Guilty by Design: A Critical Race Analysis of the Over-Incarceration of Indigenous Peoples in an Era of Reconciliation

by

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Abstract

In the decade since the Indian Residential School Settlement Agreement (IRSSA) went into effect, governments have been promoting, discussing and celebrating the idea of reconciliation between Indigenous peoples and the state. However, in many policy arenas, governments are continuing practices that reinforce the colonial relationship between Indigenous peoples and the state, casting doubt on the potential of the current reconciliation framework in transforming that relationship. This is particularly evident in the criminal justice system, where an Indigenous person living in Canada is ten times more likely to be incarcerated in a federal penitentiary than a non-Indigenous person. This disproportionate rate of incarceration is dramatically higher in some provinces and has been climbing steadily over the last few decades. This thesis argues that the over-incarceration of Indigenous peoples is a continuation of the racialized state violence experienced by Indigenous peoples through ongoing colonialism and is thus a measure of how much work remains if reconciliation is to mean the restructuring of the relationship between Indigenous peoples and the state. Critical race theory (CRT), highlights the role that race and racism play in relationships of power, and challenges settler societies to examine the parts of their world that depend on the continued oppression and colonization of Indigenous peoples. Without large scale, Indigenous-led changes to legal, economic, social and political structures, present-day reconciliation efforts may be of little benefit to the individuals and groups who have been and continue to be adversely impacted by colonial power structures.

Preface: Situating Myself in a White Settler Society on Indigenous Lands

I will never forget the first time that I walked into a jail. Unlike most people who spend their days in carceral facilities in Canada, whether as a prison worker or as a prisoner, I entered in the privileged position as a summer student with the Government of Saskatchewan, having just completed my Bachelor's degree in political science—thinking I'd learned everything there was to know about politics and the world—and about to embark on my graduate student career at the University of Alberta in the upcoming Fall. My unique outsider position provided me the opportunity to take in the dynamics of the prison as a system of power.

I knew the statistics regarding the overrepresentation of Indigenous peoples in Canadian jails. However, hearing a statistic that 80 per cent of prisoners in Saskatchewan are Indigenous doesn't quite have the same effect as entering a converted-classroom-to-dorm packed full of 20 individuals and seeing 16 Indigenous faces. In addition to that unsettling encounter, I was surprised by three other observations. First, I was shocked by the youth of the prisoners—at the age of 22, I wasn't expecting so many of the adult inmates I met to be younger than me. It was only after I'd began working as a policy analyst with the Ministry of Justice that I learned that 18-to-22-year-olds (the age at which most of my peers were pursuing university degrees) are the largest and fastest growing age group of adult prisoners in Saskatchewan. Second, I was alarmed by how many individuals were cognitively disabled or mentally ill. Recent numbers show that approximately one quarter of inmates in the federal system have a cognitive disability or impairment and that the prevalence of mental illness amongst the prison population is three times higher than in the general population (Correctional Service Canada, 2017). Finally, I was humbled by the friendliness, good humour and politeness of the men and women I encountered. With a few notable exceptions, the incarcerated individuals that I met that first day and in the

years to follow were far from the perpetually aggressive, seething sociopaths that we are conditioned to believe exist behind prison walls. That these are the people Canadians learn to fear and demand be locked up says much about Canada as a country.

A well-intended jail guard who I met that first day remarked: “yep, you are just one bad choice from winding up here yourself.” I knew this wasn’t true. As a White, educated, young, able-bodied woman from a middle-class family, my opportunities can be traced directly to the dispossession of Indigenous lands. My great-grandparents, originally immigrants from Hungary, settled in southwest Saskatchewan to farm and ranch land in the Treaty Four area. Our family’s relative wealth emerged from land that became theirs through the genocidal practices of the Canadian state. This is a fact, even though my grandparents and parents work(ed) very hard. This is a fact, even though they were poor during the depression. The effect of the settler-colonial structure is that my interests, as a White woman, have been privileged over those of Indigenous peoples. The structure that provided me with so many opportunities is the same structure that locks up so many young, Indigenous people who have been systemically denied the same opportunities that I’ve come to expect. I am cognizant of the fact that writing this thesis on this topic is another example of my white privilege.

I had planned for that first summer with the Ministry of Justice to be a pit stop between degrees—never imagining that a couple of years later I would end up working full time for the government, an entity I had always believed was “the problem”. The reality, I learned, is much greyer. Far from the bleak, robotic bureaucrats that I’d once imagined government officials to be, the majority of the individuals who work with the Ministry Justice are passionate, dynamic leaders who care deeply about the vulnerable clients they serve and work hard every day to try to make improvements to a flawed system. I am aware that I am implicated in the problem that I

assess in this thesis—not only as a civil servant, but as a citizen. This awareness can lead to paralysis or cynicism, thinking that the problems of our time are too big to tackle or that nothing will change anyway, so why bother? On the other hand, it can sometimes lead to action. The challenge for governments and individuals engaged in reconciliation efforts is in ensuring that actions are collaborative and do not reproduce or create new harms.

As a student of political science, I've been trained to think critically. Political scientists look at the world as a system of interlocking structures of power. Thus, I've learned that approaching problems, even those that have been around for centuries, from fresh angles can offer new insights into familiar issues. I've always been interested in the relationship between Indigenous peoples and the Canadian state, the role of racism in the state and the prospects of self-determination and decolonization in Canada. However, it wasn't until I combined my educational training with my work in the public sector that I understood, in practical terms, how impenetrable the racism of Canada's institutions can be. For me, the over-incarceration of Indigenous peoples is a glaring example of the continuity of colonialism. However, in my role as a Policy Manager with the Ministry of Justice, I am challenged to find solutions within existing systems. Therefore, I believe I can bring a unique perspective to the issue of over-incarceration of Indigenous peoples in the era of reconciliation. The arguments advanced in this thesis are mine alone and do not represent the views of the Saskatchewan Ministry of Justice. My perspective is simply one voice in an ongoing conversation between people living in Canada who want to live in a just society.

Acknowledgements

First, I would like to acknowledge that I wrote this thesis while occupying the traditional lands of the Plains and Wood Cree, the Métis, the Assiniboine and the Saulteaux bands of the Ojibwa peoples, while travelling back and forth between Treaty Four and Treaty Six territory.

Second, I acknowledge that I would not have been able to complete this thesis if it were not for the tremendous amount of support I've received from various people throughout my journey. I owe enormous thanks to my advisor, Dr. Roger Epp, whose patience, encouragement and readiness to help throughout this process has been unwavering. I benefited greatly from his brilliant, challenging and thought-provoking comments and questions, the careful editing of my work and our numerous stimulating discussions about the potential of reconciliation in Canada. I am privileged to have learned so much from such an exemplary intellectual and remarkable teacher. I will be forever grateful for Dr. Epp's willingness to give his time so generously and his commitment to assisting me over the finish line.

My interest in Critical Race Theory (CRT) was sparked by two outstanding academics, Dr. Malinda Smith and Dr. Joyce Green, both of whom deserve immense gratitude for their roles in this project. As my professor in her CRT course, during her time as the Graduate Chair and as the internal member of my thesis committee, Dr. Smith encouraged me to push the boundaries of how race, racism and colonialism are understood in Canadian political science through her challenging questions and comments that took my analysis to the next level. As an influential professor during my undergraduate career and my honours thesis advisor, Dr. Green introduced me to much of the early literature, concepts and ideas that I engaged throughout this thesis. Were it not for Dr. Green's mentorship and enthusiastic suggestion to apply to the University of Alberta for graduate school, I do not believe that I would have pursued a Master's degree. I will be eternally thankful to Dr. Green for ensuring that I continued my education.

I would also like to thank Dr. Adam Gaudry for engaging with my thesis as the external examiner from the Faculty of Native Studies. His thorough reading and editing of my thesis offered insightful perspectives which greatly assisted me in producing a more polished final product. I sincerely appreciate Dr. Gaudry's perceptive suggestions for revisions and thoughtful questions presented during my defence. In addition, I want to thank Dr. Jared Wesley, Graduate Co-Chair, for ensuring a smooth, comfortable and organized defence process, as well as for his feedback on an early thesis proposal prepared for POL S 599. I am extremely grateful to everyone who was present for my oral examination, as the thought-provoking discussion made my defence more enjoyable than I had imagined and left me with a renewed appetite for pursuing my topic further.

I appreciate the support of the staff and administration of the Department of Political Science, particularly Caroline Kinyua, who has kindly helped me navigate my program throughout the years. Additionally, I am grateful for the generous financial support from the Department, the Social Sciences and Humanities Research Council and the University of Alberta.

Part way through writing this thesis, I embarked on a career as a Senior Policy Analyst with the Ministry of Justice in Saskatchewan. Although this decision caused me to extend my program and presented many challenges, this practical experience enriched my understanding of my topic. There are a number of people with whom I work(ed) that I must acknowledge for their particular role throughout this process. My boss and mentor, Fred Burch, whose constant encouragement, willingness to accommodate my schedule and interest in my success will be forever appreciated. I am also grateful to my "office mom", Judy Orthner, whose support and comfort was always there when I needed it most. Finally, I would like to thank my like-minded colleagues Roxane Schury, Kelly Harris, Obeyaa Ampofo-Hunstand and Bonny Gerger who enthusiastically discussed the possibilities of reconciling our existing system. It is heartening to know that these six individuals are committed to the principles of reconciliation and will work hard to confront systems of ongoing colonialism in their own ways.

Most importantly, I want to thank my family. I will be forever indebted to my sister Kayla Gurski van Gelder for her incredible support, including reading and editing early drafts of my thesis, reassuring me to keep going and eagerly discussing my topic in theory and in practice as it relates to both of our professions. I would also like to thank my sister Kara Bates for her continuous encouragement and capability to help me put things in perspective throughout this process. I am grateful, too, for my adorable nephew Jack, whose ability to put an instant smile on my face has helped me keep my sanity whenever I was feeling particularly overwhelmed. I can hardly express the gratitude I have for my parents and everything that they've done to help me to this point. I want to thank my mom, Penny Gurski, for being my number one fan throughout this process. Her willingness to assist me in any way that she could is sincerely appreciated. I am incredibly thankful to my dad, Murray Gurski, for assisting me in setting and achieving goals, reminding me to break things down and encouraging me every step of the way. The support from both of my parents allowed me to see this project through. Finally, I am extremely grateful for my partner, Andrew Doan, whose support throughout this process took many forms: from study buddy to private chef; from sounding board to debate opponent; from cheerleader to counsellor, depending on which phase of the writing process I was in. I am certain that I would not have been able to complete this thesis if it were not for Andrew's constant reassurance that I could make it to the end.

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Introduction: "If it Was Racist, Why Aren't They All Dead?"[1]

> *...it is the desire of Her Majesty to open up for settlement, immigration and such other purposes…a tract of country…and to obtain the consent thereto of Her Indian subjects inhabiting the said tract, and to make a treaty and arrange with them, so that there may be peace and good will between them and Her Majesty, and that they may know and be assured of what allowance they are to count upon and receive from Her Majesty's bounty and benevolence* (Treaty No. 6, 1876).

On August 9, 2016, a group of five young people were enjoying the hot summer afternoon swimming and drinking in the river near the Red Pheasant Cree Nation in Saskatchewan where the youths lived. Around 5:30 p.m., the group drove into a farmyard. By one account, the youths were having car trouble and pulled into the farm to seek assistance. Another interpretation of events suggests that the reason for the group's presence on the farm was to steal vehicles or property inside of vehicles. In both versions, the ending is the same—22-year-old Colten Boushie, one of the five Indigenous[2] youths, was killed by bullets allegedly fired by 54-year old Gerald Stanley, a White[3] farmer, who has been charged with second degree murder as a result of the incident.[4] Ultimately, the facts of that fateful Tuesday will be determined by the courts in what is likely to be a lengthy criminal proceeding. But, regardless of why those five individuals found themselves on the farm and whether or not Stanley intentionally meant to harm any of them, the confrontation between Stanley and Boushie was a colonial encounter. The farm on

[1] While this quote was pulled from a Facebook thread about Colten Boushie's death, and is in reference to the surviving four Indigenous youth, it serves as a double entendre in that it feeds into the idea that Canada has never intended to harm Indigenous peoples during any part of colonialism—if we had wanted that, we would've killed them all, right? (Derek Andrew, Facebook comment, August 13, 2016.)

[2] I capitalize the term Indigenous to signify their status as a distinct peoples, recognizing that Indigenous peoples in Canada are made up of hundreds of distinct Nations. Indigenous peoples includes the three Indigenous groups of Canada: Indians, including non-Status and Status; Métis and Inuit. When I use the term Indigenous, I will be referring to all three groups, however it is important to note that most of the legislation concerning Indigenous peoples in Canada concerns Status Indians.

[3] I capitalize "White" when referring to the racially constructed group of light-skinned people. To use the lowercase "white" would imply that it is a neutral, natural or normal term, which is not the case. Terms such as white privilege, white supremacy and whiteness remain lowercase throughout this thesis because they are systems of oppression similar to capitalism, patriarchy and heteronormativity.

[4] Gerald Stanley pleaded "not guilty" to the charge of second degree murder and has since been released on bail.

which the shooting of Colten Boushie took place was in Saskatchewan on Treaty Six land. Like many parts of rural Saskatchewan, despite the close proximity between farming communities and reserves, they might as well be worlds apart (Epp, 2008: 127; Razack, 2002: 130).

The stories of the encounter between Colten Boushie and Gerald Stanley, and between Indigenous peoples and non-Indigenous peoples across the prairie West, go back to 1867 when the Fathers of Confederation embarked on a nation-building project that would provide land-based opportunities for White settlers at the expense of the Indigenous population who had lived on the land for thousands of years. This process can be traced through law. Under section 91(24) of the *British North America Act, 1867*, "Indians and lands reserved for Indians" became federal jurisdiction, allowing for decades of unilateral policy-making aimed at managing, controlling, containing and eradicating the Indigenous population. This early act of colonial violence enshrined the oppression and domestication of Indigenous peoples into law. Five years later, the *Dominions Land Act* made way for the settlement of the West, encouraging European immigration and migration from Eastern Canada to what is now Saskatchewan, Alberta and Manitoba by offering a quarter section of land for homesteading to each man who paid a fee of ten dollars. Ultimately, 1.25 million homesteads were created through the *Dominions Land Act* (Ward, 2014: 4), establishing what Sherene Razack calls "White settler space" (2002: 1). In 1876, the same year that Treaty Six was first signed,[5] the federal government enacted the *Indian Act*. This legislation, which aimed to eliminate "Indians" through assimilation and enfranchisement,[6] was passed in the same year that negotiations began on a treaty recognizing

[5] While several chiefs signed Treaty 6 in 1876, others, including Minahikosis (Little Pine) and Mistahimaskwa (Big Bear) were opposed and did not sign onto the treaty until 1879 and 1882, respectively. When Big Bear finally signed, it was with much reluctance and in exchange for food for his people (Daschuk, 2013: 123).
[6] Enfranchisement meant that an Indian, as defined by the *Indian Act*, would lose their status. In addition, Indigenous women who married a non-Indian man lost their status until Bill C-31 was passed in 1985.

the nationhood of the Cree, Assiniboine and Ojibwa peoples. Despite the treaty's assumption of peace and good will between nations, historian James Daschuk reminds us that it was through genocidal tactics, such as the forced starvation of Indigenous peoples on the Plains (2013: 184), that the Canadian government was able to carry out its development agenda in the West (2013: xix; see also Adema, 2015: 464).

These are the laws and experiences that have shaped and structured the lives and opportunities of the families of Colten Boushie and Gerald Stanley. While many Canadians would be quick to point out that these laws were passed nearly a century and a half ago and have nothing to do with this case, I invite readers to absorb the following statements made in public about the Colten Boushie shooting:

> "These dirty Indians off the Rez stopped in at our farm and tried to steal our vehicles…" (Anonymous, quoted in Tait, January 2017)
>
> "In my mind his only mistake was leaving witnesses." (Ben Kautz, quoted in Warick, August 2016)
>
> "He should have shot all 5 of them and [been] given a medal." (Mark Huck, quoted in Cuthand, August 2016)
>
> "And shut the f*ck up about this being a race thing. The old guy was standing his ground… 'Cause I would side with the shooter. Doesn't matter if it was five white people on a brown [man's] land. It still stands. They were on his land. They could've left. They made the choice to stay for open season." (Chase Jeschke, Facebook, August 12-14, 2016)

Colten Boushie was killed because he was constructed as someone who should be feared by settler Canadians. In life, he was viewed as a source of danger, even criminal. In death, he is further dehumanized and his life is seen as not grievable (Butler, November, 2015; Silverstein, June, 2013). These conceptions remain part of the conversation surrounding Boushie's death despite the fact that he is described as "a man of the community" and as "being very devoted to his family" (CBC, August, 2016). Boushie's death serves as an entry point into the broader

racialized violence experienced by Indigenous peoples *because* of this construction. Even though it was Stanley, a White man, who committed a violent crime on August 9, 2016, the discourse casts Stanley's violence as justified because the presence of five Indigenous youths in White settler space is regarded as inherently threatening. The construction of Indigenous peoples as a threat to White settler space is rooted in Canada's nation-building and settlement processes. Through authorized state violence, Indigenous peoples have been controlled, confined and contained as part of a continuation of colonialism observable today in the over-incarceration of Indigenous peoples. In the same way that Stanley's violence was justified by his supporters, state violence towards Indigenous peoples is not seen as such or is justified by the presumed criminality of Indigenous persons.

Today, Canada's prisons are packed with Indigenous individuals, many of them still awaiting trial (Statistics Canada, 2015). An Indigenous person living in Canada is ten times more likely to be incarcerated in a federal penitentiary than a non-Indigenous person (Office of the Correctional Investigator, 2013). This disproportionate rate of incarceration has been climbing steadily over the last few decades (see Figure 2). The rate is even higher in some provinces (see Figure 1), such as Saskatchewan, where Indigenous people make up close to eighty per cent of the imprisoned population (Government of Saskatchewan, Ministry of Justice, 2014), yet account for only sixteen per cent of the province's population (Statistics Canada, 2016). Michelle Alexander explains that "mass incarceration operates as a tightly networked system of laws, policies, customs, and institutions that operate collectively to ensure the subordinate status of a group defined largely by race" (2011: 13). In Canada, much like in the United States, practices such as racial profiling and carding are day-to-day realities for Indigenous peoples, which contributes to the normalization of Indigenous peoples as criminals (Huncar, June 2017;

Mohamed, June 2017). This thesis will demonstrate that these acts of violence are representative of the silent and symbolic colonial violence that runs deep throughout Canada's political, social and legal structures (Regan, 2010: 38). Further, I argue that if the racialized state violence in the form of Indigenous over-incarceration continues, reconciliation cannot be achieved because mass incarceration is a form of colonialism that seeks to segregate, assimilate, control and erase Indigenous bodies.

The Colten Boushie shooting happened the year after the Truth and Reconciliation Commission (TRC) released its Final Report—in the year that some Canadian cities dubbed "The Year of Reconciliation" (CBC, January 22, 2016). The TRC had been mandated to collect testimonies from residential school survivors and other individuals impacted by residential schools in order to inform Canadians about Indian Residential Schools (IRS). The establishment of the TRC was the cornerstone of the settlement agreement reached between the federal government and thousands of residential school survivors, being parties to a series of class action lawsuits that sought compensation and apology from the federal government for its role in establishing and maintaining an assimilationist and genocidal policy of forced residential school attendance of Indigenous children. Endorsed by the federal government, all provincial premiers and various churches and other organizations, the TRC made 94 Calls to Action with the aim of advancing reconciliation between the Canadian state, the Canadian public and Indigenous peoples. For Canada, the TRC represented a framework for a renewed relationship between Indigenous and non-Indigenous peoples. Yet for many observers (see for example, MacDougall, August, 2016; Cuthand, August 2016; Tait, January, 2017), Boushie's death has become a symbol of the growing racial tensions on the ever-segregated Canadian prairies and the ongoing intergenerational racialized violence inherent to settler colonialism. My research attempts to

make sense of these two seemingly opposing narratives.

The core research questions of this thesis are: What can CRT reveal about the ways in which Canadian law has contributed to the over-incarceration of Indigenous peoples and what does this mean for how reconciliation is understood in Canada? Further, what does this dynamic reveal about how power, race and racism operate in Canada? This thesis argues that the over-incarceration of Indigenous peoples is a continuation of the racialized state violence experienced by Indigenous peoples through ongoing colonialism and is thus a measure of how much work remains if reconciliation is to mean the restructuring of the relationship between Indigenous peoples and the state. Critical race theory (CRT), highlights the role that race and racism play in relationships of power, and challenges settler societies to examine the parts of their world that depend on the continued oppression and colonization of Indigenous peoples.

Despite similarities between the Boushie shooting and police and "vigilante" shootings of Black youths in America, Canada likes to distance itself from the racial tensions in the United States (Hill, February, 2016; Gilmore, January, 2015). This is true when we look to our race relations today, as well as those in the past (Backhouse, 1999). In examining how Canadians view our history of colonization and settlement, Kathleen Ward writes: "Everything that was done, we learned, was necessary and inevitable. What needed to be done was all done in the kindest way possible – different from how 'they' treated 'their' Indians in the United States…" (2014: 3). In these discussions, the degree to which violence played a role in colonization is usually minimized, especially in comparison to the colonial experiences of South America, Africa and the United States. This myth is reflected in social, political and academic discourse, as demonstrated by anthropologist Douglass Drozdow-St. Christian, who matter-of-factly states: "…Canada was colonized by law rather than by force" (2001: 3).

More recently, with the release of the TRC's Final Report, the term "cultural genocide" became the subject of debate, with many arguing that equating the residential school experience with "the language of the Holocaust" goes too far.[7] These statements don't sit right with anyone who is familiar with the trauma and violence that Indigenous peoples experienced through colonialism and continue to experience through forms of ongoing colonialism. In fact, some scholars argue that the term "cultural genocide" is used to steer conversations about the TRC away from genocide in order to prevent denialist movements or in an attempt to downplay the violence of Canada's colonialism (Macdonald, January, 2015; Woolford and Benvenuto, 2015; Wildcat, 2015). Therefore, it is crucial to critically question Canada's colonial history, and particularly the role that colonial racism continues to play in our collective story, because doing so challenges the conventional nation-building mythology, which ignores the racialized state violence upon which the initiation and maintenance of the Canadian state has relied.

This thesis will demonstrate that Canadian law and subsequent policy decisions created inequalities that have allowed extreme historical and current injustices to occur, which not only benefit—but are done in the name of—White-Canadian society. From the earliest conceptions of Canada to today, the federal government has controlled Indigenous peoples in order to maintain control over land and resources, thus reinforcing Indigenous dependency (Irlbacher-Fox, 2009: 5). Although many of the overtly racist policies of the past have been replaced with seemingly neutral public policy, such as 'tough-on-crime' legislation, which has seen a spike in incarceration rates amongst Indigenous offenders, increasing by 52.4 percent from 2005 to 2015 (Office of the Correctional Investigator, 2015: 2), the undertone from then to now is the same:

[7] For example: Mark DeWolf, "Letter to the Editor", *The Globe and Mail*, June 1, 2015; Joseph Brean, ""Cultural Genocide" controversy around long before it was applied to Canada's residential schools", *The National Post*, June 3, 2015.

Indigenous peoples are a threat to civilized Canadian society and "they" may participate in "our" society only on "our terms" (Alfred, 2012: 168). Indeed, as Lorenzo Veracini (2007) explains, "the definition of a successful settler project is when the Indigenous population has been reduced to a 'manageable remnant'" (quoted in Razack, 2015: 5).

Canada's colonial project constitutes a century and a half process of asserting and maintaining national sovereignty to the benefit of White settler society at the deliberate expense of Indigenous peoples. This process is often racist and violent and is achieved strategically and systemically by political actors through the silent consent of the Canadian public. This phenomenon can be traced from the making of the Canadian state to modern-day policy decisions that directly and indirectly affect Indigenous peoples. I will demonstrate how colonialism and racism continue to exist by examining tough-on-crime policy changes, embodied by the *Safe Streets and Communities Act* and the *Tackling Violent Crime Act*, that reinforce the over-incarceration of Indigenous peoples against current reconciliation efforts. By tracing federal government policy from the making of the Canadian nation-state to existing federal public policy, I will address how law is used as a form of violence that establishes and maintains unequal relationships of power between Indigenous peoples and the Canadian state. While demonstrating that law has shaped race and racism in Canada (Aylward, 1999: 30; Backhouse, 1999), I will employ critical race theoretical perspectives in order to explain law as a form of violence during the colonial process—an epoch, I maintain, that is not yet over.

I look at Indigenous criminalization and over-incarceration within the context of reconciliation because each phenomenon explains a different piece of a larger story about Indigenous-settler relations. Critical race theory (CRT) gives us the tools to connect these pieces and examine these factors together as a broader power relationship of ongoing settler

colonialism. In doing so, I will demonstrate how colonialism and racism continue to exist, how Indigenous peoples are impacted differentially from multiple angles and how settler Canadians perceive what is going on. Similarly, taken together, these areas of inquiry reveal truths about Canadian identity and Canada's political culture, the understanding of which is essential for any meaningful restructuring of the colonial state. In the same way that the policies of the late 1800's towards Indigenous peoples were about building the nation Canada would become, contemporary policy decisions reflect the values of many Canadians. I will expand further on how these issues relate to the Canadian political psyche in the pages that follow, but in brief these topics exemplify the "us" versus "them" mentality that frames the discourses about Indigenous policy issues.

As Indigenous peoples are constructed as victims, criminals or dependents, based on the issue being discussed, settler Canadians reinforce their identity as the generally sympathetic, responsible, taxpaying citizens (Francis, 1992: 8). This dynamic allows Canadians to individualize the broader colonial injustices by characterizing them as wrong acts that were committed in the past by bad or ignorant people, which simultaneously absolves modern Canadians of taking any personal responsibility and prevents Canadians from confronting the state's role in continuing colonial injustices. Stephanie Irlbacher-Fox describes the phenomenon of the state positioning itself as both the cause of and solution to Indigenous peoples' "dysfunction" as the state's "dysfunction theodicy" (2009:31), which can be understood as follows:

> Canadian Aboriginal policy provides a rationale to Indigenous peoples for their suffering, while simultaneously positioning the state as a source of redemption and healing. This positioning functions as the state's theodicy, characterizing Indigenous peoples as unmodern and dysfunctional, caused respectively by cultural difference and poor lifestyle choices. Injustice, being in the past and therefore neither a credible source of suffering nor a candidate for restitution, is substantively

> irrelevant…Indigenous peoples are encouraged to turn to the state as the source of redemption through programs and services that will assist both their modernization and their development of necessary knowledge and techniques to overcome self-imposed dysfunction (Irlbacher-Fox, 2009: 31).

CRT forces settlers to challenge this dynamic.

