Unsettled Times: Indigenous Incarceration and the Links between Colonialism and the Penitentiary in Canada[1]

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Abstract: The high rate of Indigenous incarceration is a well-documented problem throughout Canada. Within mainstream discourses, this problem is often framed as the legacy or effects of colonialism, which has resulted in the systemic racism and cultural and socio-economic deprivation experienced by Indigenous people today. An increasing body of scholarly literature is challenging the assumption that colonialism is something of the past by looking at how its structures and logics persist today. Thus far, however, little consideration has been given to the colonial context and emergence of Indigenous incarceration in Canada. By tracing the historical links between modern colonialism and the emergence of the Canadian penitentiary into the present, this research reveals some of the hidden connections that contribute to the current rates of Indigenous incarceration and the relationship that continues to exist between colonialism and the penal system today. These findings highlight a socio-politics of incarceration that go beyond a crime and justice framework.

Keywords: modernity, over-representation, penitentiary, settler colonialism, penal system, Indigenous incarceration

Résumé : Le haut taux d'incarcération autochtone est un problème bien documenté partout au Canada. Dans le discours dominant, ce problème est souvent présenté comme étant les résultats ou les effets du colonialisme, lequel a entraîné le racisme systémique et les privations socio-économiques vécues par les peuples autochtones aujourd'hui. Un corpus croissant d'études conteste la supposition que le colonialisme est une chose du passé en regardant comment ses structures et sa logique se perpétuent. Par contre, à ce jour, peu d'études ont porté sur le contexte colonial et l'émergence de l'incarcération autochtone au Canada. En reliant les chaînons historiques entre le colonialisme moderne et l'émergence du pénitencier canadien jusqu'à maintenant, cette étude dévoile certaines des connexions cachées qui contribuent aux taux actuels d'incarcération autochtone et la relation qui continue d'exister entre le colonialisme et le système pénal actuel. Ces résultats soulignent un aspect sociopolitique de l'incarcération qui va au-delà d'un cadre de crime et de justice.

Mots-clés : modernité, surreprésentation, pénitencier, colonisation européenne, système pénal, incarcération autochtone

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The concern with the incarceration of Indigenous people in the criminal justice system is currently at the forefront of Canadian intellectual, political, and public discussion.[2] In 2016, *Maclean's*, one of Canada's largest mainstream magazines, published an article entitled "Canada's Prisons are the New 'Residential Schools'" (Macdonald 2016). Building on a substantial body of research, the exposé offers an investigation into how Canada's criminal justice system works against Indigenous people at every level, from police checks and arrests (e.g., Nettelbeck and Smandych 2010) to bail denial and detention (e.g., Roberts and Stenning 2002), sentencing miscarriages and disparities (e.g., Roberts and Melchers 2003; Roberts and Reid 2017), and higher rates of imprisonment, classification, and segregation (e.g., Martel 2001; LaPrairie 2002). Consequently, these criminal justice trends with Indigenous populations are also well documented across other settler colonial countries, including Australia (Blagg 2008), New Zealand (Tauri 1999), and the United States (Jeffries and Stenning 2014). While the *Maclean's* article locates these trends within the context of colonialism, it nonetheless continues to describe what are often referred to as the "effects" or a "legacy" of a colonial past that has resulted in a subsequent economic and sociocultural deprivation and racism experienced by Indigenous people today (e.g., Adjin-Tettey 2008; Monchalin and Marques 2012). Framing colonialism as something of the past, however, de-historicizes existing colonial relationships and displaces an understanding of the links between incarceration, sovereignty, and the state (Nichols 2014: 444). Indigenous struggles and experiences are thus symptomized as an unfortunate but inevitable consequence, while the structural and systemic manners in which Indigenous people continue to be colonized are rarely explored.

Challenging this colonial legacy hypothesis is an increasing body of scholarly literature that analyses current and ongoing practices, arrangements, and discourses of colonialism within the criminal justice system today (e.g., Balfour 2008; Blagg 2008; Muhammad 2010; Douglas and Finnane 2012; Murdocca 2013; Cunneen and Tauri 2016; Nettelbeck et al. 2016). This work highlights how the underlying structures and logics of colonialism continue to pervade criminal justice practices, albeit within diversified and fragmented forms. Stoler (2008: 196) points out that terms such as "colonial effect" or "colonial legacy" are deceptive and arbitrary placeholders in time that gloss over the dispersed effects of colonialism into the present. While it is often assumed that the present is a break from our colonial past, in this article, I investigate the Canadian penal system and how the high rates of Indigenous incarceration are linked to a continuing colonial project in Canada. As argued by (post-) colonial theorists, colonialism has not simply dissipated but is central to understanding current events and arrangements throughout our world (e.g., Spivak 1988; Bhabha 1994; Said 1995).[3]

Although significant discussion on Indigenous imprisonment has taken place in both scholarly and public debate, there has been little consideration of when the levels of contact between Indigenous people and the federal Canadian prison system began to occur, or of the socio-political context of that occurrence.[4] To develop this insight, I analyse the role of the penitentiary in the project of settler colonialism through a historical study of penal trends in the Canadian federal prison system. I consider this trajectory by (1) tracing the emergence of the penitentiary system and its role in establishing the Dominion of Canada; (2) establishing the parallels between the penitentiary and the colonization of Indigenous people; (3) highlighting major key colonial and penal events and shifts in the building and settlement of the nation; and (4) identifying the convergence between the penitentiary and

Indigenous imprisonment into the present. This investigation reveals how the penitentiary eventually assumed a new role in the lives of Indigenous people by the middle of the twentieth century as a normal and legal step to historical settler processes of dispossession, assimilation, and segregation. I conclude that Indigenous incarceration is not the result of a colonial past but rather a part of the colonial process itself.

