106] Palacios, Lena. "Challenging Convictions: Indigenous and Black Race-Radical Feminists Theorizing the Carceral State and Abolitionist Praxis in the United States and Canada." *Meridians: feminism, race, transnationalism* 15, no. 1 (2016): 142.

and its unmarked 'outside' to ensure absolute state control over 'surplus' populations. The penal system is thus an integral piece of Canada's central organizing power. It is a system, not for punishment necessarily, but to have a guarantee on the persons being punished. More specifically, punishment is a means employed by the state to secure control over 'surplus' populations, and in the process, *hopefully*, secure its sovereignty, in the face of such a clear deficit. The contemporary expansion of the Canadian prison system and the simultaneous increase of Indigenous imprisonment across the country is best understood, as Nichols aptly notes, as a "*political* choice adopted from within a range of possible responses[107]."

The criminalization of Indigenous peoples and their so-called 'overrepresentation' in the Canadian prison system forces the state into focus. The 'state', Simpson writes, "is one frame in which visibility is produced, creating the conditions under which difference becomes apparent, political aspirations articulated and culture authenticity and tradition appear as political expedient resources. By framing what is official, the state creates conditions of either affiliation or distance, association or disassociation[108]", which arise from its project of homogenising heterogeneity. Similarly, T.C. Mercier writes: "there is no sameness, no identity, no ipseity without an organising power, which strives to constitute itself as such by repressing differences, and by reducing differential forces to the hegemony of the homogenous[109]."

Indigenous peoples, however, have been interrupting these state practices by refusing inclusion and homogenization through the ongoing assertion of their own distinct practices of

[107] Nichols. "The Colonialism of Incarceration," 435 – 455.
[108] Simpson, Audra. Paths Toward a Mohawk Nation: Narratives of Citizenship and Nationhood in Kahnawake. In. *Political Theory and the Rights of Indigenous Peoples.* Eds. Duncan Ivison, Paul Patton, and Will Sanders. (2000): 122.
[109] Mercier, T.C. "Violence, Ipseity, Self-Difference: Sovereignty and legitimacy, between psychoanalysis and political theory." n.d.

sovereignty/self-determination. As Leanne Simpson puts it, "[Indigenous peoples'] presence is [their] weapon[110]", further emphasizing how Indigenous resurgence is not a new phenomenon but their "original instruction[111]." In this way, Indigenous peoples, their ways of life, knowledge systems, and socio-cultural-politico practices have always represented a real and serious threat to the state and its democratic sovereign legitimacy.

The settler colonial state requires many forms of power to persist: the capitalist-industrial complex; the colonial gender systems; extractivism; the prison-industrial complex, and racial-capitalism – to name a few. Given that dismantling these power structures is necessary for a decolonial future, worthy of the name, they have always been one of the primary targets for Indigenous and/or other racialized theorists and activists. Lena Palacios writes: "Indigenous renaissance and resurgence is about reclaiming Indigenous contexts (e.g., knowledge, interpretations, values, ethics, processes) for their own political cultures and refocusing Indigenous-led organizing work 'from trying to transform the colonial outside into a flourishment of the *Indigenous* inside[112].'"

Leanne Simpson has also written extensively about nurturing self-determined and community-led responses to colonial and settler colonial violence that refuse "the sanction, permission, or engagement of the state, western theory, or the opinions of Canadians." Similarly, Andrea Smith has written about Indigenous nation-building and how it always "represents a direct intervention against pro-nation-state models of governance built on exclusion and chauvinism[113]." By outlining some of the central tenets to indigenous feminism, Smith demonstrates how "the

[110] Simpson, Leanne. *As We Have Always Done.* (Minnesota Press, 2017), 6.
[111] Simpson, Leanne. *Islands of Decolonial Love.* (Arbeiter Ring, 2013).
[112] Palacios. "Challenging Convictions," 142.
[113] Smith, Andrea. "Against the Law: Indigenous Feminism and the Nation-State," *Affinities: A Journal of Radical Theory, Culture, and Action* 5 no. 1 (2011): 56-69.

colonial condition that Native women are forced to navigate have compelled many to think beyond the heteropatriarchal nation-state in [their] vision of liberation for everyone[114]."