In this thesis, I seek to address both the theoretical and the practical considerations of the issue of racism in public policy discourses in Canada. The conclusions of this study will inform how the involved parties understand the distribution of power between Indigenous peoples and the Canadian state. By conducting critical race analyses of Canada's response to Residential Schools, and particularly how governments view reconciliation in light of Canada's response, in conjunction with the current criminal justice policy arena, I intend to account for how the issue of racism is framed in discussions of Indigenous peoples in Canada and why racism is discussed—or not discussed—in particular ways. Conducting a critical race analysis on these issues shows a set of values held by a certain segment of the Canadian population. Razack notes, "critical scholars have tended to focus on racism without understanding its connection to the maintenance of a settler colonial social order" (2015: 202). These topics demonstrate that racism sustains White settler privilege, while continuing to advance colonial practices and policies, which are not as different from Canada's "previous, now shameful priorities" of the past (Weiss, 2015: 38).

Arriving at the Questions of Inquiry

Almost immediately after Boushie's death, a conversation about another Indigenous mother having to come to terms with her young son's untimely death,[8] quickly and publicly turned into

[8] Indigenous men are the group of people most likely to be murdered in Canada—information from Statistics Canada shows that 1,750 Indigenous men were murdered over a 32-year period, compared to 745 Indigenous women (National Post, April, 2015). See also the deaths of Indigenous youths in Thunder Bay: https://www.thestar.com/news/canada/2017/05/31/first-nations-leaders-call-for-rcmp-to-take-over-thunder-bay-teen-death-cases.html

one about an individual's right to protect their private property. In the months that followed, some Saskatchewan farmers took to displaying firearms in the backs of their pickup trucks and harvesters. The provincial government responded by dedicating one million dollars and seven MLAs to establish a task force on preventing rural crime (Government of Saskatchewan, 2017: 16). This crime prevention initiative was announced while the province was in the midst of a suicide epidemic amongst Indigenous youth in the North.[9] In early 2017, the Saskatchewan Association of Rural Municipalities voted 93 per cent in favor of a resolution to increase self-defence laws in order to protect private property, drawing comparisons to the "stand your ground laws" that exist in certain American states (CBC, March 14, 2017; Rothman, February 15, 2017). Although the violence of these actions may seem shocking or un-Canadian, Indigenous peoples and allies understand that Colten's death and the aftermath was a resounding reminder of the persistent and unnoticed violence against Indigenous peoples (Razack, 2015: 111).

When analyzing the hate and violence with which comments about Boushie's death were made, one quickly realizes that these comments are directed towards a group *other* than those with which the commenters identify. Certainly, the above comments are not words that would be exchanged between good neighbours. To whom are the comments directed, then? "Indians"? Of course not—we are assured that it is foolish to believe that this case had anything to do with race. The commenters didn't mean *all* Indians should be shot, they just meant *those* Indians. Indeed, one commenter promises that it would've been the exact same conversation if it had been the other way around. By that logic, the group that is worthy of such hateful comments can only

[9] As of March, 2017, the province had hired a mental health professional and a community health nurse in the northern community of La Loche (Global News, March, 2017). For more on Indigenous suicides see Dr. Darien Thira: https://www.google.ca/amp/www.cbc.ca/amp/1.3881652; Vikki Reyonds, 2016. Hate Kills: A Social Justice Response to "Suicide": http://www.vikkireynolds.ca/documents/2016ReynoldsHatekillsasocialjusticeresponsetosuicide.pdf

be criminals. Interestingly, when young White "boys"[10] break into private property on the prairies to go for a joyride on stolen property, such as a bobsled or a riding lawn mower,[11] and the outcome is the tragic death of those young men because of a horrible accident involving the stolen property, we do not demand that their accomplices also be killed; we do not say that their deaths were deserved; we do not even suggest that those accidents were the boys' own fault—doing so would be an affront to the decency and dignity of human life.[12] These tragic cases are classic examples of "boyish high jinks" gone wrong (CBC, March 2016). Yet, with respect to allegations of trespassing on the Stanley farm, Colten and his friends were not seen as "boys being boys", nor "stupid kids doing stupid things". Colten's friends were not deemed to have already suffered enough after seeing their friend die—they were promptly arrested at the scene. In constructing a criminal, it appears there is more at play than the simple commission of a crime.

In pondering what appears to be a contradiction—on the one hand, a racial divide so severe that an elected official who advocated the murder of Boushie's friends received as much support as Colten Boushie's family (Domise, August 2016) and, on the other hand, a country that is on its way to repairing the harms caused by residential schools—a second lens through which to view this event is a critical reflection of how reconciliation is viewed in Canada. Framed as atonement for the past wrongs of previous governments, reconciliation narratives recognize

[10] Critical race scholars have discovered that in the media and in court transcripts, White male youth accused are more often referred to as "boys"—even young men in their mid-to-late twenties, compared to Black or Indigenous youth accused who are referred to more often as "men" or "youth" (Razack, 2002; Bump, 2014; American Psychological Association, 2014).

[11] These are in reference to two cases: one in Calgary, Alberta, involving a group of youths who broke into Calgary Olympic Park to go bobsledding on the tracks after it had closed; the other involved a young man from Regina, Saskatchewan who broke into a regional park's maintenance shed to ride a ride-on lawn mower. In both cases, the youths died after crashing the stolen vehicles.

[12] Only two comments out of 229 on a CBC story suggested the boys were to blame for their own deaths (CBC, March, 2016).

residential schools as a failed government policy, rooted in colonialist and assimilationist, perhaps even racist, ideas that have "no place in our country [today]" (Harper, June, 2008). This framework locates racialized state violence in the past, casting present-day pathologies, such as Indigenous profiling, carding, and over-incarceration, as legacies of residential schools rather than as the continuation of a colonial system that privileges settlers and oppresses Indigenous peoples. In this way, reconciliation fails to acknowledge present-day acts of racialized state violence as such and presents Canadian governments as benevolently improving the lives of Indigenous peoples—otherwise known as solving the "Indian Problem."

For more than a century and a half Canadians have been discussing the "Indian Problem," while the language used to describe "the problem" has changed to become more politically correct, the general outlook has remained. More recently, scholars have flipped the "Indian Problem" into the "settler problem" (Epp, 2003: 228; Regan, 2010), an approach that calls upon settler societies to examine the parts of their world order that depend on the oppression of Indigenous peoples.

I seek to add my analysis to this evolving discussion of the settler problem. In digging deep into what purposes Indigenous over-incarceration and reconciliation serve, assumptions of white superiority, which are usually buried far beneath the surface, are uncovered. These narratives rely on each other—without the "dysfunctional native," there is no perceived need to "reconcile." For Canadian liberal democracy, then, the problem isn't colonialism; it is that colonialism wasn't successful. In this way, reconciliation gets framed as creating a more perfect Canada rather than challenging and dismantling colonial systems. Although this dynamic has been studied from post-colonial, decolonial and Indigenous theoretical perspectives, with large bodies of literature in the humanities and social sciences being produced to the point that Settler

Colonial Studies has become its own impressive academic field, I will approach the settler problem from a critical-race perspective. In doing so, I ask what can Critical Race Theory (CRT) demonstrate about the ways in which power, race and racism operate in Canada and how these structures account for the seemingly opposing narratives of reconciliation and Indigenous over-incarceration?

Why Critical Race Theory?

Thomas King argues, "When we look at Native to non-Native relations, there is no great difference between the past and the present. While we have dispensed with guns and bugles, and while North America's sense of its own superiority is better hidden, its disdain muted, twenty-first-century attitudes towards Native people are remarkably similar to those of the previous centuries" (2013: xv). The "Indian Problem" today manifests in perceptions of the realities that Indigenous individuals endure—from the accounts of missing and murdered Indigenous women and the overrepresentation of Indigenous peoples in the criminal justice system to the "social dysfunction" and impoverished conditions on First Nation reserves. For Canadians absorbing this information, with political rhetoric coming in one ear and stories of Indigenous social deviance coming through the other, it is easy to understand how quick political fixes, which are typically located within the existing colonialist structure, are appealing. These familiar solutions—"if only we understood them better"; "if only they could heal and move forward"; "if only we could get rid of the *Indian Act*"—all envision the same end: "…then they could start being more like us." This type of racism is less about racial dominance and more about cultural appropriateness. In other words, Indigenous peoples "are not dismissed as racially inferior but as culturally incompatible" (Fleras, 2004: 431). This mindset allows Canadians to ignore the settler problem

(Regan, 2010; Epp, 2008: 126)—a problem that exists because ideas about racial superiority and inferiority have shaped Canadian notions about what is and is not culturally desirable.[13]

Racism in Canada is framed as something that happened predominantly in the past, involving individuals who endorsed hierarchal worldviews or who simply didn't know better (Razack, 2015: 16). Likewise, present-day occurrences of racism are attributed to cultural misunderstandings or personal ignorance and are typically individualized. These mythologies of racism persist because of powerful subscriptions to liberal Canadian ideas about equality, ambition and opportunity. But these conceptualizations ignore that racism exists because political, legal and economic structures rooted in colonialism operate to systemically privilege White settler Canadians, while oppressing Indigenous peoples. This racism sustains the lifestyle and social order that Canadians expect (Razack, 2015: 27). Thus, it is hardly surprising that political reactions to Indigenous issues advocate solutions that perpetuate and idealize the colonial system that sustains racial inequalities.

Critical race theory can assist in addressing questions of how power is distributed along racial lines through state institutions (White, 2002: 410). There has been some debate about whether CRT should be applied to the Canadian or to the Indigenous contexts because the theory is traditionally viewed as an American perspective that explains the complex relationship between Black[14] and White Americans (Nelson and Nelson, 2004: 3). In addition, some argue that discussing race as it pertains to Indigenous-state relations is a diversion from their political aspirations for self-determination (Cuthand, 2011). As a result, it is more common to see

[13] For an explanation of the "settler problem", see page 31.

[14] While "Black" is a racially-constructed category for dark-skinned people, it is recognized that "Black" is an identity to which many dark-skinned people subscribe because of a shared history or culture. For both of these reasons, I have chosen to capitalize Black. For a fuller discussion on the capitalization of identity-based descriptor see Braganza, Chantal. 2016. "Why we decided to capitalize Black, Aboriginal and Indigenous" (http://tvo.org/article/current-affairs/shared-values/why-we-decided-to-capitalize-black-aboriginal-and-indigenous-)

postcolonial or Indigenous theoretical perspectives used in analyses of Indigenous issues (for example, Smith, 1999; Alfred, 2005). Although these assessments are crucial, I argue that a critical race analysis of the policy decisions affecting Indigenous peoples is important because racism is infused within Canadian political culture and Canada's dominant institutions in a systemic way that can only be made visible through a critical lens (Backhouse, 1999: 14). In addition, CRT can broaden understandings of the diversity of Indigenous peoples and the complexities of Indigenous identities in ways that account for intersections of class, gender and space (Razack, 2002). CRT is a relatively new (Smith, 2003; Thompson, 2008; Razack, Smith and Thobani, 2010), and certainly marginalized (Hawkesworth, 2010), theoretical perspective within the discipline of political science. Applying the theory will make an important theoretical contribution to the way in which Indigenous-state power relations are understood in Canadian political science.

Thesis Outline and Chapters: What do these topics reveal about Canadians?

Chapter one sets the stage by explaining the key themes of CRT; establishing its relevance in analyzing the Indigenous-state relationship in Canada; demonstrating how CRT can assist in understanding the past; and arguing that CRT can be helpful in acknowledging the power dynamics that exist today which allow for the continuation of colonialism in Canada. I make the case that race-making through Canadian law created inequalities that allowed post-Confederate federal governments to legally oppress Indigenous peoples and marginalize Indigenous knowledges, while privileging European settlers and systems such that the legal basis of Canadian sovereignty and the violence inherent to it are taken for granted. Through a CRT lens, I demonstrate how law was manipulated and construed to establish and maintain legitimacy. Additionally, I show that the violence inherent to the nation-building process was racist

(Thobani, 2007; Jawani, 2006; Razack, et al., 2010). I also argue, drawing upon the work of Frantz Fanon (2004; 1952), that both the British and the Canadian Crown objectified and dehumanized Indigenous peoples, while privileging whiteness through legal processes. I examine Canada's obsession with race, arguing that race is a fabrication of the colonial imagination that permits the state to oppress Indigenous peoples to ensure the supremacy of a White settler state on Indigenous land (Razack, 2002). CRT assists in demonstrating that this objectification and oppression continues today.

By analyzing Canada's tough-on-crime policies through a CRT lens, chapter two demonstrates that there are examples of continuing colonialism in Canada through the over-incarceration of Indigenous individuals. Zeroing in on Canada's criminal justice system within the context of so many social justice issues—lack of clean drinking water on reserves, the number of Indigenous children in the child welfare system, unequal funding for education for First Nations children—seems, at face value, to be ignoring the big picture or working backwards. Certainly, Canada's failure to honour treaty rights and settle land claims is a more prominent issue in Canadian political science, Indigenous studies and legal studies than is the institutionalized racism of the criminal justice system (see, for example Alcantara and Davidson, 2015; Asch, 2014). It is fair criticism to suggest that focusing on some of the issues listed above would inevitably address the problems faced by Indigenous individuals experiencing the criminal justice system. But, I argue that these elements are inexorably connected. It is commonly said that political science is the study of power. Colonial power may look different today than it did in the early days of Confederation, but in large part, the structures of power that sanction the arrest and imprisonment of a disproportionate number of Indigenous individuals each year are the same systems that were used to control Indigenous populations and deprive them of their

land so many years ago. Canada's criminalization of Indigenous peoples is a continuation of colonization and the symbolism is glaring—Indigenous bodies are locked up so they can't fight back. In examining the structures that maintain state power, Michel Foucault reminds us that there is perhaps no greater power inequality than between an offender and the state (1995: 90). For Indigenous peoples, this power dynamic is exacerbated because they are colonized. Furthermore, the normalization of Indigenous criminality prevents Canadians from recognizing and confronting the ways in which colonialism and white supremacy operate today. In other words, "What we are doing is using our criminal justice system to defend ourselves from the consequence of our own racism" (John Struthers in MacDonald, 2016: p. 31).

Whatever the virtues of Canada's legal system, not all people living in Canada experience it the same way. On considering Canadian law, Tracy Lindberg wonders, "what if Canadian law was not just—not just unjust, not just unfair….what if Canadian law is wrong?" (2015: 226). The preamble to the *Canadian Charter of Rights and Freedoms* states, "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law." The rule of law is based on the two following premises: first, it supports a just legal order, with which even governments must comply, and second, it does not allow illegitimate actions by the state (Borrows, 2002: 113). The idea that Canadian law is based on these principles legitimizes the justice system. Typically, lawmakers decide that a law is just if accords with the rule of law and the procedures of law making. As a result, while specific laws may be subject to constitutional challenge, *the law* as such is rarely held up for critical examination. However, in examining the relationship between Indigenous peoples and the Canadian state, especially in their interactions with the justice system, it becomes apparent that the rule of law has not been fully extended to Indigenous peoples (Borrows, 2002: 115). As a result, Indigenous peoples are routinely

dehumanized through racialized state violence, while mainstream Canadians fail to recognize this violence as a continuity of colonialism because it is performed under the guise of law enforcement.

In chapter three, the focus turns to reconciliation, a concept with various subjective definitions, all of which propose to improve the existing relationship between Indigenous peoples, non-Indigenous peoples and the state. Uncomfortable and unsettling issues, such as addressing the racialized state violence and racism that contributes to the over-incarceration of Indigenous peoples, rarely enter the political discourse of reconciliation. Instead, efforts tend to promote education, unity and the affirmation of the Canadian state. By applying CRT to Canada's response to Residential Schools, which includes the Indian Residential School Settlement Agreement (IRSSA), official apology, the TRC and its Calls to Action, I question if the current reconciliation framework is able to meaningfully alter the colonial relationship between Indigenous peoples and the state to the point where the tough issues of Indigenous incarceration and racialized state violence are addressed. I do not suggest that reconciliation is not needed, but rather that it ought to be pursued in a manner that confronts white privilege and the settler problem. In particular, Canada's response does not require non-Indigenous Canadians to give up any substantive power, privilege or land, other than symbolically (Irlbacher-Fox, 2009), in the reconciliation process.

Through a CRT analysis of the existing reconciliation framework, I will demonstrate that colonial relationships are largely reaffirmed and that white privilege is left unquestioned, despite the fact that the work of the TRC has been generally positive. At worst, Canada's response reinforces harmful stereotypes and locates acts of colonialism in the past. Though the TRC's final report and Calls to Action condemn the racial injustices occurring today, such as the

overrepresentation of Indigenous individuals in the child welfare system and criminal justice system, these issues are framed mainly as colonial legacies, existing because of the intergenerational effects of colonialism, rather than as the continuity of colonialism, sustained by racialized state violence. Once the work of the TRC was made public, observers were quick to point out the comparisons between the residential school system and current government policies impacting Indigenous peoples (MacDonald, 2016). The TRC itself cautioned against allowing history to repeat itself. Scholars and activists have written about how provincial and federal child welfare systems continue to separate Indigenous children from their families in grossly disproportionate ways (BC Association of Social Workers, 2016: 9), provide substandard care to Indigenous children and, tragically, neglect the death and injury of hundreds of Indigenous children (Blackstock, 2017). Similarities have also been drawn between residential schools and the criminal justice system and more specifically jails, with *Maclean's* magazine declaring that "Canada's prisons are the 'new residential schools'" (MacDonald, 2016). While these analyses are crucial in establishing the continuity of colonialism in Canada, scholars do not typically approach the issue from a CRT perspective. Doing so unveils the carefully coded racism of the existing reconciliation framework.

Taken together, these chapters provide opportunity to reflect on Canada as a state of racialized violence, both in the past and today. This critical reflection challenges readers to rethink what it means to be Canadian and to ask what kinds of political, economic and social changes are required for a real restructuring of Indigenous-state relationships. Political scientists are increasingly attentive to the role that racism plays in Indigenous-state relations (see Green, 2006; Epp, 2008; Smith, 2003; Wilmer, 2016). For example, Roger Epp explains that the failure to acknowledge racism in Canada is due to "a political culture in which a certain idea of equality

has gained a powerful foothold" (2008: 133). In other words, when state institutions are seen as neutral, and the law is applied to individual cases, the racial inequalities that are the product of systemic racism are seen as normal. As Joyce Green reminds us, "Racism, like other forms of political culture, is transmitted intergenerationally and is thus rendered non-controversial. Destabilizing it is enormously difficult" (2006: 515).

Contribution to Knowledge

Ultimately, I bring CRT into the discussion of reconciliation and decolonization, alongside settler colonial studies, not to suggest that it is the answer for the "Indian Problem" or the "settler problem," but as a way to remind well-intentioned settler Canadians engaged in reconciliation efforts that Canada is a racialized state and that racism continues to shape the lives of everybody living in Canada, benefiting White settlers and disadvantaging Indigenous peoples. I will demonstrate that the inadequate acknowledgement and treatment of racism, colonialism and violence in Canada contributes to the failure of policies designed to ameliorate the conditions of Indigenous peoples because the power dynamics that sustain colonialism in Canada are not meaningfully challenged. This research confronts "the settler problem" from a critical race perspective which, until recently, has been on the margins of Canadian political science (Razack, et al., 2010). Combating this problem is crucial for the advancement of Indigenous decolonization projects in Canada and for the ways in which Canadians understand issues of race, racism and (de)colonization in Canada.

Chapter One: Theoretical Framework

This chapter explains the theoretical framework that will shape my analysis of federal government actions affecting Indigenous-state relations. I will apply critical race analytical tools to the following contemporary federal government policy decisions: tough-on-crime policy changes, embodied by the *Safe Streets and Communities Act* and the *Tackling Violent Crime Act*; and the residential school apology and establishment of The Truth and Reconciliation Commission. Critical Race Theory (CRT) assists not only in understanding how these policy decisions affect Indigenous peoples, but also how Indigenous and non-Indigenous Canadians understand race and racism within the context of Indigenous-state relations and their social positions within a settler state.

I will describe CRT in general terms by using broad examples to demonstrate how each of the themes of the theory broaden understandings of the role of racism in power relations at the local, global and national levels. Although CRT's relevance to Indigenous-state relations in Canada has been debated, I will explain how the framework can be useful in the Canadian context by tracing race, racialization and racism through legal processes and by understanding CRT as a way in which both Indigenous peoples and settlers can challenge white supremacy in all of its forms. Following that, I will use CRT to demonstrate that the historical oppression of Indigenous peoples largely occurred through Canada's legal system. There are clear examples from Canada's past to illustrate how the law functions as an agent of racialized violence; however extending that argument to the modern era is controversial because CRT operates on an anti-essentialist assumption, whereas decolonial theories tend to depend on a degree of cultural determinism (Smith, 1999: 110). In addition, some scholars of Indigenous Studies argue that the goals of anti-racism and decolonization are not compatible (Hokowhitu, 2012; Tuck and Yang,

2012). In the final section of this chapter, I will demonstrate that CRT continues to be relevant in understanding the relationship between Indigenous peoples and the Canadian state. The chapters that follow will further demonstrate the applicability of CRT to the Indigenous-state relationship in Canada by examining the race and power structures at play in areas of contemporary public policy.

What is Critical Race Theory (CRT)?

CRT is a critical perspective rooted in American legal scholarship. The theory was developed as a way to analyze the more nuanced and institutionalized racial power imbalances that sustained the disparity between Blacks and Whites, even though many mainstream Americans believed that formal equality had been achieved (Delgado and Stefancic, 2017: 4). Though there are differences in the ways that scholars approach CRT (Crenshaw, 1996: xiii), it is generally accepted that CRT rests on four central assumptions: race is a social construction (Delgado and Stefancic, 2017: 9); racism is institutionalized, such that it not recognized as racism (Delgado and Stefancic, 2017: 8); racism exists to maintain an invisible order of white supremacy (Crenshaw, 1996: xiii); and race and racism can be combated through counter-stories, which have the potential to transform existing laws and systems (Crenshaw, 1996: xiii). A fifth element—intersectionality—is increasingly considered to be a central component of CRT (Crenshaw, 1996: 357). These arguments help to study the link between race, racism and power. The main objective of CRT is to challenge liberal notions of meritocracy and equality by questioning the foundations of law and other socioeconomic systems, which have operated to systemically oppress certain racial groups (Aylward, 1999; Delgado and Stefancic, 2017: 3). Ultimately, CRT desires to reform the exclusionary laws and systems that have been and continue to be impediments to equality and liberty for racialized groups (Gómez, 2010: 488).

Though CRT began in the discipline of law, it has become a useful theoretical framework in many fields, including political science (Harris, 2012), because it assists in examining and explaining structures of power through its five main components.

The first element of CRT is that *race is not real*—it is a social construction, created to categorize, classify and legislate people to oppress certain groups and privilege others, usually for economic purposes (Ford, 1999: 714). It is through these constructions that people and groups are racialized. Though presented as biological, race is more accurately a pseudo-scientific idea that is rooted in the modernist obsession to categorize and define everything (Blaut, 1993: 61; Hall, et al., 1996). Race and the processes of racialization are constantly being redefined and usually depend on the interests and anxieties of the dominant group. The obvious historical examples of slavery and segregation in the southern United States demonstrate that race was used to justify an economic system that relied entirely on the exploitation and dehumanization of West Africans. But consider who benefits from modern day initiatives, such as America's welfare-to-work policy where a disproportionate amount of those forced to work low-paying, low-skilled jobs usually for high-earning corporations[15] are poor, black unmarried mothers. Despite the political rhetoric of America's culture of good, hard work,[16] the poverty rate for working single mothers actually increased after the welfare policy change (Limbert and Bullock, 2005: 254), while the participating corporations received generous supplements from the federal government (Limbert and Bullock, 2005: 267). Yet, the image of lazy black "Welfare Queens" (Kohler-Hausmann, 2015: 756) getting off of their front porches to learn the value of hard work

[15] Included in the 800 corporations that have participated in the welfare-to-work program are: Burger King; Monsanto; United Airlines; Sprint; and UPS (Clinton, 1997: 1088).

[16] Indeed, the reforms were made possible by the euphemistically named statutes: the *Personal Responsibility and Work Opportunity Reconciliation Act* and later, the *Personal Responsibility, Work, and Family Promotion Act of 2002*, which were amendments made to the work-to-welfare program under the George W. Bush administration.

became another chapter in the American success story and is an example of how groups are racialized through intersections of race, class and gender.

Racialization is linked to nation-building. Take, for example the term "visible minority" in Canada. The term is defined in the *Employment Equity Act* (1995) as referring to "…persons, other than Aboriginal peoples, who are non-Caucasian in race or non-White in colour." According to Statistics Canada, subgroups of visible minorities include a wide array of ethnicities, races, nationalities and even linguistic groups, from Latin American to black and Chinese to Arab (Statistics Canada, 2011). The term visible minority speaks to the nation's vision of who belongs. The process of racialization often begins through law, mainly through immigration and citizenship legislation, however it is carried out both formally and informally in a number of ways including, "…objectification, exclusion, infantilization, ridicule, scapegoating, and violence" (Schmidt, 1996: 39). In the process, men and women are racialized differently in gendered ways (Green, 2007). As groups are officially labeled by the state, individuals of those groups are perceived by members of the dominant group as "others." These acts shape the way that racialized people experience racism at both the macro and micro levels, while simultaneously informing how the general public conceptualizes race.

CRT maintains that while race isn't real, racism is. Ta-Nehisi Coates writes, "race is the child of racism, not the father" (2015: 7). Therefore, the second component of CRT assists us to understand how racism functions by forcing us to acknowledge that it is more than overt racist attitudes and actions—it is a structural part of all of our institutions and therefore, is integral to the experiences of non-White people. In other words, one doesn't have to point to the individual racist to prove that racism is alive and well; or on the flipside, Barack Obama's two-term presidency doesn't mean that Americans no longer have to worry about racism. Whereas the

racism of the past may have meant that pejoratives were regularly used to describe ethnic minorities and the thought of a black president of the United States would have been unfathomable, today's racism can be understood as the symbolic or everyday racism that racialized individuals experience (van Dijk, 2000: 34). This racism functions subtly, but it is also deeply embedded within society's legal, educational and socioeconomic systems.

Third, CRT proposes that institutionalized racism deliberately benefits White people, an idea that allows individuals to address white privilege when examining systems of power in society (McIntosh, 1992). White privilege is afforded to individuals "who have been brought up to believe they are White" (Coates, 2015: 7). White privilege should be simple to understand—*it is a certain set of privileges that come with appearing White*. For instance, appearing White in Canada or the United States comes with the privilege of not having one's citizenship questioned. Yet, white privilege is a highly controversial idea, with many who are privileged denying that it exists in any way (for example, Webb, 2016). To be sure, "White" is also a racial construct (Leonardo, 2009: 169), whereas whiteness "…refers to a set of assumptions, beliefs, and practices that place the interests and perspectives of White people at the center of what is considered normal and everyday" (Gillborn, 2015: 278). The concept of white privilege is important to CRT because in practice, it is disguised as meritocracy. The idea of a merit-based society implies neutrality because those who enjoy social and economic advantages are thought of as having earned them through hard work. When the mantra of *hard work equals success* becomes the official discourse of the Canadian middle class, the work of marginalized individuals is devalued and delegitimized (Kohler-Hausmann, 2015: 758). But, as Carol Schick and Verna St. Denis point out: "This is the assumption of superiority that whiteness permits: what we have and who we are is what the world needs whether it wants it or not" (2005: 387).