Socio-politics of Indigenous incarceration

Since the 1970s, significant efforts have been made to explain and address the disparities in the justice system for Indigenous people (e.g., Royal Commission on the Donald Marshall, Jr., Prosecution 1989; LaPrairie 1990, 1997, 2002; Aboriginal Justice Implementation Commission 1991; Law Reform Commission of Canada 1991; Task Force on the Criminal Justice System and Its Impact on the Indian and Métis People of Alberta 1991; Royal Commission on Canada's Aboriginal People 1996; Roberts and Stenning 2002; Rudin 2005; *inter alia*). There have also been several significant legal initiatives to address the rate of Indigenous incarceration, such as with the 1996 Sentencing Reform Act, which added section 718.2(e) to the Criminal Code to direct sentencing judges to consider alternative sanctions to imprisonment for Indigenous people. In *R v Gladue* (1999), a landmark interpretation of section 718.2(e), the Supreme Court held that widespread discrimination and adverse socio-economic factors serve as the source of Indigenous over-representation in the criminal justice system and that alternatives need to be fully considered in sentencing. There were also the Supreme Court of Canada cases of *R v Ipeelee* (2012) and the Federal Court decision in *Twins v Canada (Attorney General)* (2017) that extend the *Gladue* principles to breaches of parole and parole, respectively. Under sections 81 and 84 of the Corrections and Conditional Release Act (1992), Indigenous-specific planning and programming in federal corrections were introduced to allow corrections to enter into agreement with Indigenous communities for the provision of correctional and parole services. Restorative justice approaches – such as an Aboriginal court in Toronto – were also introduced into the criminal justice system's existing arrangements. These and other initiatives have been a part of ongoing justice reforms in Canada to address Indigenous incarceration at various levels of the system.

Despite these recommendations and reforms, the Office of the Correctional Investigator (OCI 2015: 36) points out that in the 10-year period between March 2005 and March 2015, the Indigenous federal prison population increased by more than 50%, compared with a 10% overall population growth during the same period. Today, Indigenous people make up 26.4% of the total federal prison population, with Indigenous women composing 37.6% of the federal women prison population (OCI 2017). In the provincial prisons, Indigenous incarceration rates are as high as 80%–90% in some regions of Canada (Perreault 2009). Although policing (e.g., LaPrairie 2002; Rudin 2005) and sentencing (e.g., LaPrairie 1990; Roberts and Reid 2017) have no doubt figured into these rates, the prison itself also contributes to this outcome. According to the OCI (2017), Indigenous prisoners are disproportionately over-represented in higher security classifications, segregation placements, use-of-force interventions, maximum security, and forced interventions – all of which often lead to longer institutional stays. According to the Auditor General of Canada (2016; see also Zinger 2016), in 2015–16, of the Indigenous prisoners released from custody at their statutory release date, 79% were released into the community directly from a maximum or medium security institution without a graduated or structured return. Only 12% of

Indigenous prisoners had their cases prepared for a parole hearing once they were eligible, just 20% were able to complete their mandatory programs by the time they were first eligible for release, and 83% postponed their parole hearings. Fewer Indigenous prisoners are granted full parole by the Parole Board of Canada, and, if they are granted some form of release, it is often later in their sentence. The Auditor General (2016: 16) further notes that

> CSC [Correctional Service Canada] has yet to develop tools to assess how culturally specific correctional interventions for Indigenous offenders, such as Elder services, Healing Lodges, Pathways Initiatives and partnerships with community groups and organizations contribute to an offender's progress toward successful reintegration. CSC sometimes makes security assessments and program referrals for incarcerated Indigenous persons without adequate information from the provincial or territorial courts system. CSC assessments and program referrals can be delayed for months awaiting this information.

Webster and Doob (2014), in their study on Alberta's 1993 decarceration strategy, point out that the reduction in the prison population was the result of a fiscal, political, and public will, and not simply the result of changes in a crime and justice framework. The idea that prisons are a neutral arbitrator of colonial wrongs is nonetheless consistently reflected in the various reports that advance the notion that the penitentiary can do little to address the rates of incarceration (e.g., Task Force on Aboriginal Peoples in Federal Corrections 1988: 8; Standing Committee on the Status of Women 2017: 1). These works, however, alert us to the need to consider the socio-politics of imprisonment and to situate the penal system in a broader set of concerns outside of simply criminal justice reforms.

