

Beyond Settler Carcerality:  
Abolition and Reparatory Justice in Canada

by

Dr. Sarah Annabella Riley Case

May 2025

Prepared for the Canadian Network for Equity and Racial Justice (CNERJ)  
Tiohtià:ke/Montreal 2025

Acknowledgement: this paper benefitted from research support by Ta'Ziyah Jarrett

© Sarah Annabella Riley Case

# Contents

I	Summary.....	1
II	On Framing: Telling Truths and Exceeding Narratives of Damage .....	5
III	The Weight of History on Canada’s Carceral System .....	9
	i.    The Racial Distribution of Canada’s Criminal Law .....	10
	ii.   Settler Colonialism and the Roots of Carcerality as a Social Structure .....	15
IV	Abolition and Reparatory Justice in Theory and Practice .....	25
	i.    Why Abolition and Reparatory Justice .....	26
	ii.   Abolition: Mindful Actions Beyond Police and Prisons .....	27
	iii.  Reparatory Justice: Redress for the Past and Seeking Guidance from Below .....	35
V	Conclusion: Sustaining Critical Reflection .....	41
	References .....	42

# I Summary

This research explores the detrimental effects of Canada’s criminal law on racialized communities, and alternative possibilities for achieving safety, responsibility, accountability, and healing for everyone. The research was commissioned by the Canadian Network for Equity and Racial Justice (CNERJ) and is rooted in the network’s anticolonial and antiracist orientation to fostering equity across the territories that Canada claims of Turtle Island.

Setting aside for a moment the language used in the title of ‘settler carcerality’ – which will be used to describe Canada’s criminal law and its racial foundations – it must be acknowledged from the start that Canada’s criminal law is widely taken-for-granted as needed and good. If around the dinner table, at community agencies, or in the news, some criminal law rules are commonly said to need reforms, this narrative about progress *within* and *by* the state comes from a particular standpoint – one that assumes the propriety and effectiveness of criminal law, overall, for achieving safety, order, and justice.<sup>1</sup>

On the other hand, the terms used in this research such as ‘settler carcerality’ and ‘carceral system’ help to decenter and reflect on this basic assumption. At a fundamental level, this language may question what the ‘rule of law’ means in Western democratic states, such as Canada.<sup>2</sup> Here, it questions why the rule of criminal law is premised on and reinforces measures that are *dehumanizing*. Take solitary confinement, a practice that Canada claims to have eliminated after facing mounting resistance, but that has been longstanding and that persists in new forms.<sup>3</sup> Solitary confinement significantly targets Black and Indigenous prisoners,<sup>4</sup> while the fact of isolating anyone for extended periods, and in horrific conditions, also sheds light on the essential inhumanity at the core of caging people in prisons at all.

Indeed, ‘carceral system’ refers to a web of institutions and techniques that discipline people through imprisonment and beyond – notably, through legislation, policing, judicial discretion, and the routine administration of prisons and parole.<sup>5</sup> Carceral systems are based on dominant assumptions that certain behaviours, and that certain people, are deviant and dangerous, requiring state control and punishment.<sup>6</sup> The mention of policing and prisons above illustrates that carceral systems involve coercion (e.g., the threat of punishment), surveillance, and violence.<sup>7</sup> They also surpass criminal law to include many domains of everyday life,<sup>8</sup> such as immigration regulation (e.g., policing, deportation), mental health policy (e.g., confinement, forced medication), education (e.g., policing, expulsions). This paper acknowledges that the experiences of any person subject to carcel systems will cross over such

---

<sup>1</sup> *Corrections and Conditional Release Act*, SC 1992, c.20, s. 3.

<sup>2</sup> Mariana Valverde, Kamari Clarke, Eve Darian Smith, and Prabha Kotiswaran, ‘Contested Laws, Contested Societies’ in Mariana Valverde, Kamari Clarke, Eve Darian Smith, and Prabha Kotiswaran, eds, *The Routledge Handbook of Law and Society* (2021).

<sup>3</sup> Public Safety Canada, *Solitary Confinement and the Structured Intervention Units in Canada’s Penitentiaries: The Final Report of the SIU IAP* (2024).

<sup>4</sup> Office of the Correctional Investigator, *A Case Study of Diversity in Corrections: The Black Inmate Experience in Federal Penitentiaries* (2013) [OCI, *Black Inmate Experience*]; Ivan Zinger, *Ten Years Since Spirit Matters: A Roadmap for the Reform of Indigenous Corrections in Canada* (2023).

<sup>5</sup> Michel Foucault, *Discipline and Punish* (1975).

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

areas that Canada purports to govern separately, while, as mentioned before, the focus of this research is on criminal law.

From this standpoint onto criminal law (of informed and critical reflection onto its settler carceral character) one might even question whether Canada has legitimate authority to define law and justice on these lands.<sup>9</sup> Government administrators have claimed the authority to do so since the 17<sup>th</sup> century, purportedly on behalf of Indigenous nations, Black people, migrants, poor people, those experiencing precarities of labour, housing, health....<sup>10</sup> However, British, French and, later, Canadian administrators have managed populations in ways that are odds with the self-determined visions of law and justice that marginalized individuals and communities foster, based on their own cultural traditions and needs.

As this report will discuss, although Canada's criminal law is therefore premised upon a logic about the morality and practical outcomes of disciplinary measures, the criminal law is neither universally moral nor effective at promoting safety, order, and justice. On the contrary, the well-known consequences of Canada's carceral logic are to siphon precious funds, to perpetuate violence, and to overwhelmingly deprive already marginalized, often racialized people, of their wellbeing. In the case of Indigenous peoples, the wellbeing that Canada denies includes the full exercise of their sovereignty, for our purposes their sovereignty to be self-determining overall, to resist colonialism without criminalization, and to rebalance relations among individuals and the community when hurt and harms occur.<sup>11</sup>

Canada is, after all, a settler colony. In the United States there are quite public conversations about the weight of transatlantic slavery and the plantation system on the present-day 'prison industrial complex'.<sup>12</sup> Discussions around the 'disproportionate' impacts of Canada's criminal law on primarily Indigenous and Black communities are finally gaining attention, especially since the 2015 Truth and Reconciliation Commission (TRC) Calls to Action<sup>13</sup> and the 2020 uprisings for Black life.<sup>14</sup> The popular framing around proportionality is troubling, however, because it presumes that there is an appropriate level of criminalization and imprisonment for Black and Indigenous people,<sup>15</sup> while this paper proposes that carcerality, as a historically developed and continuing *logic*, can be understood otherwise: as *fundamentally inhumane* and therefore *inherently demanding alternatives* rooted in non-domination. At the same time, the language of disproportionality highlights that Black and Indigenous people can expect to be targeted by police, receive harsher sentences, be placed in maximum security facilities, and so on – in other words, it highlights that their oppression, within and by the state, is *predictable*.

---

<sup>9</sup> Shiri Pasternak, 'Jurisdiction and Settler Colonialism: Where Do Laws Meet?' (2014) 29:2 CJLS 145.

<sup>10</sup> Mariana Valverde, 'Liberalism' in Mariana Valverde, Kamari Clarke, Eve Darian Smith, and Prabha Kotiswaran, eds, *The Routledge Handbook of Law and Society* (2021).

<sup>11</sup> Beverley Jacobs, Yvonne Johnson, and Joey Twins, 'Decolonizing Corrections' in Sujith Xavier, Beverley Jacobs, Valarie Waboose, Jeffery G. Hewitt, Amar Bhatia, eds, *Decolonizing Law: Indigenous Third World and Settler Perspectives* (2021).

<sup>12</sup> Interview of Ruth Wilson Gilmore, Alberto Toscano, and Brenna Bhandar by Daniel Denvir, 'The Prison-Industrial Complex Goes Beyond Cops and Jails. It's All Around Us.' *Jacobin* (2022).

<sup>13</sup> Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (2015) [TRC, *Calls to Action*].

<sup>14</sup> See Sarah Riley Case, 'To Protest for Black Life during the Pandemic: Resistance and Freedom in a Settler State' (2024) 38:3 CJLS 316 [Riley Case, 'To Protest'].

<sup>15</sup> Maria Dugas, 'Addressing Anti-Black Racism in Sentencing: A Critical Comparison of *R v Anderson* and *R v Morris*' (2024) 103:3 Can Bar Rev 644 [Dugas, 'Sentencing'].

It is important to emphasize, again, in this respect, that Canada is still colonial – it is a settler colonial state where Europeans of centuries past came to stay. People, such as you and me, living under Canada’s present-day jurisdictional claims have inherited carceral systems that began with the transplantation of Anglo-European worldviews and practices aimed at Indigenous genocide, African slavery, precarious migrant labour, and mass white settlement across Turtle Island.<sup>16</sup> This ‘social contract’ of Western liberal democracy, the philosopher Charles Mills described as, effectively, a *racial contract*,<sup>17</sup> and it plays out in ever shifting directions, recently, for example, in the targeting of protesters against genocide and apartheid in Palestine.<sup>18</sup>

Government officials and citizens (a distinctive state subject) reproduce such distressing structures of ‘our society’. Whether we are born into or migrate to Turtle Island, we are all bound up with settler carcerality, albeit in differing intersectional ways. We should never lose sight of this fact: that individuals and communities will be *positioned differently* (intersectionally) in respect of settler carceral systems. Nonetheless, a central message of this report, drawing on Black feminist thought, is that not only Black, Indigenous, and further racialized people benefit from anti-carceral practices – everyone does.<sup>19</sup>

This is not simply because many marginalized individuals living under white supremacy are themselves white, including poor people, disabled people, and prisoners. It is primarily because, as a human species, we are each and collectively bound up in carcerality, and therefore we are each and all bound up in renewed commitments to *our collective humanity*. This is true however remote, quiet or individualized demonstrations of humanity for others may seem in everyday life (e.g., the criminal record of someone unknown to us being expunged).

