

The Colonialism of Incarceration

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Abstract: This essay attends to the specificity of indigenous peoples' political critique of state power and territorialized sovereignty in the North American context as an indispensable resource for realizing the decolonizing potential latent within the field of critical prison studies. I argue that although the incarceration of indigenous peoples is closely related to the experience of other racialized populations with regard to its causes, it is importantly distinct with respect to the normative foundation of its critique. Indigenous sovereignty calls forth an alternative normativity that challenges the very existence of the carceral system, let alone its racialized organization and operation.

Despite common perception to the contrary, the Canadian prison population is disproportionately large relative to other comparable societies—with the seventeenth highest incarceration rate of thirty-four OECD nations, higher than most European nations—driven in part by a dramatic increase in Canada's prison population in the last twenty-five years.¹ In the 1990s alone, federal prison populations increased by 25 percent and provincial prison populations by a further 15 percent. The number of young people in the country's correctional institutions has increased by nearly 30 percent since 1986.² A large omnibus crime bill recently passed into law by

1. Mia Dauvergne, "Adult Correctional Statistics in Canada, 2010–2011," *Juristat* (11 October 2012): 7.
2. Unless otherwise indicated, statistical information on Aboriginal incarceration in Canada is drawn from Dauvergne, "Adult Correctional Statistics" and from Samuel Perreault, "The Incarceration of Aboriginal People in Adult Correctional Services," *Juristat* (21 July 2009). The majority of statistical evidence on indigenous incarceration in Canada derives from *Juristat*, a

the Conservative government, which promotes further ideologically driven, yet demonstrably dysfunctional “tough on crime” policies, ensures that these trends will only expand and compound over time.³

This reality has been somewhat obscured by the hyperbolic violence of prison expansion and carceral power in the United States. Nevertheless, just as is true of the U.S. case, prison expansion north of the border has been highly racialized, especially targeting indigenous peoples. In 2010/11, Aboriginal peoples comprised 27 percent of the total adult population in provincial or territorial custody and 20 percent in federal custody in Canada. Since Aboriginal peoples account for only 3–4 percent of the total Canadian population, this incarceration rate is 7 to 8 times higher than the general average. This discrepancy is particularly striking when considered in conjunction with a gendered analysis: Aboriginal women make up the single fastest growing imprisoned population, and now account for 33.6 percent of all federally sentenced women in Canada.⁴ Additionally, Aboriginal inmates are subject to what the head Federal Correctional Investigator refers to, rather euphemistically, as “routine over-classification.” This means that indigenous peoples are commonly classified as higher risk and more likely to reoffend; thus, they are released later in their sentences and are more often subjected to highly intense forms of incarceration, such as maximum security prisons and “administrative segregation” (otherwise known as solitary confinement). Partially as a result of this intensification, Aboriginal peoples are more likely to be involved in incidents involving harm to self or others while in custody, including 45 percent of all documented cases of self-injury.⁵ Significant discrepancies between indigenous and non-indigenous incarceration rates can be found consistently across all provincial and territorial jurisdictions in Canada, but the degree of disproportion

periodical published by Statistics Canada, which advertises itself as “of interest to all those who plan, establish, administer and evaluate justice programs and projects, as well as to anyone who has an interest in Canada’s justice system.” <http://www.statcan.gc.ca/pub/85-002-x/index-eng.htm>. Accessed 26 October 2013. Copyright Minister of Industry, Government of Canada (2013).

3. The controversial bill, travelling under the equally bloated and mangled title *An Act to Enact the Justice for Victims of Terrorism Act and to Amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts* (abbreviated title: *Safe Streets and Communities Act*), passed into law in September of 2013. See <http://www.parl.gc.ca/LEGISInfo/BillDetails.aspx?Mode=1&billId=5120829&Language=E>.
4. Government of Canada, *Annual Report of the Office of the Correctional Investigator* (2012–2013), Section IV, p. 30.
5. *Ibid.*

increases significantly in the West (e.g., Alberta, Manitoba and Saskatchewan) and in the Territories of the North. Moreover, just as with the U.S. case, racial disproportionality is increasing over time. As the Office of the Correctional Investigator recently put the matter: “Aboriginal over-representation has grown in recent years: between 1998 and 2008, the federal Aboriginal population increased by 19.7 percent. Moreover, the number of federally sentenced Aboriginal women increased by a staggering 131 percent over this period.”⁶

Critical prison studies—and the various forms of radical, grounded praxis out of which it has emerged, been transformed and subsequently reinvigorated with conceptual and practical tools—has insufficiently attended to the centrality of colonialism to the origins, scope, scale, and legitimation techniques of carceral power in North America and, as a result, it has by and large deprived itself of the energy and force of indigenous critique. With the aim of contributing to a positive interjection and reinvigoration of the *decolonizing* possibilities latent within this field then, this essay seeks to expand and refocus this framework. I argue that although the incarceration of indigenous peoples is closely related to the experience of other racialized populations in North America (especially African Americans) with regard to its *causes*, it is importantly distinct with respect to the *normative foundation* of its critique. Indigenous critique is (1) first and foremost a political critique, related but not reducible to causal explanations rooted in economic and sociological developments. It is a form of critique that (2) challenges the prevailing paradigm of “over-representation” in critical prison studies by calling into question the biopolitical category of “racialized population” itself; (3) challenges the ideological distinction between the logic of war and the logic of social pacification upon which carceral expansion depends; (4) situates critical prison studies within the broader horizon of settler colonialism and territorialized sovereignty, and; (5) offers alternative normative grounds from which to launch a general critique of these processes.

6. Office of the Correctional Investigator, *Good Intentions, Disappointing Results: A Progress Report on Federal Aboriginal Corrections* (Ottawa: Office of the Correctional Investigator, 2009), 6. Cited in Patricia A. Monture, “The Need for Radical Change in the Canadian Criminal Justice System: Applying a Human Rights Framework,” in *Visions of the Heart: Canadian Aboriginal Issues*, ed. David Long and Olive Patricia Dickason (Don Mills, ON: Oxford University Press, 2011), 238–57, 238. For a study on the imprisonment of women in Canada (but with little specific attention to Aboriginal women and no mention of colonialism), see Kelly Hannah-Moffat, *Punishment in Disguise: Penal Governance and Federal Imprisonment of Women in Canada* (Toronto: University of Toronto Press, 2001).