Locating the penal system in colonialism

(Post-)colonial and Indigenous studies have long pointed out that colonialism is a recurrent and worldwide feature of human history. Unlike in what are referred to as the post-colonies, in settler colonial countries such as Canada, the colonizers stay: "Invasion is a structure and not an event" (Wolfe 1999: 2; see also Veracini 2010, 2013). Settler colonial studies have been useful in rethinking the context of historical and contemporary colonial relations. Strakosch (2015), in her work on neo-liberal colonialism in Australia, shows how the "Aboriginal problem" was reimagined as social and economic deficiencies, leading to a liberal preoccupation with Indigenous welfare, capacity, and resources rather than ongoing colonial arrangements. Audra Simpson (2016) looks at how national apologies, such as the one issued by Stephen Harper in June 2008, give a temporal past to a settler colonial project that masks ongoing genocide, land seizure, and capital accumulation (see also Alfred 2005). Of course, Indigenous communities are not simply "victims" of a modern liberal genesis; they are also actively weaving their own past, present, and future through resurgence and presencing – as seen with the Idle No More movement, for example, among others (Simpson 2011; Corntassel 2012; de Finney 2017; Savarese 2017). Settler colonial studies draw attention to an ongoing colonial enterprise and the ensuing resistances that operate from a decolonial and anti-colonial framework.

Drawing from colonial and Indigenous studies, an emergent body of scholarly literature similarly locates the penal system within a broader context of colonialism. Alexander (2010) and Childs (2015) link the incarceration of black people in the United States to the practices of slavery and segregation as legitimated through Jim Crow laws and prison privatization. In Australia, Baldry, Carlton, and Cunneen (2012) consider how the historic colonial practice of racial "difference" continues to target Aboriginal Australians today in

the penal system. Razack (2015) links Indigenous deaths in custody throughout Canada with the historical violent paternalism that continues through discourses of institutional benevolence. By exploring the penal system within a context of colonialism, this literature reveals how historical practices such as slavery, assimilation, segregation, exploitation, and violence can transform through language and institutions into the present. According to Cunneen and Rowe (2014), there is a dearth of colonial analysis in criminology that recognizes the continuing practices of colonialism in the criminal justice system (see also Blagg 2012). Building on this scholarship that connects interdisciplinary and theoretical boundaries of criminological, (post-/settler) colonial, and Indigenous studies, this work reveals the historical and present links between the penal system and the governing colonial logics implicated in Indigenous incarceration in Canada.

Foundational to understanding the links that continue to exist between colonialism and penality today is the "episteme" – a generalized structure of thought and knowledge that gives discourses and practices their regularity (Foucault 1970). An episteme can be traced through a history of the present that reveals how historic processes have discursively emerged into specific logics – or modes of reasoning – that we continue to cultivate today. A logic of colonialism emerged within modern narratives of progress that made the containment, segregation, assimilation, and elimination of entire populations a central feature of its organizing practices (see Patel 2014). To trace a colonial episteme linked to the penitentiary, I analyse archival material related to the federal penitentiaries from 1838 into the present, alongside major key events in colonial development.[5] For data management, I used NVivo 11.4.3 software (QSR International, 2017) to establish initial themes and link nodal categories, used keyword searches related to Indigenous incarceration, and explored documents on a text-by-text basis. This multi-coding method was useful in both broadly and specifically detecting and linking multiple themes and codes that would not have otherwise been evident or repeatedly saturated (Berg and Lune 2014). Although official reports do not offer a complete account of the material past, they nonetheless provide epistemic insight into the links between colonial and penal systems over time. Stoler (2002: 87) points out that archives must be treated as epistemological experiments "on which power relations were inscribed and [as] intricate technologies of rule in themselves." Rather than complete or accurate sources, official penal reports provide a window into the penitentiary's role in Canada's colonial history.

Colonial logics

With modern colonialism beginning in approximately the mid-fifteenth century, Loomba (1998: 15) points out that by the 1930s, European colonies and ex-colonies covered almost 85% of the globe's land surface. She locates the economic system of advanced capitalism as a crucial difference from earlier forms of colonialism, whereby modern colonialism not only extracted tribute, goods, and wealth from the countries that it conquered but also consisted of a restructuring of local economies, markets, and governance. Quijano and Wallerstein (1992) argue that this pervasive arrangement of colonialism has been so effectively inscribed and normalized into the narration of the genesis of the modern world that colonial logics now constitute modernity itself. What is often considered progress or "civilized" is reflective of a colonial logic that establishes sovereignty over lands, resources, and people – in other words, modernity and colonialism are imbricated aspects of one another (Jackson 2017: 20).

(Post-)colonial studies identify modernity as emerging in the Enlightenment period, with deeply structured processes of colonization rationalized through discourses of progress, science, reason, and nature (see Hall and Gieben 1992). Quijano (2005) identifies four main products of modern colonialism – namely, (1) the racialization of relations between colonizers and colonized, as well as sex, class, and age, among other categorizations; (2) the formation of a new capitalist system of exploitation that included slavery, servitude, and simple commodity production; (3) Eurocentrism as the new mode of production and control, with subjectivity developed within the experience of the colonizer; and (4) the establishment of the nation-state as a new system of control and collective authority. Although not monolithic, these advances framed the basis for advancing imperial control and colonial conquest.