Further, Glen Coulthard asserts that "dispossession continues to inform the dominant modes of Indigenous resistance and critique that this relationship has provoked […] Indigenous anticapitalism is best understood as a struggle primarily inspired by and oriented around the *question of land* – a struggle not only *for* land in the material sense, but also deeply *informed* by what the land *as system of reciprocal relations and obligations* can teach us about living our lives in relation to one another and the natural world in nondominating and nonexploitative terms[115]."

Although these theoretical inquiries are not necessarily facing explicit state-intervention, the university itself remains a domain that directly supports, whether financially or otherwise, the settler colonial project, and as a result, both implicitly and explicitly, denies Indigenous critical interventions into the ongoing settler colonial project the same support and/or respect. Santiago Castro-Gomez articulates this well explaining how, although 'other' knowledges are considered more often today. When they are considered they are done so in a way that is pragmatic rather than epistemic.

The wisdom of Indigenous communities is now often seen as 'useful' to the conservation of the environment, for example, but the *categorical distinction* between 'traditional knowledge' and 'science' remains intact. "The former *continues* to be seen as *anecdotal* knowledge, not quantitative, and thus lacking methodology while the latter continues, in spite of the

[114] Smith. "Against the Law," 56-69.
[115] Coulthard, Glen. *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition.* (Minnesota Press, 2014), 13.

transdisciplinary efforts of the last decades, to be taken as the only epistemically valid knowledge[116]." Incorporating Indigenous knowledges mainly works to reify the legitimacy of the settler colonial project and in the process its ability to coopt *more information* and *experiences* to claim as its own. It is in this way that the position held by the western episteme as *the only* legitimate discourse is part and parcel to the sovereignty project; a project that must destroy any trace of multiplicity and divisibility, in order to replace it with oneness, self-sameness (ipseity) and indivisibility [117].

Theoretical counter-narratives to settler colonialism and its structures of power are not the only aspect of Indigenous activism and resurgence that the state seeks to erase, displace, and/or discipline. Indigenous peoples have also always been explicitly refusing and/or resisting the state and its narrative through both individual and collective organizing. For example, Theresa Spence's hunger strike in 2012, which was advanced against the state's complete indifference, not only to the life and lands of Indigenous peoples, but also to the life of land and people in Canada, more generally.

While Theresa Spence's requests were simple: "that she would stop eating until the Prime Minister of Canada and the Governor General of Canada - the official representative of the Crown, met with her to discuss treaties, to discuss the deplorable conditions of life in her community as well as the broader and also deplorable conditions of life in the North[118]." What

[116] Castro-Gomez, Santiago. "The Missing Chapter of Empire," *Cultural Studies* 21 no. 2 (2007): 423-448.
[117]Rarely do we, as students and practitioners of the academy, pause to consider why it is the case that when we talk about knowledge(s) we talk about it as if it is singular. Knowledge(s) has never been singular. As Lewis R. Gordon points out "the formulation of knowledge in the singular already situates the question in a framework that is alien to times before the emergence of European modernity and its age of global domination, for the disparate modes of producing knowledge and notions of knowledge were so many that *knowledges* would be a more appropriate designation." European modernity and its age of global domination emerged (in part) through the coalescing of a variety of knowledges that were eventually subsumed under the absolute singularity of knowledge, as such.
[118] Simpson. "The State is a Man."

Chief Spence and her hunger strike represented was something much more 'dangerous' than a simple meeting between her and the Canadian government. Her ongoing and unwavering refusal to back down or cower in the face of the government was a sign of strength, and an embodiment of, as Simpson puts it, "something radically different than Euro-Canadian governance[119]." Chief Spence's body – both because of its Indigeneity and its womanhood - signified "the dangerous possibility of reproducing Indian life and most dangerously, other political orders, [o]ther life forms, other sovereignties, other forms of political will[120]." As a result, while Chief Spence was not explicitly criminalized, or killed, for her hunger strike, her body was used as site of discipline, demonization, and unworthiness, and her protests delegitimized by the Canadian government and the broader public[121].

Theorists like Glen Coulthard, Lena Palacios, and Leanne Simpson not only writing scathing critiques about the state and its heteropatriarchal, racialized, violent, colonial-capitalist practices, but they also offer new ways of thinking, being, sensing, and knowing, in the world that stand in direct contrast and thus directly challenge the legitimacy and naturalization of Canadian sovereignty and the logic of the nation-state, more broadly. Similarly, activists like Chief Spence not only expose (settler)colonial structures and practices in Canada as violent and uncaring, but also act as a direct counter-narrative to the state narrative of reconciliation. In this way, Indigenous peoples, and their unwillingness to be subsumed, contained, and/or erased by the homogenizing practices of settler institutions and their transcarceral structures poses a major problem to the strength and legitimacy of Canadian settler sovereignty, which is why, as outlined

[119] Simpson. "The State is a Man."
[120] Simpson. "The State is a Man."
[121] Simpson. "The State is a Man."

by my first claim, Canada requires the death, displacement, and so-called discipline of Indigenous peoples to secure its sovereignty.