I.

The single most important set of tools available to any contemporary critical prison analysis in North America comes to us from decades of work in African-American and women of color feminism, broadly defined. Academic/activists such as Angela Davis and Ruth Gilmore are central to this debate, but so are organizations such as *Incite! Women of Colour Against Violence*, *Critical Resistance*, and the *Sylvia Rivera Law Project*.⁷ Since these thinkers and organizations are building their analysis and critical praxis out of the U.S. experience, they have been particularly focused on the centrality of anti-Black racism to understanding prison expansion in that country.⁸ This has taken the form of drawing a line of continuity between the contemporary prison system and the long history of slavery, either by way of a causal link, or via argument by analogy. The former attempts to demonstrate how the proliferation of Black Codes in the wake of formal abolition was directly and causally responsible for the turn to incarceration as a primary mechanism of social control over racialized populations (but especially African Americans). Such causal explanations have been difficult to establish with sufficient certainty, however, and can tend towards reductive, “single variable” forms of analysis that may improperly bracket out alternative explanations. Of late then, critical prison studies in the United States has tended towards a looser analogizing structure of argumentation, making the case that contemporary forms of imprisonment are *functionally equivalent* to Antebellum slavery or Jim Crow legislation in the post-Reconstruction era, even if not causally determined by these antecedents.⁹

Any critique of indigenous incarceration will have to grapple with a similar ambiguity whenever linking imprisonment to colonialism, and in this we can no doubt learn from Critical Race Theory, women of color feminism, and their related domains. However, we will as fundamentally require some departure from them. For just as any properly grounded critical praxis would be, these other fields are rooted in a historical experience that, while intersecting with settler colonialism and indigenous struggles, also diverges

7. Two of the most frequently cited works in contemporary critical prison studies include Angela Davis, *Are Prisons Obsolete?* (New York: Seven Stories Press, 2003), and Ruth Wilson Gilmore, *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California* (Berkeley: University of California Press, 2007).

8. In the section that follows, I will be speaking frequently of “racism” and “racialization.” My specific understanding of these terms is highly indebted to Ruth Gilmore’s definition of racism as “state-sanctioned or extralegal production and exploitation of group-differentiated vulnerability to premature death” (Gilmore, *Golden Gulag*, 28).

9. E.g., Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: The New Press, 2012).

from them in relevant ways. Although some important literature exists that focuses on the specificity of indigenous incarceration—most notably, work by Patricia Monture and Luana Ross—to date this dimension of the field remains relatively occluded from view.¹⁰

One feature of prevailing discourses on prisons that serves to propagate a certain occlusion of its colonial dimension is the persistent language of “over-representation” and “racial disproportion,” an idiom one can find even in the most critical camps. In this framework, empirical evidence is presented just as has been given here (above). The standard narrative structure begins with a recitation of statistical evidence pertaining to demographics, specifically comparing the racial organization of society at large versus that of the incarceration population. Any incongruity or discrepancy between the two is noted, commonly named as over-representation, and then employed to offer tacit or overt condemnation of the system. This rhetorical strategy is, not surprisingly, most evident in mainstream organizations and academic research, but it is also startlingly widespread in more critical or radical literature as well. To offer but one influential example of the former, in April of 2011 the NAACP released a major report titled *Misplaced Priorities: Over Incarceration, Under Education*.¹¹ This meticulously detailed report documents the rapid growth of racialized incarceration in the United States with a particular focus on its impacts on African-American communities, and the detrimental effects this is having on state capacities in other areas of investment and service delivery (especially education). Nevertheless, the primary critical thrust of this work rests with the idea of *disproportionality*, or the *over-representation* of racialized populations. As the title attests, it is primarily about *over* incarceration, not imprisonment per se.

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10. Luana Ross, *Inventing the Savage: The Social Construction of Native American Criminality* (Austin: University of Texas Press, 1998); Patricia Monture-Angus, “Aboriginal Women and Correctional Practice: Reflections on the Task Force on Federally Sentenced Women,” in *An Ideal Prison?: Critical Essays on Women’s Imprisonment in Canada*, ed. Kelly Hannah-Moffat and Margaret Shaw (Halifax, NS: Fernwood Publishing, 2000), 52–60; Monture, “The Need for Radical Change.” See also Jane Dickson-Gilmore and Carole La Prairie, eds., *Will the Circle be Unbroken?: Aboriginal Communities, Restorative Justice, and the Challenges of Conflict and Change* (Toronto: University of Toronto Press, 2005); Joyce Green, “From Stonechild to Social Cohesion,” *Canadian Journal of Political Science* 39.1 (2006); Patricia Monture-Okanee and Mary Ellen Turpel, “Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice,” *University of British Columbia Law Review* (Special Edition), vol. 26 (1992): 239–77. On incarceration as a theme in indigenous literature, see Deena Rymhs, ed., *From the Iron House: Imprisonment in First Nations Writing* (Waterloo, ON: Wilfrid Laurier University Press, 2008).
11. http://naacp.3cdn.net/ecea56adeef3d84a28_azsm639wz.pdf.