The fourth assumption is that CRT can transform the standard discourse, both historical and contemporary, that shapes the way we understand our world, by offering counter-narratives or using storytelling to speak truth to power and give voices to those who have been marginalized through the actions and decisions of the dominant group (Chavez, 2012: 339). There are several ends accomplished through this component of CRT aside from the evident aspect of challenging dominant ideology (Solorzano, et al., 2000: 63). First, it creates more space for racialized individuals to participate in academic research. While being careful not to essentialize non-White academics or limit their contributions, the storytelling element of CRT expands the meaning of research to include the personal experiences of racialized academics and confronts the biases inherent to empirical research (Smith, 1999: 67). Second, storytelling creates new forms of knowledge, allowing for a greater development of the truth and a broader acknowledgement of injustices. These two elements assist in proposing alternative approaches to solving real world problems. Finally, it is through counter-narratives that critical race theorists make a plea for a better world, one in which the experiences of the oppressed are not silenced or regulated to the margins of society, public policy, history and academia; but rather a world that is inclusive for all people. Social justice is at the heart of CRT.

Finally, intersectionality is the recognition that individuals are discriminated against by multiple, interlocking systems of oppression. A person's gender, class, sexual orientation, dis/ability, as well as their race influences their experiences and interactions. Kimberlé Crenshaw explains intersectionality as:

> a concept that enables us to recognize the fact that perceived group membership can make people vulnerable to various forms of bias, yet because we are simultaneously members of many groups, our complex identities can shape the specific way we each experience that bias….For example, men and women can often experience racism differently, just as women of different races can experience sexism differently, and so on (quoted in Gillborn, 2015: 278).

CRT's interest in intersectionality examines how inequalities are maintained through socioeconomic and legal structures, whether formally through law or informally through systems of domination, such as capitalism, patriarchy, colonialism or white supremacy. Intersectionality allows for a fuller understanding of oppression and assists in accounting for diverse experiences of discrimination. Makau Mutua argues that an intersectional approach to CRT "…help[s] unpack various oppressions and assist in the forging of new and multidimensional sites of resistance" (2000: 841).

In sum, CRT provides many tools for analyzing race as an institutionalized system of social control and for understanding racism as the complex power dynamics that play out within that system. I argue that the theory can be applied to explain relationships between racialized groups and the state in most societies even though CRT is rooted in and typically used to explain race relations in the United States. Through counter-narratives that exhibit the processes of racialization and white privilege, we can begin to understand that race and racism are the products of unequal systems. Improving and examining the outcomes of our legal and socioeconomic structures then, cannot be fully understood without analyzing their racist origins, asking how systems continue to racialize and questioning who benefits?

What can CRT explain about the over-incarceration of Black Americans in the United States?

The general conclusion amongst critical race theorists is that the over-incarceration of Black Americans is an extension of an oppressive racial system that disenfranchises, controls, contains, segregates and surveils Black people, often through racialized violence and dehumanization, in order to maintain the existing order of capitalism, white supremacy and concentrated political power in the United States (see for example, Davis, 2003; Alexander, 2011; Pemberton, 2015;

Coates, 2015). Scholars Angela Davis and Michelle Alexander argue that over-incarceration is the modern-day manifestation of slavery and Jim Crow segregation laws (Davis, 2003; Alexander, 2011). Sarah Pemberton adds to these analyses, making the case that the criminal justice system in the United States *is* a system of racism (2015: 321). All of these accounts examine how law justifies violence against racialized individuals. Ta-Nehisi Coates' analysis of mass incarceration compares criminal justice trends between the United States and Canada, arguing that while crime rates were decreasing in both countries, rates of imprisonment went up in the United States but "held steady" in Canada (2015: 65). Interestingly, Coates' analysis did not capture that between 2000-2013, the rate of incarceration for Indigenous people in Canada actually went up 56.2 per cent (Office of the Correctional Investigator, 2015).

A Note on Terminology:

Before examining how CRT is applicable in the Canadian context, I will discuss some key terms and concepts that will be used throughout this thesis:

Decolonization

Decolonization is a contested term. Historically, the term has been associated with an era lasting from the end of the Second World War until the 1970s, in which dozens of African and Asian nations fought for and declared independence from various European superpowers. Decolonized nations replaced colonial regimes with nationalist movements characterized by plans for cultural revitalization and political reorganization (Smith, 1999: 111). These contexts are different from the Canadian situation for a variety of reasons, perhaps the most significant of which is the fact that Canada was established as a settler colony, whereas the majority of the African continent was intended to be divided into proprietary colonies, meaning that "the settler problem" was less of a concern during decolonization. In the truest sense, decolonization—even within the context

of settler colonialism—means "the repatriation of land simultaneous to the recognition of how land and relations to land have always already been differently understood and enacted; that is, *all* of the land, and not just symbolically" (Tuck and Yang, 2012: 7). In this conception of decolonization, the fate of the settler is not a consideration (Tuck and Yang, 2012: 17).

Different interpretations of decolonization suggest that the process of decolonization must involve Indigenous peoples and settlers (for example, Russell, 2005; Veracini, 2007; Green, 2014). Lorenzo Veracini explains the challenge associated with decolonizing the settler colony: "If settler colonialism is an ambivalent circumstance where the settler is colonized and colonizing at once, decolonization requires at least two moments: the moment of settler independence and the moment of Indigenous self-determination" (2007: 18). Because colonialism is so deeply woven into the social and political fabrics of the Canadian federation, it is necessary to decolonize every political and social institution, from the legal system (Borrows, 2002), to education systems (Smith, 1999) and even the media (Knopf, 2010). As Green points out, "[decolonization] requires the systematic dismantling of colonialism" (2006: 521). To be sure, Indigenous sovereignty and land are at the centre of decolonization. However, a fuller discussion of what this may look like is beyond the scope of this thesis.

There are different paths to decolonization. I use the term to reflect that it is *a process* of restructuring the existing settler-Indigenous-state relationships, which involves challenging systems of power and privilege and restoring Indigenous sovereignty and autonomy over Indigenous homelands (Corntassel, 2012: 89). The goals of decolonization and anti-racism are intimately connected because both require replacing existing power structures, confronting white supremacy and reimagining the state. Taiaiake Alfred and Jeff Corntassel express the urgency of challenging contemporary colonialism (2005: 597), arguing that decolonizing modern-day

manifestations of colonialism requires "shifts in thinking and action that emanate from recommitments and reorientations at the level of the self that, over time and through proper organization, manifest as broad social and political movements to challenge state agendas and authorities" (2005: 611). In order to achieve these objectives, it is necessary that settlers engage with Indigenous peoples to correct the currently unequal distribution of power, which is sustained through systemic racism. Although CRT does not lead directly to decolonization, it does assist with providing the analytical and political tools to challenge the key barriers to decolonization. Further, it is particularly useful in addressing contemporary manifestations of colonialism, such as the over-incarceration of Indigenous peoples because the disparate outcomes between Indigenous peoples and non-Indigenous reveal unsettling truths about Canada's seemingly fair and colourblind institutions.

Reconciliation

While decolonization requires the confrontation of colonialism and colonial systems, reconciliation does not necessarily challenge colonialism. Although reconciliation seeks to improve the relationship between Indigenous peoples, settlers and the state, the current reconciliation framework exists largely within colonial structures and does not fundamentally seek to restructure current relationships of power. Indeed, it is possible to discuss reconciliation without reference to colonialism, observable in the responses of some governments (see for example, Government of Saskatchewan website, 2017).[17] Furthermore, reconciliation does not always engage Indigenous peoples and risks co-opting the goals of decolonization. Chapter three provides further unpacking of "reconciliation" and highlights the implicit white supremacy of the existing reconciliation framework endorsed by governments across Canada.

[17] https://www.saskatchewan.ca/residents/first-nations-citizens/moving-forward-with-the-truth-and-reconciliation-commission#ongoing-work-with-first-nations-and-metis-people

The Settler Problem

The settler problem is the critical response to Canada's "Indian Problem" (Epp, 2003). In short, the settler problem argues that it is settler Canadians who must change in order to achieve reconciliation or decolonization in Canada. The concept problematizes white privilege and ongoing colonialism. Paulette Regan explains that addressing the settler problem means acknowledging "our collective moral responsibility for the systematic removal and institutionalization of Native children, some of whom were abused and most of whom were deprived of their family life, languages, and cultures" (2010: 4). She further explains that citizens are accountable for the actions of our governments because a colonial mentality of "benevolent paternalism" justified the dispossession of Indigenous lands and continues to shape Indigenous-settler relationships today (Regan, 2010: 4).

Epp articulates that solving the settler problem starts with "challeng[ing] *in every generation* the mythology that there was no one here when "we" came, that we made something of it, and that, therefore, we represent a superior civilizing force" (August, 2013. emphasis added). I argue that CRT offers a dynamic entry point for this generation to investigate the settler problem because we are starting to have important conversations on the global scale about race, racism and power, which will make room for grassroots activism, solidarity and challenging assumptions of privilege.

***Why* use CRT to study Indigenous-state relations in Canada?**

Over the last two decades, CRT has offered critical insights for the ways in which race and racism are understood in Canada. Malinda Smith suggests that there tends to be a misconception about "race" and "racism" in Canada, largely because of an inclination to compare ourselves to the United States and a subscription to a national mythology that Canada is a multi-cultural or

colour-blind society (2003: 108). Smith challenges these mythologies by tracing how race and racism function to create and preserve a white settler society (2003: 115). She explains: "Ideas of "race" difference and racial superiority were central to nation-building in nineteenth and twentieth-century Canada" (2003: 111). Green points to the racism of the Canadian state as a legitimating factor in establishing and maintaining colonialism (1995). She states: "racism becomes part of the structural base of the state, permeating the cultural life of the dominant society both by its exclusive narrative of dominant experience and mythology, and by its stereotypical rendering of the "Other" as peripheral and unidimensional" (1995). In *States of Race: Critical Race Feminism for the 21st Century*, Razack et al. demonstrate that "race-making is political and a central project of the modern liberal state" (2010). Caldwell and Leroux add that white supremacy is normalized and maintained through the celebration of colonial symbols and events (2017: 2). All of these studies agree that whiteness and white supremacy are the systems that invisibly operate through Canada's institutions, allowing for systemic racism and ongoing colonialism to remain undetected by mainstream Canadians.

Despite the applicability of CRT to the Canadian context, some scholars of Indigenous Studies argue that "anti-racism and decolonial discourses are incompatible" (Hokowhitu, 2012: 62). There are those who believe CRT belittles the Indigenous struggle—that it treats Indigenous peoples as just another ethnic group (Stevenson, 1998)—and others who see the causes and effects of colonialism and racism to be unrelated processes altogether, thus requiring different responses (Walia, 2012: 251). While these viewpoints are important to the decolonization project, racism is real for Indigenous peoples in Canada; it is a deep-rooted aspect of our political, legal, and socioeconomic institutions.

After exploring the main criticisms of using CRT to analyze Indigenous-state relations, I will offer some counterpoints to those critiques and argue that while there are limits to what CRT can achieve, it is useful in studying the Indigenous-state relationship in Canada. This is not to suggest that Indigenous peoples in Canada are the only group to whom CRT applies or that postcolonial or decolonial discourses are not relevant to Indigenous-state relations. In a way that other theories cannot, CRT highlights that the privileges that the rest of Canadians enjoy have depended on ensuring, at least in some point in our history, that Indigenous peoples have been denied those same benefits. Further, CRT demonstrates that these structural inequalities are established and maintained through law and that race is reproduced through legal processes. The theory is particularly helpful when studying and understanding the position of Indigenous peoples, both historically and today, because CRT can help to explain the intricate relationship between racism and colonialism in Canada by looking at how our political, legal and socioeconomic structures sustain and reproduce racism and colonialism through implicit and explicit state violence and understandings of race in Canada, which are often supported by law (Andersen, 2014: 9). In addition, applying CRT to decolonization discourses challenges White settlers engaged in this work to question their own privilege as a critical step in the decolonization process (Morgensen, 2014).

The critiques of using anti-racist theories, such as CRT, in the context of Indigenous-state relations come from several different fronts and depend largely on the goals of the theorist, scholar or advocate. One perspective is that CRT operates on an anti-essentialist assumption (i.e., race isn't real), whereas decolonial theories tend to depend on a degree of cultural determinism, namely a connection to ancestral land and the return to traditional life, to establish legitimacy in challenging the existing power structures and dominant ideologies that support the maintenance

of colonialism (Smith, 1999: 110). A second claim is that anti-racism discourses reduce Indigenous groups to ethnic minorities, rather than nations, which can actually threaten rather than assist in achieving decolonization and self-determination. The third critique centres around the assertion that colonialism and racism are too different for anti-racism analyses to adequately tackle the concerns of colonialism and achieve decolonization. These arguments suggest that the advocacy components to each movement are incompatible because Indigenous resistance focuses on reclaiming and recognizing their inherent rights to the land. In contrast, CRT does not have the same set of specific goals to its mandate.

The argument that CRT is unable to study indigeneity and colonization is rooted in a perspective that advocates for a type of Indigenous nationalism, which requires a solidified identity based in Indigenous spiritually and Indigenous ways of life. For example, Taiaiake Alfred argues that Indigenous individuals' "true" identities are located in traditional cultures (2005: 175). He asks: "Is it wrong to tell our people that they must marry an Indigenous person? Or that membership will be determined by us based on the strength of a person's lineage?", and answers: "…it would be wrong not to do these things" (2000: 4). This conception of indigeneity may essentialize Indigenous identity and potentially infringe on individuals' rights (see Simpson and Smith, 2014: 14). CRT demonstrates that essentializing Indigenous cultures and identities in this way places a tremendous burden on Indigenous individuals who are already alienated because of racism. The reality faced by many individuals who feel responsible for carrying on fundamental traditions and being "Indigenous enough" can be dehumanizing and oppressive. For example, Prime Minister Justin Trudeau raised eyebrows when he suggested that Indigenous youth "want a place to store their canoes and paddles so they can connect back out on the land" and that chiefs who request TVs and couches for youth centres "haven't actually talked to their

young people" (CBC, Februray, 2017). Salée and Lévesque argue, "The acceptance and use of the dominant culture and institutions are not necessarily a proof of capitulation on the part of the oppressed and colonized, but can in fact be seen as a sign that they are reinventing themselves…" (2010: 107). In this way, culture is seen as something that is evolving rather than as something that is static and therefore, must be reclaimed. Green links Alfred's conceptualizations to a form of cultural fundamentalism and explains that, under these circumstances, "Self-determination cannot thrive, for in order to be self-determining, the community of interest must both be able to make a critical determination based on information and alternatives" (2003: 3). To put it in another way, CRT can demonstrate that governments at all levels may be at risk of designing new systems of oppression as they create governance structures to replace the existing colonial system. This risk can be seen when examining which voices are included and excluded when provincial and federal governments, or the media, engage Indigenous peoples and who gets to speak on behalf of Indigenous peoples.

While many theorists of Indigenous studies may not subscribe to the same strict interpretation of indigeneity, there is a sentiment amongst some decolonial scholars that CRT cannot take up the complexities of sovereignty, nationhood and land struggles (Simpson, et al., 2011: 291). Bonita Lawrence and Enakshi Dua (2005) explain that this disconnect can be accounted for because until recently, anti-racism has largely ignored the Indigenous question. These scholars maintain that CRT and anti-racist theorists have the potential to engage with the decolonization process, but that the anti-racism movement has fallen short of meaningfully including Indigenous peoples and colonialism in challenging state and racial power. At worst, this exclusion has perpetuated colonial ideologies and the normalcy of whiteness and the colonial state (Lawrence and Dua, 2005). However, CRT can be particularly helpful in understanding and

challenging the dispossession, containment and control of Indigenous peoples and their lands because these injustices can be traced through law. CRT maintains that there is a "vexed bond between law and racial power" (Crenshaw, et al., 1996: xii) and transforming the laws that have maintained white supremacy and the subjugation of racialized peoples is central to the advocacy of CRT. Therefore, analyzing the way Canadian law has supported racialized state violence to claim land in the first place and to continue to regulate, police and control Indigenous lands and bodies, such as through Indigenous over-incarceration, is an important component of reclaiming sovereignty and assists in Lawrence and Dua's call to "decolonize antiracism" (2005:126-27).

Even if it is accepted that the challenges with linking antiracist and decolonial perspectives result from a failure to include a wider variety of Indigenous identities as a part of the decolonization discourse on the one hand and decolonization as a part of the anti-racist discourse on the other hand, critics will argue that the goals of anti-racism and the goals of anti-colonialism are incompatible (Hokowhitu, 2012). Part of the resistance to incorporating these two concepts centres around the belief amongst decolonial theorists that the state's power is illegitimate and that analyzing "race" affirms the colonial state's power to create and regulate racialized individuals. In other words, if the goals of decolonization are achieved, issues of race will no longer be a problem for Indigenous peoples because the source of racial oppression—the state—will be unable to exercise racialized state violence to control Indigenous peoples (Alfred, 2005). Taking this argument even further, Indigenous laws will replace those of the oppressor and the state will no longer have authority or jurisdiction to continue neocolonialist policies and practices on Indigenous lands (Tuck and Yang, 2012).

Interrogating (de)colonization from a critical race theoretical perspective, however, can mitigate the possibility of exclusionary movements that can victimize and dehumanize

individuals and groups, such as urban Indigenous, non-territorial based Indigenous peoples and Métis or other multiracial Indigenous individuals, all of whom need to be considered and included in a decolonized Canada. The challenge of Indigenous and non-Indigenous governments alike is to ensure that decolonization is inclusive of all Indigenous peoples, with their various identities, as well as settlers and new Canadians, while at the same time honouring treaties, land entitlements and the distinct traditions of Indigenous governance. Prime Minister Justin Trudeau has committed to working "…with Indigenous peoples on nation-to-nation basis" (Mandate Letter, 2015). Although this promise is an important gesture, Trudeau and governments at all levels cannot shy away from the obligations they have to the Indigenous individual who is simultaneously a Canadian citizen with Charter protected rights. For instance, what impact will working "nation-to-nation" mean for the non-Status Cree woman making her life in Saskatoon, Saskatchewan where she faces racism in accessing housing and employment (The Environics Institute, 2016: 6). As Dua, et al. argue, "critical race scholarship must integrate the ongoing colonization of Indigenous peoples into theories of "race" and racism" (2005: 8). Doing so can assist in navigating complicated questions of race, racism and colonialism in Canada by problematizing both the state and the ways that we think about racial identity, culture and what it means to decolonize.

Making Space for Solidarity: United Against White Supremacy

Scholars of Indigenous Studies have warned of the dangers in substituting the experiences and struggles of African Americans for those of Indigenous peoples in North America. For instance, the ideas which arose out of the civil rights movement in the United States resulted in assimilative and inclusivity projects in Canada, such as the 1969 White Paper. To be sure, the goals of the civil rights movement were different than goals for Indigenous self-determination,

decolonization or Indigenous Resurgence. Andrea Smith explains that the oppression of Black people in the United States is rooted in slavery. As slaves were legally defined as "property," Black people were considered non-citizens (2016). In this way, historical African-American struggles have focused on inclusion—a problematic reinforcement of the state. Indigenous peoples, on the other hand, while legally defined as "wards," are framed as potential citizens, a designation that depends on the ongoing genocide of Indigenous peoples (Smith, 2016). Indigenous movements have historically focused on recognition (Coulthard, 2007), again deferring to the state's authority to *recognize*. However, in both cases, white supremacy continues to be sustained by the legal oppression of Indigenous peoples and Black people. Derrick Bell illuminates that CRT is interested in "an orientation around race that seeks to attack a legal system which disempowers [racialized] people…" (1995: 900). Therefore, when decolonial and anti-racist theories engage, it is in the name of confronting legally established white supremacy. Smith (2016) articulates that this interaction is crucial because:

> What is at stake for Native Studies and critical race theory is that without the centering of the analysis of settler colonialism, both intellectual projects fall back on assuming the givenness of the white-supremacist, settler state. On the one hand, many racial-justice theorists and activists unwittingly recapitulate white supremacy by failing to imagine a struggle against white supremacy outside the constraints of the settler state, which is by definition white supremacist. On the other hand, Native scholars and activists recapitulate settler colonialism by failing to address how the logic of white supremacy may unwittingly shape our vision of sovereignty and self-determination in such a way that we become locked into a politics of recognition rather than a politics of liberation. We are left with a political project that can do no more than imagine a kinder, gentler settler state founded on genocide and slavery.

This solidarity appears in a number of political projects. For example, the #BlackLivesMatter movement expressed an alliance with Indigenous activists at Standing Rock: "…we are clear that there is no Black liberation without Indigenous sovereignty…. We are in an ongoing struggle for our lives and this struggle is shaped by the shared history between

Indigenous peoples and Black people in America, connecting that stolen land and stolen labor from Black and brown people built this country" (Black Lives Matter website, September 2016). It is because of the stakes involved that alliances must be formed between Indigenous movements and other movements for justice, including potential solidarities with settler allies. In order to take on the tremendous task of confronting white supremacy, Audra Simpson argues that Indigenous Studies should engage in "theoretical promiscuity" (2014: 12). Doing so makes decolonization more possible. Carol Tator and Frances Henry further the rationale for making intellectual coalitions, arguing that "the clash of frameworks with regard to questions of knowledge, methodology and the role of politics in academic life can be a positive force when issues of vital concern to society are addressed. Such a clash can help push the boundaries of knowledge into new, productive, and creative areas" (2006: 6).

CRT offers tools to confront white privilege and racism, which permeate state institutions. When privilege and racism are established and reinforced through the legal system, projects with decolonial goals, such as the over-incarceration of Indigenous peoples, can benefit from a CRT perspective because the theory points to the law simultaneously as problematic and as a tool for transformation. Indeed, in Canada's case, the courts have been a key player in advancing certain Indigenous rights, such as land claims. While engaging with colonial systems (e.g., the legal system) may seem counterintuitive to decolonization efforts, both practically and theoretically, cohesiveness is not necessarily the aim when seeking transformation. One critical race scholar explains, "Critical race theorists seem grouped together not by virtue of their theoretical cohesiveness but rather because they are motivated by similar concerns and face similar theoretical (and practical) challenges" (Williams, 1987: 430 quoted in Bell, 1995: 900). If it is accepted that CRT is an inclusive theory that "…seeks to take into account many of the

variables that create powerlessness, marginalization, debilitating and degrading social hierarchies and exclusion" (Mutua, 2000: 848), then it is appropriate to use CRT to study certain aspects of the Indigenous-state relationship in Canada, especially where Indigenous peoples are oppressed through law, such as over-incarceration. Although there are limits to what CRT can do—the theory cannot, alone, bring about decolonization—it is helpful in pointing to white supremacy and legal racism as barriers.

What can CRT tell us about Indigenous-state relationships in the past?

In order to analyze the role that racism plays in Indigenous-state relations today, it is important to understand how racism and ideas about race have historically operated in Canada. Foucault explains the relationship between racism and colonialism as follows: "racism first develops with colonization, or in other words, with colonizing genocide" (2003: 257). Fanon furthers the notion that racism is inherently violent by explaining that "racism objectifies" (quoted in Schmitt, 1996: 35). Richard Schmitt explains, "Objectification is what racism is all about: exclusion, infantilization, ridicule, scapegoating, violence…are only so many means to the final goal of objectification" (1996: 39). In this way, racism is inherently violent. In the case of the colonization of Canada, it was through the legal system—created by White, European, male elites—that this racist violence operated. Looking at each of the means to objectification, as explained by Fanon (1952) and Schmitt (1996), I explore how the dehumanization of Indigenous peoples in Canada was achieved through legal processes. This shows that racism is an institutionalized part of the Canadian legal regime.

Fanon identifies exclusion as a racist practice that leads to objectification. The Canadian government has used exclusion in its attempt to control and subordinate Indigenous peoples. Some notable examples are the exclusion of Indigenous peoples from citizenship rights, the

exclusion of Status Indians from participating both economically and politically in the dominant society and the exclusionary nature of the law-making process. I must clarify, however, that although they were excluded from these institutions, Indigenous peoples did not necessarily want to be included in them because doing so would legitimate a political regime that was not their own (Green, 2004). For example, the exclusion of Indigenous peoples from citizenship rights is a form of dehumanization because, although different from human rights, which are inherent, citizenship rights grant individuals the ability participate fully in the socio-political culture of a nation, while having the simultaneous protection of the rights-granting state. In excluding them from these rights, the Canadian state made a commitment to ignore Indigenous peoples in law-making and political processes. This was not hard, considering democratic inclusion and representation is tied directly to citizenship rights.

While Status Indians were constantly contained through federal legislation, other Indigenous peoples were generally neglected. But, the laws that were applied to Status Indians had and continue to have racist implications for all Indigenous peoples. Since Indians were not considered citizens, nor were their forms of government acknowledged, we must ask how Indigenous peoples fit into the Canadian nation state. This question leads to Fanon's next means of objectification—infantilization. Officially, Status Indians during the first half of the twentieth century were wards of the state (Mawani, 2009: 19). Fanon points to ridicule as another component of racism. Traditional Indigenous dances are one source of this governmental scorn. The traditional practices of Indigenous groups were often ridiculed because they posed a threat to the penetration of a White settler society in Canada. Backhouse states: "Ceremonial practices were inextricably linked with the social, political, and economic life-blood of the community, and dances underscored the core of Indigenous resistance to cultural assimilation" (1999: 64).

These dances were described as uncivilized orgies that lead to insanity (Backhouse, 1999: 66). Potlatches, sun dances, ceremonies and other practices were made illegal and Indigenous children were taught that these practices were evil once they were violently, yet legally forced into state-controlled, church-run residential schools.

Canada's legal system has attacked Indigenous peoples' human rights. Examples of this violence include the military invasion of sovereign nations, police treatment of Indigenous individuals and the abuses of residential schools. Additionally, it should be noted that much of this violence is glorified. Fanon argues, "The entire racist and colonialist enterprise is supported and kept viable by a steady stream of physical violence from soldiers, the police, and private vigilantes…The names of the torturers are preserved in the heroic tales of the mother-country…" (quoted in Schmitt, 1996: 38). A number of Canadian monuments, schools and cities are named after individuals who are known for their roles in establishing White settlement at the expense of Indigenous peoples.[18]

Razack explains that White-settler societies are established through the fusion of race, space and law (2002: 1). Although Canadian spaces of privilege, such as universities, suburbs and businesses, are thought of as neutral, meaning that belonging to them is related to individual meritocracy, the reality is that these are spaces of "white privilege" (McIntosh, 1992). White privilege in Canada has been characterized by the state favouring the interests of White settlers over those of non-Whites. Cheryl Harris expands on the idea of white privilege by explaining whiteness, because of its "value," as a property that should be protected by the state's legal institutions (1993: 1724). In turn, White settlers assert their entitlement to the land, while disregarding the fact that their privilege of settlement and ownership came at the expense of

[18] Davin Elementary School in Regina, SK after Nicholas Davin; The MacDonald Monument; The Samuel Steele Memorial Building are among examples.

Indigenous peoples. This sense of entitlement is fed by notions of white superiority, which stem from the idea of land ownership, as proponents of the modernization theory argue that private property is a step in development (Blaut, 1993: 25). Blaut explains that the theory of white supremacy created a legal basis for the expropriation of land occupied by Indigenous peoples (1993: 25).