Apart from describing the reliance of criminal law on racial harms, this research therefore also reflects on what our individual and collective responsibilities are when living under settler carcerality, and it explores possibilities for living otherwise. Ideally, this forward-looking direction would take up the bulk of the paper, because documenting harmful experiences can be an endless, unproductive orientation, as too many reports have shown. However, it is necessary to tell truths about the wrongs, hurt and harms that the state inflicts for the sake of honesty, which provides a foundation for an alternate reality, especially in Canada where dominant institutions obscure well-documented state oppression through narrative erasure (e.g., across the education system, data collection, media, electoral democracy, Canada’s official policy of multiculturalism...)<sup>20</sup>

Moreover, the CNERJ goals for this research are to enable conversations among grassroots agencies that support directly affected individuals and communities. So, the research (and the writing, to the extent

---

<sup>16</sup> Amar Bhatia, ‘Statehood, Canadian Sovereignty, and the Attempted Domestication of Indigenous Legal Relations’ in Sujith Xavier, Beverley Jacobs, Valarie Waboose, Jeffery G. Hewitt, Amar Bhatia, eds, *Decolonizing Law: Indigenous, Third World and Settler Perspectives* (2021); Natsu Taylor Saito, *Settler Colonialism, Race, and the Law: Why Structural Racism Persists* (2020).

<sup>17</sup> Charles Mills, *The Racial Contract* (1997).

<sup>18</sup> Joshua Sealy-Harrington, ‘Righteous Student Activism and Evolving Anti-Palestinian Reprisal in Canada’ (2024), Canadian Dimension; Waniza Wasi, ‘Sacrifice and Silence Neoliberalism, Right-Wing Populism, and the Repression of Pro-Palestinian Student Movements at Alberta Universities’ (2025) 2:2 Can J Academic Mind 109.

<sup>19</sup> Riley Case, ‘To Protest’, note 14.

<sup>20</sup> Rinaldo Walcott, ‘The Book of Others (*Book IV*): Canadian Multiculturalism, the State, and Its Political Legacies’ (2014) Can Ethnic Studies 46:2 127; El Jones, *Abolitionist Intimacies* (2022).

possible)<sup>21</sup> is meant to be approachable for a broad audience consisting of those agencies as well as directly affected persons themselves, academics, other service providers, and activists, who will have differing experiences and knowledge.

The next section of this paper, Part II, follows up on these considerations to share a methodological note on the attempt made here to tell truths *and* exceed narratives of damage. Specifically, Part II navigates a concern that focusing on the oppression of racialized people may reproduce harms that this focus seeks to overcome – in other words, it may reproduce *deficit thinking* about racialized people. Since knowledge produces our world, shifting narratives to how the world, and human relations within it, ought to be is crucial for transformation. Those supporting marginalized folks, and affected individuals and community themselves, might therefore refocus attention on our *desires*. At the same time, as mentioned above, it will be necessary to take stock of where we find ourselves and the reasons why. The remaining parts of the paper thus bare out this method of holding harm and desires together.

Part III expands on the Summary to trace Canada’s history of settler carcerality, sharing truths about the present-day effects of the past on racialized individuals and communities caught up in the criminal law system. This section aims to chart out key elements of criminal law, which go beyond the *Criminal Code*, to include routine state practices such as racial profiling, the use of judicial discretion in sentencing, and the use of assessment tools in prisons that funnel Black and Indigenous prisoners into maximum security, for instance. Readers of this section will be asked, as well, to reflect on the fact that ‘crimes’ are not hard, objective facts, but social constructs about certain behaviours and people said to be criminal. Thus, although all human societies will undoubtedly address conduct that members may consider wrong, the morality of this conduct is variable and need not imply *criminalization* and *punishment*, including incarceration,<sup>22</sup> which are historically developed state structures marked by racial disparities. Nor must the state be involved in the means to redress wrongs, hurt, and harm, however they are defined,<sup>23</sup> as alternatives may better respect community needs and desires.

Given that policing, prisons, and other elements of criminal law are state structures, and reproduce racial injustices, Part IV turns to alternative theories and practices seeking to foster safety, accountability, responsibility, and healing. This section explores the two frames of *abolition* and *reparatory justice*. Conversations about prison abolition, defunding the police, and related visions of law and justice, are gaining in popularity, and yet many readers will assume that abolition is irrational, unachievable, maybe even inflammatory. This section seeks to dispel these mainstream stories about abolition, tracing it to the advocacy of women and queer folk of colour, and grounding discourses of abolition in the revitalization of Indigenous legal orders. The section then attempts to connect abolition to the concept of reparatory justice, which has many historical and present-day sources, while it basically stands for the notion that racial justice in the present demands redress for the past, so all of humanity may strive for a future beyond domination.

---

<sup>21</sup> This includes the priority of citing publicly available reports, scholarship, and popular media, even where there may be rich sources behind paywalls. However, there have been limitations in the author’s ability to locate such sources and render the text broadly accessible, mostly due to time.

<sup>22</sup> See generally, Jeffrey Kennedy, ‘Crimes as Public Wrongs’ (2021) 27 *Leg Theory* 253.

<sup>23</sup> *Ibid.*

Abolition and reparatory justice may seem theoretical, but they are truly about figuring out how to plot and realize concrete ‘mindful actions’ in daily life.<sup>24</sup> This Part therefore also explores strategies and tactics from below, drawing on examples of initiatives that are underway across the jurisdiction that Canada claims of Turtle Island, and that might be evaluated for their emancipatory potential. This section considers grassroots initiatives as well as how they get taken up in the system in practical ways, for example using Impact of Race and Culture Assessments (IRCAs) during sentencing. IRCAs are provided among the examples because they may help criminalized individuals reduce their sentences and yet, depending on how IRCAs are framed, they may *reproduce* deficit thinking about racialized people and hide state oppression.<sup>25</sup> The paper proposes the alternative of *reparatory narratives*, as a result.

This highlights the need for diligence in engaging reflectively and carefully with state institutions. Recognizing that this paper has limitations in reflecting upon strategies, tactics, and initiatives (because it is a brief review and many efforts in Canada lack visibility), this section therefore also poses questions about how people advocating for racial justice may sustain critical reflection about their own concrete actions, instead of deferring to Canada’s settler carcerality – also, given many agencies receive government funding. The idea is to provide some avenues for readers, coming from diverse life and work experiences, to engage each other in conversations by and for themselves, which this research simply cannot do.

The paper ends in Part V with final reflections on the resonance of mindful actions for living beyond oppression, drawing on the forward-looking insights from the paper, in particular the proposal in Part II to advance a ‘desires-based framework’ (rather than a deficit lens onto those made vulnerable to settler carcerality), rooted, as such a framework would be, in a commitment to respecting and nurturing everyone’s full humanity, however each of us is positioned.<sup>26</sup>

## II On Framing: Telling Truths and Exceeding Narratives of Damage

An important consideration for leading this research was how *not* to repeat much of what has already been documented about the harms that Canada’s criminal law inflicts on racialized individuals and communities. As mentioned before, there is a paradox at the heart of this consideration.

On the one hand, there are countless reports that describe harms within Black, Indigenous and further racialized communities living within the jurisdiction that Canada claims. To provide an example, as early as 1977, a government commissioned report exposed the racist violence of Toronto police. That report was produced *half a century ago*, and was ironically called *Now Is Not Too Late*.<sup>27</sup> Similar studies proliferated into the 1990s, when comprehensive reports of note were released, such as the Stephen Lewis Report *Race on Relations* (1992), with a focus on anti-Black racism and criminal law,<sup>28</sup> the Report of the Royal Commission on Aboriginal Peoples (1996), which situated criminal law among structures of

---

<sup>24</sup> Ruth Wilson Gilmore, *Abolition Geographies: Essays Towards Liberation* (2022), 490 [Gilmore, *Abolition Geographies*].

<sup>25</sup> Riley Case, ‘To Protest’, note 14; Dugas, ‘Sentencing’, note 15; Danardo Jones, ‘Paradoxical Race Visibility in Canadian Sentencing Law’ (2024) 102:2 Can Bar Rev 419.

<sup>26</sup> Eve Tuck, ‘Suspending Damage: A Letter to Communities’ (2009) 79:3 Harvard Educational Rev 409.

<sup>27</sup> Walter Pitman, *Now Is Not Too Late* (1977).

<sup>28</sup> Stephen Lewis, *Report on Race Relations in Ontario* (1992).

Indigenous dispossession,<sup>29</sup> and the Report on Federally Sentenced Women (1990), which documented experiences of incarcerated Indigenous women.<sup>30</sup> The production of data on race and criminal law has since only increased, alongside the increasing criminalization and punishment of racialized people. Still, the availability of such information varies based on the topic, demographics, province and territory, and communities routinely call for *more* information, specifically disaggregated data, which may be a laudable form of advocacy.