Over-representation is a highly ambiguous and malleable idiom, susceptible to multiple interpretations and easily rendered into diverse programs for action. For instance, disproportion may be construed as the result of economic or social pathologies exogenous to the criminal justice system itself. In this formulation, the over-representation of racialized populations in prisons merely *makes visible* broader social pathologies, albeit in a highly dramatic way. For instance, criminality is correlated to poverty, which in turn is correlated to racialization and marginalization. Thus, the over-representation of certain populations in penal institutions may be thought a function of racism, but only in a highly mediated manner. On a different reading, however, we also know that the judicial system *itself* is rife with racialized violence and injustice. Such relatively unmediated mechanisms of racism operate endogenous to the system and have also been found to directly contribute to over-representation, for instance, in the manner in which racial bias operates at various stages of interaction with criminal justice officials, from being stopped for routine infractions (especially “stop and frisk” policies), through to sentencing and treatment by prison officers. Returning to the Canadian context then, both of these (external and internal) factors have been central to understanding the expansion of indigenous incarceration. To cite but one example, a 2004 study found that Aboriginal women in maximum security were involved in security incidences at a rate (28.6 percent) comparable to female inmates in minimum and medium security institutions (26.8 percent), and the correlation between the Security Risk Score (based on previous criminal history) and involvement in such incidences was found to be practically zero: 0.01 for violent incidences and 0.05 for non-violent incidences. The report drew the following conclusion from this evidence: “Aboriginal women are thus more routinely placed into tighter security settings despite the fact that their *criminal history has no predictive value* for whether they are genuinely a risk to other inmates or staff.”¹² In other words, racial bias is demonstrably impacting internal prison operations, a key factor in understanding divergence between Aboriginal and non-Aboriginal experiences of incarceration (in terms of scope, scale and intensity).

Analysis of the racism both exogenous and endogenous to the criminal justice system is clearly indispensable to a comprehensive analysis of imprisonment. It remains therefore the focus of much critical prison studies, as analysts seek to provide causal explanations for recent carceral expansion. However, this focus has its limits. While discriminatory implementation is undoubtedly important to the overall operation of penal power in

12. David Milward, “Sweating It Out: Facilitating Corrections and Parole in Canada Through Aboriginal Spiritual Healing” in *Windsor Yearbook of Access to Justice* 29.1 (2011): 43.

North America, it is limited as an explanatory device in relation to prison expansion. For racial discrimination to serve this explanatory function, one would need to demonstrate not merely its contemporary extent and operation, but its dramatic *increase* since the 1970s. However racist the operation of the criminal justice system today may be (and no credible position can deny this generally), it another thing altogether to suggest that the system prior to the 1970s was significantly *less so*.¹³

As numerous works have documented then, understanding the expansion of prisons in North America requires not merely a *social* analysis—that is, one rooted in the sociology of criminal justice officials in their interactions with targeted populations—but a *political* one. This is to say that carceral mutation and expansion is explainable principally as a political strategy, one that links up with a variety of social and economic transformations taking place over the last few decades (especially neoliberal economic “adjustments,” and deregulation and dissolution of social welfare networks) without being entirely reducible to these other factors.¹⁴ In other words, while these social and economic forces produced the relevant context, multiple responses to these transformations were nevertheless possible. Carceral expansion was not so much then the necessary, automated effect of these various causes: it was (and is) a political choice adopted from within a range of possible responses. This point is punctuated by the fact, made repeatedly in the literature, that carceral expansion is not a function of increased crime. In fact, as volumes of work attest, there is little connection between crime and punishment in North America: technologies of punishment (and their ideological justifications) grow and morph quite independently of changes in crime trends.¹⁵ Nor are such punitive transformations a function of economic demands in any simple, straightforward manner. Despite a continued emphasis in activist literature on privatization, for-profit motives, prisoners-as-surplus-labour, or even the somewhat misleading “prison industrial complex” neologism, prisons remain overwhelmingly public

13. As Loïc Wacquant puts this point, “True, discrimination in sentencing remains a reality at the final stage of the criminal justice process . . . but discrimination clearly has not *increased* since the mid-1970s and so it cannot account for the spectacular worsening of ‘racial disproportionality’ in prison administration in the recent period.” Wacquant, *Prisons of Poverty*, expanded edition (Minneapolis: University of Minnesota Press, 2009), 156.

14. Cf. Joe Soss, Richard Fording, and Sanford Schram, *Disciplining the Poor: Neoliberal Paternalism and the Persistent Power of Race* (Chicago: University of Chicago Press, 2011).

15. E.g., in the same year that the Conservative government of Canada announced sweeping new “tough on crime” laws, Statistics Canada reported that the crime rate was the lowest in decades. See <http://www.cbc.ca/news/canada/canada-s-crime-rate-lowest-since-1972-1.1334090> (accessed December 11, 2013).

institutions and carceral expansion a function of state imperatives. So the growth of prisons is not straightforwardly a function of either an increase in crime, nor unmediated profit motives. This isn't to say that privatization has not increased, or that it is not a central component of many contemporary prison systems in the western world. However, such phenomena are more properly understood as the effects of prison expansion, rather than its causes.¹⁶ This indicates then that prison expansion is a distinctly *political* phenomenon.

Ruth Gilmore theorizes the politics of carceral expansion in terms of "surplus state capacity," which she defines as a "quality that can emerge over time as a result of the difference between what states can do *technically* and what they can do *politically*."¹⁷ Thus, while the surplus state capacity mobilized towards carceral expansion is about technical power, it equally pertains to and has its roots in discourses of legitimation, namely social pacification and managerial democracy. Political elites push "law and order" ideologies and carceral expansion because they recognize that these work to solidify hierarchical chains of authority and control over of the state apparatus, and this functions primarily because large swaths of middle class white people, driven by fear and racist fantasies, support such policies even in the face of overwhelming evidence that they do not operate to reduce crime. By bringing forward this political circuit of violence and legitimation, we can thus break from the kind of social critique proffered by the prototypical exasperated criminologist who throws up her hands in frustration that governments continue to pursue legal reforms that are not only ineffective but actively counter-productive (i.e., they fail to reduce crime rates and may actual increase them). For, unlike this naïve approach, we can see that such policies may not be designed to reduce crime in the first place. They can only be viewed as failures if one adopts the view that they are primarily enacted in order to make communities safer. Once we see that this is not the case—once we realize that such policies are first and foremost devised to maintain a system of state violence, racialized hierarchy, and, as I will argue, continuous colonial reterritorialization—then we must confront how effective and successful they truly are.