Different forms of racist legal practices occurred during Canada's colonial process. Thus far, I have frequently used the inclusive term Indigenous peoples, which includes: Indians, including those who have Status and those who do not, Métis and Inuit. Canadian law and policy have often categorized and treated these groups in distinct ways. Additionally, Indigenous men and women experience Canada's legal system differently. The grouping of Indigenous peoples into three racial categories is problematic (See Green, 2005; Mawani, 2009). For example, although Oneida First Nations and Cree First Nations are considered "Indians" by the Canadian government, culturally and politically these two groups are very different. Equally, a Métis person and an Indian person living in the same community may even be a part of the same family. Further, it is possible for an individual to be Métis and simultaneously a Status Indian. The Canadian government and courts continue to define and differentiate Indigenous peoples.

The "Indian" has been defined and legislated by the Canadian government for decades, which is significant in the maintenance of the unequal power relationship between Indigenous peoples and the Canadian state. The very concept "Indian" is a product of the colonial imagination. As such, the identity of Indians has been established through a number of unilateral political decisions. Whether Indians actually accept this identity for themselves has nothing to do with its existence. The *Indian Act* and the legal term Indian were created to manage Indigenous populations, who were intended to eventually disappear through enfranchisement (Titley, 2005:

242). In effect, the Canadian government of 1876 used an imaginary racial label to apply to a diverse group of peoples with the intention that the newly homogenized group would cease to exist as "Indians". The irony, of course, is that the Indigenous peoples of Canada never viewed themselves as "Indians".

This confusion comes from the fact that the Canadian government arbitrarily and unilaterally defined Indians based on so-called "Indian characteristics" (Backhouse, 1999: 26). While these characteristics were categorized from the perspective of the settler government, the Canadian legal regime created laws that applied to Indians as if the characteristics that they ascribed to them were innate and biologically essential. Furthermore, the state used these characteristics to justify the inferiority of Indians and to therefore determine that they needed a paternalistic system of governance, based on legislation premised on the complete assimilation of Indigenous peoples. As Canadian history attests, those that defied assimilation met harsh legal consequences (Backhouse, 1999: 131).

Indians were subject to an entirely different set of laws, in addition to the *Canadian Criminal Code*, than White Canadians (Backhouse, 1999: 128). A number of laws applied only to Indians, which were enacted through the *Indian Act*, the most oppressive of which made it illegal for Indians to challenge the courts' decisions.[19] Backhouse addresses the legal classification of race: "Legal decisions had been based on an amazing array of factors: language, customs and habits, mode of life, manner of dress, diet, demeanour…skin colour, head shape…legitimacy at birth, place of residence, reputation, and the racial designation of one's companions, to offer just a few examples" (1999: 54). Cases of this absurd racial categorization in the Canadian legal process include an entirely White court designating "Eskimos" as

[19] A 1927 law was passed that made it illegal for Indians to raise money for the prosecution of land claims (Backhouse, 1999: 84).

"Indians" (Backhouse, 1999: 23), an entirely White government enacting a pass system to keep Indian women on reserves (Mawani, 2009: 101) and a White judge legally defining an individual as an "Indian" because he wore moccasins (Backhouse, 1999: 25).

While Indians have been over-legislated through Canada's legal processes, the Métis, historically falling under provincial jurisdiction, have been subject to a patchwork of policies, while being ignored or cast as vanishing or illegitimate peoples by the federal government. Although a recent Supreme Court Case, *Daniels v. Canada*, has extended Aboriginal constitutional rights to the Métis and non-Status Indians, the case reaffirmed race-based classifications of the Métis, which presents challenges for the meaningful political recognition of Métis nationhood or peoplehood (Andersen, 2014; Gaudry and Andersen, 2016; Chartrand, 2016). In this way, the aspirations of the Métis continue to remain marginalized in comparison to other Indigenous groups. Diedre Desmarais explains that "The Métis do not experience equality with other Indigenous Canadians in relation to the Canadian state and in relation to other Indigenous peoples" (2013: 6). For example, the government's failure to consult with the Métis regarding land claims is a key way in which the Métis have been ignored by the Canadian state (Isaac, 2008: 42). Desmarais adds that the Canadian government's historical isolation and neglect of the Métis arose from the view that the Métis did not serve a purpose within the state (2013: 10).

Adam Gaudry and Chris Andersen explain that the courts have played a role in advancing racialized notions of the Métis, with *Daniels* relying on racial ideas about mixed-ness to define the Métis (2016: 23). The court's usage of race in *Daniels* demonstrates that Canada continues to rely on racialized ideas to support the status quo, such as reaffirming the courts' authority to decide who is and who is not Indigenous. This racialized conceptualization is taken

up amongst members of the Canadian public who equate people with mixed European and Indigenous ancestry to persons with a connection to Métis communities and culture (Gaudry and Andersen, 2016: 21). Definitions that rely on race "work to marginalize, if not gut completely, policy logics that are based on a respect for Métis peoplehood" (Gaudry and Andersen, 2016: 19). The broad definition of Métis in Daniels will allow people who do not have ancestral ties to land claim Métis status, which is problematic because it effectively works to erase Métis people as distinct peoples. Gaudry and Andersen call the process of falsely claiming a Métis identity "self-Indigenization" (2016: 26). Tuck and Yang argue that self-Indigenization is "an attempt to deflect a settler identity, while continuing to enjoy settler privilege and occupying stolen land" (2012:11). Perhaps one of the most well-known recent examples of this appropriation is Canadian author Joseph Boyden, whose claims to indigeneity are questionable (Barrera, 2016), yet he has been a prominent voice for Indigenous issues over the last decade. John Ralston Saul has used the concept of settler self-Indigenization at the macro-level to suggest that Canada is a Métis Nation, implying that all Canadians are Métis because "We are a blend of Aboriginal and non-Aboriginal, but the driving ideas underneath are the Aboriginal ones" (quoted in Fillion, 2008). While on its surface, Indigenization seems to advance ideas about inclusion and racial harmony, its implications are similar to colourblindness—if everyone is a little bit Indigenous, then there is no colonialism with which to reckon and no settler problem to solve.

In a similar manner, while the Supreme Court declared the Inuit to be "Indians", the federal government wasn't so easily convinced that the two groups belonged to the same category (Backhouse, 1999: 53-55). Indeed, in 1898, the Inuit, without having ever been consulted, became subjects of the British Crown with a simple stroke of a pen that granted the land occupied by the Inuit to the Dominion of Canada (Backhouse, 1999: 32). In the same way

that “Indians” were arbitrarily defined by the state, the Inuit too, were defined as “any person, male or female, who follows the Eskimo mode of life” (Backhouse, 1999: 27). “Eskimos” were neglected by the federal government until the 1960s, when the Canadian state showed an interest in the economic development of the North (Backhouse, 1999: 32). The economic interests of the federal government have shaped the way that Canadian law has treated the Inuit. Blaut reminds us that one must be attentive to the economic interests involved in the colonial process (1993: 24). While the Canadian state’s control over Indians was related to settlement, their interest in the Inuit had much more to do with resources and the demonstration of Canadian sovereignty, since very few European immigrants desired to settle in Inuit territory. Nevertheless, the relationship between the Inuit and the Canadian state has been characterized by unequal power relations that have been maintained through Canada’s racist legal regime. The most obvious example of this inequality is the fact that the Inuit were excluded from all the legal processes that affected them, including the way in which they were legally defined. As Fanon (1952) argues, exclusion is a form of dehumanization.

Colonialism is not simply about gaining control over lands, it is also about—and depends heavily on—gaining control over the way that people think (Smith, 1999). In colonial relationships, colonizers define and legitimate Western knowledge, and therefore push Indigenous knowledges to the margins of society (Smith, 1999: 61). For Linda Tuhiwai Smith, the colonization of the mind has been made possible because of Eurocentric assumptions about the supremacy of their histories and cultures. She states that “history is the story of a specific form of domination” (1999: 29) and that “It is the story of the powerful and how they became powerful” (1999: 34). Looking at Canada’s case, the relationship between power, knowledge,

racism and the law has functioned to legitimate institutionalized state violence in the past and sustain it in the present.

In sum, I have explained that in order for colonialism to be successful, racist practices of objectification, dehumanization, exclusion, infantilization, ridicule, scapegoating, violence had to be accepted by settlers. I have shown that racism is important and relevant because it objectifies and dehumanizes by using a number of racist practices (Fanon, 1952). Deploying a CRT perspective, I have analyzed how these racist practices have been rationalized through Canadian law. Moreover, I've demonstrated that racism is inherently violent because it creates and maintains unequal relationships of power. A principal goal of the Canadian nation-building process was to turn Indigenous peoples into governable subjects (Mawani, 2009: 102), which would ensure that Indigenous peoples could be easily managed and controlled. To put it in another way, the development of the Canadian legal system has traditionally depended on the racialized state violence, including denying Indigenous peoples of the right to self-determination (UNDRIP, 2007: article 3). In this way, the Canadian social context is very much implicated in a racist past. Therefore, we must address our racist past in order to understand the public policy implications of today and to eventually decolonize in an inclusive manner.

What can CRT tell us about these relationships today?

Colonialism has left many Indigenous communities devastated. A snapshot of Indigenous peoples in Canada shows this: Indigenous peoples make up 4.3 per cent of the Canadian population, and represent 24.4 per cent of Canada's federal prison inmates (Office of the Correctional Investigator, 2015(b): 36). This figure is worse in some provinces, especially Saskatchewan where Indigenous peoples make up 79 per cent of its custody population (Statistics Canada, Canadian Centre for Justice Statistics, 2014), yet comprise only 15.6 per cent

of the province's total population (Statistics Canada, 2011 National Household Survey). Worse yet, Indigenous women account for nearly 90 per cent of prison admissions in some prairie provinces (Statistics Canada, Canadian Centre for Justice Statistics, 2014). In addition, over half of the Indigenous population living in cities falls below the poverty line (Macdonald and Wilson, 2013). These statistics are worrisome because they are getting worse as time goes on (Spooner, 2010). Remarkably, in the face of this adversity, Indigenous peoples continue to demonstrate great strength, resilience and resistance. Despite overwhelming research that relates the devastation facing Indigenous peoples to their experiences of colonialism (Green, 2007; Schick and McNinch, 2009; Irlbacher-Fox, 2009), Indigenous peoples are often blamed for their own impoverished and destitute situations. Fanon explains this form of racism as scapegoating. Green explains that it is because of liberal assumptions about agency that this practice occurs: "Racism exists because of the conflation of the circumstances of peoples' lives with their aspirations about their lives…" (2006: 519). Both perspectives demonstrate that race and racism still factor into the experiences of Indigenous and non-Indigenous peoples. CRT assists in making sense of how racism continues to operate in Canada by challenging stereotypes and portrayals of Indigenous individuals, from the subtle to the extreme; confronting systemic racism by examining the role of racism in our social institutions and questioning who continues to benefit from ongoing colonialism. Finally, CRT provides the tools to speak truth to the continuing colonialist regime by locating counter narratives in the present day, which forces governments and individuals to acknowledge the ongoing injustices rooted in racism and colonialism.

Whereas examples of racist practices, policies and laws are apparent throughout Canada's history, such examples today are subtle. We must read between the lines when we look at official policies. For example, tough on crime policies have served to punish Indigenous individuals in

disproportionate ways. While there are arguments that present this fact as a mere coincidence (see Blatchford, 2010), I argue in the chapters that follow that this outcome has been the result of ongoing colonialism. To be clear, the state did not enact tough on crime policies with the explicit intent of imprisoning Indigenous peoples; rather, the normalization of the overrepresentation of Indigenous peoples in the criminal justice system is one way that we can tell that colonialism is ongoing in Canada. Statistics that state over a quarter of the total federal prison population is Indigenous have failed to ignite action amongst governments and the public (Office of the Correctional Investigator, 2015(b)). It is this acceptance of oppression and failure to recognize privilege that CRT can assist in understanding. In the chapters that follow I will demonstrate, using CRT, how new colonialism plays out in the relationships between state actors and Indigenous individuals, as well as the perceptions and portrayals of the Indigenous person in the Canadian's mind. Even today, the way Indigenous peoples are constructed in the media, popular culture and our nation's collective imagination contributes to the maintenance of assumptions about white superiority in Canada (Knopf, 2010: 92).

Despite the substantial social disparities that exist between Indigenous peoples and non-Indigenous Canadians, there exists an overwhelming belief that state-endorsed institutions offer all individuals the equality of opportunity. A certain *if I can do it, anyone can* mentality permeates Canada's sociopolitical culture. This liberal assumption is rooted in national mythologies that presume Canada was settled peacefully by trailblazing explorers (Razack, 2002: 2). Built into these mythologies is the notion that White settlers have earned their entitlement to the land and to their rights and privileges. Such a belief system ignores the violence and inequality inherent to colonialism. CRT reminds us that "inequality is not naturally occurring" (Schick and St. Denis, 2005: 304).

In juxtaposition to the Canadian dream is the image of modern indigeneity, characterized in part by constructs of criminality, victimization and dependency. By critically examining Canada's social institutions, CRT not only assists with unpacking these racialized labels, but goes even further and challenges the concept of race to begin with. As demonstrated in this chapter, racial narratives of Indigenous peoples or "Indians" continue to serve a purpose in Canadian society today—they allow Canadians to accept the injustices of our colonial society. By using examples of contemporary policy issues, CRT forces us to confront institutionalized racism and ongoing colonialism because it is a tool that problematizes state power as it relates to the disenfranchisement and treatment of Indigenous peoples and dispossession of Indigenous lands.

Normalizing the unequal power relationships between indigenous peoples and the Canadian state includes framing Indigenous peoples as needing paternalistic governance because they are unable to properly govern themselves. Historically, this was based on the assumption that if they were able to do so, Indigenous civilizations would've been developing in the exact same way as European societies (Blaut, 1993: 13). Today, this dynamic is justified by the impoverished conditions of some Indigenous communities, supported by the prevailing idea that this reality exists because of poor personal choices (The Environics Institute, 2016: 22). Colonization—both of people and of the mind—is not simply about power for power's sake (Smith, 1999:29). It is about the constant legitimization of Canadian values and norms. This legitimization is crucial in the hegemonic quest for power because in order for the state to maintain legitimacy, citizens must accept, promote and identify with these values and norms to the extent that nonconformity to mainstream values and norms is seen as a threat.

I argue that the continued privileging of Euro-Canadian knowledges and values over Indigenous knowledges is an act of violence that sustains colonialism and the injustices that come with it. Regan explains that Canadians do not "…see the more subtle forms of violence that permeate everyday Indigenous-settler relations – racism, poverty, cultural domination, power, and privilege" (2010: 10). This blindness is necessary to legitimating Western knowledge and carrying out colonial processes, especially when these processes are delineated in law. Indeed, one purpose of law is to bind all members of a nation to a common set of morals and values so that society can function according to those morals and values (Razack, 1993: 42). It is through this lens that a CRT analysis can assist in problematizing the racial power dynamics in Canada, which must begin with interrogating white privilege and the settler problem. Doing so will make room for the decolonization of Canada and our political, legal and economic structures.

Summary of Chapter One

Although CRT is less prevalent in Canadian political science, I argue that it offers important insights into how power relationships between Indigenous peoples and the state are understood. A CRT analysis problematizes power structures, such as the legal system, in order to demonstrate that racism and white supremacy are systemic features of Canadian law and society, thus requiring responses that seek to confront the settler problem. Rather than working against each other, CRT intersects with settler colonial theory to call upon settler societies to examine the ways in which white supremacy and racism operate to deny Indigenous sovereignty and sustain white privilege.

Chapter Two: "More than Criminal and Less than Human":[20] A Continuity of Colonialism through Canada's Criminal Justice System

Introduction

After calling 911 for help, seventeen-year old Jamie Haller, a First Nations girl from Williams Lake, B.C., was mistaken for a suspect, subsequently arrested and punched repeatedly in the face by a police officer while handcuffed in the back of a police car (September 27, 2011, CBC; Human Rights Watch, 2013). In the process of enforcing a routine eviction order in Prince Albert, SK, police officers shot and killed Jacqueline Montgrand, a 44-year old First Nations woman who was allegedly holding a steak knife while intoxicated. Raymond Silverfox, a 43-year old member of the Little Salmon Carmacks First Nation, was picked up for intoxication at a homeless shelter in Whitehorse, Yukon, and was later found dead in police cells, with video footage revealing that the police officers responsible for his care made fun of the fact that he had vomited 23 times before eventually dying. These incidents occurred between 2008 and 2011 across Canada and all involved police agencies responding to Indigenous individuals in various forms of crisis. Although Canadian news outlets reported on these cases and hundreds of other cases of Indigenous deaths in custody or by police violence that occurred in the last decade (Razack, 2015: 197-199), this racialized state violence largely remains under the radar in Canada. A CRT analysis of the criminal justice system can assist with understanding why these encounters escalated into violence, despite the fact that the initial dispatches were in response to non-violent incidents.

In the United States, Trayvon Martin, Michael Brown and Eric Garner are among the names that have become well-known over the last five years, catalyzing the #BlackLivesMatter

[20] Coates, Ta-Nehisi. 2015. "The Black Family in the Age of Mass Incarceration." *The Atlantic* October, 2015. https://www.theatlantic.com/projects/mass-incarceration. 69.

movement and serving as reminders of the pervasive racial discrimination that Black people continue to experience across America. Despite the fact that, in each case, the person had either not committed any crime (Martin was walking home from the convenience store) or had committed a minor crime, the individual's life was taken by a police officer or a vigilante who maintained that they were justified in their response to the threat presented by the presence of a Black male. The shootings of these unarmed individuals sparked protests and debates aimed at reforming America's justice system, characterized by police brutality, racial profiling and incarcerating African Americans at disproportionate rates.

Recent numbers show that Canada's rate of incarcerating Indigenous peoples is higher than the United States' incarceration rate of African Americans (MacDonald, 2016). While certain predominantly Indigenous social movements (e.g., Idle No More) have spoken out against the injustices facing Indigenous peoples in Canada, many Canadians are blind to this reality or refuse to acknowledge that systemic racism contributes to the way the criminal justice system interacts with Indigenous peoples (The Environics Institute, 2016: 27). Even though there are Canadians who are sympathetic to Indigenous issues and agree that racist practices of the past were wrong, many Canadians are reluctant to recognize the biases within our existing systems, laws and socio-political institutions (The Environics Institute, 2016: 5). In this chapter, I argue that the legitimacy of these institutions has been culturally encoded through intergenerational national mythologies that are spread through various agents of socialization.

The relationship between Indigenous peoples and the law has been fraught since the inception of Canada. CRT, through the theory's four elements, provides a critical perspective through which to examine this relationship, in particular with respect to the last decade of Canada's tough-on-crime policies. The first theme of CRT—race isn't real—is demonstrated by

looking at how Indigenous peoples in Canada are continuously criminalized and concurrently, how crime is racialized (Balfour and Comack, 2004: 80). The second factor exposes the institutionalization of racism within our social structures and Canada's criminal justice system, in particular. By looking at who benefits from maintaining the current system at the expense of Indigenous peoples, the third component of CRT shows that white privilege is reinforced and perpetuated in the criminal justice system (Razack, 2002: 6). Finally, CRT makes room for counter-stories through individuals' experiences of the criminal justice system and seeks alternatives, including traditional Indigenous conceptions of justice. These four factors, taken together and demonstrated through the example of the racialized subject within the Canadian justice system, assist in understanding how Canada is continuing the colonization of Indigenous peoples (Razack, 2015: 45). Furthermore, I argue that this neo-colonialism is occurring in the name of all Canadians, under the guise of protecting the public and with our implicit consent of the use of state sponsored racialized violence.

Using CRT, I seek to achieve four objectives in this chapter. Critical scholars who research the overrepresentation of Indigenous peoples in the criminal justice system typically agree that the problem is systemic (see Neugebauer, 2000; Rudin, 2009). Therefore, I will begin my assessment by examining the political, social and legal systems through which racial power inequalities have been created and sustained. By providing a picture of Canada's justice system as a racist form of colonialism, I will demonstrate that the law can be used as a system of control that contains, dehumanizes, deprives and objectifies Indigenous peoples. Today, this state-sponsored violence is epitomized by the mass incarceration of Indigenous individuals and the indifference to the suffering of those who are "in the system". Second, through the introduction of specific tough-on-crime legislation, namely the *Safe Streets and Communities Act* and the

Tackling Violent Crime Act, I argue that seemingly colour-blind laws and legal processes have disproportionately impacted Indigenous peoples and that the various agents of the justice system interact differently with Indigenous peoples than they do with White Canadians, whether intentionally or not (Alexander, 2011:14). These interactions are modern colonial confrontations, reinforcing the control of the state and regulating non-compliant "Indians" to a life of state surveillance.

Third, I will show that Canada has normalized the "Indian as criminal"—that the high numbers of Indigenous peoples in the criminal justice system not only fail to shock Canadians, but that people have come to expect criminal behaviour and dysfunction from Indigenous individuals as if it were a way of life. I argue that this characterization is deeply racist in its origins and that it perpetuates racism by dividing "us" from "them." Related to this point, I will explore and challenge the idea that criminal activity is a personal choice. I argue that the continuity of colonialism traps Indigenous individuals in situations that either lead to criminal behaviour or criminalize unwanted behaviour. Barbara Ehrenreich (2009) calls this the "criminalization of poverty." Colonialism has added another layer to the distinct poverty facing Indigenous peoples—what the Royal Commission on Aboriginal Peoples (RCAP) has called "poor beyond poverty" (quoted in Rudin, 2006: 25). These arguments demonstrate the ways in which ongoing colonialism continues to objectify Indigenous peoples through the racist practices of exclusion, dehumanization and infantilization (Schmitt, 1996).

The first three arguments use tools from CRT to summarize the problems with the criminal justice system in Canada. Changing the justice system must begin with analyzing our assumptions. Therefore, solutions to this crisis must be collaborative and involve all Canadians, including governments at every level. In order to fix our current system, we must challenge ideas

about crime, poverty and the neutrality of laws, confront racism and ensure that Indigenous peoples are actively involved in restructuring the Canadian justice system. Aligning with the fourth pillar of CRT, the final component of this chapter will explore the possibilities of achieving an alternative criminal justice system. I will look at reforms made so far, including the *R. v. Gladue* and *R. v. Ipeelee* decisions. Although I will assess the positives and negatives of these initiatives, I argue that these reforms are not likely to achieve the outcome of dramatically reducing the number of Indigenous individuals who come in to contact with the criminal justice system because they have relied on the "culture-clash" theory (Rudin, 2006).

Evidence suggests that changing what happens in the back end of the criminal justice system—after people have already committed a crime or behaved in a manner that attracts attention from law enforcement—does not prevent crime (Waller, 2014; Mallea, 2011: 55; MacKenzie, 2006). Policy initiatives like *Saskatchewan's Building Partnerships to Reduce Crime* focus on preventing crime before it happens by providing services to individuals and families who are at a high risk for becoming criminally involved (Government of Saskatchewan, 2014). No doubt, racism plays into this process as well. While prevention of crime is discussed peripherally throughout this chapter, I intentionally focus on those who are already in system because, too often, Canadian society sees these individuals as lost causes, undeserving of resources or social action. But, framing Indigenous people who are involved in the criminal justice system as being outside of normal society is another way that colonialism continues to occur.

Furthermore, this chapter does not speak to the fact that Indigenous people are more likely to be victims of crime—though this fact is certainly a symptom of ongoing colonialism (TRC Vol. 5, 2015: 8). In the previous chapter, I discussed the victimization of Indigenous

peoples, in general, but did not get into specifics about gang-on-gang violence or high rates of intimate partner violence within some Indigenous communities (Statistics Canada, 2011). Another important part of this picture, but one that is beyond the scope of this chapter, is how racism in the criminal justice system impacts other racialized Canadians, new immigrants to Canada and even White settlers. Though Indigenous peoples have a different relationship with the law than these groups, all of these individuals are dehumanized and objectified because of their status as a criminal. As Alexander states "…a racial state can harm people of all colours" (2011: 18).

A Relationship of Control and Containment

The relationship between Indigenous peoples and the colonial government has been characterized by control and containment. British law was used to assert sovereignty over British North America, dispossess Indigenous nations of their lands and legitimize every policy decision made regarding Indigenous peoples, from entering into treaties, to the enactment of the *Indian Act*, to confining Indian populations on reserves and later forcing children off of those reserves to attend residential schools. Peter Russell explains, "Law has provided the justifying discourse in taking over other peoples' lands…it is the Europeans—their authorities, their judges, their jurists—who get to make the law that counts. It counts because it is backed up by superior military power" (2005: 31). Indigenous nations were forced onto reserves through John A. Macdonald's official policy of forced starvation (Stanley, 2015). The oppressive pass system prevented "wild Indians" from leaving reservations for fear that they would join forces with one another to overthrow the newly created Canadian state (Monaghan, 2013: 504). But none of this could have been accomplished without agents of state-sponsored violence, in the form of the North-West Mounted Police (NWMP), now the Royal Canadian Mounted Police (RCMP). The

NWMP was established to police and control Indigenous bodies and was at one time under the purview of Indian Affairs (Daschuk, 2013: 127). Today, the RCMP and other law enforcement agencies continue the Crown's work by keeping Canadians safe from "ghetto-dwelling" Indigenous "delinquents" (Comack, 2012).

The assumption of the superiority of European laws is particularly evident when looking at the colonization of Canada because two Imperial superpowers—France and England—were competing for the entitlement to Indigenous lands, on Indigenous lands. Both the English and the French made alliances with different First Nations, only to later betray their comrades at the time of Confederation. Ironically, when the French and the English came together to create Canada, albeit under the rule of the British Crown, they went from being enemies to allies and at the same time, they turned their former allies into wards of the state. Today's Indigenous people are not so much "enemies" but are othered and seen as a threat by being regarded as criminals or dependents or are seen as standing in the way of Canada's economy by protesting against pipelines or other developments that might harm the relationship between Indigenous nations and the land (Alfred, 2012). These acts reinforce the "Indian" as not belonging or as being an outsider. Further, these conceptions are a continuation of the racist practice of exclusion.

The foundations of our contemporary criminal justice system, one that is overwhelmed by residential school survivors and their descendants, are violent and racist. Nevertheless, Canada's justice system is thought to reflect and represent morality, authority and above all, rationality. Thobani (2007) looks at how appealing to rationality justifies the acceptance of violence in the law. She explains that the violence inherent in colonial conquest becomes reasonable through law because violence is rationalized as a necessary part of colonialism (2007: 35). I argue that legalized state violence, when used against Indigenous men and women, such as

police use of force or solitary confinement in Canadian prisons and provincial jails is evidence that colonialism is ongoing because Indigenous people are dehumanized through these experiences and these acts reinforce Canada's sovereignty. This violence is justified through any inquests or investigations, even in cases where such violence leads to the death of an Indigenous person (Razack, 2015). In other words, state-sponsored violence is acceptable when it is used to protect Canadians from non-compliant and dangerous natives.