4.2 WHY THE STATE PRODUCES INDIGENOUS CRIMINALS

The production of Indigenous criminality that make 'savages' and the 'uncivilized' in a 'lawless' land, while having material implication for Indigenous peoples as seen with high rates of incarceration and the continued subjugation of their sovereign authority, also brings forward the conditions and contexts that enabled these narrations, reminding the settler state that it remains a criminal empire

- Heidi Stark, *Criminal Empire*

Canada has a long history of surveilling and criminalizing Indigenous peoples. The North West Mounted Police (NWMP), the Indian Affairs bureaucracy, Indian Act Status cards, the reserve pass system, and so on, have all been used in different ways to monitor and control the lives of Indigenous peoples and the limits of Indigeneity. In the past these organizations were a necessary way to enforce assimilation and legitimize land dispossession. However, over the past decades there has been a variety of social and economic transformations across the globe that have shaped and altered standards of 'good governance.' The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), for example, placed increased scrutiny on settler-colonial governing practices. No longer could liberal democracies like Canada legitimately use explicit forms of violence to manage and control the Indigenous 'problem.' New and more insidious forms of violence, ones that relied increasingly on discourses of legitimation were therefore necessary.

The goal to obtain data and use it to classify persons in terms of the potential risk they pose has become an integral aspect of colonial policing. By classifying Indigenous peoples as a potential 'risk' – whether to themselves, to other 'Canadian' citizens, or to the state itself – colonial

agencies (police, RCMP, CSIS, corporations, and other governmental and non-governmental actors/stakeholders) and their explicit practices that target Indigenous peoples and communities are painted as necessary forms of 'assistance' used to 'fix' 'issues' of crime, violence, and poverty that supposedly 'plague' Indigenous communities. The construction of Indigenous criminality is thus a discursive political strategy used by the Canadian government to repress and disavow the ongoing use of state sanctioned violence onto Indigenous peoples and reinforce the myth of reconciliation and 'good' governance.

Andrew Crosby and Jeffrey Monaghan's account of over a thousand pages of documents from the RCMP, CSIS, and other government agencies reveals how RCMP practices today represent a "new dynamic of policing" that aims to suppress/discipline Indigenous peoples and the challenge they pose to colonial control of land and resources[122]. An example of this 'new dynamic' of policing is well-represented by the activities advanced by the RCMP in response to the ongoing Unist'ot'en and Gidumt'en rejection of the Trans-Canada pipeline on Wet'suwet'en territory[123]. As Crosby and Monaghan's research outlines, "Aboriginal Policing Services of RCMP's 'E' Division in B.C. tracked Unist'ot'en Camp activities on a monthly basis from at least 2010 to the end of 2015[124]."

Although these monthly strategic outlook reports cited mostly mundane activities "like upgrades in camp infrastructure[125]", the reports were also meant to be read as a warning. Indeed, the

[122] Crosby, Andrew., Monaghan, Jeffrey. *Policing Indigenous Movements.* (Fernwood Publishing, 2018).
[123]Brake, Justin. "Researchers say RCMP action against Wet'suwet'en would place corporate interests over Indigenous rights," *APTN News*, 2019, https://aptnnews.ca/2019/01/06/researchers-say-rcmp-action-against-wetsuweten-would-place-corporate-interests-over-indigenous-rights/
[124] Crosby & Monaghan. *Policing Indigenous Movements.*
[125] Crosby & Monaghan. *Policing Indigenous Movements.*

reports mentioning "a yearly *Action Camp* which includes hundreds of participants[126]" held at Unist'ot'en Camp were meant to be read as a cautionary tale, one that was later used to identify the Unist'ot'en Camp "as not only the physical focal point blocking the proposed pipelines but also the *ideological* centre[127]." While the activities and behaviors of the Unist'ot'en Camp are simply non-violent assertions of sovereignty over *their* lands, the Unist'ot'en have been "interpreted as a national security threat, and the security of the state has monitored every movement associated with the Wet'suwet'en and Unist'ot'en Camp[128]."