Thus, carceral expansion as a *political formation* has been increasingly grasped as a function of the emergence and consolidation of a new "penal ethos" in North America over the last twenty to thirty years.¹⁸ This entails

16. For criticism of the "new slavery" arguments and the idea that capitalist labour exploitation is the primary driver of prison expansion, see Gilmore, *Golden Gulag*, 21; James Kilgore, "The Myth of Slave Labor Camps in the U.S.," *Counterpunch* (August 11–13, 2013).

17. Gilmore, *Golden Gulag*, 113.

18. Loïc Wacquant has meticulously documented how this new "penal common sense" has been actively exported by the United States to Western Europe (and

the deliberate dismantling of the social welfare state (however inadequate and uneven its institutions were), a corresponding growth and glorification of the penal state, and a internal transcription of the very terms of the penal state towards an increasingly moralized, punitive approach that prioritizes the isolation, segregation, and politically symbolic (though functionally ineffective) performance of castigating criminals (overwhelmingly the racialized poor). In other words, it is not merely that the state punishes *more*, it does so *differently*, with a new penology that emphasizes highly intense sociospatial isolation.¹⁹ As Loïc Wacquant reminds us, “The expansive and expensive penal system is not just a consequence of neoliberalism . . . but an *integral component of the neoliberal state itself*.”²⁰ The ritualized morality of punishment has ensured that even those remnants of the social welfare state that persevere have been effectively integrated into and subordinated to carceral rhetoric and imperatives, for instance in so-called “workfare” programs.²¹ The horizontal spread of carceral governmentality thus exceeds its limited institutional manifestation in the prison itself, confirming yet exceeding one of Foucault’s central insights from *Discipline and Punish*.

II.

Much of the survey above is known. Although the general trajectory of critical prison studies has been driving towards the kind of distinctly *political* critique of carceral expansion outlined above, the field nevertheless still remains fixated primary upon causal explanations. To be clear, I am not suggesting that explicating the sociological causes of prison growth over the last thirty years or so is unworthy of time and attention. However, no causal explanation, however complex and nuanced, can satisfy our need for a normative critique. And in this regard, historically and in the present, the indigenous peoples of North America provided indispensable tools since their critical praxis (decolonization) has always *primarily* focused on a robust normative critique of state sovereignty *as such*, and only secondarily upon its racist implementations. The focus of indigenous peoples’ struggles has always been the imposition of the Euro-American state apparatus itself. This critique imports a broader perspective, one that activists from various other traditions (indigenous and non) can learn from and must contend with.

beyond) through neoliberal think tanks, policy experts, and lobby groups. It is reasonable to expect that the appearance of many of the same trends in Canada can be attributed to the adoption of this new kind of “Washington Consensus.” See Wacquant, *Prisons of Poverty*, especially p. 54.

19. For a powerful political-phenomenological critique of solitary confinement, see Lisa Guenther, *Solitary Confinement* (Minneapolis: University of Minnesota Press, 2013).
20. Wacquant, *Prisons of Poverty*, 175–76.
21. See Soss, Fording, and Schram, *Disciplining the Poor*, passim.

In light of this perspective, sociological and demographic analysis of racialized incarcerated populations is inadequate when thinking about the political form of carceral power in North America. The colonial violence of carceral power in North America is not exclusively, or even predominately, a function of the *number* or *proportion* of racialized bodies within institutions. Moreover, framing the matter in this way may exacerbate the problem. When the critique of incarceration rests upon the over-representation of racialized bodies within penal institutions, this tacitly renders carcerality as a *dehistoricized* tool of state power—even if distorted by the pathological effects of a racist society—displacing an account of the continuity and linkages between carcerality, state formation and territorialized sovereignty.

As indigenous scholars such as Taiaiake Alfred, Joanne Barker, Glen Coulthard, and Audra Simpson (*inter alia*) have consistently argued, unlike other racialized populations in North America, indigenous peoples constituted self-governing political communities prior to the imposition of European state and market forms.²² Their *continued* sovereign presence on the North American continent attests then not only to the failure of a series of projects of racial population management, but also fundamentally calls into question the very legitimacy of Euro-American states themselves. The central role of policing, prisons and the criminal justice system in the maintenance and reproduction of the state form is therefore challenged in a manner that exceeds the paradigm of over-representation. Moving beyond the over-representation model means then asking after the political function of the carceral system as a whole beyond that of racialized bodies within. In so doing, we confront a series of new questions: How can we analyze carceral power in the context of an ongoing denial of indigenous peoples not merely as individuals, nor even as “populations,” but as self-organizing, self-governing political collectivities? How are we to apprehend the cataloguing and deploying of statistical evidence itself in this situation, especially when the evidentiary record is itself so indebted to a state apparatus of monitoring, tracking, and documenting indigenous bodies?²³ How do we draw upon such statistical evidence while recognizing that these numbers constitute

22. See Taiaiake Alfred, *Wasáse: Indigenous Pathways of Action and Freedom* (Peterborough, ON: Broadview Press, 2005); Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Oxford: Oxford University Press, 1999); Joanne Barker, ed., *Sovereignty Matters* (Lincoln: University of Nebraska Press, 2005); Glen Coulthard, *Red Skin, White Masks* (Minneapolis: University of Minnesota Press, 2014); Audra Simpson, *Mohawk Interruptus* (Durham, NC: Duke University Press, 2014).

23. For instance, consider the role of *Juristat* in the Canadian context. Discussed above in footnote 2.

bodies as “populations” in a context of a depoliticizing biopolitics of surplus humanity and human management?²⁴

Returning once more to the Canadian case then, indigenous peoples do not merely represent racialized bodies produced by a biopolitics of population management. Rather—and this is the radical actuality that must always be held at bay by the state—they constitute alternative political, economic, ecological and spiritual systems of ordering, governing, and relating. In the context of ongoing occupation, usurpation, dispossession and ecological devastation, *no* level of representation in one of the central apparatuses of state control and formalized violence would be proportionate. Instead, indigenous sovereignty itself calls forth an alternative normativity that challenges the very *existence* of the carceral system, let alone its internal organization and operation.