Following Said (1995), the widespread restructuring central to modern colonialism was legitimated through a knowledge system that elevated the colonized through the separation and subordination of the other. Institutions were developed for the specific purpose of separating populations – the old from the young, the sick from the healthy, the mad from the reasonable, the savage from the civil, and the criminal from the law-abiding (Foucault 2003; Chartrand 2017: 677). Advanced through discourses of modern progress, colonial logics made invisible a construction of the colonized as inferior that subordinated their welfare to the colonizer. Thobani (2007) argues that through sociocultural hierarchies, the colonizer was naturalized and universalized as the national subject – a stable, conscious, unified, and reasonable figure, exemplary of the natural order of humanity. These epistemic orderings, central to modern colonial logics, are more obviously reflected in the practices of enslavement, genocide, assimilation, and segregation, but are also perpetuated through refugee, citizenship, and immigrations laws; sterilization practices; child welfare apprehensions; and committal to carceral systems. As Thobani (2007) further argues, colonial logics invest a difference in the quality of humanity that sees the colonized – or other – as deserving of different claims from the national subject and with less entitlements.

Colonial logics are reflective of what Spivak (1988) refers to as an "epistemic violence" – a repressive ordering that has become such a pervasive part of our modern ontological fabric and psyche that we fail to recognize its patterns or challenge its structures. Wolfe (1999, 2006) argues that in modern imperial projects of settler colonies, the language, techniques and practices change, but the overriding colonial logics and structures for dispossession remain. In the context of the penal system, although emerging discursively, this framework also expresses itself throughout Canada's colonial history. By tracing the historic episteme of colonial logics in relation to the penal system, this research makes visible a colonial ordering that persists in Canada today, and it demonstrates how the penal system remains complicit in a project of colonization that continues to project Indigenous people as a problem population.

Modern punishments

In Canada, justice and security apparatuses such as the police, courts, and penitentiaries emerged during the period of early settlement (1763–1867) and nation building (1867–1910) as part of a process to consolidate the nation.[6] Systems of justice helped establish the colony throughout the land through the laying of British laws (e.g., Provincial Penitentiary Act 1851; British North America Act 1867; Federal Penitentiary Act 1868), the

establishment of a federal police force (the Dominion of Police in 1868, the North-West Mounted Police in 1873, and the Royal North-West Mounted Police in 1904), and a national court of justice (the Supreme Court of Canada in 1875). To manage the colonies and secure dominion, penitentiaries would be strategically erected in the more populated areas of the province within five to seven years of joining the federation. This was considered to have a "commanding and salubrious" effect on the population (Minister of Justice 1877: 7). As a structure of modern progress, the penitentiary symbolized advancement for the colony in modernity's quest to establish the laws of the land and eradicate "evils" through humane discipline (Inspectors of the Provincial Penitentiary of Canada 1857: 37).

Often referred to as the great incarceration (Foucault 1977; Beiras 2005; Wacquant 2014), carceral landscapes proliferated to manage and spatialize populations in a way that was compatible with advanced modern systems of governance and sovereignty in regulating populations (Widder 2004: 421). First emerging in 1835, the Kingston Penitentiary was modelled as a state-of-the-art institution at the vanguard of humanitarianism and civilization. Up until the late nineteenth century, visitors would tour the facility, a symbol of modern progress, to admire its structures (Miron 2011). Local gaols, however, predated the penitentiary and operated within the districts to regulate local issues, including Indigenous affairs. Jacobs (2012) establishes the links between the gaols and colonialism: Indian Agents would use band funds to build local gaols on reserves to take over where reserve policies failed. The purpose of the penitentiary, on the other hand, was to replace frontier justice and arbitrary punishments with rationalized measures of punishment and deprivation (Chartrand 2014). For instance, corporal punishment was only administered through scales considered necessary for individual reform: "One lash was inflicted on an Indian, merely as a caution" (Minister of Justice 1884: 26). This policing of a rational penal administration was sought to advance the modern value of the penitentiary, as "prisons shall not become the moral tomb of those who enter them, but rather schools where the ignorant are enlightened and the repentant strengthened. The permanent moral reform of the convict is the chief aim" (Brown Commission 1849: 281). From the onset of early settlement, the penitentiary was intimately woven into the politics of colonialism as a vast new modern mechanism of social control through reformation and securing the nation.

The policing of modern logics within the penitentiary was achieved through a micro-regulation over labour and economics (the superintendent/wardens), moral instruction and schooling (chaplains), and the health of the body (the surgeon). Penitentiary reports consisted of detailed reporting on the minutiae operations of the penitentiaries, including costs, labour, financial disbursements, items owned, population, nationalities, escapes, convictions, refractors, punishments, crimes, convicts returned, injuries, schooling, health, and so on. This level of detail corresponded with a rational modern punishment that sought reformation by maximizing the capacity of the institution and the individual: "The penitentiary is adapted to those whose criminal habits have been formed, and who therefore require reformation in the full sense of the expression" (Minister of Justice 1906: 33). The penitentiary and convict were calculated in terms of their specific function, capacity, and worth; unless properly administered, its object of reformation would be lessened. In short, the administration of the modern prison was established with modes of reasoning that sought to colonize the body, mind, and soul.