One Government Operations Center (GOC) report that Crosby and Monaghan shared with *APTN News,* went as far as to suggest that one of the Unist'ot'en leaders was an "aboriginal extremist[129]." The reality, however, is that all the protests have been entirely without violence, and the Wet'suwet'en hold significant legal authority over these territories as they are located on unceded lands. As Monaghan and Crosby explain, these practices are not meant to govern some kind of actual national security threat or stop 'real crime' but are simply being used as a way to ensure the pipeline project, for example, eventually gets built and is relatively well supported by the general public[130]. It is clear then that, although the state tactfully (mis)represents Wet'suwet'en and Unist'ot'en resistance as a threat of real physical violence, their resistance actually only poses a "material threat in the form of challenging Canada's energy superpower

[126] Crosby & Monaghan. *Policing Indigenous Movements.*
[127] Crosby & Monaghan. *Policing Indigenous Movements.*
[128] Crosby & Monaghan. *Policing Indigenous Movements.*
[129] Brake. "Researchers say RCMP action against Wet'suwet'en would place corporate interests over Indigenous rights," https://aptnnews.ca/2019/01/06/researchers-say-rcmp-action-against-wetsuweten-would-place-corporate-interests-over-indigenous-rights/
[130] Crosby & Monaghan. *Policing Indigenous Movements.*

ambitions and settler sovereignty claims over unceded Indigenous territories, as well as an immaterial threat to Canada's post-colonial status[131]."

Painting Indigenous collective organizing as a direct and violent threat to the 'Canadian' way of life, which is always-already assumed to be 'good' for all Canadians, grants the executive power of the state the right to suspend normal laws, implementing a state of emergency type situation in the name of so-called 'reasons of national security/interest.' As Shiri Pasternak, Sue Collis and Tia Dafnos put it, "discursive representations of Indigenous land defenders by media, police, and security agencies as 'criminals', 'extremists', 'militants,' and 'terrorists[132]'" are just as much a part of Canada's pacification project as arresting and prosecuting Indigenous peoples.

These 'criminalizing' techniques allow for the symbolic and literal displacement, dispossession and erasure of Indigenous peoples from their lands. They work to suppress and delegitimize their claims to sovereignty. And, they help legitimize and normalize intrusive and violent state practices against Indigenous peoples by reframing these aggressive practices as necessary forms of self-defense. As a result, the activities that groups like Unist'ot'en Camp engage in are understood through the lens of violence and criminality, which in turn works to legitimize these ongoing practices of violence and discipline, whether in the form of surveillance, or incarceration.

State narratives always-already assume a certain kind of violence; a destructive violence that comes from the 'Other', from some external source. The dominant consensus is that violence, or threats to security, always come from the outside, from the imagined and constructed external

[131] Crosby & Monaghan. *Policing Indigenous Movements.*
[132] Pasternak, Shiri., Collis, Sue., Dafnnos, Tia. "Criminalization at Tyendinaga: Securing Canada's Colonial Property Regime through Specific Land Claims," *Canadian Journal of Law and Society* 28 no. 1 (2013).

'Other', who is also the enemy. Perhaps this is why, today, there is barely any public scrutiny directed at the prison system. Once you become a criminal, you are understood as deserving of punishment, deserving of inhumane treatment, deserving of social and legal death, and as a result, little to no care or attention is given to your experiences. The criminal is the feared 'Other' par excellence. That is why there is no better story than the state narrative that says Indigenous peoples are 'Other,' are 'criminal,' are 'deviant', and no better strategy than their mass-incarceration, which is used as a means to its own end.

What gets lost in all of this, however, is the 'state' itself. As I have shown, state violence is never as innocent as it would like to appear. T.C Mercier makes this case when he says: "[Violence] defines and determines its borders and lines of fracture, as well as the identities, objects and actors at play within and without the field. Violence engenders territories by aggregating and expelling, by rejecting and appropriating[133]." The settler-colonial state functions through an active and ongoing denial of its contradictions (ie. other forms of life, differences) the results of which are violent: "An avowing of freedom while maintaining slavery; humanism while maintaining racism; freedom through colonialism[134]." Becoming the universal subject of all histories and dominant articulations, *the* silent-referent (or never attainable singular), that Europe, and subsequently Canada dreams itself to be, can only be done through an over asserted particularity, which makes its system incomplete. And a system that "denies its incompleteness faces the constant denial of its contradictions[135]."