III.

Before turning more centrally to the question of alternative normativities, consider how indigenous critique recasts another, related theme currently circulating in activist-academic literature, namely, the contemporary concern over a collapse between military and police operations. We are repeatedly reminded that, at present, foreign policy objectives described explicitly in terms of “war” are advanced not through the traditional confrontation of armed combatants, but through police-like operations over a globe envisioned as one large domestic space of surveillance and pacification. As we repeatedly hear from critics and defenders alike, U.S.-led empire functions as a “global policeman.” The corollary development is the increased militarization of traditional, domestic policing. Policing is thought to be militarized either when (1) it begins to employ certain technologies of intense violence normally not deployed against civilian citizenry (e.g., the use of armed personal carriers, drones, aerial surveillance, etc.) or (2) when it

24. Statistical evidence of over-representation is not irrelevant or useless as a tool of argumentation. However, due to the inherent ambiguities of “over-representation,” it has never been sufficient for a robust normative critique of carceral power itself. Consider that between 1967 and 1991 there were thirty major studies commissioned on Aboriginal peoples and justice in Canada that, on some accounts, have resulted in some 1800 recommendations for reforming the Canadian justice system. In 1996, the Report of the Royal Commission on Aboriginal Peoples (RCAP) included a separate volume on Indigenous peoples and criminal justice, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Minister of Supply and Services, 1996), which provided fifteen major new findings on the matter and seventeen additional recommendations. Almost none of these have been implemented and, in the time since RCAP was released, the problem has only compounded. Monture, “The Need for Radical Change,” 239.

begins to serve overtly political aims, exceeding its traditional mandate to “serve and protect” the citizenry.²⁵ In such situations, the police risks being viewed as a force imposed externally by a government that the subjugated population does not recognize, authorize and/or does not have effect participation within.²⁶ Criminal control bleeds into war.

Assertions that the logic of war and that of social pacification can still be effectively disentangled are belied by our reality. In the current climate no attempt to fully insulate these two logics from one another can succeed. Yet, while recent commentators have expressed great dismay at the nakedly fluid boundary between military and policing operations today, viewed from the vantage point of settler colonialism and indigenous critique, there is nothing new about this permeability. In the history of Anglo-American settler colonialism, for instance, the extension of criminal jurisdiction has long been central to the subjugation and displacement of indigenous polities.²⁷ Existing in the “third space of sovereignty,” indigenous nations have always subverted foreign/domestic distinctions, as well as attempts to distinguish war decisively from crime management.²⁸ The largest and most important domestic policing organization in Canada, the Royal Canadian Mounted Police (RCMP), emerged from its predecessor organization, the North-West Mounted Police (NWMP). The latter was modelled upon the Royal Irish Constabulary (RIC) and was expressly intended to function as a paramilitary organization, meant simultaneously to defeat indigenous resistance politically and pacify it criminally.²⁹ In the United States as well, although the Office of Indian Affairs, created in 1824, was very symbolically

25. For examples from mainstream and journalistic work of spreading fear related to the former development (but which completely overlooks the colonial and racial dimensions of these questions), see Sarah Stillman, “Swat Team Nation,” *The New Yorker*, August 8, 2013 (<http://www.newyorker.com/online/blogs/comment/2013/08/swat-team-nation.html>); Radley Balko, *The Rise of the Warrior Cop: The Militarization of America’s Police Forces* (New York: Public Affairs, 2013); Arthur Rizer and Joseph Hartman, “How the War on Terror has Militarized the Police,” *The Atlantic*, November 7, 2011 (<http://www.theatlantic.com/national/archive/2011/11/how-the-war-on-terror-has-militarized-the-police/248047/>).

26. See Wacquant, *Prisons of Poverty*, 19.

27. For historical work documenting this fluidity, see Sydney Haring, *White Man’s Justice: Native People in 19th Century Canadian Jurisprudence* (Toronto: University of Toronto Press, 1998).

28. Kevin Bruyneel, *The Third Space of Sovereignty* (Minneapolis: University of Minnesota Press, 2007).

29. Haring, *White Man’s Justice*, passim; and R. C. Macleod, “Canadianizing the West: The North-West Mounted Police as Agents of the National Policy, 1873–1905,” in *The Prairie West: Historical Readings*, ed. R. Douglas Francis and Howard Palmer (Edmonton: Pica Pica Press, 1992), 225–38.

relocated from the War Department to the Department of the Interior in 1849, from this point forward, including Wounded Knee and the complex and tense relationship between American Indians and the F.B.I., indigenous peoples have always doubled subjected to these two logics of violence and control.³⁰ As a result, they are well positioned to observe that these are not, and never have been, fixed and parallel logics, but have always intersected one another. Indigenous critique thereby discloses the oscillation of these forms of state violence as *constitutive* of territorialized sovereignty in a colonial context, rather than extraneous and novel.

The deep challenge posed by indigenous peoples does not merely consist in their doubly-subjected position here, however. Rather, it resides in the delegitimizing of the war/crime dichotomy in the first place, for indigenous peoples in North America are in precisely the position mentioned above: experiencing policing itself as a force imposed externally by a government that the subjugated population does not recognize, authorize and/or does not have effect participation within.³¹ In short, the *state itself* is apprehended as the primary vehicle for the collective organization of violence upon indigenous peoples, historically and in the present. Indigenous politics is founded upon this existential challenge. As indigenous (Mohawk) scholar, Patricia Monture-Angus points out, in the Canadian context, study after study has demonstrated that, “Aboriginal people do not view the criminal justice system as a system that represents or respects them,” and, as a result, “the perceptions of Aboriginal peoples (while keeping in mind their diversity) thus