Until the mid-twentieth century, the penitentiary in Canada was mostly reserved for white settlers. Race was part of a penal management that was recorded in annual reports through categories such as "White," "Indian," "Half-Breed," "Negroe," "Mullatoe," and "Mongloid." Quijano (2007) points out that the new social classification of race was a part of the process of Eurocentrification that used physiognomic traits as external manifestations of one's "racial" nature. For example, the acting chaplain of the British Columbia penitentiary "strongly advised" that "something be done to separate young offenders from the hardened criminals and especially that the Indians and Half-breeds be permitted to associate as little as possible with the white prisoners" (Minister of Justice 1895: 113). Of the 106 penitentiary reports dating from 1838 to 1968, outside of reported rates of incarceration, Indigenous people were only spoken of in 39 reports, and in no particularly substantive way. Racial themes of pathology and contamination were a part of a colonial logic in penal administration to segregate populations and serve the biopolitical function of increasing the utility and health of the settler state.

As a contaminating influence, penal administration did not see Indigenous people as having the same capacities or needs as settler convicts. Indigenous prisoners were often said to be easily amenable to reform, to have weak constitutions, to lack an ability to adapt to long prison sentences, to be predisposed to diseases like scrofula or tuberculosis, and to pose a significant expense for the penitentiary: "Negroes and Indians cannot bear confinement long in the prison until they are seized with the disease [scrofula] in some of its phases. The Indians, more especially can scarcely spend the full period of the shortest sentence for which they can be sent to the penitentiary" (Directors of Penitentiaries 1870: 28).

Efforts to reduce the Indigenous population in the penitentiary were ongoing and achieved by offering clemency, issuing tickets of leave, providing compassionate leaves, or exonerating through pardons:

> It is pleasing to note that during the year a number of the Indian convicts of the Rebellion of 1885 have been discharged or pardoned. (Minister of Justice 1890: 96)

> I think that [for] the Indian a ten-year sentence means death if not sooner liberated. The possibility of granting a "ticket of leave" is a great boon to this case. (Minister of Justice 1902: 63)

From the 1830s into the 1960s, the rates of Indigenous incarceration in the penitentiaries remained low, averaging from 1% to 8% of the prison population.[7] Though the logics of reformation and assimilation were similar, colonial administration did not see Indigenous peoples as having the same capacities or needs as settler convicts or as belonging to a penal institution.

Reformation, segregation, and assimilation

Lloyd and Wolfe (2016: 111) point out that the period after "conquering the frontier" is typically marked by intensified programs of Native assimilation or "mopping-up exercises for civilization." While colonial systems of justice were initially reserved for the white settler population, the so-called Indian problem was almost exclusively managed by the Indian agent through segregation and assimilation projects to improve on the "less developed people" (TRCC 2015: 18). During the initial stages of settlement, Indigenous people were not considered a part of modernity's advances and were regulated outside of modern institutions on reserves and in local gaols, and they were segregated through racialized legislation.[8]

This dispossession included the ceding of land, the criminalization of culture and ceremony, Indigenous peoples' confinement to and regulation over reserves, the restructuring of Native governance, and mandated residential and industrial school requirements. Given the similarities in the colonial logics of segregation and reformation, the regulation over Indigenous people was consistent with penal models of colonizing the body, mind, and soul. Indigenous regulation was thus similarly achieved through routines of labour and material hardship, moral instruction, and bodily discipline.

Labour in the penitentiary, on reserves, and in residential schools was central to the regulation of populations. Residential school children were making garments and uniforms for prisoners; women prisoners were making clothing for men in prison; and the men in prison would make uniforms, shoes, and desks for the Indigenous children. Labour in the penitentiary was instrumental to an agenda of reforming the criminal, who was sentenced to both the penitentiary and hard labour: "The insufficiency of suitable work for the convicts is a serious detriment to the proper management of the prisons, and it seems extremely desirable for financial, disciplinary and reformatory reasons" (Minister of Justice 1913: 13). Agriculture on reserves was also introduced to provide local sustenance, reduce costs, eliminate nomadic traditions, and instil a work ethic (Milloy 1999: 21). Mosby (2013), in his research on the post-war scientific experiments of testing nutrition on Indigenous populations, highlights that medical practitioners were interested in solving the "Indian problem" by constructing malnutrition as evidence of laziness and apathy. Essential to the colonization of lands and physical infrastructure, forced labour was an organizing feature in the reform of both "problem populations."

In addition to labour, punishments in the forms of floggings, whippings, beatings, food deprivation, and solitary confinement were common practices in both penitentiaries and residential schools. Indigenous children were often chained to their beds, and stocks were used in the playgrounds to prevent escapes (Kelm 1996). In the 1920s, several young Indigenous boys were documented to have committed suicide or died trying to escape the schools to avoid punishment (Kelm 1996: 73). Punishments in the penitentiaries were also documented and debated all throughout the nineteenth- and mid-twentieth-century reports: "Flogging, if it is to be useful as a deterrent, should be at least as public as the execution of a death sentence" (Minister of Justice 1909: 22). Also central to penal and colonial regulation was the control of movement. Indigenous mobility was restricted through a pass system whereby Indian agent authorization and regular reporting to the police chief was required to travel off-reserve. Convicts were similarly regulated through remission and tickets of leave, which also required regular reporting to the police chief. With restricted mobility, as with the penitentiary, the overcrowding of reserves and residential schools were common occurrences (see Minister of Justice 1912; Superintendent of Penitentiaries 1929; Commissioner of Penitentiaries 1959; Kelm 1996: 56). In 1914, the Indian Act (no. 6, s 92) was amended to limit "habitat dwelling" in order to avoid overcrowding and the spread of disease. For prisoners, overcrowding often resulted in transfers to other penitentiaries across the country (e.g., Minister of Justice 1887; Superintendent of Penitentiaries 1924, 1931). Overcrowding and restricted mobility also resulted in higher rates of infectious diseases, particularly tuberculosis or scrofula, on reserves, in residential schools, and in penitentiaries. School administrators often sent sick children home to their reserves, where the contagion would be spread. In prison, sick Indigenous populations would be offered a form of clemency to prevent further spread of infection. As discussed above, the colonial