[133] Mercier. "Violence, Ipseity, Self-Difference."
[134] Gordon, Lewis. "Problematic People and Epistemic Decolonization: Towards the Postcolonial in Africana Thought." In., *Postcolonialism and Political Theory,* Eds., Nalini Persram, 2011, http://readingfanon.blogspot.com/2011/06/problematic-people-epistemic.html
[135] Gordon. "Problematic People and Epistemic Decolonization."

The establishment and continuation of a 'functional' and 'legitimate' sovereign nation-state depends on this denial. Canadian sovereignty must constantly (re)produce the phantasmic story that says its violent practices, institutions, and structures are necessary by constructing a perception of constant struggle against an ideal 'peace' that can never be reached. To (re)produce a Self as *ipseity* and indivisibility, the Self must unify against an Other; "it allows the One to be 'as such', to be itself, by differing from the other[136]." The reality, however, is that the state struggles against its own internal contradiction; between, on the one hand, the need for democratic consensus and multicultural freedom, and, on the other hand, the desire to secure unilateral power and control over the land and people who reside there.

So, while violence is almost always described and represented as originating in an external disruptive force, what these representations conveniently leave out is the ongoing internal state violence that creates this so-called 'external' violence in the first place. And, how all of this is required to establish and maintain democratic legitimacy in the face of the continued existence and resistance of Indigenous peoples. Given that they constituted self-governing political communities prior to colonial invasion, Indigenous groups represent the ultimate threat to the singularity and indivisibility of Canadian sovereignty. Their very existence has the capacity to expose the state's internal struggle. This is the underbelly of (settler)colonial violence.

All of this informs the overall point I am driving at, which suggests that the so-called 'overrepresentation' of Indigenous peoples in the prison system is symptomatic of the incommensurability between Indigenous existence and the logic of the nation state. So, there is really nothing surprising in the so-called 'over-representation' of Indigenous people in prisons because Canada and the First Nations are competing sovereignties. The carceral system is needed

[136] Mercier. "Violence, Ipseity, Self-Difference."

to resolve, at least temporarily, the state's dream/myth of singularity and indivisibility and secure the Canadian nation-state as the only legitimate sovereignty. These are the logics that make up the *real* story of the so-called 'over-representation' of Indigenous peoples in Canada's prisons. Subsequently, it ought no longer be a debate that the prison project *is* the colonial project, and both are ongoing.

5 THE FUTURE OF INDIGENEITY AND THE REFUSAL OF SETTLER FUTURITY

Those who take power unjustly defend it with injustice.

- Moana Jackson

One of the most significant developments in Canadian criminal law for Indigenous peoples was the decision by the Supreme Court of Canada in *R. v. Gladue*[137]. It has now been twenty years since the *Gladue* decision was made and Indigenous rates of incarceration continue to rise. Additionally, compared to all other categories of accused persons, they continue to be imprisoned younger, denied bail more frequently, granted parole less often, released later in their sentences, over-represented in segregation, over-represented in remand, and are more frequently classified as higher risk prisoners[138].

It is my contention that *Gladue's* failure has everything to do with what I have presented in my thesis. *Gladue* functions as a method of inclusion as enclosure. It is a way of distributing rights and freedoms under the conditions laid out by Canadian sovereignty, which is always-already at the expense of Indigenous claims to sovereignty. In fact, these reformist measures follow a

[137] [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (S.C.C.).
[138] Department of Justice. "Spotlight on *Gladue:* Challenges, Experiences, and Possibilities in Canada's Criminal Justice System." *Government of Canada,* 2019, https://www.justice.gc.ca/eng/rp-pr/jr/gladue/p2.html

similar logic to Vitoria's universal humanist legal formulations in the sixteenth century. They offer Indigenous peoples settler rights and freedoms in exchange for their continued dispossession.

Although legal solutions are constructed in such a way as to appear culturally responsive to the so-called Indigenous experience, they are actually recursive, in that they are always-already designed to secure the universal legitimacy of settler sovereignty and (re)instantiate the taken-for-granted 'truth' that Canadian ways of life, governing practices, and legal systems are naturally occurring and universally valid. Responding to the 'problem' of 'indigenous' incarceration through the language of rights is problematic, then, for two reasons: On the one hand, it (mis)represents indigenous incarceration as a problem that can be fixed, rather than a necessary component of Canadian sovereignty. And, on the other hand, it fails to take into account how rights discourse has always-already been constructed in such a way as to secure, what Eve Tuck and Ruben A. Gaztambide-Fernandez refer to as settler-futurity, i.e., a future where indigenous peoples have been completely replaced by settlers[139].