At the same time, the production and proliferation of research on racialized people living in Canada has played a role in portraying them/us as almost bound to harm, predisposed to the conditions that they/we withstand – a lack of education, disproportionate imprisonment, and poverty, for instance. This gives rise to apprehensions that research may reinforce a *deficit* lens, where the humanity of racialized people gets lost in statistics and essentialism – turning people into abstract *objects* of analysis.<sup>31</sup> It may also obscure the determinative role of the state, and settler carcerality in our case, in oppressing people.<sup>32</sup>

This is a complex topic and may benefit from disentangling. Again, usually, and honourably, community advocates call for more information on the harms that racialized people sustain to gather empirical evidence that mirrors their known experiences and, thus, justify governmental reforms. This is largely because Canadian governments routinely argue there is insufficient evidence of oppression under its purview, while also opposing the collection of race-based disaggregated data.<sup>33</sup> Nonetheless, the genesis of collecting race data is also, paradoxically, traceable to imperialism, colonialism and the advent of capitalism, which relied on categorizing human beings – who do, factually, belong to the same biological species – into separate ‘races’ based on tropes that facilitated land theft, slavery, and other racial exploitation. Hence, the present-day drive among advocates to produce *more documentation* of racial disparities, however altruistic, risks reinforcing stereotypes that have undergirded oppression in the first place, without acknowledging the fact that government claims about insufficient evidence are a ‘distraction’,<sup>34</sup> used to evade responsibility for racism.

From at least the 17<sup>th</sup> century until today, there has indeed been an *overwhelming* documentation of racialized and poor people, couched in the purported scientific language of race. However, it has often, in the paradox described above, reflected white supremacist purposes and misrepresentations, consolidating rather than overcoming racial oppression. As mentioned before, race is not a biological fact, but a social construction,<sup>35</sup> a process of *racialization*, that has consolidated over centuries according to primarily Anglo-European ideologies and institutions that have made race *seem* real. Racial thinking is

---

<sup>29</sup> Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (1996) [RCAP, *Report*].

<sup>30</sup> Correctional Service of Canada, *Creating Choices: The Report of the Task Force on Federally Sentenced Women* (1990).

<sup>31</sup> Essentialism refers to the notion that people are predisposed toward certain behaviours based on markers of identity and expression such as race, gender, class, ability, and sexuality. See Angela P. Harris, ‘Race and Essentialism in Feminist Legal Theory’ (1990) 42:3 *Stan L Rev* 581. On the objectification of people’s experiences, see Adrian Smith, ‘Seeing Like a Clinic’ (2022) 59:1 *Osgoode Hall LJ* 37.

<sup>32</sup> Smith, *Ibid*.

<sup>33</sup> Jones, note 20, p. 64.

<sup>34</sup> Toni Morrison, “A Humanist View” (Public Dialogue on the American Dream Theme delivered at Portland State University, 30 May 1975) [unpublished].

<sup>35</sup> Ian Haney López, *White by Law: The Legal Construction of Race* (1996).

now reproduced, as a matter of daily life, almost universally.<sup>36</sup> The gathering and use of social science evidence has been part and parcel of this *longue durée* of racialization, operating to embed racism. Some examples may be helpful.

The production of statistics through the Census, for instance, has been a key technique of racialization, beginning as it did with colonial administrators around the world classifying people into different supposed races for population control.<sup>37</sup> This kind of deliberate calculus was also a key technique of slavery, which relied on slave ship logs, insurance estimates, profit projections, among other accountings, that tallied the bodies of enslaved Africans according to, what Katherine McKittrick calls, the ‘mathematics’ of Black life.<sup>38</sup> To provide another example, from the recent past, the 1969 Statement of the Government of Canada on Indian Policy, known as the White Paper, reproduced a skewed view of indigeneity through social science research. The White Paper was premised on describing the serious challenges that Indigenous peoples do face on these lands, while it proposed, in response, perhaps in anticipation, to assimilate Indigenous peoples into the Canadian polity in the name of beneficent ‘equality’.

These examples are, of course, not the same as contemporary reports on the harms that Canada’s criminal law inflicts on racialized communities. And yet, there is a factual connection between them, and a corresponding apprehension that some Black and Indigenous thinkers have expressed. Namely, that by repeating narratives about the deprivations that racialized people experience, researchers, advocates and communities themselves may perpetuate the longstanding narrative, traceable to colonial data production, that non-white people are *lacking* and requiring of state paternalism, while evading state responsibility for oppression.

This deficit lens maintains and fuels stereotypes, rather than contesting them, making the plight of marginalized folks seem natural, just as race seems natural (but is not). Focusing efforts on representing harms may make it seem that the very essence of non-white people is an absence of wellbeing. And the solutions that such research proposes may be premised on the notion that reforms – beneficent government measures – are needed to correct our brokenness. Whereas alternative practices could be premised on the understanding that governments and certain citizen-subjects are responsible for wrongs that they commit against racialized people. Alternatives could thus also promote the self-actualization of marginalized people, our self-determination, under but also *beyond* state oppression.

Eve Tuck is one scholar and advocate who has brought attention to this issue. In a public letter, called *Suspending Damage*, she proposed a moratorium on ‘damage-centered research’ in favour of a shifting toward a ‘desires-based framework’.<sup>39</sup> Crucially, Tuck’s appeal is directed at community members and supporting agencies as much as it is at researchers and educators. The idea of a ‘desire-based framework’ is to recognize the complex experiences of racialized and otherwise marginalized people, which include hurt and harm as well as our wisdom and hope.

The lives of racialized people are, of course, marked by contradictions, some are mentioned throughout this paper. There are many ways in which Anglo-European worldviews and practices have become

---

<sup>36</sup> Denise Ferreira da Silva, *Toward a Global Idea of Race* (2007).

<sup>37</sup> See e.g., Debra Thompson, *The Schematic State: Race, Transnationalism, and the Politics of the Census* (2016).

<sup>38</sup> Katherine McKittrick, ‘Mathematics Black Life’ (2014) 44:2 Black Scholar 16.

<sup>39</sup> Tuck, ‘Suspending Damage’, note 26.

embedded in our habits and psyches.<sup>40</sup> Tuck cites the desire to purchase sneakers from an unethical company for social status, as a simple example. More relevant to this paper, it could be said, as Tuck also explores, that marginalized people may internalize narratives of damage, which then frame how we approach demands for change.

In contrast, a desire-based framework for advocacy, and community life, would acknowledge the real effects of harms perpetuated under settler colonialism, and the carceral system that settler colonialism depends on and perpetuates, while also foregrounding our humanity and self-assuredness. A desire-based framework would therefore *depathologize* narratives about how racialized individuals and communities get caught up in carceral systems,<sup>41</sup> refocusing, yes, on the *role of the state* in producing oppression as well as on *our wholeness as complex beings* who suffer and live, work, admire, are joyful, love.... and who have affirming visions of ourselves and our communities, including intimate knowledge of what it means to be well in the world. This different kind of framing is aimed at *emancipation*.

Adrian Smith explores this emancipatory potential through what he describes as ‘visioning’ and ‘re-envisioning’ in the context of legal education and professionalism.<sup>42</sup> Although this section of the paper on telling truths and exceeding narratives of damage is aimed at explaining the methodological choices made for this research, Smith’s reflections are helpful to fill out the discussion partly because this paper will ultimately draw linkages between the research method discussed here, and practical strategies and tactics that advocates, such as lawyers and communities organizations, might deploy, as well as directly affected individuals and communities.

Smith’s focus is on how teaching and practicing ‘poverty law’ in the legal clinic system emerged as an effort to promote social justice. Yet, positioned, as the clinic system is, between government regulation and mainstream legal professionalism, he identifies a risk that poverty law may work to constrain collective action by seeking to pacify ordinary people and deferring to the state for solutions. One way this may occur is through the translation of peoples predicaments into narratives of damage: the ‘depiction of clients as people enduring miserable and crisis-ridden personal lives, never well-adjusted, always in dire circumstances’.<sup>43</sup> Surely other service providers also flatten the lives of those whom they serve into such narratives to meet government procedures.

Against this background, he suggests that poverty law, and the legal clinic system, ought to instead foreground that oppression is endemic to the settler and imperial project of Canada. The conditions that poor and otherwise marginalized people live are therefore not about ‘gaps’ or ‘unmet needs’ in a generally functional system. Rather, by exposing the conditions that oppressed people experience as integral to state exploitation, it becomes possible to re-envision alternatives. What is needed is an ‘emancipatory politics not beholden to the authority of the state and its law’, reflecting a constant struggle *against* the state, and rooted in social movements, notably the ‘creative capacities and self-

---

<sup>40</sup> Frantz Fanon, *Les Damnés de la Terre* (1961); Sylvia Wynter, ‘Unsettling the Coloniality of Being/Power/Truth/Freedom: Towards the Human, After Man, Its Overrepresentation—An Argument’ (2003) 3:3 CR: New Centennial Rev 257.

<sup>41</sup> Tuck, note 26, p. 416.

<sup>42</sup> Smith, note 31.

<sup>43</sup> *Ibid.*, p. 58.

organizing activities... of poor and otherwise oppressed communities'.<sup>44</sup> This, Robin Kelley describes as 'freedom dreaming'.<sup>45</sup>

In explaining his hopes for poverty law re-envisioned, Smith uses the language of *prefiguration*, which many Black, Indigenous, and further racialized persons use to highlight the necessity of acting *now* in ways that are consistent with the *future* we wish for. Glen Coulthard and Leanne Betasamosake Simpson, for instance, describe Indigenous resurgence as such a prefigurative politics that refuses to appeal to Canada's recognition for affirmation, favouring the pursuit of self-assured, self-determined, Indigenous lifeways daily.<sup>46</sup> Crucially, their proposal looks back to Indigenous histories and traditions, while it also looks forward to how those may be renewed today, with the world as it has come to unfold, for a desired future.<sup>47</sup> Similarly, Amna Akbar, Sameer Ashar, and Jocelyn Simpson – lawyers who work alongside marginalized communities – envision research and advocacy in terms of solidarity with and accountability to social movements, which may themselves already 'prefigure the economic, social, and political relationships to the worlds they are working to build'.<sup>48</sup>

The ability to live out affirming visions in ordinary life – as a reflective and intentional practice (a praxis) – without defaulting to the notion that government reforms are the goal, this, is possible, in concrete terms, because, as Christina Sharpe has noted about Blackness, although oppressed people may be overwhelmed by force, *we are not determined by that force*.<sup>49</sup> Racialized people have experiential knowledge of realities that are different in kind from Canada's settler carcerality.