projects that enabled widespread Indigenous segregation and assimilation were borne of the same modern logics that advanced criminal containment and reformation, with very similar effects. By the mid-twentieth century, however, both the Indian agent and penal operations were inconsistent with modern advances in resolving the "Indian problem" or reforming the "criminal."

Penal assimilation

In Canada, the post-war era brought a new wave of humanitarian-based reforms in settling the nation. Along with civil and human rights, a new relationship between the colonizer and colonized was also developing. Formal segregation and assimilation legislation were replaced with integration policies and "a repositioning of 'Indians' within the general social welfare programs of the state" (Jacobs 2012: 4; see also Sangster 2011; Nason 2016). In 1950, Indian Act amendments repealed the anti-ceremonial and potlatch provisions and barriers to making land claims. Further amendments in 1951 allowed Indigenous women to participate in band democracy; additionally, prohibitions on traditional ceremonies were removed, the residential and industrial school requirement was abandoned, and a standard curriculum was introduced. These trends were the beginning of what Coulthard (2014: 3) explains as a "politics of recognition" – "the now expansive range of recognition-based models of liberal pluralism that seek to reconcile Indigenous assertions of nationhood with settler state sovereignty." During this period, colonialism in Canada shifted from overt domination to a cultural model of acknowledgement with apologies, occasional land titles, and financial restitutions, while the same colonizing relationship that subordinates Indigenous interests to the state was retained (Coulthard 2014: 30–31; see also Macoun and Strakosch 2013: 435).[9] In acknowledging "past wrongs," this shift to a politics of recognition established colonialism as a historic moment, effacing European settlement and Indigenous sovereignty while establishing white settlers as the rightful and national subject. As Scott (1995: 213) points out, while reforms mark a great leap forward in the march of rationality, progress, and freedom, they also signal a reconfiguration of colonial power, its redistribution, and redeployment.

As Canada was hosting a new era of post-war humanitarian reforms, the security function of the state was refining its dominion. In 1955, the Criminal Code was revised to define criminal offences and establish penalties. In 1958, the Parole Act and the National Parole Board were established to replace tickets of leave. In 1947, a national rehabilitation project was implemented for the one federal and eight provincial penitentiaries spanning the nation. Rehabilitation was to restore the promise of an enlightened reformation project of the post-war era. The penitentiary revised its focus to be more in line with a corrective philosophy over labour as the rehabilitative value (Commissioner of Penitentiaries 1959: 1). In 1961, the Penitentiary Act underwent a complete revision to professionalize the system and "reinforce faith in modern, enlightened solutions" (McCoy 2012: 3). Part of this new correctional vision was to include the protection of society, the safe custody of inmates, strict but humane discipline, and the rehabilitation of prisoners through treatment and classifications. Reform was no longer to occur through physical punishments, labour, and moral teaching, but instead through discipline, training, treatment, and re-education (Commissioner of Penitentiaries 1959).

In line with this new penal model, from 1950 to 2000, with the building of penitentiaries, farms, camps, Annexes, training centres, Healing Lodges, and women's facilities, there was

an explosion in the number of prisons. In this 50-year period, approximately 46 federal prisons were built, compared with the 13 penitentiaries constructed in the previous 115-year period. Prior to this, from 1900 to 1960, the general penitentiary population increased by 345%, from 1,424 convicts to 6,344, while rates of Indigenous incarceration only increased 174%, from 31 Indigenous convicts to 85. After 1960, however, the federal rate of Indigenous incarceration increased 1%–3% every year to its current rate of 26.4% – an increase that continues, despite a decrease in the overall prison population since at least 2012 (CSC 2018). Also coinciding with this new penal vision was the disappearance of race from all the federal penal reporting schemes after 1960. By the twenty-first century, with race having disappeared from its reports, the penitentiary was quietly hosting a new problem population as formal assimilation practices receded (see Hogg 2001; Cunneen and Tauri 2016). The active biological racism of colonial times was giving way to a sanitized racism of equal opportunity and treatment (Harding 2006).