To be clear, it is the policing of "undesirable behaviour" of Indigenous people with which I take issue. This type of behaviour is criminalized even though it may have very little to do with keeping the public safe. Although most crimes for which Indigenous offenders are incarcerated are classified as "violent offences" (TRC, Vol. 5, 2015: 220), poverty-related crimes and offences against the administration of justice, such as failing to appear before court, or breaching a condition of a probation order, such as drinking alcohol at a party, disproportionately lead to the incarceration of Indigenous individuals (*R. v. Aboriginal Legal Services Toronto Inc.*, 2015; Alberta Justice, 2012). In some provinces, 56 percent of incarcerated Indigenous offenders had committed an administration of justice offence that led to a custodial sentence (Alberta Justice, 2012: 6). These are crimes that involve a great deal of discretion from police and other state justice officials. At 19 per cent, Saskatchewan has the highest proportion of administration of justice offences. That province also has the second highest incarceration rate of Indigenous peoples (Office of the Correctional Investigator, 2015(b)). These numbers show that there is institutionalized racism within the criminal justice system. This is a system that takes young people from difficult upbringings—many of whom were previously wards of the state—and says "let's make life even harder for you". The way that Indigenous offenders are monitored once they are released from custody demonstrates a highly problematic system that sets people up for

failure. It is common for an Indigenous person to be released from custody with an order to follow strict release conditions (Alberta Justice, 2012: 10). Yet, they are often released into the exact same situation that caused them to become criminally involved in the first place, without any supports, money or job. It is not surprising that the recidivism rate for Indigenous offenders released from custody in some provinces is as high as 74.6 percent and is significantly higher than the rate amongst non-Indigenous offenders (Wormith, et al., 2012: 9). It is clear that the objective of this system is not to rehabilitate criminals; rather, its effect is to control, confine and contain what it considers undesirable behaviour.

Many scholars (see Monture, 2006; Adema, 2015; Daschuk, 2012) have made comparisons between the reserve system and the modern-day criminal justice system, with one researcher calling prisons "the neo-colonial reserve" (Balfour, 2012: 86). Likewise, numerous residential school survivors have commented that Canadian jails have similarities to residential schools (TRC, Vol. 5, 2015: 219), prompting *Maclean's* magazine to publish a story entitled "Canada's prisons are the 'new residential schools'" (MacDonald, 2016). Prisons have been described as total institutions (Goffman, 1961). In these situations, like life under the *Indian Act* or time spent at a residential school, Indigenous peoples face constant state surveillance (Monaghan, 2013). Similarly, the reserve, the residential school and the prison are projects of exclusion (Stanley, 2015). Once Indigenous people are shuffled through the prison door by police officers, they are subject to dehumanizing treatment. From routine strip-searches to the threat of solitary confinement for minor infractions, the potential for dehumanization, objectification and infantilization is high within any prison setting (Foucault, 1975). However, Canadian penitentiaries, especially those on the prairies where Indigenous offenders account for

over sixty percent of the prison population (Office of the Correctional Investigator, 2015(b): 37), are particularly spaces of neocolonial interaction.

The power struggles that occur between White prison guards and Indigenous prisoners go beyond an authority figure's desire to assert dominance—these are the contemporary relationships between the colonizer and the colonized. In federal prisons, Indigenous offenders are more likely to be subject to authorized "uses of reasonable force" (Office of the Correctional Investigator, 2015(b): 34). Indigenous inmates also spend more time in solitary confinement than non-Indigenous inmates (Office of the Correctional Investigator, 2015(b): 27). The federal government claims that these measures are necessary "for the safety of staff and inmates" (Correctional Service of Canada, 2015). Indeed, one of the most common reasons for using solitary confinement is "for the inmate's own safety" (Bottos, 2007). Similar to how reserves and residential schools were justified, the idea that this racialized state violence is somehow warranted to protect Indigenous individuals reinforces the notion that "Indians" cannot take care of themselves and that they must be controlled and contained, through legal state intervention.

Tough on Crime Policies are Tougher on Indigenous Offenders

Beyond the obvious and authorized forms of violence within the justice system, such as peace officers' use of force at the point of arrest, I argue that it is even more crucial to identify the legal system *as a form of violence*. Walter Benjamin makes this connection: "Lawmaking is power-making, assumption of power, and to that extent an immediate manifestation of violence" (quoted in Thobani, 2007: 35). In Foucauldian terms, the legal system exerts violence without using traditional forms of violence, thus naturalizing the unequal relationships that result from interactions in the justice system. As demonstrated above, Canada's justice system is a system of institutionalized racism. Therefore, it is worthwhile to look closely at the laws that are made and

question for what purpose these laws exist. Where CRT is most powerful is when examining seemingly neutral laws, policies and political institutions (e.g., courts) and how these systems of power impact racialized individuals differently, and more negatively, than their settler counterparts.

Over the last decade, a series of tough on crime bills was introduced by the then Conservative government. These statutes, often euphemistically named and introduced as omnibus bills, include the *Safe Streets and Communities Act* and the *Tackling Violent Crime Act*. Tough on crime policies appeal to Canadians who believe in individual rational choice and personal accountability. As Katherine Beckett and Theodore Sasson argue "…the discourse of law and order provide[s] a means by which a number of pre-existing fears and concerns—about the pace and nature of social change, as well as the means used in an attempt to bring this change about—[are] tapped, organized, and given expression" (2005: 45). Collectively, these laws say more about the values of Canadians than about the kinds of criminal activity that actually occurs in this country. These laws negatively impact Indigenous individuals. It is these bills that, either directly or indirectly, contribute to the over-incarceration of Indigenous people and to the maintenance of a racist political culture that sustains this injustice and inequality. Despite having these impacts, many of these laws remain in place. Tough on crime laws obscure the collective responsibility for challenging ongoing colonialism by emphasizing only individual accountability.

The *Safe Streets and Communities Act* (SSCA) was an omnibus bill passed in March, 2012. The bill amended several statutes, including the *Criminal Code*, the *Youth Criminal Justice Act* (YCJA) and the *Controlled Drugs and Substances Act*, eliminated the option of community based sentences for certain offences and introduced mandatory minimum jail sentences for drug

crimes and sex offences. The SSCA was the ultimate "tough on crime legislation", its aim being to "…crack down on pedophiles, drug dealers, drug producers, arsonists, and the most serious violent repeat young offenders" (Hon. Rob Nicholson, 2012). The Supreme Court has since found that the mandatory minimums for drug trafficking imposed under the SSCA are unconstitutional, yet the remaining measures are still intact. The impact that tough on crime reforms have had on Indigenous peoples is well-documented (see, for example, Newell, 2013; Rudin, 2008; Pate, 2015). Looking specifically at the SSCA, the legislation has disproportionately affected Indigenous offenders because of the amendments it made to the YCJA, the limitations on the use of conditional sentences and the removal of judicial discretion in a number of circumstances.

The amendments to the YCJA in 2012 signalled a change in philosophy from a youth justice system that emphasized alternatives to incarceration to one that would systematically become more reliant on the use of custody. The most significant changes include a requirement for the Crown to consider an application for an adult sentence for youth over age 13 who commit a "serious violent offence" (YCJA, 2012: s. 64); an expansion of offences for which a custodial sentence can be an option (YCJA, 2012: s. 2 and s.39); and the addition of specific deterrence and denunciation as a sentencing principle (YCJA, 2012: s. 38). Despite the fact that the overall crime rate had been steadily decreasing when the SSCA was passed, these changes were made in the name of public safety, as demonstrated by the number one principle in the amended Act being changed to "the youth criminal justice system is intended to protect the public by… holding young persons accountable…" (YCJA, 2012: s. 3). This is a shift from the previous number one principle, which stated: "the youth criminal justice system is intended to…prevent crime by addressing the circumstances underlying a young person's offending behavior…"

(YCJA, 2003: s. 3). We know that the circumstances that contribute to Indigenous youth crime can be traced through the effects of colonialism (TRC, Vol. 5, 2015: 253), so for the government to lessen the legal obligation to tackle these root causes, the state not only ignores the colonial context, but creates a mandate for continuing colonialism and systemic racism under the guise of strengthening Canada's criminal justice system.

It is well known that one of the biggest predictors of becoming a criminally involved adult is prior involvement with the criminal justice system as a youth (Waller, 2014: 108). While the incarceration rate of Indigenous peoples in general is shocking, the disproportionate rates of Indigenous youth who are imprisoned is even more concerning. Though Indigenous children make up seven percent of all children aged 12 to 17 they accounted for 33 percent of youth admitted to a youth correctional facility in 2014 (Statistics Canada, 2015). This disparity is the highest in Saskatchewan, where Indigenous youth are 30 times more likely to be incarcerated than non-Indigenous youth (Department of Justice, 2015). Furthermore, while the overall youth custody rate has been declining, the rate for Indigenous youth has stayed the same as compared to previous years (Statistics Canada, 2015). The reasons for the involvement of Indigenous youth in criminal activity have been studied extensively (LaPrairie, 1999). While the reasons for why Indigenous youth commit crimes are widely understood as being rooted in colonial forces, my intent is to use CRT to show that legislative changes, such as those made under the SSCA, can contribute to the institutionalized racism that sustains a system of ongoing colonialism.

The limitation on conditional sentences is another feature of the SSCA that has exacerbated the over-incarceration of Indigenous peoples. The SSCA has reduced the availability of conditional sentences in two significant ways. First, these community-based sentences are no longer available for specific offences, ranging from criminal harassment, to motor vehicle theft,

to being unlawfully in a dwelling-house (Criminal Code, s. 742.1(f)). Second, the introduction of new mandatory minimum prison sentences has eliminated the option of imposing a conditional sentence for a broader range of offences, including many drug-related crimes (Criminal Code, s. 742.1(b)). Conditional sentences are a pragmatic alternative to incarceration and have been traditionally effective at diverting vulnerable individuals from custodial sentences. In particular, Indigenous women, whose crimes are most likely to be non-violent or poverty-related, are the group most affected by the restrictions (Hotton Mahony, 2011: 26). The incarceration of Indigenous women, especially the 70 percent who are mothers (Elizabeth Fry Society, 2008: 2; Canadian Human Rights Commission, 2003: 6), may be the most compelling symptom of ongoing colonialism. When the state chooses to incarcerate an Indigenous woman, instead of providing her with supports through community supervision, the state chooses to deprive that woman of her freedom and self-determination, while simultaneously depriving her children of their mother—forcing yet another generation of Indigenous kids to grow up away from their family and adding yet another layer to the intergenerational trauma and institutionalized racism that continues to plague Canada. Still, since 2001, Indigenous women have been and continue to be the fastest growing prisoner population (Office of the Correctional Investigator, 2015(b)). A residential school survivor expressed that "those schools were a war on Indigenous children…" (Truth and Reconciliation Commission, 2015: 45). One day, we may look back at Canadian prisons and say "those jails were a war on Indigenous families."

The elimination of judicial discretion for specific offences through the introduction of mandatory custodial sentences under the SSCA further contributes to an overreliance of incarceration in Canada (Newell, 2013). Although these minimum prison terms affect both Indigenous and non-Indigenous individuals, the fact that judges are no longer able to consider a

compounding set of circumstances when determining whether a prison sentence is necessary for a particular offence erases the role that the effects of intergenerational colonialism has played in Indigenous individuals' offending. These amendments undermine our justice system because they force judges to give sentences that are unfair in some cases and they undercut the intent of Canada's sentencing principles, including the requirement to consider "the circumstances of aboriginal offenders" when determining if a sentence of imprisonment is required (Criminal Code, s. 718.2(e)). Theoretically this principle acknowledges that colonialism and its effects continue to shape the lives of Indigenous peoples. While the sentencing principle was introduced in 1996, it became known as the "Gladue Principle" in 1999 after the Supreme Court ruled that a trial judge had not appropriately considered 718.2(e) in the sentencing of Jamie Gladue because she was an urban Métis (*R v. Gladue*). The Gladue factors allow for a conversation to occur about why an individual joined an Indigenous gang at the age of nine or why an Indigenous person consumes alcohol every day to forget the abuse she endured at a residential school. The SSCA effectively shut down those conversations in a large number of cases, making irrelevant the centuries of colonial history leading up to an offence. This legislative mandate places the blame and accountability squarely on the Indigenous person's shoulders, simultaneously diverting the discourse to one of hardened criminals paying for their actions.

While the SSCA made sweeping changes that impact the system as a whole, the cadre of tough-on-crime laws that were passed during the late 2000s and the early 2010s included reforms that are particularly unfair to Indigenous individuals. These changes came through in the form of another omnibus bill, the *Tackling Violent Crime Act* (TVCA), which became law in February, 2008 with support from all four represented parties (39th Parliament, 2nd Session, Vote 15). In addition to creating the first batch of 61 new mandatory minimums that would be introduced

during the Stephen Harper regime (Comack, et al., 2015: 5), the effects of which have been described above, the TVCA made it easier to designate persons convicted with multiple violent offences as "dangerous offenders". The dangerous offender designation was intended for Canada's most notorious serial killers and rapists, such as Paul Bernardo and Clifford Olsen, and it typically carries an indeterminate prison sentence—Canada's toughest sanction. In order to receive a dangerous offender designation, an assessment must show that it would not be reasonably possible to reintegrate and manage the offender in the community (Blais and Bonta, 2015: 254). One might think, in accordance with the principles of fundamental justice, such a severe penalty would be subject to the procedural safeguards that are the epitome of any fair justice system. However, parts of the TVCA fly in the face of the justice system it was supposedly trying to strengthen, including instituting a presumption of dangerousness and a reversal of the burden of proof in cases where the offender has been convicted of more than two designated offences (Criminal Code, s.752).

These amendments have disproportionately impacted Indigenous individuals. In 2000, there had been a total of 297 individuals designated as dangerous offenders since 1978, the year the designation was created. Of these, 17.4 percent were Indigenous and a total of 17 (Indigenous and non-Indigenous) were designated in Saskatchewan (Correctional Service of Canada, 2002). By 2015, the number of designations had risen to 735 (Public Safety Canada, 2015: 107), with Indigenous offenders accounting for 31.5 percent of all dangerous offenders (Public Safety Canada, 2015: 107). Since the TVCA became law in 2008, 281 individuals, an average of 40 each year, have been added as dangerous offenders. This has occurred despite the fact that the overall crime rate has been decreasing (Statistics Canada, 2016). Looking again to Saskatchewan, the total number of dangerous offenders reached 72 by 2015 (Public Safety

Canada, 2015: 108), with statistics showing that Indigenous people made up 77.2 percent of dangerous offender designations after 1996 (Scott, 2014: 6). This disparity exists even with Saskatchewan studies showing that "there [is] no significant difference in the offence severity of Indigenous and Non-Indigenous offenders" (Wormith and Hogg, 2012: 9).

If only because Indigenous people lack access to justice (Rudin, 2006), including adequate resources to obtain legal counsel to prepare compelling arguments, they are in a more difficult position when they must convince the court that they are not dangerous. However, the issues run even deeper than this disparity. Indigenous peoples have been disempowered by the justice system—at every step, regardless of the crime, from the presentencing process to applications for appeals, Indigenous offenders, despite their economic or academic background (Rudin, 2006: 29), face discrimination. Furthermore, as demonstrated by conceptions of "White" space and language used to describe Indigenous offenders (Razack, 2002), there exists a systemic bias in the justice system that views Indigenous people as criminal. This bias exists, in part, because of the lengthy criminal records of many individuals who are facing dangerous offender designation, which are often a symptom of ongoing colonialism and institutionalized racism. By assessing the factors of access to justice and structural discrimination in the justice system, compounded by individuals with criminal histories rooted in colonialism, Indigenous individuals are at a disadvantage when they are being considered for a dangerous offender designation and that explains why they are so grossly overrepresented in this category. In addition to the invisible whiteness of legal proceedings, which makes the legal process seem raceless, the above factors play a part in discriminating against Indigenous peoples in their interactions with the justice system (Balfour and Comack, 2004). Discrimination in the justice system evidences how law continues to operate as a system of violence, by labelling Indigenous

offenders as “dangerous offenders” and containing them as such. This reality exists because legal and political actors refuse to confront the unequal power relationships between Indigenous peoples and the Canadian state.

The facts and statistics showing discrimination in bail and sentencing procedures are telling: 55 per cent of Indigenous individuals do not qualify for bail compared to 41 per cent of non-Indigenous individuals; Indigenous offenders spend twice the amount of time in remand custody as do non-Indigenous people charged with a crime (Balfour and Comack, 2004: 81); Indigenous offenders are less likely to receive probation as a sentence than are non-Indigenous offenders (Goff, 2008: 263). These statistics are significant when examining dangerous offender designations because a designation is given based on an assessment of an offender’s entire criminal history, rather than a judgment of the qualifying offence (Thompson, 2016: 50). In many dangerous offender cases, the onus is reversed, requiring the defence to make a case that the offender is not dangerous, rather than the Crown proving beyond a reasonable doubt that the offender is a danger to society (Milward, 2014: 644). Furthermore, persons who have criminal records are more likely to be seen as criminal by the court and will therefore be more likely to be remanded and eventually convicted of a crime. As Balfour and Comack observe, “once someone’s in jail, it is easier for the courts to leave them there” (2004: 84).

The view of Indigenous peoples as criminal or of crime as an Indigenous problem impacts crime rates and statistics (Goff, 2008: 109). This discrimination does not stop at the front-end of the justice system. One study examined how the TVCA increased the reliance on assessments to determine an individual’s dangerous offender designation, which not only infringed on judicial discretion, but also artificially rated Indigenous offenders as being risker and more dangerous because of factors that place a heavy emphasize on past behavior

(Thompson, 2016: 68). This study found that there is no evidence to suggest that the assessments are reliable in predicting an Indigenous person's danger to society (Thompson, 2016: 69), yet these assessments are still being used as justification to put Indigenous offenders behind bars indeterminately. Another study looked at appeals of lower court decisions regarding dangerous offender designations in Saskatchewan, both those brought forward by the Crown and the defence, and found that appeal courts seldom considered circumstances for cases involving Indigenous offenders (Scott, 2014: 14). These examples of structural discrimination demonstrate that laws such as the TVCA can have devastating effects on racial minorities. This disproportionate number of Indigenous dangerous offenders reflects a form of institutionalized racism, legitimized through law and is a modern-day example of Fanon's racist practice of scapegoating.

The troubling aspect of these policy decisions is that the changes were made despite the government knowing the systemic challenges faced by Indigenous peoples in the criminal justice system and society in general. Too often, policymakers seek individualized solutions to systemic problems. When these policies contribute to the marginalization of one group, "race" factors as a prevalent variable, while racism is left out of the conversation. This type of institutionalized racism is demonstrated by one Conservative Senator's remarks during a debate about the SSCA, "… I think I can speak for rural Canada…. For the life of me, to say that 'Because you are Aboriginal, it is okay; we will give you a lighter sentence, although you have been dealing in some very serious drug offences,' I just cannot buy it. It just defies common sense" (Senator Lang, Standing Senate Committee on Legal and Constitutional Affairs, 2012). By focusing the discussion on an Indigenous drug offender receiving a light sentence—rather than examining the complex socioeconomic power dynamics that may have caused an Indigenous person to become

criminally involved and drug dependent—white privilege and Indigenous inequality, sustained by institutionalized state racism, are left unquestioned. Furthermore, the appeal to "common sense" negates the experiences of non-Whites and normalizes the unequal power dynamic between the racialized, criminalized, colonized Indigenous people and the racial state that controls, confines and legislates them.

The Normalization of Indigenous Crime and White Settler Fear

> "It seems the first experience of going through the justice system isn't getting through to them," Inspector [Ron] Gislason told the local media. "So what's going to happen is either they're going to learn after the second or third time, or they're not…If they don't, then I'm afraid we're going to have a very young group of career criminals." (quoted in Friesen, 2016: 44).

The above quote was made by a police officer in 1994 in response to the proliferation of the notorious Canadian street gang—the Indian Posse (IP). In his book, *The Ballad of Danny Wolfe*, Joe Friesen traces the lives of two of the IP's founding members, brothers Richard and Daniel Wolfe. At the time of Inspector Gislason's quote, the Wolfe brothers were 18 and 19 years old and had spent nearly two-thirds of their youth in jail. While both brothers would go on to commit horribly violent crimes, Friesen explains that the boys were born into conditions created by colonization that shaped their choices and realities. Richard and Danny's mother was a residential school survivor and spent time at an institution for runaway youths prior to giving birth at the age of seventeen to Richard and one year later, to Daniel. The brothers spent the first decade of their lives in and out of foster care, mainly raising themselves on the streets of Winnipeg while their parents engaged in days-long benders to forget about the intergenerational trauma they'd endured—unknowingly furthering that trauma for Richard and Daniel (Friesen, 2016: 19). Violence, prison, gangs and the pursuit of power were the constants in the lives of the

Wolfe brothers and are among the variables that contribute to the construction of Indigenous people as criminals.

The construction of Indigenous individuals as criminals occurs within colonial spaces, such as cities, prisons and reserves (Razack, 2002; 2015) and is reinforced by the mainstream media. Settlers are afraid of Indigenous individuals, both physically—39 per cent of people living on the prairies stated that they would be uncomfortable if an Indigenous person moved in beside them (CBC, November 2014)—and symbolically—settlers are afraid of having their economic, political and social structures upset (Alfred, 2005). The non-conforming Indigenous "criminal" is a reminder that Canada does have a history of colonialism (Comack, 2014: 77). It is easier for "peace-loving, tax-paying Canadians" to accept that Indigenous peoples are incarcerated *because* they are criminals than it is to confront the continuance of colonialism. As one observer explains, "You have quintessential Canadian people….whose racism is so deep and so perfectly melded with their person that it's not identifiable" (Kelliher in Razack, 2015: 80). Thus, when settlers promote tough-on-crime initiatives, such as the adoption of stand-your-ground laws in rural Saskatchewan or longer prison sentences in the Criminal Code, this advocacy is done without regard to the impacts that seemingly neutral laws have on Indigenous peoples (Comack, 2014: 78).

Both Wolfe brothers died in the Saskatchewan Penitentiary. Daniel was 33 and Richard was 40. Understanding the prison as a racialized space of colonialism is key to understanding the relationship between Indigenous peoples and the state (Jacobs, 2012: 30). Prisons further the criminalization and dehumanization of Indigenous peoples. Coates refers to prisons in the United States as "Gray Wastes" and argues that "it is impossible to conceive of the Gray Wastes without first conceiving of a large swath of its inhabitants as both more than criminal and less than

human" (2015: 69). In Canada, Indigenous deaths in custody are routinely designated as inevitable or unpreventable. Razack explains that this categorization exists because "Indigenous peoples are first treated as remnants—as people who are dying anyway—and their bodies are then legally staged as bodies already in their final stages of decay" (2015: 9). The justifying settler colonial logic goes as follows: "the Wolfe brothers lived violent and criminal lives, thus it should come as no surprise that they died in prison or in violent ways." After Richard's death, a spokesman for the Correctional Service of Canada stated "A person's death in custody is a tragedy" (Ponticelli, May, 2016). However, these rationalizations obscure the fact that Indigenous deaths in custody are a continuation of the ongoing genocide of Indigenous peoples by the state (Adema, 2015: 453).

While Daniel was stabbed to death by other gang members and lived out his last days still very much involved in the gang lifestyle, Richard's last days were much quieter. He died from a suspected heart attack, taking his last breaths in an open-air outdoor exercise yard—something he did not have the chance to do very often in the two years he spent remanded in the Regina Provincial Correctional Centre where he was placed in solitary confinement for lengthy periods of time (Friesen, 2016). People who live in conditions of solitary confinement within prisons are dehumanized and reduced to what Achille Mbembe calls the "status of the living dead (ghosts)" (2003:11). The use of solitary confinement—the harshest form of restriction in Canada—is one way that prisons cast inmates "…*as both more than criminal and less than human*" (Coates, 2015: 69. Emphasis added). A system that justifies locking people in cages for 23 hours each day with minimal access to human contact, stimulation, socialization and information because they are "the worst of the worst" or "dangerous offenders" is a system that deprives individuals of their humanity and subsequently normalizes this dehumanization. Alexander explains how

assigning criminals a sub-human designation has become accepted: "Criminals, it turns out, are the one social group in [North] America we have permission to hate….When we say someone was "treated like a criminal," what we mean to say is that he or she was treated as less than human, like a shameful creature" (2011: 141). Angela Davis adds that: "Because of the persistent power of racism, "criminals" and "evildoers" are, in the collective imagination, fantasized as people of color" (2003: 16).[21] Historically, Indian Agents' surveillance of Indigenous peoples on reserves and the placement of children in residential schools was justified by white supremacist perspectives that viewed Indigenous peoples as less than human. That this dehumanization occurs in a different form today demonstrates that colonialism is an ongoing, unbroken process that continues to oppress the colonized in particularly racialized and violent ways.

Although prisons are spaces of colonialism, Indigenous gangs are trying to find power within the structures that have oppressed them. For example, spending time in a penitentiary means that members of the IP can rise through the ranks to a leadership position within the gang (Friesen, 2016: 27). Alexander argues that "…embracing the stigma of criminality is an act of rebellion—an attempt to carve out a positive identity in a society that offers them little more than scorn, contempt, and constant surveillance" (2011: 171). For the Wolfe brothers, the gang life promised money, power and belonging—things that Daniel and Richard were systemically denied. In addition, prisons provide gangs with ample opportunity for recruitment, which creates more criminally entrenched individuals and undermines the role of prisons in contributing to public safety (Koch and Scherer, 2016: 41). Symbolically, the rise of Indigenous gangs impedes the assimilating and colonizing objectives of incarceration (Jacobs, 2012: 251).

[21] "Evil-doers" is a term added to the American vocabulary by George W. Bush during the War Against Terror.

In contrast to prisons, cities are spaces of "civilization" and "progress". The spatial organization of groups by race and class within cities implicates certain individuals with criminal behaviour. The 1995 Regina murder of Pamela George, a Saulteaux woman, by two White male university students was one of colonialism in action, in which "White men forcibly and fatally [removed] indigenous bodies from the city space, a literal cleansing of the White zone" (Razack, 2002: 143). George had been working as a prostitute on the night that she was murdered and despite speculations from people who knew her who guessed she had been killed by a client, the police investigating her death looked only for Indigenous male suspects in North Central and downtown Regina—even though most clients of prostitution were White, middle-class men (Razack, 2002: 156). So, while prostitution is an act that involves two parties, it is conceptualized as a crime that Indigenous women commit and one that occurs far away from White spaces. Balfour and Comack explain that White Canadians "have come to associate [I]ndigenous communities as places where violence, alcohol and drug abuse, welfare dependency and crime are commonplace" (2004: 79). Thus, Indigenous peoples are not equal in legal processes because they are viewed as criminal. The idea of indigeneity as criminal and whiteness as innocent is rooted in colonial ideas about racialized morality (Lacy, 2008: 295).