For the purposes of this paper, it will be important, then, to avoid narrating Canada's criminal law through a deficit lens that pathologizes racialized people caught up in the carceral system, acknowledging, nonetheless, how Canada inflicts wrongs, hurt and harm. This exemplifies honesty, providing a foundation for discussion about radical alternatives. Meanwhile, it will be necessary to explore those alternatives, since remaining with narratives of oppression – however true – is insufficient for realizing the freedom dreams of people who are oppressed *and* self-actualizing.

### III The Weight of History on Canada's Carceral System

Keeping in mind an approach to research that is both truthful and affirming, this section positions Canada's criminal law within the *longue durée* of history, illustrating through examples that the criminal law is a settler carceral institution, still very much grounded in colonialism, slavery and imperialism. The section first describes what the paper means by criminal law in a manner that is intended to be approachable to a broad audience of readers, observing that Canada's criminal law goes beyond the *Criminal Code* to include routine processes of state administration. The section takes stock, as well, of how Canada's criminal law has disparate effects on racialized people, especially Black and Indigenous individuals and communities, in intersectionally significant ways.

---

<sup>44</sup> *Ibid.*, p. 71.

<sup>45</sup> *Ibid.*; Robin D.G. Kelley, *Freedom Dreams: The Black Radical Imagination* (2002).

<sup>46</sup> Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (2014); Leanne Betasamosake Simpson, *As We Have Always Done: Indigenous Freedom Through Radical Resistance* (2017).

<sup>47</sup> Coulthard, *Ibid.*, p. 157–58; Betasamosake Simpson, *Ibid.*, p. 137–38.

<sup>48</sup> Amna A. Akbar, Samer M. Ashar and Jocelyn Simonson, 'Movement Law' (2021) 73 *Stan L Rev* 821, p. 852.

<sup>49</sup> Christina Sharpe, *In the Wake: On Blackness and Being* (2016), p. 16.

The second part of this section briefly illustrates why Canada's present-day criminal law may be understood at its core as *carceral*. Canada's carcerality is, moreover, said to be integral to the state's continuous assertions of *settler jurisdiction* over these territories and people living within them, which helps to explain Canada's overwhelming criminalization and incarceration of Black and Indigenous people. Although, settler carcerality must also be acknowledged as fundamentally harmful to *everyone*, since carceral systems are premised on coercion, surveillance, and violence against our shared humanity.

*i. The Racial Distribution of Canada's Criminal Law*

As discussed before, criminal law purports to manage behaviours that the state outlaws in the name of safety, order, and justice. A common misconception is that the *Criminal Code* determines this area of the law, whereas Canada's criminal law includes this statute as one, admittedly important, part of a much more widespread system of rules and practices. These involve, for example, policing, court proceedings, imprisonment, some victim and family supports, and the supposed reintegration of prisoners into communities after release.

To illustrate the point, first by naming a few applicable statutes, Canada has enacted the *Controlled Drugs and Substances Act*, the *Correctional Services and Conditional Release Act*, and the *Youth Criminal Justice Act*, and the provinces and territories have relevant legislation as well, for example regulating parole, jails, and offenses. These statutes, in turn, provide the scaffolding for significant complexity in the day-to-day workings of the state's administration of criminal law across all levels and branches of government (e.g., federal, provincial and municipal police, courts, tribunals...), across the bureaucratic offices that operationalize government in practice, and across even more formal and informal roles. Roles and offices that sustain the system include prosecutors, defense lawyers, academic experts, social workers, mediators, health care providers, prison guards, restorative justice consultants, parole officers, non-profit and charitable organizations, companies using prison labour, and many others.

Canada's criminal law is therefore often called a 'system', and this paper uses the term because of the criminal law's sprawling web of governance, and because some outcomes are predictable, such that it could be described as 'systematic', notably when it comes to the predictable negative impacts on racialized people. All that said, the criminal law is not systematic in the sense of total rational planning, or effectiveness, since it has developed over centuries in a piecemeal way, even at times of consolidation, and is increasingly proven to be ineffective and harmful.

The language of system, while helpful, might also be taken to imply that criminal law is a 'thing' in the world, almost a subject, like a person, or a machine, functioning of its own accord. It is therefore important to remember that criminal law, like any law, does not exist beyond the people who sustain it,<sup>50</sup> whether in the legislatures, through government employment, funding and partnerships, or through other day-to-day actions.

It is in a quite different sense that accused persons, prisoners and other directly affected individuals engage with the system, as do their families and communities, and often those who advocate alongside them. As well, an added layer of complexity is the reflection, expressed earlier, that anyone living in a

---

<sup>50</sup> Martha-Marie Kleinhans and Roderick A. Macdonald, 'What is a *Critical Legal Pluralism*?' (1997) 12:2 CJLS 25.

Western democratic state, such as Canada, is bound up in the criminal law (and its carcerality, as we will see), having inherited this system through consent or imposition. We will each, therefore, be positioned differently in respect of Canada's criminal law, raising questions about responsibility that this paper returns to later.

What is clear, from hundreds of reports since at least the 1960s, some mentioned before, is that Canada's criminal law massively targets and penalizes racialized people across each part of the system: in the classification of behaviour as an offense, the laying of charges, bail, sentencing, discriminatory treatment while in prison, and, among other things, the inaccessibility of related social supports. Those among racialized people who are impacted by the system in these ways are also overwhelmingly Indigenous and Black, while there are meaningful, intersectional differences in experiences across all groups of people who are directly affected, including in terms of the rebounding effects on their families and communities.

These disparities, of course, worsen the precarity that racialized people, and their loved ones, face across multiple areas of life, for example, immigration, housing, child welfare, poverty, employment, and health, including mental health. As such, the topic of criminal law and racial justice *does not point to a linear lifecycle* from start to finish, beginning with the definition of a crime and ending with community release, but instead to a *self-reinforcing cycle of precarity* that the Canadian state, and those beholden to it, create, facilitate, and entrench.

Again, some examples might be helpful. If we consider the definition of what constitutes a crime, Canada's prohibitions against gangs ('criminal organization') have been used by police to target already, often isolated and underserved neighbourhoods where racialized people live, go to school, and otherwise gather, for example the neighbourhoods of Montréal Nord, Little Burgundy and St Michel in Montreal, and Jane-Finch and Regent Park in Toronto.<sup>51</sup> Black youth, especially, have been penalized in their neighbourhoods for socializing with each other, hanging out on the street, speaking in slang or their own languages, wearing street clothes, and sometimes engaging in minor infractions.<sup>52</sup> This habitual practice of labeling Black presence in terms of prohibitions against 'criminal organization', some argue, has stoked violence within communities, as youth get forced into the system, and it outlaws kinship and culture, at a distressingly formative age.<sup>53</sup>

Offences said to be against the public order, or the interests of property owners, such as loitering, theft, trespass, public intoxication, and incivility (in Quebec) bolster the criminalizing of Black and other racialized people in the context of anti-gang campaigns, and generally, as have drug offences.<sup>54</sup> Similar prohibitions criminalize people experiencing homelessness, many of whom are Indigenous, Black, and migrants, given the precarities these communities face in accessing mental health care, employment,

---

<sup>51</sup> Verity Stevenson, 'How the Myth of the Montreal Street Gang Led to More Street Checks on Black Youths' (2020) CBC News; Byron Armstrong, 'Police Apologies Are Meaningless When They Actively Invest in Surveillance of Black People' (2022), Ricochet; Maxime Aurélien and Ted Rutland, *Out to Defend Ourselves: A History of Montreal's First Haitian Street Gang* (2023).

<sup>52</sup> Reakash Walters, 'The Criminalization of Black Friendship, Kinship and Belonging' (2025) 48:2 Dal LJ (forthcoming); Aurélien and Rutland, *Ibid.*

<sup>53</sup> Walters, *Ibid.*; Aurélien and Rutland, *Ibid.*

<sup>54</sup> Clayton James Mosher, 'Chapter 6 Drug and Public-Order Crimes' in *Discrimination and Denial: Systemic Racism in Ontario's Legal and Criminal Justice System, 1892-1961* (1997).

and affordable housing.<sup>55</sup> And these offences are also used to criminalize those who resist the policing of marginalized communities, who protest Canada's imperialism abroad in Palestine and elsewhere, and who take direct action against Canada's alignment with oil, gas, and other companies that violate Indigenous sovereignty, as is the case with Indigenous land defenders.<sup>56</sup>

Thinking past minor, arguably harmless, infractions against property and supposed civility, it should be apparent from the above that even the definition of serious violence as a 'crime' is a social construction of the state, not an unchangeable reality, and that the regulation of violent crimes may itself justify a skewed racial and gender distribution of Canada's criminal law.<sup>57</sup> The mass incarceration of, above all, Indigenous women, trans and two-spirit persons serving life or indeterminate sentences, testifies to Canada's racially entrenched treatment of these individuals and their communities.<sup>58</sup> Readers may or should know about the fact that 'the Indigenous women, girls, trans, and two-spirit people whose disappearances and deaths have been largely ignored by law enforcement in Canada are the same people who fill women's prisons in Canada'.<sup>59</sup>

Crimes related to intimate partner violence, for instance, have resulted in the heightened criminalization of Indigenous women as well as Black, queer, disabled, migrant, trans and low-income women, partly because mandatory charging policies tied to this offence criminalize all parties to a dispute.<sup>60</sup> Evidently, although intimate partner violence, and other serious violence, call out for accountability, responsibility and healing, the resort to criminalization and punishment of all parties pushes racialized people into deep precarity in differently gendered ways, while the roots of violence remain unaddressed.