Given that the rule of law has been used, in the settler-colonial context, as a means to an end: the end being the disappearance of the 'indigenous problem', and given that Indigenous peoples continue to exist in the present, making amendments to the rule of law, establishing a new rights discourse that better includes Indigenous peoples within settler law's pre-existing frame, won't change the fact that it remains fettered to settler-futurity. To secure settlement into the future settler law must follow the praxis of pre-emptive security.

[139] Tuck, Eve., & Gaztambide-Fernandez, Ruben A. "Curriculum, Replacement, and Settler Futurity." *Journal of Curriculum Theorizing, 29* (1), 2013. pp. 72 – 89.

So, while I aim to situate the Canadian state and legal practices in their colonial history and show how the carceral system of today is a direct descendant of the legal/philosophical gymnastics of the past, both of which are extensions of the nation state seeking to legitimize its existence. It is not enough to look only at the past and present. Settler-state logics also rely on gaining control over a different temporal horizon: the future. By privileging "an ontology of linear causality in which the past is thought to act on the present and the present is said to be an effect of whatever came before[140]" we are at risk of erasing the role the future plays in all of this, both settler-futurity, and the possibility of creating an alternative future. The thrust of my argument, then, is not to simply seek historical justice for the past or make some kind of point about Canada's unsettled present. It is also about envisioning and creating an un-settler future[141].

5.1 YOU CAN'T REFORM AWAY ERASURE/CAPTURE/CONTROL/ELIMINATION

there is no "I" in that "we"
– never was
there is no room for white superiority in indigeneity

- Joshua Whitehead, *Full Metal Oji-Cree*

By failing to reflect on how the criminal (in)justice system is not so much designed to punish and deter as it is designed to secure control over asymmetrical forms of power and violence by conflating 'law' with 'right', efforts such as *Gladue* remain invested in the same legal framework that was used to normalize Indigenous dispossession and criminality, in the first place. Although they are often painted with good intentions, these reformist measures ultimately, as Dylan Rodriguez points out, "reinforce a violent system that is *fundamentally asymmetrical* in its

[140] Tuck & Gaztambide-Fernandez. "Curriculum, Replacement, and Settler Futurity," 72 – 89.
[141] I use the prefix 'un' to highlight how an un-settler futurity does not mean a future where the non-indigenous inhabitants of Indigenous lands no longer exist, but a commitment to a future that is opposed to settler colonialism and settler epistemologies; a future where settler colonial structures have been abolished.

production and organization of normalized misery, social surveillance, vulnerability to state terror, and incarceration[142]."

So-called 'humanitarian' efforts, such as the allocation of rights and recognition to Indigenous and other racialized folks, have a strategic function. They are a means used to stretch and reconfigure the law so as not to step outside its bounds. It is a way for the (settler) state to do as little as possible to address a massive problem without having to give up any of its power. More specifically, these efforts are used to ensure that any backlash directed at Canada's carceral institutions and structures is made to appear unwarranted. The violence Indigenous peoples continue to face is reverted back onto them; is made to appear as though it has always been an internal problem that cannot be fixed unless Indigenous communities are willing to adapt to the 'Canadian way of life.'

The rights and recognition paradigm is thus a way to (re)enforce the (false) notion that the criminal (in)justice system and the settler-state are an inherent part of the normative socio-political landscape, as if they were a natural part of our progression into 'modernity.' The reality, however, is that, not only are Canadian governing and legal practices far from neutral and natural, given that the criminal (in)justice system is designed to legitimize the ongoing dispossession of Indigenous peoples from their lands and bodies and suppress their claims to sovereignty. But, in addition to this, the western onto-epistemological and political-judicial scaffolding that undercuts the nation-state form are not the only possible logics used to organize life. Indigenous forms of collective organizing follow a fundamentally different model and, as a

[142] Rodriguez, Dylan. "Abolition as Praxis of Human Being: A Foreword." *Harvard Law Review, 132* no. 6 (2019): 1575 – 1613.

result, western structures and institutions remain inadequate in addressing and responding to Indigenous modes of being and knowing.