Where in the earlier periods of colonialism, Indigenous people were considered to have the wrong constitution for the advances of the penitentiary, in the era of recognition, new knowledge was now developing around the "Native criminal." In 1964, the Department of Indian Affairs and Northern Development commissioned the Canadian Corrections Association (1967) to investigate Indian criminality and imprisonment as a result of increasing negative media accounts that projected the stereotype of the "drunk Indian." The report, entitled *Indians and the Law*, showed that Indigenous incarceration increased from 2.5% in 1960 to 15% in 1965 across six federal penitentiaries – Dorchester Penitentiary, Manitoba Penitentiary, Saskatchewan Penitentiary, BC Penitentiary, William Head Institution, and Agassiz Camp.[10] The report established a "legacy of colonialism" as the driving force to the incarceration rates. To address this, the report recommended Native programming, community liaison, after-care support, legal advocacy, less policing, reduced jail sentences for liquor offences, the expansion of existing criminal justice services, the hiring of Native people in the system, the elimination of residential schools, and addressing treaty and land rights. Since this first report in 1967, many studies have followed in a long and ongoing series of similar accounts and recommendations (e.g., Law Reform Commission of Canada 1974; Solicitor General of Canada 1975; Task Force on Aboriginal Peoples in Federal Corrections 1988; Law Reform Commission of Canada 1991; Solicitor General Canada 1994; Forum on Corrections Research 2002; OCI 2004, 2012; *inter alia*). As Strakosch (2015: 7) points out, a politics of recognition advances a liberal citizenship that "includes Indigenous people as citizens and … allows the [ongoing] selective coercion, racial pathologisation and exclusion of Indigenous subjects in order to maintain settler privileges." Having already passed through similar institutions and laws of segregation and assimilation, a shift from the Indian agent to a penal ethos was invisible, uneventful, and seamless.

The penitentiary silently displaced reserves and residential schools to what now has become "Native" and eventually "Aboriginal criminality." With penal advances and expansion acting in tandem with the receding of formal colonization practices, the prison took over as the new expression of colonialism. Civilizing Indigenous difference remains the deep logic of settler colonial authority (Wolfe 2006). As Douglas and Finnane (2012) show in their research on colonial law in Australia, shifts and ruptures are often simply concessions and reforms rather than actual moves toward self-determination (see also Million 2013). This does not suggest that Indigenous difference and autonomy has been erased or vanished (see Coulthard 2010; Simpson 2011) but that rather little has been done by the nation-state

to dismantle the settler colonial relationship or a project of reformation, segregation, and assimilation. Muhammad (2010) argues that the colonial principles of inferiority have been repackaged now through a language of criminal justice. As the author argues, black people are assumed not to be worthy of full citizenship until they conquer their vices, now through the tropes of broken homes, violence, alcohol and drug use, poverty, and bad parenting. Where civility and savagery were the tropes of the Indian agent, the discourse eventually shifted to symptoms of a colonial legacy and ensuing criminality. The penitentiary is fundamental to this process of reproducing Indigenous people as a colonized and now criminalized group, subsumed into criminal justice language and logics (Cunneen and Tauri 2016: 69). In the penal system, the social hierarchies upon which modern colonialism is built remain obscured in its project of reforming the "criminal" (see Andersen and Denis 2003).

Projected in rationalist terms of modern progress and intervening along well-established discourses of criminal reformation, Indigenous incarceration became a normal and legal response to former assimilation and segregation practices – slowly replacing the white settler as overall decarceration rates decline. The historical racial divides used to keep Indigenous people out of the penitentiary (e.g., lack of resources, capacity, weak constitution) shifted to a politics of recognition that assumed equal treatment and participation *within* the system. While penal research and recommendations continue to attempt to address the context of a colonial past, the underlying episteme nonetheless maintains the rationality of segregation and assimilation. In other words, the question of "why the prison?" never enters the discussion. As Saleh-Hanna (2015: para 9) points out, "crimes of enslavement within plantations, chain gangs, reservations, and penitentiaries are shielded from moral interrogation, while processes of confinement (whom, how and for how long) take precedence." This shift is an important epistemological cornerstone of a colonial trajectory whereby, given its coherence with colonial logics, the penitentiary, along with similar carceral institutions such as youth detention centres (Sangster 2002) and child welfare (Blackstock 2007), quietly emerged as a natural response to the "Indian problem." A shift to the criminal justice system disperses the colonial logic into something necessary and normal and obfuscates the same logic and processes used throughout the history of colonization. This is the epistemic violence of colonialism that retains the historical binaries of colonizer and colonized.

Conclusion

From its inception, the penitentiary has been central to a project of modern colonialism in Canada in establishing settler dominion. Although the penitentiary was not a part of the initial project of colonizing Indigenous people, given that it was born of the same logics, it quickly replaced the receding of formal assimilation and segregation policies in the latter part of the twentieth century. Part of what has made it difficult to investigate colonialism as part of the present has been a politics of recognition that situates colonialism as an artifact of the past. Discourses of progress and modernity give the appearance that Indigenous incarceration is a consequence or effect of a colonial legacy that exonerates our current systems and structures from scrutiny. Similarly, where the literature links Indigenous incarceration to administrative, procedural, and systemic forms of racism and socio-economic deprivation, it makes the existing colonial relationship appear irrelevant today. This is particularly germane when containment, segregation, and reformation remain a part of ordering and regulating populations. Modernity still has violent consequences for colonized people.