Indeed, the consequences that follow most immediately from the definition of a crime, namely policing and laying charges, have been used to massively criminalize predominantly Indigenous and Black people across a gender spectrum, when compared to white counterparts engaged in the same activities.<sup>61</sup> Once inside the court system, then, Black and Indigenous accused persons are less likely to receive bail,<sup>62</sup>

---

<sup>55</sup> Alice Giannini, 'An Intersectional Approach to Homelessness: Discrimination and Criminalization' (2017) 19 Marq Benefits & Soc Welfare L Rev 27.

<sup>56</sup> Muriel Draaisma, 'Police Charge 3 People After Black Lives Matter Protesters Splatter Paint on Statues in Toronto' (2020) CBC News; Verity Stevenson, 'McGill Moving Forward with Injunction Request Against Pro-Palestinian Encampment' (2024) CBC News; Yellowhead Institute, *Land Back: A Yellowhead Institute Red Paper* (2019).

<sup>57</sup> Robyn Maynard, *Policing Black Lives: State Violence in Canada from Slavery to the Present* (2017); Debra Parkes, 'Starting with Life: Murder Sentencing and Feminist Prison Abolitionist Praxis' in Kelly Struthers Montford & Chloë Taylor, eds, *Building Abolition: Decarceration and Social Justice* (2021) [Parkes, 'Starting with Life'].

<sup>58</sup> See Parkes, *Ibid.*

<sup>59</sup> Parkes, *Ibid.*, p. 11.

<sup>60</sup> Julie Kaye and Alana Glecia, "'Why Do We Have to be Almost Dead to Qualify for Help?': Criminal Legal and Protection Systems Responses to Intimate Partner Violence Against Indigenous Women in Canada' (2025) Can Rev Sociol; Anita Grace, "'They Just Don't Care": Women Charged with Domestic Violence in Ottawa' (2019) 42:3 Man LJ 153; Holly Johnson and Deborah E. Conners, 'Negotiating Women's Safety: The Mandatory Charging Debate' in Kate Fitz-Gibbon, Sandra Walklate, Jude McCulloch, JaneMaree Maher, eds, *Intimate Partner Violence, Risk and Security: Securing Women's Lives in a Global World* (2018); Luke's Place, *Call For a Review of Mandatory Charging Policies* (2024); Patrina Duhaney, 'Criminalized Black Women's Experiences of Intimate Partner Violence in Canada' (2021) 28:11 Violence Against Women 2765. See also Leigh Goodmark, *Imperfect Victims: Criminalized Survivors and the Promise of Abolition Feminism* (2023).

<sup>61</sup> Maynard, note 57.

<sup>62</sup> Storm K. Jeffers, *Summary of Site Reports for Canada's Black Justice Strategy* (2023), p. 29; Scott Clark, *Overrepresentation of Indigenous People in the Canadian Criminal Justice System: Causes and Responses* (2019), p. 20.

meaning they are more often placed in provincial jails, sometime for extended periods, and certainly under unbearable conditions, while awaiting trial. Black and Indigenous convicted persons are then more likely to receive sentences of imprisonment.<sup>63</sup> And, once in prison, they are more likely to be placed in maximum security facilities, to be routinely abused with racist language and interactions, to be penalized for violating rules of conduct, to be placed in solitary confinement, and to be denied parole, further entrenching them in the system.<sup>64</sup> Racialized people of diverse origins, including migrants, are denied access in prison to cultural traditions that give life meaning.<sup>65</sup> Migrants are liable to be deported after serving their sentences.<sup>66</sup>

This distressing, clear distribution of Canada's criminal law is frequently explained in reports and popular culture as arising from the social precarity that racialized people face, which characterizes their/our communities, as a result, as predisposed to crime. Poverty, unemployment, inaccessible health care, unaffordable housing, a lack of education, and intergenerational trauma, are said to be 'criminogenic' factors, which implies that these forms of social precarity tend racialized people toward violating the law. And, while it is true, and crucial to acknowledge, that racialized individuals and communities living under Canada's assertions of jurisdiction do experience greater social precarities and may break the law for a variety of reasons, including as a response to intergenerational trauma, for sustenance, survival or resistance, it is vital to also remember a few things.

For one, the clear racial distribution of social precarity in Canada can be understood in terms *structural discrimination* on the part of the Canadian state, which therefore demands redress through the equitable redistribution of benefits. This understanding helps to *depathologize* racialized people caught up in the system, and in relation to social precarity generally, since their/our oppression does not arise from a deficit in capacity to achieve upward mobility (the 'American Dream' is, after all, premised on the false notion that individuals are fully responsible for relative successes, even in the face of longstanding structural harms that keep people down).<sup>67</sup> This insight is particularly important for racialized individuals and communities who continue to withstand the afterlives of slavery and colonialism in the present-day.

As well, as discussed before, the racial distribution of Canada's criminal law partly depends on how 'crime' is defined in the first place, since this social construction has served to legitimize the *criminalization* of racialized people's lifeways as *an active state process that real people sustain*, not an objective fact about enforcing universal morals or objective tools for living well. Finally, it is crucial not to lose site of the fact that surveillance, policing, laying charges, and other practices within the criminal law system affect racialized people more so than their white counterparts *for the same or similar conduct*.<sup>68</sup>

---

<sup>63</sup> Jeffers, *Ibid.*, p. 40; Charbel Saghbini, Angela Bressan and Lysiane Paquin-Marseille, *Indigenous People in Criminal Court in Canada: An Exploration Using the Relative Rate Index* (2021).

<sup>64</sup> OCI, *Black Inmate Experience*, note 4; Zinger, note 4.

<sup>65</sup> OCI, *Black Inmate Experience, Ibid.*; Zinger, *Ibid.*; Standing Senate Committee on Human Rights, *Interim Report – Study on the Human Rights of Federally-Sentenced Persons: The Most Basic Human Right Is to Be Treated as a Human Being* (2019), p. 9.

<sup>66</sup> Canadian Council for Refugees, 'Permanent Residents and Criminal Inadmissibility' (2018).

<sup>67</sup> Kimberlé Crenshaw, 'Twenty Years of Critical Race Theory: Looking back to Move Forward' (2011) 43:5 Conn L Rev 1253; Khiara M. Bridges, *Critical Race Theory: A Primer* (2019), pp. 40–44, 47–50, Mills, note 17.

<sup>68</sup> Maynard, note 57; Canadian Civil Liberties Association, *Anti-Black Racism in Canada's Criminal Justice System: Fact Sheet* (2021), p. 4; Scot Wortley and Akwasi Owusu-Bempah, *Appendix A: Street Checks, Racial Profiling and Police-Community Relations: A Review of the Research Literature* (2019), p. 113.

The last point may require some more explanation. This refers to the fact that the criminal law system functions to a great degree through the exercise of discretionary powers on the part of those who administer it, such as police officers, judges, parole officers, prison administrators, and so on. And it signals that *state representatives, and related actors, wield discretion in racially biased ways throughout the criminal law system*, from street checks to laying charges, plea bargaining, sentencing, risk assessments and placements in prison, and imposing parole conditions. Racial profiling by police is one example of this discretionary power of the state – and it is probably the discretionary practice that has received the most public attention, having been taken up by various human rights commissions.<sup>69</sup>

But the use of discretion infuses the system; it is an essential feature of the criminal law because, like any law, criminal law applies to a range of situations that cannot be fully anticipated. Of course, discretionary powers are, and can be *differently*, circumscribed by statute, regulations, operational policies and protocols, the *Charter of Rights and Freedoms*, and other constitutional rights.<sup>70</sup> However, many decisions across the criminal law system are taken beyond public scrutiny or in a top-down manner<sup>71</sup> that does not reflect the realities of marginalized people, while their discretionary character facilitates outcomes imbued with racism.

When interpreting the law for sentencing, for example, judges consider a variety of submissions, and potentially engage with social workers, the convicted person, victims, affected family members, the prosecutor, and defense counsel, although the judge will ultimately render a sentence that she believes is suitable.<sup>72</sup> Depending on the judge's approach, this discretion could reflect interactive listening and humility, especially when the accused comes from a community that is not the judge's own.<sup>73</sup> It could involve accounting for the ineffectiveness and dehumanizing conditions of prisons, which rarely features in sentencing.<sup>74</sup> It could also involve the acknowledgement of state wrongs in criminalizing the affected person, both for the sake of honesty and to influence the sentence.<sup>75</sup> Or, the use of discretion could, as the empirical evidence shows, effectively reinforce the afterlives of slavery and colonialism.

This is not an argument for implicit bias training as a remedy, or for other measures that may similarly help to legitimize Canada's criminal law, because, as we will see, settler carcerality is foundational to the system, and is dehumanizing for everyone who is directly affected, which therefore demands *decarceral* strategies and tactics. As alluded to above, overcoming 'judicial solitude' in sentencing through *critical*

---

<sup>69</sup> Ontario Human Rights Commission, *Eliminating Racial Profiling in Law Enforcement* (2019); British Columbia's Office of the Human Rights Commissioner, *Equity is Safer: Human Rights Considerations for Policing Reform in British Columbia*, (2021); Commission des droits de la personne et des droits de la jeunesse Quebec, *Review of Implementation of the Recommendations Issued in the Report of the Consultation on Racial Profiling and its Consequences* (2020); Scot Wortley, *Halifax, Nova Scotia: Street Checks Report* (2019).