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30. The FBI shares jurisdiction with the Bureau of Indian Affairs, Office of Justice Services (BIA-OJS) and has primary law enforcement responsibility on nearly 200 Indian reservations. The Department of Justice traces its authority over law enforcement to treaty responsibilities established in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831), which set out the United States government’s duty to “protect” Indian tribes as “domestic dependent nations.” See http://www.fbi.gov/about-us/investigate/vc_majorthefts/indian/indian_country_crime and <http://www.justice.gov/otj> (accessed June 2014). Perhaps the locale most symbolically associated with the overlap of military and policing powers as they relate to American Indians is Alcatraz, which initially functioned as a military prison where indigenous political opposition was routinely incarcerated, and, as a result, was later the target of indigenous (re)occupation from 1969 to 1971 by the United Indians of All Tribes. See Paul Chaat Smith and Robert Warrior, *Like a Hurricane: The American Indian Movement from Alcatraz to Wounded Knee* (New York: New Press, 1997).
31. This article does not attempt to extend the comparison beyond Canada and the United States to include other Anglo-settler polities, such as Australia and New Zealand. No doubt, however, such comparative work is possible and needed. For an example of such analysis, see Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous Peoples in America and Australia, 1788–1836* (Cambridge, MA: Harvard University Press, 2010).

thoroughly challenge the perspective of those who regard Canada to be a free and democratic state."³² In this context, reforming the penal system to produce less "disproportionality" in racial demographics (between inside and outside the prison walls) will continue to fail to take into account Aboriginal justice traditions themselves, which are "a clear component of the inherent right to self-government."³³ While indigeneity consistently avoids reduction to any fixed or determinate content, the condition of possibility for continued creative reinvention and reproduction of culture, tradition, spirituality, and life itself *as* indigenous peoples has meant a persistent refusal to acknowledge the dehistoricized naturalization of domestic/foreign distinctions meant to legitimize state violence.

Although this has a centuries-long history, what has changed is that, unlike previous eras (unlike even the 1970s, e.g., Pine Ridge) the incarceration of indigenous peoples is increasingly dehistoricized—and thus depolitized—through its representation as the general extension of racialized criminality. Even though far more indigenous peoples are incarcerated today than, say, when Lenard Peltier was convicted in 1977, today this is more effectively and smoothly enacted because it has been routinized, bureaucratized, and detached from the longer colonial history of the state itself. By attending to the colonial function of carceral expansion today, we are cautioned then against too hastily accepting the supposed radical novelty of the present, not to mention the story of neoliberalism's hollowed out states, or Empire's virtuality. Indeed, we are even cautioned against too hastily accepting one of indigenous studies' prevailing narratives today, namely, that North American settler states have moved from openly coercive and violent relations with indigenous communities towards a more flexible, docile, politics of recognition and assimilation—a move away from the "hard infrastructure" of military operations and residential schools to the "soft infrastructure" of public apologies and cultural accommodation. While this transition to soft tactics has certainly occurred in some fields of governance, it is coeval with the growth of a whole shadow system of hard infrastructure that is every bit as material, physical and coercive as ever. The settler colonial state has not gone away at all, or even become less of a physical, material presence—it has merely shifted its site of operation, perhaps most symbolically from the residential school to the prison. Read against this larger backdrop then, we can begin to read the vast network of prisons in North America in terms of its ideological function relative to settler colonialism: that is, the manner in which it functions strenuously to depoliticize this ongoing material violence and erect a strict separation between *criminal control* and *conquest* despite indigenous societies' continued insistence that externally imposed coercive

32. Patricia Monture, "The Need for Radical Change," 244.

33. *Ibid.*, 240. See also RCAP, *Bridging the Cultural Divide*, 289.

control over their members (for whatever reason) is an affront to the inherent right to self-government.

IV.

Ruth Gilmore has persuasively argued that if we are to understand and properly subject carceral power to an effective critique then we must not only “develop complex understandings of how prisoners became so massively available as carceral objects”—a matter surely deeply rooted in processes of racialization—but we must also “figure out how the ground the prisons stand on becomes available for such a purpose.”³⁴ In thinking about how this ground becomes available, Gilmore has in mind the manner in which a permanent crisis in the workfare-welfare state has been literally displaced onto the landscape of relatively low-density, rural communities, which has produced new opportunities and demands for land grabbing. However, highlighting the colonialism of incarceration further draws our attention to the territorial foundation of prison expansion in a deeper and longer history. It forces consideration of the politics of territoriality in North America in a variety of forms, including the ways in which territorialized sovereignty aspires to impose an exclusivity and singularity of command and control that obliterates alternative normative orders beneath and beyond its aegis.

At the most immediate level, criminalized capture by the state is about management of “disorderly populations” through isolation. As Allen Feldman famously put it: “Arrest is the political art of individualizing disorder.”³⁵ Of course, isolation and sequester are always already geospatial and are thus implicated in territoriality in a general sense. Prisons are a spatial and territorialized matrix of punishment and control inasmuch as they attempt to provide geographical solutions to socio-economic and political contradictions (in the form of cages, walls and other technologies of isolation and segregation). As Gilmore forcefully put this point,

Incapacitation doesn’t pretend to change anything about people except where they are. It is in a simple-minded way, then, a geographical solution that purports to solve social problems by extensively and repeatedly removing people from disordered, deindustrialized milieus and depositing them somewhere else.³⁶

Prisons certainly operate through geospatial media in this general sense, sharing a certain continuity with other technologies of spatial control such as “ghettoization.” As a result, there is overlap here with other important experiences of, for instance, African American subjugation and control.

34. Gilmore, *Golden Gulag*, 130.

35. Allen Feldman, *Formations of Violence* (Chicago: University of Chicago Press, 1991); cited in Gilmore, *Golden Gulag*, 235.

36. Gilmore, *Golden Gulag*, 14.

Prisons, ghettos, and other tools of capture and separation exhibit a revealing morphological continuity.³⁷ Attending to the historical experience of indigenous peoples, however, these general geospatial formations are re-focused through another lens of territoriality—settler colonialism and land acquisition—reframing Gilmore’s considerations on the territorial foundation of the prison apparatus.