Using the very system that was designed to criminalize Indigenous peoples as a way to address their criminalization mainly works to reify Canadian sovereignty and western epistemological-ontological practices at the expense of indigenous ways of life. And, this is a self-fulfilling prophecy. By erasing the reality that there are and always have been a variety of other ways of worlding - an erasure that is relationally bound to the justificatory mechanisms used to secure settler legitimacy and advance a belief in settler-futurity as the only possible terrain upon or through which the settler-state can cross in order to ultimately 'fix' settler-Indigenous relations - absolute (settler)immunity is upheld and indigenous criminality is naturalized.

So, when the Canadian government, and the nation's people, engage in efforts to 'fix' the social and political 'ills' that 'plague 'poor Indigenous peoples', I see something completely different going on beneath the surface. These so-called 'moral' calls to 'save' Indigenous peoples from themselves, from their 'backward' existence, are actually a way to uphold settler sovereignty, conflate 'law' with 'right', legitimize the ongoing colonial project, and secure settlement into the future. Subsequently, these responses are not only at risk of naturalizing the present and justifying the past, they are also a way to ensure settler-state control of the unfolding future through pre-emptive forms of rights intervention in the present.

Criminalizing indigeneity forecloses the possibility of an Indigenous future and secures settler immunity. The settler-state and its correlate, the criminal (in)justice system, are invested in and designed to foreclose the possibility of an Indigenous future, which means that any attempts to recuperate it – 'fix' it – or reform settlement practices to better incorporate Indigenous peoples into the settler colonial nation-state are fettered to settler futurity. Moves to reform the criminal

(in)justice system through so-called efforts of 'care' and 'benevolence' keep it running as a tool of control over surplus populations, i.e., those whose very existence interrupts the legitimacy of settler structures and institutions.

In this way, practices that recuperate rather than interrupt settler colonialism, and strategies that reform "settlement and incorporate Indigenous peoples into the multicultural settler colonial nation state[143]" are actually just another arm of (settler)colonialism, disguised by their claims to universality and legal equality. More problematically still, these measures end up foreclosing the possibility of envisioning and creating a future that does not follow the same logics of the past and present. I aim to debunk these reformist narratives as symptomatic of something bigger and more insidious so as to ensure we keep carving out space for the real work: Imagining beyond settler-futurity requires orienting our thinking around abolition.

5.2 Abolitionist Refusal as Praxis: Towards an Un-settler Future

What is, so to speak, the object of abolition?

Not so much the abolition of prisons but the abolition of a society that could have prisons, that could have slavery, that could have the wage, and therefore not abolition as the elimination of anything but abolition as the founding of a new society.

Fred Moten & Stefano Harney, *The University and the Undercommons*

I was first introduced to the notion of prison abolition in my undergraduate degree in a political science seminar on 'sovereignty and cruelty'. We had just finished a rigorous discussion about the prison-industrial complex and how the structures of oppression are so deeply entangled with one another. The scale and seriousness of the problem of prisons was becoming more and more clear to me. Feeling defeated, I spoke up: "it seems like the only way we can address any of

[143] Tuck & Gaztambide-Fernandez "Curriculum, Replacement, and Settler Futurity, " 80.

these issues is if the whole structure of things change." I was met with a response: "Isn't that what is so generative about prison abolition though? To abolish prisons would require an entirely new structuring of society." While most people would scoff at this, I felt invigorated. The notion of prison abolition gave me a point of departure, a locus from which I could start orienting my thinking.

Those who advocate for abolition do not think that the solution is to close all the prisons tomorrow and let the prisoners free. As Ruth Wilson Gilmore writes, "big problems require big solutions […] [and] big answers are the painstaking accumulation of smaller achievements[144]." Abolishing prisons is a big solution to a massive problem, which means it isn't going to be fixed in one fall swoop. But, there is a fundamental difference between breaking a big problem, up into small pieces and trying to solve it, piece by piece, versus defining a problem by the pieces that seem easiest to fix. This is, as Gilmore so instructively lays out, what differentiates abolition from reform.