<sup>70</sup> Lisa Coleen Kerr, 'The Origins of Unlawful Prison Policies' (2015) 4:1 *Canadian Journal of Human Rights* 89 (writing on delegated authority, specifically).

<sup>71</sup> See e.g., *Ibid.*

<sup>72</sup> Jeffrey Kennedy, 'Beyond Judicial Solitude: Listening in the Politics of Criminal Sentencing' (2024) 43:3 *Crim Just Ethics* 225.

<sup>73</sup> *Ibid.*

<sup>74</sup> Lisa Kerr, 'How the Prison is a Black Box in Punishment Theory' (2018) 69:1 *UTLJ* 85. But also see the discussion of developments respecting Indigenous people in *R v Hills*, 2023 SCC 2 in Lisa Kerr, 'The Place of *Gladue* in Constitutional Law (2024) 33 *Constitutional Forum* 1.

<sup>75</sup> Marie Manikis, 'Recognizing State Blame at Sentencing: A Communicative and Relational Framework' (2022) 81:2 *Cambridge LJ* 294.

consciousness,<sup>76</sup> including accounting for state wrongs and the depravity of prisons, might be one example of a mindful decarceral action. Nonetheless, for present purposes, what is important to remember, is that the reasons why racialized people are massively caught up in the system cannot be described in essentialist terms based on racist assumptions about certain groups of humans being predisposed toward ‘crimes’ (which are socially constructed). Rather, the racial distribution of criminal law must be understood as substantially flowing from how the state oppresses racialized people.

Wrongdoing, hurt and harms will occur among all peoples of the world, and addressing them should not be neglected. There are many, culturally and historically infused ways of doing so. Yet, when it comes to racialized people, and predominantly Black and Indigenous people, living under the jurisdiction that Canada claims of Turtle Island, wrongs on the part of the state make criminalization and imprisonment, in Robyn Maynard’s words, ‘a self-fulfilling prophecy’.<sup>77</sup> The foundations of this self-fulfilling prophesy are the subject of the next section.

## ii. *Settler Colonialism and the Roots of Carcerality as a Social Structure*

The prior section described how Canada produces and reinforces racial disparities through its criminal law system. Although any society will need to address wrongs, hurt and harm, the fact is that Canada’s approach targets and penalizes racialized people for the same behaviours as white people, while no group of human beings can be said to be predisposed toward crime. It is through overlapping and self-fulfilling processes, such as those mentioned above (defining crimes, criminalizing groups, and racist law enforcement), that Canada’s criminal law can therefore be understood to reflect *structural racism*.

The term ‘structural’ helps to understand that racism is not superficial, it is not a variable that can be extracted from an otherwise functional system. Rather, a structural critique denotes that racism is baked into multiple institutions operating in interacting ways that make it challenging to pinpoint, even as racism will be recognizable to those who feel the brunt of it.<sup>78</sup> A structural critique also helps to understand the popular language of ‘systemic racism’ with added depth and nuance, because racial oppression does not only run *across* the criminal law system, it is *integral* to the system. As the protest song goes, ‘The system isn’t broken; it was built that way!’.<sup>79</sup> Focusing on the level of social structure therefore requires us to ask how and why the criminal law system was built in the first place, and to whose disadvantage and benefit?

Growing research affirms the experiential knowledge of many migrants, and Indigenous and Black people, that Canada’s criminal law system arises from the weight of slavery and colonialism on the present-day. This past, moreover, continues to haunt everyone,<sup>80</sup> including white people living in poverty and with mental health challenges, inside and outside of prisons. Indeed, histories of Canada’s criminal law system demonstrate that, from approximately the 17<sup>th</sup> century onward, Anglo-European colonists and settlers began to impose their worldviews and practices onto these territories and peoples located

---

<sup>76</sup> Kennedy, note 72.

<sup>77</sup> Maynard, note 57, p. 112.

<sup>78</sup> Bridges, note 67.

<sup>79</sup> Mariame Kaba, *We Do This ‘Til We Free Us: Abolitionist Organizing and Transforming Justice* (2021), p. 33.

<sup>80</sup> Dionne Brand, *A Map to the Door of No Return* (2001).

within them, benefiting a white propertied class primarily.<sup>81</sup> This process included transplanting Anglo-European carceral logics and institutions to places around the world, while adapting them to local conditions. Canada's criminal law can thus be traced to the emergence of modern carcel systems not only in the New World, but through global processes of colonization and transatlantic slavery that endured for centuries and that persist in new and shifting forms around the globe, although Canada's settler carcerality is specific to historical processes that unfolded on these lands.

Canada has claimed sovereignty over these lands on Turtle Island through histories that cannot be recounted at length. However, it is important to briefly remark that while Anglo-European powers were extending their might across the globe, the British and French fought each other to possess these lands on Turtle Island, sometimes through trade and military treaties with Indigenous nations on terms of sovereign reciprocity.<sup>82</sup> The British ultimately conquered New France in 1763, when the British also entered into a legal relationship with many Indigenous nations, at once, to affirm the respective sovereignty of the British and Indigenous nations – their co-existent jurisdictions – through the Treaty at Niagara of 1764.<sup>83</sup> The British subsequently, increasingly dispossessed Indigenous nations of their lands and life in violation of the treaty relationship affirmed at Niagara and in other treaties as well as the Royal Proclamation of 1763.<sup>84</sup> The British then claimed that Canada is a state (a particular form of political community) with sovereignty *over* Indigenous peoples and the general population (of citizens) under the *British North America Act*, which establish that state's foundational charter (the *Constitution of 1867*).<sup>85</sup>

Shortly after, Canada falsely claimed to have acquired Indigenous lands through treaties, passed the *Indian Act* (1876), created the reserve system, and launched a program of assimilation by removing Indigenous children from their kin and placing them in residential institutions in consort with Christian churches (which they called 'schools'). These violations on the part of the British, then Canada, and the churches were therefore part of a systematic, genocidal program of settler colonialism that is still ongoing. And, for our purposes, it merits noting that when the British awarded the federal Government

---

<sup>81</sup> See e.g., Katie Thibault, 'The Canadian Carceral State: Violent Colonial Logics of Indigenous Dispossession' (Master Thesis, Queen's University, 2016); Krystal Batelaan, 'Tell Dem Wagwan Fanon: On [Colonial] Violence and Prison Labour in Canada' (Doctoral Thesis, University of Toronto, 2024); Charmaine Nelson, "'Ran Away from Her Master... A Negro Girl Named Thursday": Examining Evidence of Punishment, Isolation, and Trauma in Nova Scotia and Quebec Slave Advertisements' in Amy Swiffen and Joshua Nichols, eds, *Legal Violence and the Limits of the Law* (2018); Robert Nichols, 'The Colonialism of Incarceration' in Amy Swiffen and Joshua Nichols, eds, *Legal Violence and the Limits of the Law* (2018); Vicki Chartrand, 'Unsettled Times: Indigenous Incarceration and the Links between Colonialism and the Penitentiary in Canada' (2019) 61:3 Can J Corr 67; Akwasi Owusu-Bempah and Zilla Jones, *Canada's Black Justice Strategy: Framework* (2023), p. 3; Elizabeth Venczel, 'Settler Colonialism and Prisons: A Comparative Case Study of Canada, Palestine, and Australia' (2023) 14:2 Settl Colon Stud 140; Jones, note 20; Maynard, note 57.

<sup>82</sup> John Borrows, 'Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government' in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (1997); Bhatia, note 16; Bruce Morito, *An Ethic of Mutual Respect: The Covenant Chain and Aboriginal-Crown Relations* (2012).

<sup>83</sup> Borrows, *Ibid.*

<sup>84</sup> Borrows, *Ibid.*; Bhatia, note 16.

<sup>85</sup> Beverley Jacobs, 'International Law/The Great Law of Peace' (Master Thesis, University of Saskatchewan, 2000); *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91.

of Canada responsibility over Indigenous peoples, it also gave the federal government jurisdiction to regulate the *criminal law* (with provincial jurisdiction over some criminal administration).<sup>86</sup>

The increasing dispossession of Indigenous peoples therefore occurred at the same time, and through the same processes, as the development of carceral systems between the 17<sup>th</sup> and 19<sup>th</sup> centuries. These also unfolded alongside the enslavement of Black and Indigenous people by the French and British, which was a legal practice that was only outlawed in all forms 30 years before the Constitution was enacted.<sup>87</sup> The British had preferred to enslave African people, because of racial tropes, and when they conquered New France, Black enslavement became the dominant form of slavery on these lands, which involved forced manual and domestic labour that was fundamentally brutal and dehumanizing.<sup>88</sup>

Returning to the criminal law, which again developed alongside slavery and colonialism, before the 19<sup>th</sup> century, the British and French had transplanted their criminal law systems onto these lands as they established various colonial outposts and settlements, which they administered through localized laws and customs.<sup>89</sup> Since medieval Europe, feudal and state governments had been inflicting violence on their own populations in Europe through the definition of crimes and subsequent containment in gaols (jails).<sup>90</sup> These were not the prisons of the present-day, but rather, smaller facilities used often for people awaiting trial or transportation, or until debts were repaid.<sup>91</sup> Corporeal punishment was regularly used in this context to demonstrate the sovereign's will and power, instilling fear in the population.<sup>92</sup> The outcome of trials was often a spectacularized public display of torture and death.<sup>93</sup>

As industrialization increased, fueled to a great degree by the slave trade and imperial resource extraction, into the 17<sup>th</sup> and 18<sup>th</sup> centuries, poor people were held as well in houses of correction and workhouses for moral offences, such as begging and idleness.<sup>94</sup> The targets of these processes of criminalization were often the landless, non-propertied white poor, and imprisonment, while said to promote public order, thus also facilitated the creation of a steady workforce in Europe, notably of the growing urban poor.<sup>95</sup> Common crimes across these long periods therefore included those against property (e.g., theft, debt) and public order (e.g., vagrancy, intoxication, idleness), which we saw above continue to be used today in anti-poor, ableist, and racialized ways.