Indigenous (Dene) political theorist Glen Coulthard provides a succinct and precise definition from which we may begin to bring the colonial-territorial politics to the fore here. He designates a “colonial relationship” in terms of the distinct form of domination it engenders. Colonialism is:

A relationship where power—in this case, interrelated discursive and non-discursive facets of economic, gendered, racial, and state power—has been structured into a relatively secure or sedimented set of hierarchical social relations that continue to facilitate the *dispossession* of Indigenous peoples of our lands and self-determining authority. In this respect, Canada is no different than any other settler-colonial power: in the Canadian context, colonial domination continues to be structurally oriented around the state’s longstanding commitment to maintain—through force, fraud, and more recently, so-called “negotiations”—ongoing access to the land that contradictorily provides the material and spiritual sustenance of Indigenous societies on the one hand, and the foundation of colonial state-formation, settlement and capitalist development on the other.³⁸

Coupling Coulthard’s work with the emergent field of settler colonial studies brings into focus the extent to which state and market formation in North America has always been intimately bound up with *land acquisition* and *resettlement*, and that these have called forth distinct ideologies rooted in notions of agrarianism, territorial possession and improvement. The defining feature of this particular political formation is not the appropriation of labour, nor the subjugation of indigenous self-governing powers (although these are both also present). Rather, as James Tully reminds us, “the ground of the relation is the appropriation of the land, resources, and jurisdiction of indigenous peoples, not only for the sake of resettlement and exploitation . . . , but for the territorial foundations of the dominant society itself.”³⁹

37. See Wacquant, *Prisons of Poverty*, 82.

38. Glen Coulthard, “From Wards of the State to Subjects of Recognition? Marx, Indigenous Peoples, and the Politics of Dispossession in Denendeh,” in *Theorizing Native Studies*, ed. A. Simpson and A. Smith (Durham, NC: Duke University Press, 2014), chap. 3.

39. James Tully, “The Struggles of Indigenous Peoples For and Of Freedom,” in *Political Theory and the Rights of Indigenous Peoples*, ed. D. Ivison, P. Patton, and W. Sanders (Cambridge: Cambridge University Press, 2000), 36–59, at 39. Emphasis added.

Or as Patrick Wolfe states rather more bluntly: "Territoriality is settler colonialism's specific, irreducible element."⁴⁰

Contemporary critical theory has largely evaded an analysis of territoriality and its relationship to classical colonial formations, oftentimes staking much on a supposed movement towards a decentred, deterritorialized, virtual or "postmodern" Empire thought to have succeeded the older, land-based form of colonial power that held sway over an era now imagined as distant to us.⁴¹ However, viewed from the vantage point of indigenous struggles, settler colonialism and—our focus here—carceral power as it is subtended by colonialism, predictions of a neoliberal hollowed-out state and/or a deterritorialized Empire appear not merely premature but inattentive to the dialectical inversion of these tendencies, that is, to the processes of concretization and the persistence of *fixity*, *rigidity* and *territoriality*. Thinking through carceral power and indigenous incarceration, we can here instead ask after the continuation of classical state building practices, including its hard infrastructure, as well as classical colonial relationships to land acquisition and dispossession that have provided the literal terrain upon which biopolitical population management techniques as segregation and sequester rest, observing not only that these remain central to the global organization of capital and biopower, but that such forces are in fact advancing rather than melting away.

Work by political theorist Wendy Brown stands as an exception to this general occlusion in as much as she has attended to the paradoxes of the territoriality of contemporary sovereignty by highlighting the continued importance of walls, fences, borders, and barriers to the organization of political space. Brown notes that what we have come to call "globalization" in fact

harbors fundamental tensions between opening and barricading, fusion and partition, erasure and reinscription. These tensions materialize as increasingly liberalized borders, on the one hand, and the devotion of unprecedented funds, energies, and technologies to border fortification, on the other.⁴²

In other words, while capital and military technology is increasingly deterritorialized and fluid, it is so only through the reassertion of rigidity, fixity and territorial segmentation for certain populations. And, quite rightly,

40. Patrick Wolfe, "Settler Colonialism and the Elimination of the Native," *Journal of Genocide Research* 8.4: 387–409, at 388.

41. Important exceptions to this rule include Michel Foucault, *Security, Territory, Population* (New York: Palgrave Macmillan, 2007), and the work of Stuart Elden, especially *The Birth of Territory* (Chicago: University of Chicago Press, 2013).

42. Wendy Brown, *Walled States, Waning Sovereignty* (New York: Zone Books, 2010), 7–8.

Brown draws a line of continuity between the contemporary resurgence of concrete barriers and the historical lineage of settler colonialism and land appropriations. In this way, she provides tools for understanding how the regulation of political space is not merely about the construction (or removal) of any specific walls, fences, or cages, but more properly “a technology of separation and domination in a complex context of settler colonialism and occupation.”⁴³

In so-called “Indian Country,” there is nothing new about this paradoxical relationship of segregation and fluidity. Indigenous peoples are well acquainted with what Ann Laura Stoler has termed (following and building upon Foucault) the carceral archipelago of empire, which has always combined spatial isolation and confinement with linkages and connectivity—in this particular case, highlighted most dramatically by the circuit many indigenous peoples traverse today between the reserve or reservation and the prison, two sites of physical and spatial containment that are intertwined in one another.⁴⁴ In settler colonial societies today, however, this reality is obscured not only by the ideological depoliticization of carceral expansion in general, but also by the delinking of prison abolitionism from decolonialism and the “land question” specifically. To speak of the colonial violence of carceral power in North America is precisely to focus attention to how incarceration facilitates dispossession, in this time, in this place.

In the final analysis then, indigenous critique launches its evaluation of carceral power by attending to the ways in which this apparatus of capture operates as one armature of territorialized colonial sovereignty, a continuous process of dispossession that (always imperfectly) undermines indigenous practices of self-government by severing peoples from their historical relationship to the land. This critique speaks then already of alternative normative relationships of governance, sociality, and ecology.

With regard to this latter question, consider again the work of Patricia Monture-Angus. Drawing upon extensive work with Aboriginal women’s associations across Canada, Monture-Angus points us directly to the ultimate

43. *Ibid.*, 30.