It should be noted that most Indigenous peoples do not engage in any form of criminal activity and want safe, crime-free communities—indeed Indigenous people are more likely than non-Indigenous Canadians to be victims of crime (Statistics Canada, 2014), especially if they are female (Status of Women, 2011: 5). The high rate of violence that Indigenous women experience is a reflection of the structural violence that occurs within society (Jiwani, 2006: 6). The notion that Indigenous people *choose* to live in ghettos, where crime rates are high, is racist (Alexander, 2011: 170). Yet, some Canadians refuse to acknowledge the structural racism that limits

individuals' choices. For example, in the aftermath of the death of an Inuk artist in Ottawa, a police officer made the following comments from a private Facebook account: "It's not a murder case….typically many Aboriginals have very short lifespans, talent or not, (sic)" and "Because much of the aboriginal population in Canada is just satisfied being alcohol or drug abusers, living in poor conditions ect (sic)…..they have to have the will to change, it's not society's fault, (sic)" (quoted from Barrera, September 2016). These comments reflect a subtle kind of white supremacy which assumes that society's structures are designed to benefit everyone equally. In this this conceptualization, individuals make their own choices and are responsible for those choices. Vic Satzewich and Nikolaos Liodakis call this mentality the "white gaze", which "is a refusal to recognize the reality of racism and a refusal on the part of white people to recognize that they are disproportionate beneficiaries of the way the world is organized…" (2017: 57). The white gaze reproduces race and racism by blaming racialized individuals for their pathologized situations, while simultaneously reinforcing the idea that Canadian institutions are raceless or colourblind (Backhouse, 1999: 279).

Teun van Dijk explains that colourblind racism is "the new racism" (2000: 34), which can be understood as the symbolic or everyday racism that racialized individuals experience. This racism is deeply embedded within society's dominant power structures. "New racist" attitudes are produced and reinforced by the media. According to Marci Bounds Littlefield, "the media are the primary agent of socialization in which participants are seduced, educated, and transformed by ideas concerning race, gender, and class…and these ideas often support white supremacist capitalist patriarchy" (2008: 676). In Canada, when negative images of Indigenous individuals are shown, a tendency exists to relate the isolated incident to Indigenous peoples as a whole. In their study of media coverage in Maskwacis, Jordan Koch and Jay Sherer interviewed

a community member who explains how non-Indigenous people characterize Indigenous peoples as criminal because of what they hear in the media:

> We get labeled everywhere we go. *The Edmonton Sun* labels us pretty definitively. Every time there is a shooting or a death in the community, *The Edmonton Sun* is all over it….Our boys were labeled as killers, going from town to town.…All they see is angry ... angry Native kids. And they're going to label them too. "They're getting mad for no reason." That's how it is everywhere we go. It's a common label, that we're always angry, that we're violent, and the other stereotypes that we're late, lazy, always into drugs and alcohol. It's tough for the kids. (2016: 49).

Jiwani describes this kind of stereotyping as "homogenization of difference" (2006: 35), which fosters a racist ideology that distorts reality and prompts Canadians to think of Indigenous people as inherently deficient (Balfour and Comack, 2004: 80). By conceptualizing Indigenous peoples as lacking the requirements of acceptable human behaviour, White Canadians legitimize their entitlement to the land previously occupied by Indigenous peoples because they see themselves as the group most deserving to own and control the land (Dhillon, 2015: 7; Koch and Scherer, 2016: 46).

Prisoner advocate/Senator Kim Pate argues: "The push to criminalize the most dispossessed…demands we examine our fundamental beliefs and notions of whose interests and biases are privileged" (2006: 82). When Indigenous peoples are criminalized, the racialized state violence that Indigenous peoples experience is justified by White settler fear. In turn, those who become casualties of Canada's racialized justice system may internalize the role that the society has constructed for them, as evidenced by Danny Wolfe's insightful rap lyrics: "Tell me I'm no good Because I'm Indian/Never knew the meaning of what they say/You just better hear me. Fear me." (Friesen, 2016: 159). In her analysis of Foucault's *Society Must be Defended*, Sarah Pemberton asserts that racialized Others are "constructed as a racial threat to the nation" (2015: 340). Thus, the interests that are upheld at the expense of Indigenous peoples' humanity and self-

determination include the economic and social structures that are sustained by white supremacy (Pemberton, 2015: 343). In this way, white privilege is maintained, in part, by the criminalization of Indigenous peoples. For example, although White teenagers may commit similar crimes to the crimes that even the toughest Indigenous gangsters start out with, provincial and federal governments' responses to crime typically result in more policing of racialized groups (Mallea, 2011: 54). To upset the design of a criminal justice system that favours and protects the interests of White settlers requires a redistribution of power and wealth that Canadians are not prepared to accept (The Environics Institute, 2016: 14).

A Way Forward?

The fourth pillar of CRT suggests that law, because it is a social construction, has transformative potential. Throughout the last few decades, there have been attempts to change Canada's criminal justice system. Many of these initiatives specifically aimed to address the overrepresentation of Indigenous peoples within prisons, the particular rehabilitation needs of Indigenous offenders and the issue of Indigenous gangs. However, most of these reforms have amounted to little more than tinkering with the existing colonial system. Alexander argues that when it comes to mass incarceration in the United States, incremental changes to the current justice system simply cannot bring about the transformation required to overhaul racism: "Isolated victories can be won—even a string of victories—but in the absence of a fundamental shift in public consciousness, the system as a whole will remain intact. To the extent that major changes are achieved without a complete shift, the system will rebound" (2011: 234). While Alexander compares the mass incarceration of Black Americans to Jim Crow Segregation laws, I have compared the present day over-incarceration of Indigenous peoples in Canada to colonial policies of control and containment, such as the pass system or residential schools. The TRC's

work may be the catalyst for the fundamental shift in the Canadian public consciousness for which Alexander advocates in the American context. CRT reminds us that systems of power maintain white supremacy, thus there is no creating a better or more perfect system—the system must be dismantled and replaced with an anti-racist, decolonized system. Before examining what that system may look like in Canada, I will briefly investigate some of the attempted reforms of sentencing processes, Indigenous programming within prisons and gang intervention strategies. I argue that these reforms have been unsuccessful because they do not target the system of racism that criminalizes and confines Indigenous peoples.

In 1996, the Government of Canada amended the Criminal Code to add sentencing principles, including one that aimed to decrease the systemic overrepresentation of Indigenous peoples in prisons. As part of a Judge's obligation to consider non-carceral sentences for all offenders, the Gladue factors, mentioned earlier in this chapter, are intended to draw specific attention to the particular circumstances of Indigenous offenders (Criminal Code, s. 718.2(e)). *R. v. Gladue* and a 2012 case, *R. v. Ipeelee*,[22] which ruled that s. 718.2(e) applies to serious offences, formed the basis for how the circumstances of Indigenous offenders should be interpreted. The correct interpretation is that the factors apply to all Indigenous offenders—First Nations, Métis and Inuit, whether living on-reserve or off –reserve —and sentencing judges must consider "…the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples" (*R. v. Ipeelee*).

[22] Ipeelee refers to two cases, one involving Manasie Ipeelee and the other involving Frank Ralph Ladue.

In the twenty years that have passed since the Gladue factors were implemented, the rates of Indigenous incarceration have increased from 15 percent of federal prison admissions in 1996 (Reid and Roberts, 1997: 1) to 25 percent today (Office of the Correctional Investigator, 2016). Researchers and Justice professionals have studied why the Gladue reforms have not had an impact on reversing the trend of Indigenous over-incarceration (see for example, Bayda, 1999; Rudin, 1999; Jackson, 2002; Fenning, 2002). However, many of these analyses seek explanations that are within the existing legal structures. For example, Fenning concludes that a key reason that the Gladue factors have not ameliorated Indigenous over-incarceration is because the crimes that Indigenous offenders commit are too serious to warrant a non-custodial sentence (2002: 96). She argues that the seriousness of Indigenous peoples' crimes are rooted in complex social problems, therefore initiatives should be targeted to curb those problems (e.g., alcoholism, lack of parenting, abuse) (Fenning, 2002: 107). Others acknowledge the flaws and discrimination within the existing system, but suggest that the problem is one of implementation, rather than design (e.g., not enough training for Judges or resources for alternatives to incarceration) (Rudin, 1999; Bayda, 1999).

Because large numbers of Indigenous offenders continue to receive sentences of incarceration, correctional agencies across Canada have endeavored to indigenize rehabilitation programs in order to make them culturally relevant for Indigenous offenders. While it is important to note that "sacred indigenous cultural and spiritual traditions experientially present the thought forms and values that have aided Aboriginal people in survival for many millennia" (Jacobs, 2012: 34), the introduction of Indigenous programming into correctional facilities has not had an impact on the systemic over-incarceration of Indigenous peoples. Patricia Monture-Angus explains that attempts to incorporate Indigenous models of healing within the existing

penitentiary system have fallen short because the security-minded philosophies of the colonial system prevail (2002: 18). At times, Indigenous offenders are denied opportunities to practice cultural and spiritual traditions within prison (CBC, March 2017), suggesting that the control and confinement of Indigenous peoples continues to be the main purpose of incarceration and that cultural elements are simply add-ons. Madelaine Jacobs argues "Despite this attempt at change, racialized ideologies of an unreachable Native cultural persona nevertheless remain embedded in Canada's criminal justice systems" (2012: 37).

In their book, *Indians Wear Red: Colonialism, Resistance, and Aboriginal Street Gangs*, Comack et al. (2013) maintain that ad-hoc strategies aimed at diverting Indigenous youth from joining gangs typically have little impact beyond individual cases. Jacobs furthers this conclusion by stating that anti-gang diversion programs "[miss] the deeper connections to the criminalization of Indigenous persons when they point to "all that the legacy of colonization and residential schools entails" (Grekul and Sanderson, 2011: 48) and skip forward to possible programmic solutions" (2012: 31). Furthermore, anti-gang strategies are evaluated on factors such as an individual's "general approval of aggression", "attachment to the labour force" and "dislike of guns", comparing an individual's pre and post involvement responses (Public Safety Canada, 2012: 3-4). One evaluation of an anti-gang program recommends: "To increase the odds that youth build attachments to their culture rather than their gangs, all aspects of programming should be permeated with traditional teachings and practices" (Public Safety Canada, 2012: 6). These evaluations and recommendations reinforce the idea that criminal involvement is strictly a personal choice and ignore structural factors, such as colonialism.

Restorative justice, which focuses on repairing harms done to the community as the result of crime, presents an alternative to the colonial justice system, which is rooted in a retributive

justice model. Federal and provincial governments, as well as many Indigenous governments, communities and organizations have embraced restorative justice, albeit with much different approaches (Frederiksen, 2010). Governments' endorsements of restorative justice tend to apply the concept to specific cases and on an individual basis; whereas the vision of restorative justice that exists in many Indigenous communities can be articulated as: "…not simply a way of reforming the criminal justice system, it is a way of transforming the entire legal system, our family lives, our conduct of the workplace, our practice of politics. Its vision is of a holistic change in the way we do justice in the world" (Braithwaite, 2003: 1). It is the latter approach that aligns more closely with the goals of CRT because the movement is concerned with changing systems of oppression and replacing them with anti-racist, anti-colonialist models; rather than adding on to or tinkering with the existing system.

There are limits to what can be achieved through changes to laws. Indeed, CRT emerged from recognizing the drawbacks of the formal legal equality that was "achieved" during the civil rights era. In the case of the over-incarceration of Indigenous peoples in Canada, attempted reforms such as Gladue factors, Indigenous programming within prisons and anti-gang strategies geared towards Indigenous youth may help individuals, but they have not had an impact on the systemic issue of Indigenous over-incarceration. In fact, providing culturally appropriate rehabilitative programming can have the perverse effect of demonstrating that correctional authorities are doing just enough to distract from having to confront the bigger issues of racism and colonialism within the justice system. These findings suggest that Indigenous over-incarceration is a feature of a legal system grounded in colonialism. By using a CRT lens, transformations of the justice system, such as replacing the existing model of retribution with a restorative justice model, have the most potential for addressing Indigenous over-incarceration.

Chapter Conclusion: "If you really don't like the prison food…don't go to prison"[23]

When Saskatchewan prisoners were complaining about the substandard food quality and quantity that they were receiving because of the government's decision to privatize food services within prisons, Brad Wall responded that prisoners can avoid prison food by not going to jail. While Wall's comments may have gained some political points amongst members of the public who support "tough-on-crime" initiatives, Wall may not have realized that his comments were directed towards many individuals who are the children of residential school survivors who were also told that small government-provided portions of non-nutritious food were good enough. These residential school survivors were the children of Indigenous people whose food rations were withheld by the Department of Indian Affairs if they refused to send their children to residential schools, who were in turn the children of Indigenous peoples who were forced onto reserves through policies of starvation (Daschuk, 2013: 135).[24] On the other hand, it is possible that Wall does realize the connection, in which case, his comments are strategically crafted to reflect a prevailing neoliberal attitude in Canada that people choose lifestyles of crime, ignoring the structures of racism and colonialism that shape the availability, or lack thereof, of choices for racialized individuals. The use of food as a tool for the oppression of Indigenous peoples is just one example of the state's continued control, containment and dehumanization of Indigenous peoples.

By applying a critical race analysis to the current framework of criminal justice policies ushered in over the last decade, I have demonstrated that racism is institutionalized within

[23] Saskatchewan Premier Brad Wall, "Premier Brad Wall not waffling on jail food comments". (CBC, January 7, 2016).

[24] Other present-day examples of Indigenous peoples lacking access to quality, affordable food include: the lack of grocery stores in areas of cities with high Indigenous populations (e.g., Regina does not have a grocery store in the North Central or downtown core areas); and the shockingly high prices of basic food items, such as fruit and milk, in Northern communities.

Canada's justice system. The over-incarceration of Indigenous peoples is a continuation of colonialism, which operates to control and contain Indigenous peoples in order to justify the ongoing dispossession of Indigenous lands and remain unaccountable for the continuing disparities that Indigenous peoples in Canada face. Because of this institutionalized racism, neutral "tough-on-crime" laws disproportionately impact criminalized Indigenous individuals. The TVCA, which changed the rules for designating dangerous offenders, served to advance the construction that Indigenous offenders are more violent, dangerous—indeed more criminal—than non-Indigenous offenders. The SSCA, which targeted young offenders and community-based sentences, reinforced the idea that these violent, dangerous Indigenous offenders—even youths— belong in jails in order to keep Canada's streets and communities safe. The rates at which Indigenous peoples are incarcerated in Canada signals a continued desire to exclude Indigenous peoples from civilized, colonized, White settler spaces.

Race is constructed through the over-incarceration of Indigenous peoples, especially through colonial geographies of "race as space" (Razack, 2002). Jails, reserves, farms, cities—particularly ghettos—are spaces that symbolize colonial power relationships of control, containment, inclusion and exclusion. These spaces are a microcosm of the nation—a colonizing force that categorizes and authorizes race and racial oppression through law. Through these geographies, the Indigenous criminal is normalized and encounters between state authorities and Indigenous peoples can be characterized as colonial tensions, where the potential for racialized state violence is exacerbated. In this way, the Indigenous individual is dehumanized, with his or her presumed criminality swallowing their humanity. This depiction of Indigenous peoples resonates with a sizeable portion of the settler population—evidenced by the support Gerald

Stanley received after allegedly shooting Colten Boushie, as well as by a significant proportion of settlers saying that they would be uncomfortable living beside an Indigenous person.

White privilege is sustained through the over-incarceration and criminalization of Indigenous peoples in a number of ways. First, in violent encounters between Indigenous peoples and settlers or state authorities it is assumed that the Indigenous person is violent or intends to use violence—this assumption justifies the racialized state violence against Indigenous peoples. Second, non-criminal encounters, such as responses to intoxicated or homeless Indigenous people, are treated as crimes, whereas evidence shows that this happens to a lesser extent among the White settler population (Razack, 2015; Progress Alberta, 2017). Third, racialized spaces reinforce notions of who belongs in "White civilized spaces" and who does not. Finally, the fears of White settlers are privileged over the humanity and safety of Indigenous peoples. White privilege is a component of white supremacy—a system of oppression that institutionalizes the interests and beliefs of Western civilization within the power structures of the state based on the idea that Western societies are superior to all other civilizations. White supremacy operates silently in Canada and is considered the normal way of doing things—it is manifested through individual property rights, capitalism and the prioritization of a retributive justice system over alternatives such as restorative justice.

The laws and policy decisions that contribute to the over-incarceration of Indigenous peoples are largely made by people in positions of power who—with exceptions—probably don't think of incarcerated individuals as their neighbours, or their brothers and sisters, or their own child. Indeed, prisoners are more likely to be cast in the social imagination as "…both more than criminal and less than human" (Coates, 2015: 69). Coates explains that the collective perspective of criminals justifies their inferior treatment:

> As African Americans began filling cells in the 1970s, rehabilitation was largely abandoned in favor of retribution—the idea that prison should not reform convicts but punish them. For instance, in the 1990s, South Carolina cut back on in-prison education, banned air conditioners, jettisoned televisions, and discontinued intramural sports. Over the next 10 years, Congress repeatedly attempted to pass a No Frills Prison Act-- which would have granted extra funds to state correctional systems working to "prevent luxurious conditions in prisons (2015: 66).

Wall's comments about prisoners' food, the overcrowding of Canadian prisons, the last decade of tough-on-crime laws, privatizing aspects of prisons, such as telephone systems and food services, are ways in which Canada's prison system Others and dehumanizes criminalized individuals. One must ask: what would it take for prisoners to be viewed as neighbours, family members and friends? Would this perception change politicians' minds about the policies and laws that impact people who go to jail? The next chapter of this thesis will investigate the potential and challenges of repairing the existing colonial relationship within the current context of "reconciliation."

Chapter Three: Reconciling Colonialism?: The Limits and Potential of Reconciliation

Introduction

The persistent and structural over-incarceration of Indigenous peoples across Canada, as explained in chapter two, seems at odds with stated desires to advance reconciliation and improve the relationship between Indigenous peoples and the state. Gaudry suggests that these incompatible narratives can be partially explained by how governments view reconciliation in Canada:

> A very prominent vision for Canadian reconciliation revolves around reconciliation reinforcing Canada, as if the end goal is to make a stronger, more united Canada, which is different from how a lot of Indigenous people envision reconciliation, which is about building Indigenous collectivities back up in spite of Canadian policies over the years (quoted in Stirling, 2017).

As Gaudry articulates, there are (at least) two distinct paths emerging on what reconciliation means in Canada. The first path, which has been adopted by mainstream politicians and governments presents reconciliation as a chance to unify Canada through "gestures of inclusion" (Simpson, 2012)—in this version a reconciled Canada would be the completion of project Canada or the end of the "Indian Problem." In short, this reconciliation framework amounts to little more than a new form of assimilation. The second path ultimately leads to a restructured relationship, one in which Indigenous nationhood would be recognized, providing for the autonomy of Indigenous governance structures. To be sure, a settler colonial analysis is required to examine what such a decolonized relationship would look like. A CRT analysis of reconciliation does not necessarily lead to decolonization; rather it accounts for why governments and mainstream Canadians remain attached to the first version of reconciliation, in which the status quo and white supremacy are not meaningfully challenged.

In the aftermath of the shooting of Colten Boushie and subsequent commentary from members of the public, which was presented in the introductory chapter of this thesis, the premier's assessment of the situation epitomizing racial tensions in the province was: "Things are changing…the hope that we should have is, the next generation, they don't have some of the thoughts perhaps that even ours did or that our parents did. I think we should be hopeful about that" (CBC—August 23, 2016). While Wall's words suggest that things are getting better, a closer look at his government's response to the TRC's Calls to Action reveals a different story. Saskatchewan's response so far, expressed most notably in "Moving Forward with the Truth and Reconciliation Commission," is an example of a subscription to reconciliation that locates solutions within existing structures, rather than attempting to make space for transformation or Indigenous-led initiatives (Government of Saskatchewan website, 2017).[25] The government's response states, "some of the Government of Saskatchewan's strategies that are already well underway include the Child Welfare Transformation Strategy, Disability Strategy, Education Sector Strategic Plan, and actions on violence prevention" (Government of Saskatchewan website, 2017). In addition, the government touts its *Plan for Growth*, a multi-year plan established in 2012, as aligning with the TRC's Calls to Action (Government of Saskatchewan website, 2017). The extent to which Indigenous peoples are mentioned in the *Plan for Growth* centres on "Saskatchewan's Aboriginal Employment and Education Challenge", which aims to increase the numbers of Indigenous peoples participating in the provincial economy (Government of Saskatchewan, 2012: 19). The province's response does not name a single

[25] https://www.saskatchewan.ca/residents/first-nations-citizens/moving-forward-with-the-truth-and-reconciliation-commission#ongoing-work-with-first-nations-and-metis-people

Call to Action from the TRC's report. It is noticeably silent with respect to the criminal justice system and the over-incarceration of Indigenous peoples.

Before chalking up the Saskatchewan experience to a particularly racist political culture, Canadians should take note of other instances in Canada where the actions of governments do not match their promises to Indigenous peoples. Ward articulates that these occurrences are "not the result of an inherent regional mentality, but are rather the results of broader societal processes and power relations that constitute settler colonialism" (2014: 1; see also Caldwell and Leroux, 2017). For example, Prime Minister Justin Trudeau has been criticized for ignoring a ruling made by the Canadian Human Rights Tribunal that requires the federal government to fully implement Jordan's Principle and stop discriminating against Indigenous children in the provision of services on-reserve (Blackstock, 2017). This despite his declaration, that "[n]o relationship is more important to me and to Canada than the one with Indigenous Peoples" (LaForest and Dubois, 2017).

In examining reconciliation efforts in Canada, political rhetoric over the last several years has projected a nation that has benevolently faced its most shameful chapter and has started its long journey towards healing the wounds inflicted by residential schools. The reality is that Canada was forced to confront this history because it was slapped with thousands of class action lawsuits—comprising the largest in Canadian history—from former residential school students, who are now commonly referred to as survivors in recognition of the suffering that occurred within residential schools (Niezen, 2013: 18; TRC, Survivors Speak, 2015: xiii). Rather than fight these claims in court, the federal government and the church organizations that operated residential schools reached a settlement agreement, known as the Indian Residential Schools Settlement Agreement (IRSSA), with the former students. The IRSSA established the framework

for the financial compensation of residential school survivors and laid the foundations for the creation of a Truth and Reconciliation Commission (TRC). In June 2008, as survivors were in the process of filing their residential school claims and before the real work of the TRC had begun, then Prime Minister Stephen Harper made an official apology to residential school survivors on behalf of the Government of Canada. The apology referenced both the settlement and the TRC, the latter of which released its final report in December 2015. The TRC's final report includes 94 Calls to Action, which are intended to inform government policy direction for decades to come. Taken together, these elements constitute Canada's response to residential schools.

Applying a critical race analysis to Canada's response to residential schools reveals a small glimpse of Canadian racism and the trajectory of colonialism within Canada. As explained in chapter one, racism as a power structure exists to benefit the dominant group. The racism of Canada's response to residential schools is subtle and reflects a political culture sustained by institutionalized racism. This racism underpins a rather blasé acceptance of Canada's colonial systems and neocolonial practices amongst the White settler public. At the same time, Canada's response and particularly the work of the TRC may serve as the catalyst for re-examining those systems and practices. To demonstrate the understated ways in which racism and neocolonialism play out throughout Canada's response, as well as its transformative potential, I will analyze four aspects of the response from a CRT perspective in this chapter.

I begin my analysis with the necessary dissecting of the term "reconciliation", tracing arguments that are skeptical of the ways in which the sentiment has been interpreted across Canada, while also examining its positive aspects. Second, I discuss how increasing understanding, whether between settlers and Indigenous peoples, or of the impacts of residential

schools, is prescribed as a remedy throughout Canada's response. Related to the first two points, I argue that some reconciliation efforts have been taken up through what Audra Simpson calls "gesture(s) of inclusion" (quoted in Razack, 2015: 62), a form of race-making that simultaneously reinforces Indigenous peoples' cultural incompatibility while ultimately advancing assimilationist practices. The third element of Canada's response that warrants a critical race analysis is the repeated calls for a renewed relationship based upon respect. These themes evoke each of the pillars of CRT, especially demonstrating how institutionalized racism and white privilege continue to shape even the most well-intentioned solutions to the Indigenous-state relationship. Finally, the work of the TRC can be viewed, in part, as a counterstory to Canada's official version of history, being mindful that certain voices and perspectives have been omitted from the now mainstream national conversation about reconciliation. This theme taps into the final pillar of CRT, which is that there are opportunities for transformation even through institutions and processes that have been racist and oppressive.

Given that Canada's response to residential schools occurred mainly through legal processes rooted in colonization, it is fitting to apply a CRT lens to its main components. This analysis is important because it highlights some of the substantive racial issues that continue to oppress Indigenous peoples and sustain white privilege and white supremacy in light of formal or official acknowledgements of advancing reconciliation between settlers and Indigenous peoples. While the previous chapter used the example of the criminal justice system to demonstrate colonialism as an ongoing process sustained by racism, CRT reminds us that the legal system is just one arena in which informal racism plays out in a state's institutions. Because racism is ingrained in so many of Canada's political, legal, economic and social structures, formal attempts at combating it run the risk of delivering very little material change in the lives of

individuals such changes purport to improve. This has been true in many struggles for justice, as Martin Luther King, Jr.'s statement made during the American Civil Rights Movement reminds us: "What does it profit a man to be able to eat at an integrated lunch counter if he doesn't have enough money to buy a hamburger?" (King, 2011). Despite the promising and optimistic work of the TRC and politicians' eager endorsements of it, attention must be paid to the "lunch counters" in the struggle to decolonize Canada. Before turning to my analysis of Canada's response, I will provide an overview of some of the key elements of the IRSSA, the apology and the TRC.

The Settlement

The IRSSA came into effect on September 19, 2007. The out-of-court settlement was years in the making, with the final agreement containing a resolution for the Government of Canada to settle the thousands of class action statements of claim made by residential school survivors, which were merged together for the purposes of settlement. The parties agreed that resolution would be achieved by establishing a system for Common Experience Payments (CEP); providing an Independent Assessment Process (IAP); creating a Truth and Reconciliation Commission (TRC); and providing funding for healing programs as well as commemorative funding for the legacy of residential schools (Canada, 2006: 6). In turn, class members—survivors of recognized residential schools—were prevented from pursuing any further legal action against the government, church organizations or individuals for damages related to residential schools unless members explicitly opted-out of the settlement (Canada, 2006: 30).

The CEP system provided for automatic payments to eligible residential school survivours who made a CEP claim. The payments were based on the number of years an individual had attended a residential school, with all applicants receiving $10,000 for the first year that they went to a residential school and $3,000 for every year that they attended a

residential school after that (Canada, 2006: 44). In all, the Government of Canada paid out approximately $1.62 billion from the CEP trust fund to 79,309 eligible applicants, with the average residential school survivor receiving a CEP payout of $20,457 (Indigenous and Northern Affairs Canada, 2016).

The IAP was created to provide additional compensation to residential school survivors who had been victims of sexual assault or severe physical abuse. Schedule D of the IRSSA sets out the processes for hearing and settling IAP claims, including compensation rules based on a points system, in which the maximum compensation for a claim is $275,000 for claims worth 121 or more points (Schedule D, 2006: 3-6). To provide a reference point, "one or more incidents of anal or vaginal intercourse" counted as 36-44 points—or $36,000-$65,000—and physical abuse that lead to broken bones or hospitalization counted as 11-25 points, which converts to $11,000-$35,000 (Schedule D, 2006: 3). In addition to payments calculated per the points system, survivors could be compensated up to $250,000 for "proven actual income loss" (Schedule D, 2006: 6). Established as a quasi-judicial tribunal, the IAP was administered by the Indian Residential Schools Adjudication Secretariat (IRSAS) and headed by a Chief Adjudicator, responsible for assigning adjudicators to hearings (Schedule D, 2006: 17). As such, the rules of a court of law did not apply to the hearings as the proceedings were intended to be inquisitorial rather than adversarial. All decisions were made based on a balance of probabilities.
Despite the attempt to shelter survivors from going through lengthy and costly trials, controversies surrounded the IAP, leaving survivors and critics questioning who truly benefited from the settlement.