Reformist efforts to 'fix' Indigenous incarceration in Canada actively avoid the bigger and more complicated problems posed by the ongoing structures of (settler)colonialism, which is why they always miss the mark, and fail to have any real substantial effect on the ever-growing number of Indigenous peoples being put behind bars. Abolitionist efforts, on the other hand, see the prison as a locus, a site, and a system of sovereign violence, one that is in cahoots with all the other systems and structures that make up the (settler)colonial nation-state and its logics. Which is why my critical analysis of the prison system in Canada was less about the actual prison and more about the onto-epistemological and political-juridical structures that rely on its existence. As

[144] Gilmore, Ruth Wilson. *Foreword* to Dan Berger, *The Struggle Within: Prisons, Political Prisoners, and Mass Movements in the United States.* (PM Press and Kersplebedeb, 2014).

such, abolitionist efforts in Canada are more than just about getting rid of prisons. Addressing indigenous incarceration means not only taking seriously the abolition of prisons but also taking seriously what it would mean to abolish settler-state sovereignty and its legal apparatuses.

The significance to uncovering and undoing Canada's carceral logics, then, is also fundamentally about envisioning and creating an un-settler future. Luckily, Indigenous peoples have, since before Canada's inception been envisioning and creating alternative futures by refusing (settler)colonialism. Indigenous practices of refusal are active and direct postures that turn their back on the seemingly all-encompassing settler-state structures. They are a direct intervention into the lazy and tired contestations from both the right and left against abolitionism that repeatedly cry out 'there is no alternative;' or so matter-of-factly say 'this is the best system we've got.'

Indigenous refusal haunts the absolute object of sovereignty, exposing its conditional existence; "conditioned and affected by the secret forces and silent possibilities that it attempts to repress through the phantasm of its performative utterances." In the words of Audra Simpson: "Refusal is a symptom, a practice, a possibility for doing things differently, for thinking beyond the recognition paradigm that is the agreed-upon antidote for rendering justice in deeply unequal scenes of articulation[145]." Those who refuse do not seek themselves in the gaze of the state. Instead they turn away, and in turning away therein lies endless possibilities. Because, as refusal

[145] Simpson, Audra. "The ruse of consent and the anatomy of 'refusal': cases from indigenous North America and Australia. *Postcolonial Studies* 20 no. 1 (2017): 18-33.

praxis shows, and I quote Audra Simpson again here: "Every possibility is not in the gaze, or the minds, of the master, nor is the hope of mutuality something that all seek[146]."

Practices of refusal interrupt and intervene in the very logics of the settler state, and, in doing so, they expose the particularity, and thus the fragility, at the heart of the settler-state. Kennan Ferguson writes:

> Where the modern nation-state insists on its totalizing reality, those who refuse, deny its authority and domination. Where the state claims a monopoly on violence, those who refuse deny its universality and capacity. Where the state claims to determine what laws, treaties, and norms should be followed and which should be ignored, those who refuse, turn to alternative histories, ways of life, and documentations, not merely to resist, but to insist on alternative rationalities and legitimacies[147].

Refusal does not take authority as given; it does not succumb to its infallibility. And thus, instead of expanding the walls and logics of the nation-state, practices of refusal deny Canada's presumed authority and its claims to a singular onto-epistemological and political-judicial landscape. Practices of refusal remake ignored narratives under their own conditions, conditions that exist outside of, and often remain illegible to, settler logics and settler futurity.

As Fred Moten and Stefano Harney explain: These analytics give us, force us, to consider "what it is to endure the disaster, to survive (in) genocide, to navigate unmappable differences as a range of localities that, in the end – either all the way to the end of as our ongoing refusal of beginnings and ends – will always refuse to have been taken[148]." Practices of refusal bear an analytic of the settler-state's ongoing failure to reach its designated goal. Moreover, refusal bears an analytic of how the erased and dispossessed were, still are, and will always be, 'still' here,

[146] Simpson, Audra. "The ruse of consent and the anatomy of 'refusal'," 18-33.
[147] Ferguson, Kennan. "Refusing Settler Colonialism: Simpson's *Mohawk Interruptus." Theory & Event* 18 no. 4 (2015).
[148] Harney, Stefano., & Moten, Fred. "Michael Brown." *Boundary 2, 42*(4), 2015.

'still' standing. They are the literal and symbolic evidence of the continued existence and *survivance* of those that the state has repeatedly tried to eliminate; the radical and necessary challenge to the fraudulent universality of the western [once European] episteme.

This is why I tell this story; and I will retell it, over and over, until one day we [settlers] are forced to move forward, anew. Because, the only future worthy of the name is an un-settler one where we radically refuse to be complicit with the present ethos of power and continue to commit to a writing and thinking and doing that does not need human capture in order to exist.

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