44. Ann Laura Stoler, *Along the Archival Grain: Epistemic Anxieties and Colonial Common Sense* (Princeton, NJ: Princeton University Press, 2009). Stoler is building upon, while critically provincializing and decentring Foucault’s classic genealogy of carceral power in *Discipline and Punish*, but especially the symbolic function of the Mettray institution. While Foucault employs the opening of the Mettray penal colony in January of 1840 to “fix the date of the completion of the carceral system,” Stoler rightly points out that the institution was in fact part of a global, imperial formation that “connected strategies of confinement from metropole to colony and across the imperial world” (Stoler, 131). See also Foucault, *Discipline and Punish*, 2nd ed. (New York: Vintage, 1995).

normative foundation of the critique proffered here. In 1989, the Aboriginal Women's Caucus submitted a brief to the Solicitor General of Canada, making clear the status of indigenous women as both (1) multiply subjected by sexist, racist and colonial forms of governance, and yet (2) firmly rooted in an alternative ethic that precludes their legitimate incorporation into the criminal justice system, whatever their "level of representation" therein. They wrote:

All Aboriginal, First Nations citizens are in conflict with the law. We are First Peoples with an inherent right to exercise our own systems of justice and the values these systems represent. The issue of Aboriginal women and the criminal justice system is merely the most blatant example of the oppression of First Nations People under a system of laws to which we have never consented.⁴⁵

Reflecting on this and other examples, the conclusion Monture-Angus draws is that, "the foundational ideas of current correctional philosophy"—namely, punitive power and risk management—are "incompatible with Aboriginal cultures, law and tradition."⁴⁶ This presents a unique and important challenge then to the new penal ethos, since it cannot be easily resolved even through a "de-racialization" process, or the reorganization of demographics. Even attempts to incorporate the alternative ethical systems of indigenous peoples will fall short under such conditions. The inclusion of Healing Lodges and other Aboriginal-centred correctional facilities cannot conceal the fact that these institutions remain "within the legal and bureaucratic structure of the Canadian prison system . . . no matter how much Aboriginal culture and tradition inspires their contour, shape and form."⁴⁷ Whereas "racialization" approaches tend to focus on the racist operation of correctional institutions then, indigenous critique focuses attention on the normative

45. *Report of the Task Force on Federally Sentenced Women: Creating Choices* (Ottawa: Ministry of the Solicitor General, 1990), 23; Cited in Monture-Angus, "Aboriginal Women and Correctional Practice," p. 57. The Aboriginal Women's Caucus was a group of Aboriginal Women working in the Canadian criminal justice system.

46. She goes on to elaborate: "People (or any 'thing' with a spirit) were not intended to be managed but rather respected. The conclusion is that one of the foundational ideas of current correctional philosophy is, in my opinion, incompatible with Aboriginal cultures, law and tradition." Monture-Angus, "Aboriginal Women and Correctional Practice," 56.

47. *Ibid.*, 53. This principled, deep normative critique of prisons as institutions of violence displaces and eclipses work whose primary aim is to diagnose the manner in which carceral expansion is "antagonistic to democratic participation" and "inspires negative orientations toward government." Vesla M. Weaver and Amy E. Lerman, "Political Consequences of the Carceral State," *American Political Science Review* (November 2010): 1–17.

critique of carceral power within a broader horizon, but especially insofar as it functions as a principle apparatus of colonial-state power. This deep, territorially grounded normative vision is not reducible to the more prevalent anti-racist analysis of critical prison studies (however indispensable the latter remains) and cannot be overlooked or ignored.

V.

Theorizing and interrupting indigenous incarceration means attending to more than the over-representation of racialized bodies.⁴⁸ It calls instead for an analysis of the colonial function of the carceral form in the here and now. To recapitulate: the concern here is not with a general notion that all imprisonment, regardless of time and place, is inherently colonial merely due to its form or mode of operation. It is rather with the fact that, in *this* context carceral power takes on a colonial function as a result of its central role in manifesting and managing the territorialized violence of *these* states.⁴⁹ If sovereignty can be said to comprise the continual practice of asserting the singularity of political control in a given territorial space—thus combining exclusion and absolute decision—colonialism is the practical mediation of the external/internal boundaries of this process. It is the means by which sovereignty extends outward and is then reterritorialized through continual internal reorganization. Hence the association of colonization as an outward expansive force and an internal reorganization through containment, capture and divisive social organization. In the contemporary Anglo-American world, this colonization is predicated by its *settler* form, as so many important interventions in Native American studies have demonstrated.

Settler colonialism is a distinctive ideological and material formation, and it should be clear here that the prison industrial complex in North America is one technique in its operation today. Set alongside that other archipelago of spatial containment—the Indian reservation and reserve system—the contemporary carceral system colonizes and re-colonizes in a classical sense: by providing a solution to that which exceeds and destabilizes sovereignty via a spatial reorganization of populations and a depoliticization of that process. While this apparatus is currently situated within empire and manifests itself in fully racialized terms of articulation today, it cannot be reduced to these other formations. For settler colonialism

48. For work that carefully avoids the generalized “racialization” framework in favour of a rich historical analysis of the intertwining of anti-Black racism and settler colonialism, see Shona Jackson, *Creole Indigeneity: Between Myth and Nation in the Caribbean* (Minneapolis: University of Minnesota Press, 2012).

49. This leaves open the question of how to relate the specificity of the carceral-colonial linkage in North America to other Anglo-settler colonies or other occupied lands (which is beyond the scope of this particular article).

aims not primarily at exogenous domination or the extraction of surplus value from an enslaved and subjugated population but, first and foremost, at the acquisition and maintenance of territorialized sovereignty through continual spatial containment, reorganization and pacification—a process that both undermines, and is continually challenged by, the plurality of indigenous normative worlds. Thus, the rise of carceral power in the Anglo-American world cannot be told without attending to the history of settler colonialism, and it is only on the basis of this reframing that prison abolition can properly announce itself as decolonization.⁵⁰ — • —

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