These same systems internal to Europe were extended at the same time, then, to the outposts and settlements that colonizers established around the globe,<sup>96</sup> including in the territories that Canada would later claim sovereignty over. Here, one of the purposes, as in Europe, was to maintain order among the local population through corporeal punishment and forced labour.<sup>97</sup> Enslaved African, enslaved Indigenous, and other Indigenous persons were certainly targets of this system of control and

---

<sup>86</sup> *Constitution Act, 1867*, ss. 91, 92.

<sup>87</sup> Sarah Riley Case, 'Homelands of Mary Ann Shadd' in Immi Tallgren, ed, *Portraits of Women International Law: New Names and Forgotten Faces?* (2023) [Riley Case, 'Homelands'].

<sup>88</sup> Barrington Walker, *The African Canadian Legal Odyssey: Historical Essays* (2012).

<sup>89</sup> Chartrand, note 81.

<sup>90</sup> *Ibid.*; Batelaan, note 81; Foucault, note 5.

<sup>91</sup> Batelaan, *Ibid.*; Roger Matthews, *Doing Time: An Introduction to the Sociology of Imprisonment* (1999).

<sup>92</sup> Foucault, note 5.

<sup>93</sup> *Ibid.*

<sup>94</sup> Batelaan, note 81.

<sup>95</sup> Chartrand, note 81; Batelaan, *Ibid.*

<sup>96</sup> This also included the creation of specific penal colonies. Foucault, note 5.

<sup>97</sup> Chartrand, note 81; Batelaan, note 81.

punishment. The ledgers of facilities classifying ‘race’ in the mode of colonial data collection tell us so.<sup>98</sup> Although, Black and Indigenous people were criminalized in ways that differed from the white poor, given their exclusion from colonial society. For instance, runaway slaves were held in gaols and workhouses *on behalf of slave owners*.<sup>99</sup> Yet they did not escape corporeal punishment, as illustrated by the 1734 public torture and hanging of Marie-Joseph Angélique in Montréal for her act of resistance by fire.<sup>100</sup>

The modern penitentiary system of large, standalone institutions dedicated to imprisoning people for lengthy periods – recognizable to us today – thus emerged from the smaller facilities that dotted European and colonial landscapes.<sup>101</sup> However, the origins of our present-day infrastructures of imprisonment are also much more complex. Namely, modern prisons can also be understood as extensions of the carceral logics and techniques that underpinned slavery itself, and the reserve and residential school systems.<sup>102</sup>

Each of these forms of colonialism was premised on confining people, Black and Indigenous people specifically, to delimited geographic areas, controlling their bodily movement for long or indefinite periods, surveilling them, and inflicting various forms of discipline upon them, including but not only corporeal violence – *which are characteristics of modern prisons*. It will be helpful to proceed with these different, intertwined historical influences in turn, beginning with the expansion of gaols and workhouses into penitentiaries during the advent of modernity in the 17<sup>th</sup> to 19<sup>th</sup> centuries, and then retracing our steps to how slavery and the reserve and residential school systems also anticipated the modern prison.

Drawing on Foucault’s genealogy of European carceral systems in *Discipline and Punish: The Birth of the Prison*, several thinkers have shown how the modern prison developed across the world from jails, workhouses, and so on, including on the lands that Canada claims of Turtle Island. As mentioned before, early forms of imprisonment in Europe and the colonies had different purposes. Whereas some were holding cells for prisoners awaiting public torture and death, others were focused on controlling the poor through discipline, such as training and forced labour. Whereas the holding cells were a longstanding practice that often culminated in demonstrating the will of the sovereign through spectacular public violence, workhouses and other disciplinary facilities developed somewhat later, in the 17<sup>th</sup> to 18<sup>th</sup> centuries, reflecting a less-publicly visible, parallel structure meant to discipline the population into a particular image of Western society, while generating capital. One premise of this disciplinary approach was to ensure that conditions of imprisonment would be worse than those that poor people experienced anyway, as this was said to deter the general population from committing crimes.<sup>103</sup> The idea was to exert control through containment and mistreatment to ‘effectively create a docile and responsive workforce’.<sup>104</sup>

---

<sup>98</sup> Nelson, note 81.

<sup>99</sup> *Ibid.*

<sup>100</sup> Afua Cooper, *The Hanging of Angélique: The Untold Story of Canadian Slavery and the Burning of Old Montréal* (2006).

<sup>101</sup> Foucault, note 5; Chartrand, note 81; Batelaan, note 81.

<sup>102</sup> Thibault, note 81; Patricia Monture-Angus, ‘Women and Risk: Aboriginal Women, Colonialism, and Correctional Practice’ (1999) 19 *Canadian Woman Studies* 24.

<sup>103</sup> Foucault, note 5; Matthews, note 91, as cited in Batelaan, note 81, p. 86.

<sup>104</sup> Batelaan, *Ibid.*

The precursors to modern prisons therefore served both *instrumental and moral purposes*, since behaviours, such as idleness, theft and vagrancy, were seen as disorderly and morally repugnant. And, of course, theorists and governments continue today to rationalize prisons based on a vague mix of these historical carceral logics, including the notions that prisoners will receive their ‘just deserts’ and/or that they will be corrected through disciplinary measures (think of ‘Correctional Services Canada’), including punishment and labour (which is still, essentially, *forced labour* in prisons today).<sup>105</sup>

Historicizing these justifications for imprisonment in centuries-old, unproven, Anglo-Eurocentric beliefs helps to see that they are not objective and neutral: they rest upon skewed foundations. This is especially so, given these justifications for prisons have now been widely shown to be ineffective at improving public safety.<sup>106</sup> Nor do they represent universal morality. And, on the contrary, as we saw above, and will see again, prisons are violent and dehumanizing institutions that are fundamentally unjust for everybody.

The development of the modern penitentiary in the 19<sup>th</sup> century illustrates how carcerality nonetheless became a key social structure of the Canadian state, which was, after all, laying the grounds to assert sovereignty from east to west and north to south around the same time. Specifically, large-scale, modern prisons, as we know them, developed ‘as part of a process to consolidate the nation’, in and around the Constitution of 1867.<sup>107</sup> This occurred alongside the establishment of other branches of the Canadian government to define and enforce the new system of criminal law, each of which persists today.<sup>108</sup> The *Criminal Code* consolidated prohibitions in national legislation in 1892.<sup>109</sup> A federal police force was established in 1868, before taking various forms that eventually became the RCMP.<sup>110</sup> A national appeals court was founded in 1875, being the Supreme Court of Canada.<sup>111</sup> And a program was launched to build penitentiaries across provinces that joined the federation.<sup>112</sup>

The aim, in scaling up and systematizing earlier forms of colonial criminal law, Vicki Chartrand explains, was to ‘manage and spatialize populations in a way that was compatible with advanced modern systems of governance and sovereignty’.<sup>113</sup> Although this new, overarching infrastructure transformed prior arrangements under colonial administrations, it was still an extension of *settler colonialism*: ‘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’.<sup>114</sup>

In addition to scaling up and systematizing prior colonial practices, the British, then Canada, also transformed the daily operations of the modern settler colonial penitentiary. The Kingston Penitentiary was established in 1835 as a first of its kind on these territories, drawing on prison planning in the United States and Europe, and modelled on the notion that carceral systems would civilize an unruly,

---

<sup>105</sup> On contemporary prison labour as forced labour see *Ibid.* and Jordan House and Asaf Rashid, *Solidarity Beyond Bars: Unionizing Prison Labour* (2022).

<sup>106</sup> Debra Parkes, ‘Solitary Confinement, Prisoner Litigation, and the Possibility of a Prison Abolitionist Lawyering Ethic’ (2017) 32:2 CJS 165 [Parkes, ‘Abolitionist Lawyering’]; Jones, note 20; Maynard, note 57.

<sup>107</sup> Chartrand, note 81, p. 72.

<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid.*

<sup>112</sup> E.g., the Provincial Penitentiary Act 1851, Federal Penitentiary Act 1868. *Ibid.*, pp. 72-73. *Ibid.*

<sup>113</sup> *Ibid.*, p. 73.