In the end, the average IAP payment was $111,889, including fees paid to claimants' lawyers (Indigenous and Northern Affairs Canada, 2016). With the survivor's legal

representatives receiving 15 per cent of the compensation total from the federal government and, in many cases, receiving an additional 15 per cent from the client's own payout (Ish, 2013), the average survivor pocketed, more realistically, less than $90,000 as the result of a successful IAP claim. In total, 38,094 applications were received by the IRSAS, 94 per cent of which have been resolved, including approximately 6,000 that were dismissed, withdrawn or not admitted (Indigenous and Northern Affairs Canada, 2016). The Government of Canada has yet to disclose documents for approximately 20 per cent of claims (Indigenous and Northern Affairs Canada, 2016).

The Apology

While news of the IRSSA had reached Indigenous, legal and certain academic circles, it had hardly made a blip on the radars of settler Canadians, with only 9 per cent of Canadians admitting to knowing anything about the settlement agreement in the first year that it was in effect (Regan, 2010: 42). It wasn't until former Prime Minister Stephen Harper read Canada's official apology on June 11, 2008 that a public connection, however modest, was made between the residential school system and a collective responsibility for healing its wounds. Addressing residential school survivors, Harper stated: "…The burden of this experience has been on your shoulders for too long. The burden is properly ours as a Government and as a country… You have been working on recovering from this experience for a long time and in a very real sense, we are now joining you on this journey" (Harper, 2008). Interestingly, Harper never explained what it meant to be joining the journey or why the burden of residential schools belongs to the entire country. Without much of a roadmap, settlers were invited to be participants on the path to "reconciliation", but a failure to define what that might look like has left some critics wondering if the gesture was little more than lip service (Regan, 2010: 6).

Overall, the apology received mixed reviews. At best, it was a public acknowledgement of wrongdoings, which served as a small validation to survivors who fought for so long to have their realities recognized and to those who suffered in silence. At worst, skeptics saw the apology as an attempt to gloss over Canada's colonial origins, conveniently omitting, as Kiera Ladner and Michael McCrosson argue, "a history of genocide, territorial dispossession, cultural destruction, and regime replacement in favour of a rendering of history which represents Canada as a primarily British settler society—one whose past includes a discreet chapter containing the consequences of policies with 'lasting and damaging impacts'" (2015: 200). As time went on, those who subscribe to the mantra "actions speak louder than words" questioned the sincerity of the apology and the intentions of the federal government, with TRC Chair Murray Sinclair calling out Stephen Harper during the release of the TRC's Final Report by stating: "words are not enough" (CBC, June, 2015).

The TRC and Calls to Action

The TRC's Final Report was intended to serve as that roadmap for Indigenous and non-Indigenous peoples who seek reconciliation for Canada. While there are issues, from a CRT perspective, with the ways in which reconciliation is unfolding in Canada, the work of the commission, which was established by the settlement, promotes actions that could open the door to decolonization. In fact, the stories of the survivors serve as a form of "speaking truth to power", an important pillar of CRT. It is too early to evaluate the true impact of the commission's work because governments and other organizations are in the early stages of acting upon the 94 Calls to Action. Nonetheless, applying a CRT lens to the report and selected Calls to Action offers tools to ask and address some of the questions left unanswered by the commission's work.

In all, the TRC published a six volume report of its findings, consisting of the early and late histories of residential schools; the Inuit and Northern experience; the Métis experience; an account of missing children and unmarked burials; the legacy of the schools; and a blueprint for reconciliation in Canada. In addition, the commission compiled reports on the principles of truth and reconciliation; the testimonies of survivors; and the Calls to Action. Many of the Truth and Reconciliation Commission's Calls to Action seek to address the problem of overrepresentation of Indigenous peoples in the criminal justice system:

> We call upon federal, provincial, and territorial governments to commit to eliminating the overrepresentation of Indigenous people in custody over the next decade…;
> We call upon the federal, provincial and territorial governments to provide sufficient and stable funding to implement and evaluate community sanctions that will provide realistic alternatives to imprisonment for Indigenous offenders and respond to the underlying causes of offending;
> We call upon the federal government to amend the Criminal Code to allow trial judges, upon giving reasons, to depart from mandatory minimum sentences and restrictions on the use of conditional sentences (TRC Summary, 2015: 324).

More importantly, the TRC recognized that Canadian law is inherently and systemically damaging to Indigenous peoples:

> In Canada, *law* must cease to be a tool for the dispossession and dismantling of Indigenous societies. It must dramatically change if it is going to have any legitimacy within First Nations, Inuit, and Métis communities. Until Canadian law becomes an instrument supporting Indigenous peoples' empowerment, many Indigenous people will continue to regard it as a morally and politically malignant force. A commitment to truth and reconciliation demands that Canada's legal system be transformed. It must ensure that Indigenous peoples have greater ownership of, participation in, and access to its central driving forces (TRC, Vol 6, 2015: 51. Emphasis added.).

Given the need for transforming Canada's legal system in order to address issues such as over-incarceration, it is appropriate to begin with a CRT analysis in order to reveal structural white supremacy, which is sustained by Canadian law. Cornel West, a prominent CRT scholar and activist, suggests that CRT's role in "examin[ing] the entire edifice of contemporary legal

thought and doctrine from the viewpoint of law's role in the construction and maintenance of social domination and subordination…challeng[es] the basic assumptions and presuppositions of…prevailing paradigms" (1996: xi).

Timing Is Everything

From a critical race perspective, the timeline of these actions is significant—settlement, apology, commission. How could the government apologize for the wrongs of residential schools without first hearing the testimonies of survivors, which would be collected as part of the commission's work? Matthew Dorrell suggests that the sequencing of these events should "[raise] doubts about the value the government places on Indigenous and Métis testimony" (2009: 41). Further, the apology reinforced a power dynamic where the colonizer was in a position of (re)writing history, while ignoring, at best, or denying , at worst, the existence of Indigenous stories, knowledges and ways of knowing. Moreover, the government was able to emerge as a caring, compassionate entity that would eagerly engage in repairing the damage (Henderson and Wakeham, 2009: 3). Indeed, the timing of the government's apology, sandwiched between the settlement and the genesis of the TRC, raises questions about its sincerity and intentions. It is important to remember that whatever Canada has done to reconcile, it is because the government was faced with the largest class action lawsuit in Canadian history. Unlike in most cases of transitional governments establishing truth commissions, the government did not choose to initiate reparations on their own free will (Hughes, 2012: 109). Furthermore, while the current government's sentiment of reconciliation and response to the TRC's Calls to Action is hopeful, it should be careful in claiming too much credit for any of the Calls to Action that are eventually implemented—as the TRC rightfully points out, the issue of reconciliation has become a national priority because of the strength and determination of the survivors of residential schools

(Summary, 2015: 6). Now that it is, we must question how the issue of Indigenous-state relations is being presented and discussed and who is framing it. For example, how does the discourse change and for the benefit of whom when the objective is framed as "reconciliation" rather than one of self-government, self-determination or decolonization? These are questions for which CRT can provide perspective.

Unpacking "Reconciliation"

In the wake of the TRC's work, political leaders and other groups across Canada vowed to embrace notions of reconciliation and improved relationships between Indigenous and non-Indigenous peoples:

> "I rise today to express a personal commitment as Premier…to being full partners with Indigenous Peoples on our journey towards reconciliation and healing" (Premier Kathleen Wynne, May, 2016);
>
> "Vancouver is proud to be a City of Reconciliation, and we are committed to strengthening our relationships between our Indigenous and non-Indigenous peoples" (Gregor Robertson, January, 2016);
>
> "The Canadian Bar Association (CBA) fully supports the goal of achieving reconciliation with Canada's Indigenous peoples" (CBA, March, 2016).

At face value, the eager endorsements of reconciliation by various groups seem promising. However, the term reconciliation has become politically loaded and controversial. Before turning to some criticisms of how the concept of reconciliation is being used, I will describe how the TRC intends for reconciliation to be understood in the Canadian context. This comprehension is important because during the early phases of Canada's response, the term reconciliation was met with critical reception by Indigenous peoples, activists and academics (Alfred, 2012; James, 2012). Although the TRC has established that the reconciliation process will be lengthy and complex, some of the early concerns continue to be relevant—namely that reconciliation risks becoming a buzzword (Moran, 2017); that many interpretations fail to problematize the nation-

state and its core institutions (Matsunaga, 2016: 28); and, that reconciliation keeps wrongdoings in the past and doesn't acknowledge the ongoing injustices beyond the IRS system, which includes certain development projects and resource exploitation on Indigenous lands, as well as the control and containment of Indigenous individuals through the child welfare and criminal justice systems. The way reconciliation is playing out in Canada may well result in self-congratulatory behaviour amongst politicians and very little meaningful action on the TRC's Calls to Action to transform the country, while deceiving Canadians, Indigenous peoples and the international community. A CRT lens assists in recognizing and challenging the subtle racism of the current political interpretations of reconciliation.

The TRC was tasked with defining the vision of reconciliation for Canada. Recognizing the criticisms against the term reconciliation and its ambiguity, the TRC made sure to define what reconciliation was not: "Reconciliation is not about 'closing a sad chapter of Canada's past,' but about opening new healing pathways of reconciliation that are forged in truth and justice" (TRC Summary, 12; Vol 6: 7). The commission defines reconciliation as "an ongoing process of establishing and maintaining respectful relationships" (TRC, Vol 6: 11). Further, the TRC states that the reconciliation process involves "…making apologies, providing individual and collective reparations, and following through with concrete actions that demonstrate real societal change" (TRC Vol 6: 11) as well as "[revitalizing] Indigenous law and legal traditions" (TRC, Vol 6: 11-12). In addition to identifying what reconciliation involves, the TRC provides a framework for implementing reconciliation and "real societal changes", centred around the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and pillared by 10 guiding principles (TRC, Vol 6: 16).

The commission stated that "reconciliation begins with each and every one of us" (TRC, Vol 6: 21) and "reconciliation offers a new way of living together" (TRC, Vol 6: 17). The danger, however, is that reconciliation will result in well-intentioned settlers, in the name of wanting to improve relationships and outcomes and offering solutions to the "Indian Problem," without properly engaging Indigenous peoples. This trend has manifested itself in numerous ways—for example an FASD symposium held at the University of Regina made "reconciliation" its theme for 2017; the City of Regina celebrated Canada's 150th anniversary by collecting 150 stories from Indigenous peoples about their "…experiences especially in regards to confederation and their role in it and how they see themselves as Canadians" (*Leader Post*, March 2017). In this way, "reconciliation" risks becoming little more than a buzzword used to alleviate White-settler guilt through actions that are more about self-forgiveness than addressing the issues most fundamental to justice for Indigenous peoples. In fairness to the TRC, this is not the vision that was presented throughout the Final Report. However, the task of achieving buy-in amongst settler Canadians necessitated a soft and unifying tone. Unfortunately, a lack of discussion on white privilege and power sharing—as in, colonial governments giving back control to Indigenous nations over significant land and resources—has allowed reconciliation to become more about "gestures of inclusion", where Indigenous peoples are assisted into modernity by settlers with a desire to improve the Indigenous condition (Razack, 2015: 69), rather than the necessary shift to what Regan calls becoming settler allies, which requires "critical self-reflection and action" (2010: 237), such as naming colonial violence, confronting power inequities and taking steps to engage in decolonization efforts. For settlers and governments participating in reconciliation efforts then, the challenge is to not replicate the same

power imbalances that they are trying to "fix", which would serve to sustain white privilege and racism instead of destabilizing it.

Tamara Starblanket (2016) argues "Reconciliation is the new word for assimilation and an extension of the myth that Canada has underlying title in our territories." This assertion observes that most reconciliation discourse does not question the state's power to control land and resources or to make the laws that control the lives of Indigenous peoples. Although reconciliation strives to include Indigenous peoples in decisions, there are limits to the kinds of decisions and discussions that take place. For example, Matsunaga argues that "referring to Canada as an established or advanced state precludes discussion of harm, persecution, injustice, and ongoing genocide within transitional justice frameworks by treating Canadian democracy as a finished project and a state that is inherently and always just" (2016: 29). Further, Dian Million explains that discourses about healing "move[s] the focus from one of political self-determination to one where self-determination becomes intertwined with state-determined biopolitical programs for emotional and psychological self-care informed by trauma" (2013: 105). With many reconciliation efforts focused on healing, unity and moving on, the legitimacy of the Canadian state and settlers' place in it remains uncontested. Additionally, Indigenous peoples are shaped as victims (Niezen, 2017: 934), which fits a national narrative that, according to Gaudry, "doesn't like powerful Indigenous peoples…it likes Indigenous people that are progressively marginalized without regard for the many times at which Indigenous peoples successfully resisted" (quoted in Stirling. 2017). In this way, reconciliation continues to occur within assimilationist structures because the authority of the Canadian state is not challenged and questions of decolonization seldom enter the discussion.

The TRC's Calls to Action are most impactful where they challenge governments to address some of the ongoing legacies of colonialism. For example, Calls to Action 30-32 are meant to respond to the overrepresentation of Indigenous peoples in the criminal justice system (TRC Summary: 324), a problem I describe in chapter two as evidence of the continuation of colonialism and racialized state violence. Another set of recommendations demand meaningful action be taken to reduce the number of Indigenous children in state care (TRC Summary: 319). In addition, the commission acknowledges that "colonialism remains an ongoing process, shaping both the structure and the quality of the relationship between settlers and Indigenous peoples" (TRC, Summary: 45). Still, it has been argued that even with the focus on confronting current harms, these issues are framed as legacies of colonialism, or more specifically, residential schools. Thus, rather than recognizing practices of racialized state violence, such as the overrepresentation of Indigenous peoples in the criminal justice system, as a process of ongoing colonization, these problems are often framed as an unfortunate symptom or legacy of the *real* harm, which was residential schools. Irlbacher-Fox argues that treating these processes as the result of the past matters because "discrete past events are the basis of ongoing unjust systems, policies, and practices—and resulting suffering. This larger complex of unrestituted wrongs and suffering shapes the lives of people in the present" (2009: 30).

"Nor of a Friendly Understanding"[26]: The Limits of Raising Awareness

Throughout Canada's response to residential schools, in both the apology and the TRC's final report, pleas are made for increasing the understanding between Indigenous and non-Indigenous peoples as though a remedy for relationships that have been defined by racism, violence and

[26] Fanon explains: "Decolonization, which sets out to change the order of the world, is, obviously, a program of complete disorder. But it cannot come as a result of magical practices, nor of a natural shock, nor of a friendly understanding" (Fanon, 2004: 35).

inequality for centuries. Whether the focus is on Canadians learning about a history that allegedly wasn't or couldn't have been known until recently, or educating settlers on the intergenerational effects of colonialism so that they are better able to interact with Indigenous peoples, the sentiment suggests that once Canadians and our government have the knowledge, we will do the right thing. This dynamic is problematic for several reasons. First, the notion of settler innocence (Tuck and Yang, 2012) reinforces the privilege of the dominant group by using ignorance as an excuse for allowing racialized state violence to occur (The Environics Institute, 2016: 5). This innocence also shifts the responsibility to future generations, absolving current and past governments of any accountability. Second, we don't have to look much further than the Royal Commission on Aboriginal Peoples (RCAP), which made similar recommendations to increase understanding, to realize that Canadians don't do the right thing when presented with information about unethical parts of our history or opportunities to improve. Third, this discourse allows the damaging national myth of early colonialists as peaceful, pioneering trailblazers to prevail. There are countless accounts of individuals who understood the wrongs of residential schools as early as the late 1800s and early 1900s (Woods, 2013: 174; King, 2012: 120; Bryce, 1922). The atrocities of residential schools didn't occur because people didn't understand or know what was going on, they occurred because of deep, institutionalized racism within Canada's political structure. Implicit throughout the process of enhancing understanding is that it is about "us" better understanding "them", rather than "us" better understanding "us". In other words, the conversation lacks an acknowledgement of settler colonialism and white privilege. In this way, the problem between settlers and Indigenous peoples is framed as cultural incompatibility or a continued failure to assimilate, instead of one that problematizes the disproportionate power, wealth, influence and privilege of White settler Canadians. Finally,

awareness and understanding does not necessarily lead to action and may even produce the unintended consequence of reproducing colonial dominance through misguided settler solidarity (Snelgrove, et al, 2014: 1).

To be clear, I am not suggesting that Canadians shouldn't learn or understand the history of residential schools and colonialism. Although notions of reconciliation have been largely embraced by governments of all political stripes, as well as a variety of non-governmental agencies and churches, it is not uncommon to hear sentiments such as: "why should the taxpayers of today have to pay for the mistakes of the past?" or "it's time to move on". These attitudes are reflective of a Canadian public that largely believes Indigenous peoples have a sense of entitlement (The Environics Institute, 2016: 23). Thus, it is appealing to argue that increased awareness will reverse racist perspectives or cultural misunderstandings. But what happens when there is an increased understanding of Indigenous issues? Does increasing the understanding of non-Indigenous Canadians translate to better outcomes for Indigenous communities? CRT reminds us that the absence of overt racism is not the same as non-racism and as such, we must ask whose interests are being served by campaigns to increase awareness and understanding? Education initiatives that exploit the trauma Indigenous peoples have endured, without adequately demonstrating how much settler Canadians have benefited and continue to benefit from the colonial arrangements, permit narratives of Canada as the saviour and place Indigenous peoples in a state of victimhood. Although it is important that Canadians do understand and learn about this history, we must be conscious of the problems and limits of advancing understanding *as a solution* to the broken relationship between Indigenous and non-Indigenous peoples and the Canadian state.

The discourse coming out of Canada's response to residential schools, including aspects of the TRC's final report, has contributed to what Tuck and Yang describe as a "settler move to innocence" (2012: 9). The theorists explain that settler moves to innocence are "those strategies or positionings that attempt to relieve the settler of feelings of guilt or responsibility without giving up land or power or privilege, without having to change much at all" (Tuck and Yang, 2012: 10). There is, then, a range of ways that Canadians use ignorance as an excuse to deny taking responsibility for contemporary manifestations of settler colonialism (Alfred and Corntassel, 2005). While the "I wasn't there" defence may come across as less compassionate than what's been framed as Canadians now learning about a "hidden history" (TRC, 2015), both sentiments hide the reality that residential schools were willfully ignored by settler Canadians. This fact is evidence of Canada's racism, rather than a dismissal of it—Canadian society implicitly accepted the inferior treatment of Indigenous peoples and their children as natural and inevitable. Despite accounts criticizing residential schools while they were in operation (Bryce, 1922), Stephen Harper's repeated statements of "we *now* recognize…" throughout the residential school apology suggest that Canadians of the past couldn't have recognized that the residential school policies were wrong because they didn't know what was going on or because the general mindsets of the time did not recognize attempts at assimilation as wrong.

In the same way that the former Prime Minister's words throughout the apology appeal to settler ignorance, thus excusing Canadians of the past and present from taking action, politicians and citizens commonly pass the buck onto someone else, in particular, to future generations. For example, Brad Wall's comment in the aftermath of the death of Colten Boushie is indicative of the blamelessness or "no-fault" racism endemic to Canada. These sentiments absolve current day politicians of any responsibility to address problems facing Indigenous peoples. In addition,

statements suggesting that younger Canadians have become more tolerant perpetuate the notion that things are getting better, when so many indicators demonstrate that things are staying the same (Spooner, 2010). A couple of months after making his statement, the "next generation" upon whom Wall bestowed the task of solving the hundred-years history, was facing a crisis of Indigenous youth suicides. Somehow, Canadians should take comfort that these are the children that will solve the problems between Indigenous peoples and the state. The implicit message is that the racism and ongoing colonialism that has caused such hopelessness amongst some Indigenous communities is not an urgent problem. The message is that it is okay to tell Indigenous children that they can wait until non-Indigenous people understand the issues facing Indigenous peoples for things to change.

The underlying assumption of increasing understanding is that once our knowledge of a certain injustice improves, so too will our responses and actions. In other words, if we know we've wronged someone, we will do whatever it takes to make it right. Certainly, these are the Canadian values that have earned us the reputation of being kind, apologetic and humble. But, the thing is, we don't "do the right thing" even when confronted with the truth. In 1996, RCAP made 440 recommendations aimed at improving the place of Indigenous peoples in the Canadian state and strengthening relationships between Indigenous and non-Indigenous peoples in Canada.[27] RCAP recommended that: "Building public awareness and understanding should become an integral and continuing part of every endeavor and every initiative in which Indigenous people, their organizations and governments are involved and in which non-Indigenous governments and stakeholders have a part" (RCAP, 1996). It has been more than 20

[27] RCAP was commissioned in response to the Oka crisis of 1990, which amounted to an armed stand-off between the Mohawk Nation and the Canadian military. The dispute began because the town of Oka wanted to develop a golf course and a residential community on traditional Mohawk territory.

years since RCAP was released and either Canadians are very slow learners or attempts at increasing understanding and awareness fail to translate into meaningful material changes. Ryhms argues that inaction occurs because reconciliation processes evoke emotional responses from Canadians, "rather than overhauling existing political configurations" (2006: 109).

Canadians' reluctance to speak out against the ongoing racialized state violence that occurs today, such as the overrepresentation of Indigenous peoples in prison, is an extension of the limits of increasing understanding and awareness. Indeed, acknowledging these present-day acts as colonization would challenge the construction of Canada as an enlightened, benevolent nation that is ready to move on from its colonial *past*. Therefore, focusing on increasing understanding of what *happened* to Indigenous peoples reinforces the image of Canada as a compassionate and self-improving state. The myth of Canada being settled lawfully and peacefully is supported because the acts of violence that occurred as part of colonization were carried out by a government that thought that something good would come of their policies. In this way, understanding past wrongs is point of closure for Canadians because when we learn about the atrocities the past, we are assured that the absence of such wrongs today means that we have moved on from our colonial era (Dorrell, 2009: 33). The effect is that continued acts of colonial violence are viewed as symptoms of past wrongdoings, rather than an extension of the racialized state violence that permitted residential schools in the first place. As Weiss argues, "while the commission gives the appearance of taking the violence of Canadian colonial history seriously, this appearance also masks a process of state legitimation that performatively ''purifies'' the country's violent history without necessitating a commitment to any genuine structural change in its policies toward Canada's First Peoples" (2015: 33). In positioning Canada as being responsive to the plight of Indigenous peoples, while keeping our political and

social institutions firmly intact, we are staying true to a national identity that emphasizes our benevolence in relation to interactions with Others (Thobani, 2007: 18). The need for understanding then, becomes about Canadians trying to make sense of Indigenous peoples' continued failure to assimilate today so that the colonized can be assisted into modernity tomorrow (Razack, 2015: 69).

Through education and awareness, whiteness and indigeneity are mutually constructed, along with fabrications of Indigenous dysfunction and success (King, 2012: 53). When understanding is only about *us* understanding *them* and not us understanding *us*, a rhetoric of what Mutua calls the savage-victim-savior (SVS) metaphor is advanced. Although Mutua uses this explanation within the context of human rights (2001: 201), it can be applied symbolically to the colonized-colonizer relationship in Canada. In the SVS narrative, victims are helpless and powerless against actions of the state, while the savior "seeks to re-engineer the state and the society to reduce the number of victims, as it defines them" (Mutua, 2001: 203). Throughout this process, the state is viewed as neutral, with "the savior [being] ultimately a set of culturally based norms and practices that inhere in liberal thought and philosophy" (Mutua, 2001: 204). In settler colonies, Razack explains that the settler "…comes to know himself through violence, understanding the encounter with Native Americans…as a savage war through which [a North] American civilization comes into being. The savage war is a war of extermination" (2015: 83). If "Indians" are exterminated, then those who survive are victims of the savage war. In Canada's case, Indigenous victims of residential schools are deemed worthy of being saved, whereas those who are resistant to assimilation remain savages in the colonial imagination (Razack, 2015: 84). In constructions of both "victims" and "savages", it is implied that only the state can offer solutions, thus continuing colonial relationships of dependency between Indigenous peoples and

the state (Johnson, 2016: 36). The narrative of Indigenous peoples needing to be saved from themselves obscures the reality that the structures of settler colonialism are dysfunctional. Jo-Ann Episkenew sums up this misrepresentation in interrogating the usage of the term "healing" as it applies to Indigenous peoples:

> Healing does not imply that Indigenous people are sick…Colonialism is sick; under its auspices and supported by its mythology, the colonizers have incited heinous wounds on the Indigenous population that they set out to civilize. Although Indigenous people understand their need to heal from colonial trauma, most settlers deny that their society is built on a sick foundation and, therefore, deny that it requires a cure. (2009: 11).

Despite the benefits of increasing Canadians' understandings of residential schools and more largely, the colonization of Canada, understanding must not be mistaken for action. As Tuck and Yang argue, "even though the experience of teaching and learning to be critical of settler colonialism can be so powerful it can feel like it is indeed making change…critical consciousness does not translate into action that disrupts settler colonialism" (2012: 19). Enhanced awareness amongst settler Canadians has focused heavily on residential schools and their legacy, despite the TRC's Calls to Action that encourage a broader approach to action. As a result of this narrow concentration, Niezen maintains that "Public sympathy has become the interim goal" (2013: 14). With the outcomes of reproducing White settler privilege; reinforcing Canada's settlement stories; expecting future generations to pick up the slack; and furthering constructions of Indigenous peoples as either/or victims and savages, one must ask if awareness and understanding campaigns are more about easing settler anxieties about the role that Indigenous peoples/cultures may play in a reconciled or decolonized Canada than about real reconciliation. The next section will analyze the possibilities of settlers and Indigenous peoples knowing each other and forming relationships outside of the SVS narrative.

Change Happens in Uncomfortable Spaces: The Potential of Respectful Relationships

As mentioned in the previous chapter, a 2014 survey about Canadians' racial attitudes found that 39 per cent of respondents from Manitoba, Saskatchewan and Alberta would be uncomfortable with an Indigenous person or family as their neighbour (CBC, November 2014). This sentiment confirms the TRC's premise that "[t]he relationship between Indigenous and non-Indigenous peoples is not a mutually respectful one" (TRC Summary, 2015: 7). We don't know how Indigenous people would respond to a survey that asks how comfortable they would be if a White person was their neighbour—I have yet to come across such a study. As Andersen explains, "An unfortunate reality of colonialism is that non-Indigenous people get to choose when and how they have relationships with Indigenous people" (2011: 165). Chapter two demonstrated that ongoing colonialism relies on negative and dehumanizing constructions of Indigenous peoples, one being Indigenous people as criminals. These depictions of Indigenous peoples are essential to maintaining white privilege at the micro level and white supremacy at the macro level within Canadian political and social institutions. Therefore, restructuring the current relationship between Indigenous peoples, settlers and the state requires acknowledging and challenging white privilege and white supremacy, as well as resisting colonial violence through what Paulo Freire calls humanization (2005: 49). It further requires settlers with access to privilege to show up and then step aside to make space for Indigenous decolonization—a process that is led by Indigenous peoples but can involve both Indigenous and non-Indigenous peoples. Shuswap leader George Manuel envisioned that this alliance would mean that "We will steer our own canoe, but we will invite others to help with the paddling" (quoted in Corntassel, 2011).