By tracing a colonial episteme that has persisted over time between the penitentiary and a project of colonization, this research goes beyond a crime and justice framework by locating when the levels of contact between Indigenous people and the federal prison system began to occur and the socio-political context of that occurrence. This is significant from both an analytical and conceptual standpoint, as a historical analysis of penal and colonial trends makes visible the frequently denied or obscured connection between penal and colonial structures and logics that persist today. Without changing the underlying colonial relationship, we not only ignore the ways that colonialism continues to exist today; we also continue to offer colonizing arrangements as part of the remedy. This is relevant not only for Canada but also for other settler countries with similar trends and increasing rates of incarceration. As we move into justice reforms, with studies and restructuring under way in Canada, discussions should focus on this context of colonialism, with solutions rooted in untethering the colonizing relationship. This involves front-end and long-term strategies that are Indigenous-led and invested in self-determination, rights and entitlements, decarceration strategies, and the mitigation of the damaging impacts of an ongoing colonial encounter within the criminal justice system.[11] As was seen in the nineteenth and early twentieth centuries, and as highlighted by others (Webster and Doob 2014; Auditor General of Canada 2016; OCI 2017), the prison administration has significant capacity to affect the rates of Indigenous incarceration.

Notes

1 I first acknowledge the traditional custodians of the land known today as Canada. I also acknowledge Robert Otagan, Neegan Sinclair, and Jacqueline Ramanow for their teachings during the creation of this work. I would like to thank Kevin Walby for his generous feedback on an earlier draft. I am also grateful to the *Canadian Journal of Criminology and Criminal Justice* reviewers for their thoughtful comments. This work was funded by the Bishop's University Senate Research Committee's Research and Creative Activity grant. The opinions, findings, conclusions, and recommendations expressed in this article are those of the author and do not necessarily reflect those of the funding agency.

2 In addition to a wide-scale review by the Justice Department's "transforming the criminal justice system," there is also the Senate Committee on Human Rights, which carried out what has been referred to as a landmark study on the issues relating to the human rights of prisoners in the correctional system. At the House of Commons, the Standing Committee on Public Safety and National Security investigated Indigenous people in the correctional system, while the Standing Committee on the Status of Women explored Indigenous women in the correctional system. Quebec also carried out its own work in this area through the Public Inquiry Commission on relations between Indigenous peoples and certain public services in Quebec.

3 The term "post-colonial" has been widely criticized for conveying an idea of linear progress that telescopes crucial geopolitical distinctions into invisibility, infers a break with historic practices, and fails to consider settler colonial relations (McClintock 1992; Shohat 1992; Saleh-Hanna 2015). While it is important to highlight that the term "post-colonial" creates numerous unresolved tensions and contradictions for colonial scholars, it is beyond the scope of this article to resolve them.

4 The *Spirit Matters: Aboriginal People and the Corrections and Conditional Release Act* (OCI 2012: 12) report states that "up until the 1960s, it is generally acknowledged that Aboriginal people were, in fact, underrepresented in federal penitentiaries. That changed over the following years and was finally recognized by the Federal Government in a 1975 report by the Treasury Board Secretariat" – however, there is no actual recorded documentation of this finding.

5 Archival data related to the Ministry of Justice, the Office of the Solicitor General, the Office of the Correctional Investigator, the Correctional Service of Canada, Public Safety Canada, and Aboriginal Affairs and Northern Development Canada were obtained online and from Library and Archives Canada and the Government of Canada Public Library. Data consist of annual penal reports, commissions, correctional studies, legal analyses and briefs, legislative acts, and other official reports.

6 Modern colonialism in Canada can be generally divided into five time periods: contact and conquest (1497–1763), early settlement (1763–1867), nation building (1867–1910), the height of assimilation and segregation (1910–60), and the rights and humanitarianism era (1960–present) (adapted from Armitage 1995).

7 It is important to note that incarceration rates varied between regions, whereby the Prairies and British Columbia often reflected elevated numbers of Indigenous incarceration, sometimes upward of 11%.

8 The Gradual Civilization Act (1857) set out enfranchisement processes. The Enfranchisement Act (1859) further elaborated on enfranchisement, restricted individual land holdings, and stripped women and children of their Indian status through marriage to non-Indians. The Dominion Lands Act (1872) encouraged European settlement through land entitlements. The Indian Act (1876) consolidated existing legislation with more power to the superintendent general of Indian Affairs and provided the Department of Indian Affairs with legal and administrative powers to declare any traditions, ritual life, social and political organization, or economic practices as obstacles to Christianity and civilization. In 1909, the Indian Act was amended to make residential school attendance compulsory for Indigenous children between the ages of 7 and 15 years. By 1927, 80 residential and industrial schools were in operation, with over 17,000 children in forced attendance (Legacy of Hope Foundation 2011).

9 The post-war shift was catalysed with the *Statement of the Government of Canada on Indian Policy (The White Paper, 1969)* (Department of Indian Affairs and Northern Development 1969), which sought complete Indigenous assimilation, the dismantling of state fiduciary duty, and the elimination of Indigenous claims to land, self-determination, treaty rights, and nationhood (Gardner and Clancy 2017).

10 Ontario and Quebec were found to have insufficient data.

11 For example, the Private Member's Bill C-262 (42-1), An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous People, introduced in 2016 and currently in its second reading in the Senate, outlines the implementation of the United Nations Declaration on the Rights of Indigenous People with a right to self-determination. Other existing legislative remedies allow for the use of sections 81–84 of the Corrections and Conditional Release Act (1992), where Indigenous and non-Indigenous prisoners can serve their sentence and parole in a supported way in the community.

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