Ryhms points out that "the process of reconciliation overlooks the logic that asking for forgiveness does not imply the granting of it" (2006: 108). Indeed, framing reconciliation as the

restoration of respectful relationships positions Canadians as benevolent, caring and kind (Dorrell, 2009: 29), while placing equal blame and responsibility for reconciliation on the shoulders of Indigenous peoples. Despite occasions of cooperation during various points of Canadian history (Russell, 2017), Seth Adema reminds us that "the government's goal was not to honour treaties, but rather to eliminate Indigenous peoples as a cultural group and render the treaties moot" (2015: 464). When working towards restructuring the relationship between Indigenous peoples and the state, there is the danger of reinforcing the existing colonial relationship. Some examples of well-intended actions meant to empower Indigenous peoples that simultaneously reinforce the legitimacy of the state include granting citizenship rights (Ong, 1999: 266; Green, 2005: 234); legal interpretations of indigeneity that rely on racialized notions of Indigenous peoples (Andersen, 2014); and the current framework of settling land claims (Irlbacher-Fox, 2009). Thus, a new relationship between Indigenous peoples and the state must reflect a contemporary interpretation and application of treaties and a willingness to move beyond existing political and legal structures.

Regan takes issue with the ways that the settler society has evaded responsibility for state wrongdoings that have allowed for such discrepancies between settlers and Indigenous people, arguing that the conversation about reconciliation ought to be more "unsettling" (2010: 11). The hopeful and optimistic tone of the role of Canadians as good neighbours is no doubt an appeal to the compassionate Canadian who wants to see a future with better outcomes for Indigenous peoples, but lack of discussion about the settler problem in reconciliation discourse reinforces the invisibility and normalcy of white privilege. When asked if mainstream Canadians benefit from discrimination against Indigenous peoples, 61 percent of non-Indigenous Canadians disagreed (The Environics Institute, 2016: 28). This contradiction demonstrates that the realization that

Indigenous individuals were legally forced into living lives of deprivation is somehow easier for Canadians to accept than the flipside of the conversation: settler Canadians had and continue to have countless opportunities to pursue success and happiness, raise families, go to university and start businesses on Indigenous lands *because of* the deprivation, oppression and racism that Indigenous peoples have endured for centuries. What will it take to bring the conversation to the point where non-Indigenous Canadians seek to restructure a society that was designed to give them so much?

The paradigm shift that is required to restructure the relationship between Indigenous and non-Indigenous peoples must begin with introspection into the ways in which colonialism continues to be embedded within Canada's collective imagination. Alfred explains:

> the problem [Indigenous peoples] face is Euroamerican arrogance, the institutional and attitudinal expressions of the prejudicial biases inherent in European and Euroamerican cultures….The challenge we face is made up of specific patterns of behaviour among Settlers and our own people: choices made to support mentalities that developed in serving the colonization of our lands as well as the unrestrained greed and selfishness of mainstream society (2005: 101-102).

He further clarifies that "the enemy is not 'the white man'…it is a certain way of thinking with an imperialist's mind" (Alfred, 2005: 102). This way of thinking perpetuates colonial violence against Indigenous peoples and dehumanizing constructions of Indigenous individuals as criminals. Additionally, it distorts problems and solutions by framing issues such as the over-incarceration of Indigenous peoples as sociological problems with potential remedies located within existing structures, rather than as a continuation of colonialism that demands solutions outside of colonial institutions (Monture-Angus, 2000: 363). Without dismantling colonialism, which requires actions that upset the existing system of white supremacy, "reconciliation would permanently enshrine colonial injustices" (Alfred, 2005: 152). Therefore, settlers engaged in

"reconciliation" or decolonization efforts must interact "…directly with Indigenous people in unsettling encounters that keep us living in truth" (Regan, 2010: 218).

Chapter two demonstrated the unsettling truth that Indigenous peoples are routinely denied their full humanity because they are constructed as criminals rather than as neighbours. The chapter further discussed examples of state-endorsed initiatives designed to prevent Indigenous people from becoming criminally involved. Freire explains that these programs and forms of assistance are acts of "false generosity" and that "in order to have the continued opportunity to express their "generosity," the oppressors must perpetuate injustice as well. An unjust social order is the permanent fount of this "generosity." which is nourished by death, despair, and poverty" (2005: 44). Thus, both the criminalization of Indigenous peoples and attempts to curb Indigenous criminality rely on the continued dehumanization of Indigenous peoples. For Freire, the state is not capable of changing the relationship between the oppressed and the oppressors—it is the oppressed who must lead the process of humanization (2005: 48). I bring Freire into this discussion because, within the current reconciliation framework, there are many opportunities for "false generosity" on the part of the state and settlers, particularly within the context of the criminal justice system, which continues the dehumanization of Indigenous peoples. Consequently, Freire's analysis assists in dissecting which reconciliation efforts have the potential of restructuring the existing relationship between Indigenous and non-Indigenous peoples and which efforts simply reinforce the colonial relationship. According to Freire, "the oppressor-oppressed contradiction is superseded by the humanization of all people…no longer oppressor nor longer oppressed, but human in the process of achieving freedom" (2005: 49).

Some examples of Indigenous-led efforts to restore the dignity and humanity of Indigenous and non-Indigenous peoples include community safety patrol groups such as the Bear

Clan, which originated in Winnipeg's North End and now has a branch in Thunder Bay, or the White Pony Lodge, based in North Central Regina (CBC, April, 2016). These groups challenge constructions of Indigenous peoples as criminal and demonstrate that Indigenous peoples want and are entitled to the safety and security that all Canadians should expect. While these groups report to have good relationships with local police forces (Winnipeg Sun, May, 2016), they serve to fill the gap between individuals who do not trust the police and emphasize the humanity in encounters that have the potential for dehumanization, such as arrests for non-criminal crises or use of force against vulnerable individuals. White Pony Lodge co-founder, Shawna Oochoo explains, "We're not going in as enforcers, we're coming in to our community as supporters" (Global News, May, 2016). There is room for settler allies to participate in initiatives such as the Bear Clan and the White Pony Lodge, but participation alone is not enough. It is not enough if participation leads only to empathy—participation must lead to a transformation in the mindset of settlers (Regan, 2010: 230). With that being said, these patrols are examples of spaces that may increase the positive encounters that are required to see one another as neighbours. While forming local solidarities may seem like an anti-climactic solution to something as layered as ongoing colonialism sustained through racism and white privilege, Alfred argues that "all of the world's big problems are in reality very small and local problems" (2005: 25).

Speaking Truth to Power: TRC as a Counterstory to National Mythologies

CRT rests on the assumption that systems of power can be transformed through the restorying of the dominant narrative that is used to legitimize political and social institutions that marginalize racialized individuals (Solórzano and Yosso, 2002: 26). The official Canadian story explains the over-incarceration of Indigenous peoples as an unfortunate reality of an otherwise fair and progressive justice system. In this account of Canadian society, Indigenous individuals find

themselves in conflict with the law because of certain pathologies that result from their marginalization. Poverty, addiction, gangs and mental health problems are viewed as the causes of Indigenous peoples' criminality and interventions are directed at individuals in hopes that they will change their ways. While it may be acknowledged that past abuses by the state, such as residential schools, are partially to blame for present-day conditions facing Indigenous peoples, the legal system itself is not scrutinized as being part of the problem.

Ken Coates argues that Indigenous-led initiatives, such as Idle No More, can serve as a counter to misguided awareness-raising efforts. He states: "The goal of Idle No More was to empower Indigenous peoples, not bring reluctant people into the fold. It was not a public relations campaign but an assertion of Indigenous culture and determination…[it] was more about giving First Nations a voice than answering non-Aboriginal questions or assuaging their anxieties" (2015: 192). In the short years since the Idle No More movement began, there have been many more instances of Indigenous resistance efforts. These efforts range from large scale protests against pipelines, such as Standing Rock; to Indigenous blogs such as âpihtawikosisân or Reconciliation Canada; to recent demonstrations against Canada 150 celebrations. Caldwell and Leroux take resistance even further, arguing that people committed to reconciliation must question "the possibility of reconciliation through any investments in celebrating the White settler colonial-national project" (2017: 12).

The TRC and Indigenous-led movements challenge the racism of Canada's official story. First, the TRC locates present-day conditions in colonialism, explaining that the pathologies that are present today have historical causes and are an extension of the same colonial system that allowed for racist policies in Canada's past, such as residential schools. Viewed in this way, reserves, the *Indian Act* and residential schools were all attempts to destroy Indigenous peoples

as distinct peoples. By extension, over-incarceration of Indigenous peoples is a continuation of that racialized state violence. In addition, the commission broke down every social and political institution—from the justice system, to the education system to the child welfare system—and identified how governments, Canadians and Indigenous peoples can transform these systems to work for Indigenous peoples instead of against them. Notably, the TRC acknowledged the enormity of such a transformation: "Virtually all aspects of Canadian society may need to be reconsidered" (TRC, 2015).

Closing Thoughts

In July, 2017 the federal government put forward "Principles respecting the Government of Canada's relationship with Indigenous peoples" (Department of Justice, July, 2017). The ten principles focus on recognizing Indigenous peoples' rights to self-government and self-determination as well as their Constitutional and treaty rights; advancing efforts at reconciliation; and ensuring Indigenous consent for land and resource development. It is too soon to understand what impact these principles may have in shaping the new relationship that is needed to address ongoing colonialism sustained by racism. With "reconciliation" being the framework for restructuring the relationship between Indigenous peoples, non-Indigenous peoples and the state, there is the risk that existing colonial relationships are reinforced, rather than transformed. In particular, a focus on raising awareness diverts the conversation from the necessary acknowledgement of white privilege, white supremacy and ongoing colonialism. King articulates that "Ignorance has never been the problem. The problem was and continues to be unexamined confidence in western civilization" (2012: 265). This assumption of cultural superiority can be observed in coded responses to the TRC's Calls to Action, such as governments and politicians making announcements about making improvements for Indigenous peoples, but continuing with

status quo practices that perpetuate racism. Notably, Freire reminds us that the state cannot lead the transformation required to decolonize. There are opportunities for settler allies to join Indigenous-led causes, which are essential for restructuring colonial relationships. In order to ensure that these relationships promote respect, they must focus on humanization and making meaningful progress on the TRC's Calls to Action.

Conclusion: "Business as Usual"

A Cree woman, known publicly as Angela Cardinal due to a Crown publication ban,[28] was jailed for five days and shackled during a preliminary hearing in which she was the victim of kidnapping and aggravated sexual assault. The woman had not committed a crime, but was held on a rarely used Criminal Code provision providing for the detention of a witness who refuses to give testimony (Criminal Code, ss. 545(1)). According to court documents, "she was simply incapable of participating properly in the Court proceedings . . ." (*R v Blanchard*, 2016 ABQB 706). While detained, Angela was held in close proximity to and transported in the same van as the man accused and eventually convicted of assaulting her. Once CBC broke the news of Cardinal's treatment, Canadians expressed their anger towards incident, with many advocates relating Cardinal's treatment to the National Inquiry into Missing and Murdered Indigenous Women and Girls (NIMMIWG), one of the TRC's Calls to Action that aims to investigate the systemic causes of violence against Indigenous women. Sadly, Angela will not see the results of the NIMMIWG because she was killed in an accidental shooting several months after her appearance at the preliminary inquiry, her life ending in the violence that is disproportionately experienced by Indigenous people.

Upon apologizing to Angela's mother, Alberta Justice Minister Kathleen Ganley publicly commented on the case: "I think one of the questions that keeps me up at night is whether this would have been the case if this woman was Caucasian and housed and not addicted, whether this would have happened to her" (CBC, June 5, 2017). Ganley's question, perhaps rhetorical, strikes at the consciousness of Canadians who want to believe that Canada operates in a socio-legal system of colourblindness. Unlike Ganley, the son of the Preliminary Inquiry Judge

[28] The Crown has upheld the publican ban, despite the woman's family filing an affidavit for the ban to be lifted.

confidently assured the public that Angela's race had nothing to do with his father's decision to jail the sexual assault victim: "I guarantee my father would have arrived at the same determination if Angela was white, black, aboriginal or any other colour. Anyone who has ever met my father knows he is the farthest thing from a racist…" (CBC, June 7, 2017). Interestingly, he blamed the jail guards for Angela's mistreatment, instead of acknowledging the role of systemic racism in the justice system in its entirety.

Cardinal's experience was far from an isolated incident. In the months preceding the publication of her story, Canadian news outlets reported police indifference to the deaths of nine Indigenous youths found in Thunder Bay's river, with the acting police chief categorizing those deaths as "business as usual" (The Canadian Press, June 8, 2017); allegations of police abuse made by 28 Indigenous women and men in the community of Val d'Or, Quebec, resulting in zero charges being laid; and shocking statistics of the over-incarceration of Indigenous peoples. While these troubling cases were occurring, governments across Canada continued to boast achievements and actions taken in regards to reconciliation. Indeed, the most recent federal election has offered hopes of an improved relationship between Indigenous peoples and the Canadian state, with Prime Minister Justin Trudeau and his cabinet prioritizing the issues upon which previous governments have failed to act. But, beyond the failures and successes of Canadian political actors, the pathway to decolonization has been stalled by Canada's system of racialized state violence, sustained by institutionalized racism and ongoing colonialism.

This thesis is built on the reality of widespread racialized violence against Indigenous peoples: Angela Cardinal's treatment in Edmonton, Alberta; the dead Indigenous youths found in the river in Thunder Bay, Ontario; the accusations of police abuse in Val d'Or, Quebec; Pamela George's death in Regina, SK; Jamie Haller's assault in Williams Lake, B.C.; Jacqueline

Montgrand's death in Prince Albert, SK; the in-custody death of Raymond Silverfox in the Yukon; the shooting of Colten Boushie in rural Saskatchewan; and the over-incarceration of Indigenous peoples across Canada. This violence is not a glitch in the justice system; rather, it is a feature of an oppressive colonial structure designed to continue the erasure of Indigenous peoples through assimilation, exclusion, violence and death.

This thesis has asked: What can CRT reveal about the ways in which Canadian law has contributed to the over-incarceration of Indigenous peoples and what does this mean for how reconciliation is understood in Canada? Further, what does this dynamic reveal about how power, race and racism operate in Canada?

By using CRT to show that racism is an institutionalized element of Canada's criminal justice system, I have traced the continuity of colonialism through the legal system from 19th century legislation, such as the *Indian Act*, which controlled many aspects of a Status Indian's life and had far-reaching consequences for other Indigenous peoples, to the modern day over-incarceration of Indigenous peoples, which demonstrates the continued objectification and racialization of Indigenous peoples. In between, Indians were confined to reserves and subjected to the dehumanizing and infantilizing pass system during the early 20th century, while the Inuit and Métis were displaced from their lands and struggled for recognition as distinct cultural groups within legal and political systems that created and reinforced racialized categories. Indigenous children were placed in residential schools—an act of racialized state violence so damaging that it is now recognized as cultural genocide by the Supreme Court Justice and is the subject of the TRC's work.

Recognizing these acts of racialized state violence as the continuation of colonialism is especially important in the current era of reconciliation. Given that governments and politicians

present reconciliation as a project that seeks to create a fairer and more inclusive nation, which is ready to move on from its colonial past, the risk is that contemporary manifestations of colonialism, such as the over-incarceration of Indigenous peoples, are seen as legacies of a detached past (Irlbacher-Fox, 2009), failures or glitches of otherwise sound policy decisions (Jacobs, 2012), evidence of Indigenous peoples' inability to adapt to modernity (Razack, 2015) or bad choices made by Indigenous individuals (Alexander, 2011). With rates of Indigenous incarceration *increasing* over the decade since the IRSSA went into effect, and the public's implicit acceptance of this disparity, it is clear that Canada is not prepared for the systemic changes required to address over-incarceration—a symptom of the settler problem. Despite political rhetoric that suggests modern Canada is nothing like the country that starved Indigenous peoples, confined them to reserves or forced Indigenous children to go to residential schools, I've argued that the oppression of historical acts of colonial violence has been relocated in other political systems, chiefly the criminal justice system.

CRT, which has proved that formal equality does not translate to material differences in the lives of racialized persons, has offered an interesting lens through which to analyze the potential of reconciliation in addressing ongoing colonialisms, such as the over-incarceration of Indigenous peoples. Although CRT is not commonly used to study the relationship between the Canadian state and Indigenous peoples in Canadian political science, I have shown that it is useful in examining and finding solutions for over-incarceration. CRT argues that race is a construction; racism is institutionalized; racism maintains white supremacy; oppression is intersectional; and the law can be transformed. Applying these five pillars to the phenomenon of Indigenous over-incarceration despite promises of reconciliation, has demonstrated that race and racism continue to shape the power relationships between Indigenous peoples, non-Indigenous

peoples and the state. Although there are limits to what CRT can achieve with respect to restructuring the relationship between Indigenous peoples and the Canadian state, the theory points to the barriers in acknowledging white supremacy and confronting the settler problem in Canada.

CRT has been used to explain the over-incarceration of Black Americans in the United States. While it is not enough to substitute what's been learned in the United States for the Indigenous experience in Canada, I have demonstrated that there are opportunities to build on the work of critical race theorists in the United States. CRT has proved that in both the Canadian and American contexts, there is a racialized experience of justice. Indigenous peoples and Black people do not experience equality with White people in either country's justice system. Perhaps the most significant opportunity for using a CRT analysis within the context of the relationship between Indigenous peoples and the state is its usefulness in challenging systems of whiteness, such as white privilege and white supremacy. These systems of power are central to how Canadian institutions work and for whom. In the Canadian context, tackling the settler problem means challenging ideas, practices and systems that prioritize the interests of White settlers over Indigenous peoples. For example, although evidence has shown that heightened rates of incarceration do not decrease the crime rate, what is it about locking up so many Indigenous peoples that makes Canadians feel safe(r)?

Chapter one demonstrated that Canada has used legal processes to construct race and to define Indigenous peoples in racialized ways in order to control them for the purposes of maintaining control of land and resources, from which Canada has reaped much of its wealth. Classifying hundreds of Indigenous nations under the same racial category has been devastating to Indigenous peoples' ways of life and continues to impact the treatment and perception of

Indigenous peoples today. In tracing how race-making has been central to nation building, this thesis has shown that constructions of race based on Eurocentric notions of white supremacy have been central to Canada's genocidal policies meant to erase Indigenous peoples through racialized state violence, assimilation and the racist practices of objectification, dehumanization, exclusion, infantilization, ridicule and scapegoating (Fanon, 1952). Remarkably, Indigenous peoples have shown resiliency throughout the century and a half in which they've been subjected to Canada's racist legal system.

Although modern politicians espouse that "There is no place in Canada for the attitudes that inspired the Indian Residential Schools system to ever prevail again" (Harper, 2008), I have argued that the system that allowed for residential schools is still intact. The system has taken new forms in the criminal justice system and other political systems, such as the child welfare system, the education system and the mental health system. Canada has not gone through any sort of transformation as a nation that would suggest otherwise. Looking at the numbers of Indigenous peoples in prison is one way to prove that Canada still operates within a legal framework of racism and white supremacy. By examining tough-on-crime legislation in chapter two, I have shown that racism is institutionalized within Canada's justice system. Laws directed towards criminalized individuals, such as the *SSCA* and the *TVCA*, have had disproportionate impacts on Indigenous peoples and have contributed to the over-incarceration of Indigenous peoples. Rather than examining Indigenous over-incarceration as an unfortunate and undesirable outcome of a fair justice system, I've argued that it is an extension of a legal system that continues to control and contain Indigenous peoples. As Adema explains, "When Nishinabe Elder Art Solomon characterized the treatment of Indigenous peoples in Canadian prisons as 'a deliberate policy of genocide', he fit into a storytelling tradition that understood the penal system

as part of a network of colonial policies directed at the destruction of Indigenous peoples as a cultural group" (2015: 453).

Chapter two demonstrated that racialized state violence against Indigenous peoples is justified because the Indigenous criminal is normalized within the White settler imagination. Encounters between state authorities and Indigenous peoples can be characterized as colonial tensions and non-criminal confrontations may still be met with violence and force. Race is reaffirmed through the over-incarceration of Indigenous peoples, especially through notions of racialized space (Razack, 2002). Spaces such as jails, cities, farms and reserves symbolize colonial power relationships of control, containment, inclusion and exclusion. These spaces are a reflection of how race, power and privilege operate in Canada. As Indigenous peoples are criminalized and dehumanized through over-incarceration, white privilege is supported by assuming the criminality of Indigenous persons, keeping White spaces segregated and validating the fears of White settlers.

With one of the key components of CRT being its transformative possibilities, chapter three examined the potential and limits of reconciliation in addressing the over-incarceration of Indigenous peoples. CRT is helpful in unpacking how governments use reconciliation rhetoric because the theory flags "gestures of inclusion" (Simpson quoted in Razack, 2015) and coded language or actions that are more about nation-building than Indigenous self-determination. These techniques are reminiscent of the move towards formalized equality in the United States during the civil rights era, which critical race theorists have criticized for not bringing about the structural change required to address racism. The chapter further demonstrated that governments are not taking up the TRC's Calls to Action in the way that the commission intended reconciliation to be viewed. In the decade since the IRSSA came into effect, reconciliation has

been used to imagine a self-improving, benevolent state that locates blame in the past and solutions in the future. Often relying on increasing understanding as a remedy for the colonial conditions that Indigenous peoples continue to endure, reconciliation, in its current form, advances settler innocence. Where reconciliation does have potential is through the restructuring of relationships—between settlers, Indigenous peoples and the state. In fact, we—collectively—must improve these relationships. Part of altering the relationship includes denouncing and eliminating instances, practices and systems that dehumanize or criminalize Indigenous peoples.

When White settlers defended the Judge who jailed Angela Cardinal or the farmer who shot Colten Boushie by stating that race was not a factor in what happened, they were appealing to a mythology that suggests Canada has reached a state of colourblindness or post-racism. When individuals testify that they don't *see race* in a society where race matters, the implication is that they don't *see the humanity* of racialized Others. That settlers are blind to the normalization of the criminalization and dehumanization of Indigenous peoples is an argument for *seeing more* of each other—seeing modern occurrences of colonialism and racism, seeing that not all people living in Canada experience the justice system in the same way, seeing white privilege—rather than an argument for increasing our blindness (Alexander, 2011: 242).

Explanations of the over-incarceration of Indigenous peoples that do not take the system itself into account are doomed to let history repeat itself. Proposing programs or strategies that are aimed at "fixing" one individual or one family cannot bring about the transformative changes required to address racism and colonialism. As Comack explains, "There is an inescapable connection between the colonial forces that have shaped Indigenous communities and the criminalization and over-incarceration of Indigenous people" (2014: 71). A CRT analysis of the over-incarceration of Indigenous peoples in an era of reconciliation has provided a different lens

with which to view an issue that has been analyzed from a variety of perspectives and within many disciplines. CRT reveals that Canada's justice system is racist by design. Because racism is institutionalized, change must be systemic and unsettling. While the current framework of reconciliation offers opportunities for restructuring systems and relationships, the fact that rates of Indigenous incarceration have been increasing in the decade since the IRSSA came into effect, invites skepticism of governments' and Canadians' willingness to change beyond incremental reforms that do not challenge systems of power and privilege.

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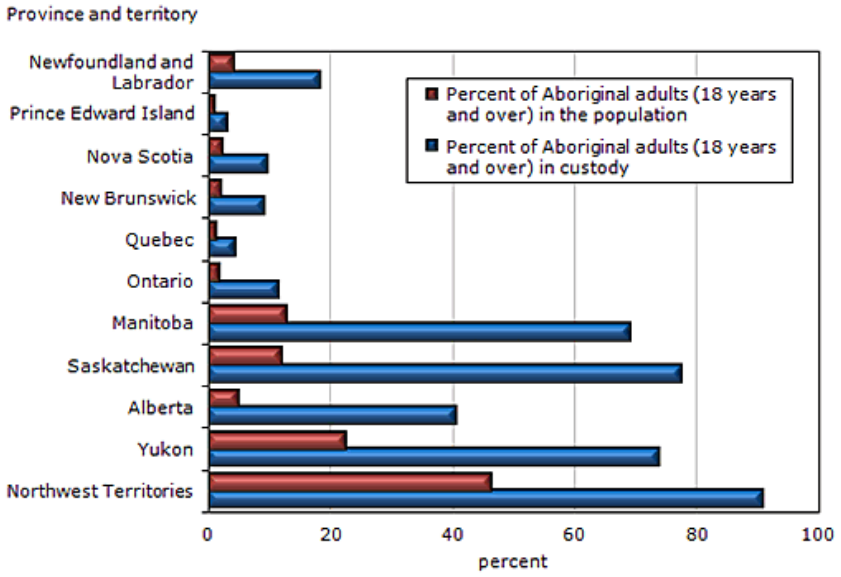
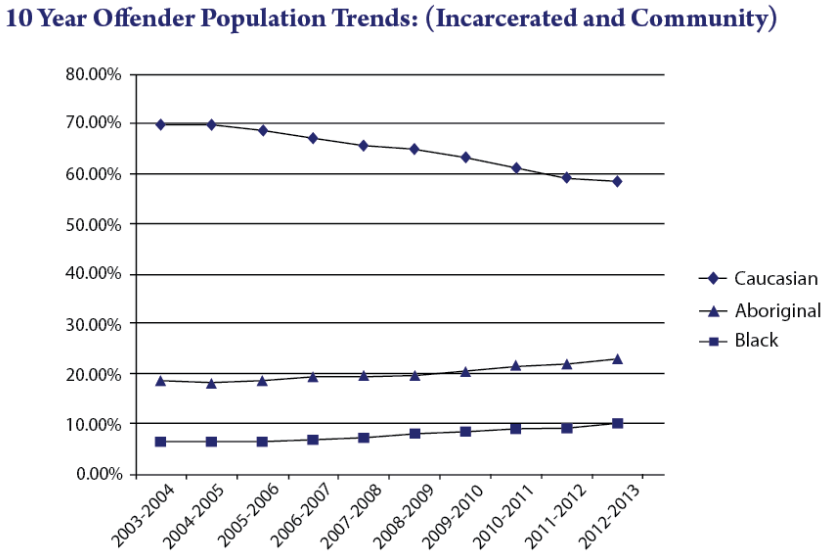
Appendix: Figures

Figure 1: Incarceration of Indigenous Peoples by Province (Statistics Canada, 2012).



Statistics Canada. 2012. *Adult correctional statistics in Canada, 2011/2010*. Ottawa: Minister of Industry.

Figure 2: Indigenous Incarceration Rates by Year (Office of the Correctional Investigator, 2013).



Office of the Correctional Investigator. 2013. *Annual Report 2012-2013*. Ottawa: Canada.