<sup>114</sup> *Ibid.*

growing population of settlers through humanitarian means, securing the terms of the emerging Western democratic state.<sup>115</sup> The idea was to replace arbitrary punishment and ‘frontier justice’ with rational, quasi scientific measures that would reform prisoners.<sup>116</sup> Corporeal punishment, for example, was supposed to be proportionate to the violation.<sup>117</sup> Here, still, most crimes, as defined by settlers with power, related to offenses against property and the public order.<sup>118</sup> And the life of prisoners was regulated by prison administrators (the warden, guard...) with absolute control over the most mundane activities with a view toward reforming such behaviours unbecoming of the new Canadian society.<sup>119</sup>

Individual cells were constructed with little but the bare necessities, rather than allowing prisoners to congregate openly as had been the case in previous centuries.<sup>120</sup> Manual labour was required for supposed rehabilitation.<sup>121</sup> Hobbies and recreation were forbidden.<sup>122</sup> A bell was used to manage the prisoners’ moves. As Krystal Batelaan explains, ‘it rang to wake them up, to send them off to work, to announce every meal and send them to bed.’<sup>123</sup> Punishments for disobedience included whippings, confining prisoners in a box, and being sent into solitary confinement – called the hole.<sup>124</sup>

In effect, the penitentiary combined the punitive and supposed corrective aspects that different carceral facilities had previously served, with the same instrumental and moral aims, including the generation of capital through forced labour, but with an even greater veneer of humanitarianism (safety, order and justice). In the words of one politician, just before the Kingston Penitentiary was built, such a penitentiary would be:

... a place which by every means not cruel and not affecting the health of the offender, shall be rendered so irksome and so terrible that during this afterlife he may dread nothing so much as a repetition of that punishment, and if possible, that he should prefer death to such a contingency. This can all be done by hard labour and privations and not only without expense to the province, but possibly bringing in revenue.<sup>125</sup>

Clearly, modern prisons, then, were no less dehumanizing than their predecessors, and they have remained so until today, using similar practices, as you can see from the examples above. You might think here of the spatial organization of prisons, their regimented structure of time, the denial of opportunities for social and educational wellbeing, the use of horrible conditions such as solitary confinement, their costliness, and the continuing use of what is essentially forced labour to raise revenues.<sup>126</sup> Clearly also then, prisons are *dehumanizing for everyone forced to live within their walls*.

---

<sup>115</sup> *Ibid.*; Batelaan, note 81, p. 94.

<sup>116</sup> Chartrand, *Ibid.*

<sup>117</sup> *Ibid.*

<sup>118</sup> Batelaan, note 81.

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*, p. 90.

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*

<sup>123</sup> *Ibid.*, p. 93.

<sup>124</sup> *Ibid.*, p. 96.

<sup>125</sup> Catherine Fogarty, *Murder on the Inside: The True Story of the Deadly Riot at Kingston Penitentiary* (2021), as quoted in *Ibid.*, p. 92.

<sup>126</sup> On the issue of prison labour, these days, it generates revenue for the Canadian government, principally, through large scale contracts managed with CORCAN, the intermediary employment agency for Correctional

How this overlaps with racialization requires some further historical retracing. You will recall that early colonial, and later Canadian, prisons were largely conceived to discipline poor white settlers. The creation of penitentiaries served this purpose with rising immigration from Europe in the 19<sup>th</sup> century, and the construction of a Western democratic identity around public order.<sup>127</sup> Moreover, you will also recall that African enslaved persons and Indigenous persons, while subjected to these mechanisms of control, were also treated *differently*, as they were considered within the Anglo-European worldview to be subhuman and, originally, they were legally non-citizens. Their differential treatment nonetheless overlapped with the development of Canada's criminal law system and can be understood as further types of settler carcerality *that influenced mainstream criminal law*, namely through slavery itself and the reserve and residential school systems.

In terms of labour, slavery was, of course, a most depraved system contrived to generate capital for a white propertied class, using force and confinement, which were carceral techniques outside the criminal law system, but intertwined with it. The mobility of enslaved persons was restricted by their owners under the law.<sup>128</sup> Enslaved persons were removed from kin and community (as prisoners are),<sup>129</sup> and criminalized according to the definition of crimes against property, as their attempts to escape captivity were said to be stealing themselves from their owners.<sup>130</sup> They were subject to brutal forms of corporeal punishment by their owners under the law. They were portrayed in runaway slave advertisements as outlaws.<sup>131</sup>

Following the formal abolition of slavery, Black people on these lands were then banned from towns and subject to 'sundown laws', which prohibited them from moving about after dark.<sup>132</sup> White citizens lobbied the Canadian government to ban Black people living elsewhere from immigrating here, which the federal government effectively did.<sup>133</sup> Segregation, in schools and businesses, was also rampant and backed by law, including by Canada's Supreme Court well into the 20<sup>th</sup> century.<sup>134</sup>

These and other practices that regulated the every move of a Black person can thus be understood as other forms of settler carcerality that cemented a stereotype of Black criminality into the emerging Canadian white public consciousness,<sup>135</sup> with long-lasting structural effects on how Black people are perceived (now even by racialized peoples), on how crimes are defined in anti-Black ways (e.g., against kinship, access to public spaces), and on how the law is enforced (e.g., racial profiling of the Black body).

---

Services Canada – while prisoners are coerced to apply for jobs in prison (through parole considerations, for instance), then paid well-below minimum wage, and receive little 'rehabilitative' training from mostly manual labour. Yet Black prisoners also experience difficulties obtaining work in prisoners, because they are classified as dangerous, which affects their ability to get parole. *Ibid.*; House and Rashad, note 105; OCI, *Black Inmate Experience*, note 4.

<sup>127</sup> Batelaan, *Ibid.*

<sup>128</sup> Rinaldo Walcott, *On Property: Policing, Prisons, and the Call for Abolition* (2021).

<sup>129</sup> Thibault, note 81.

<sup>130</sup> Saidiya V. Hartman, *Scenes of Subjection: Terror, Slavery, and Self-Making in Nineteenth-Century America* (1997).

<sup>131</sup> Nelson, note 81.

<sup>132</sup> Maynard, note 57.

<sup>133</sup> Riley Case, 'Homelands', note 87; Natasha Henry-Dixon, 'Racial Segregation of Black People in Canada' in *The Canadian Encyclopedia* (2021).

<sup>134</sup> Maynard, note 57; Henry-Dixon, *Ibid.*; *Christie v The York Corporation* [1940] SCR 139.

<sup>135</sup> Maynard, note 57.

These structural effects of criminalization and law enforcement also overlapped with the systemization of prisons through confinement, forced labour, and corporeal punishment.<sup>136</sup>

Paradoxically, however, as mentioned before, prisons were not primarily intended for Black people, and, at least from the mid-19<sup>th</sup> century to the mid-20<sup>th</sup> century, Black defendants in criminal trials were sometimes given a pardon or the charges were dropped, keeping them out of prisons.<sup>137</sup> This can be explained in a few, nuanced ways that also affect the criminal law today. For one, the eugenics thinking of the time characterized Black people as unable to withstand prison conditions, becoming ill too easily, which also meant they should be kept out or separate from other races for fear of contamination.<sup>138</sup> There are echoes of this today, as Black prisoners are concentrated in few facilities in Quebec and Ontario.<sup>139</sup>

For another thing, Barrington Walker explains that Black defendants were successful at trial, and were otherwise kept from imprisonment, because lawyers argued that, while ‘dangerous Others’, they were also ‘childlike’ and therefore needing *salvation*.<sup>140</sup> This would require the mercy of white Canadians, whose *humanitarian identity* was emerging at the time.<sup>141</sup> We will return to these tropes (of deficit and mercy) when discussing the *essentialism* that IRCA sentencing report may reproduce in the present-day, although for now it merits stating that Black people did not escape imprisonment altogether, suffering longer sentence than white counterparts, and they were more often sentenced to death.<sup>142</sup>

Similar criminal defense arguments were made about Indigenous people as needing salvation<sup>143</sup> (which again may have echoes today in *Gladue* sentencing processes) and about their sickly dispositions within prison facilities, and threats of racial contamination, meriting their release.<sup>144</sup> Nonetheless, Indigenous people were, and still are, subject to a different regime from Black people, the white citizenry, and other migrants, largely due to the *Indian Act* and residential schools.

Through the *Indian Act*, the new Canadian government legislated prohibitions specific to Indigenous lifeways and kinship, such as banning the potlatch. The Act regulated reserves to dispossess Indigenous peoples of their territories, confining them spatially under the oversight of Indian Agents.<sup>145</sup> In fact, Indigenous people were prohibited from leaving the reserves without a ‘pass’ from the Indian Agent, like the remission and tickets of leave that the settler administration used for prisoners at the same time (which evolved into the parole system).<sup>146</sup> The RCMP, and its predecessors, patrolled the territories to enforce this highly regulated regime, and to quash Indigenous rebellion.<sup>147</sup> The introduction of reserves has therefore been described as creating ‘prisons of grass’.<sup>148</sup>

---

<sup>136</sup> Thibault, note 81.

<sup>137</sup> Barrington Walker, *Race on Trial: Black Defendants in Ontario's Criminal Courts, 1858-1958* (2010) [Walker, *Race on Trial*].

<sup>138</sup> Batelaan, note 81; Chartrand, note 81.

<sup>139</sup> OCI, *Black Inmate Experience*, note 4.

<sup>140</sup> Walker, *Race on Trial*, note 137.

<sup>141</sup> *Ibid.*

<sup>142</sup> *Ibid.*

<sup>143</sup> *Ibid.*

<sup>144</sup> Batelaan, note 81; Chartrand, note 81.

<sup>145</sup> Bhatia, note 16; Thibault, note 81.

<sup>146</sup> Chartrand, note 81.

<sup>147</sup> Maynard, note 57.

<sup>148</sup> Jacobs, Johnson and Twins, note 11, p. 243 (words of Yvonne Johnson).

In terms of incarceration in brick-and-mortar prisons, Indigenous peoples were then often kept separate from the mainstream system to be jailed on reserve in facilities redolent of the gaols.<sup>149</sup> Although, Indigenous people were also imprisoned in penitentiaries, as was the case with Mistahimaskwa (Chief Big Bear) who was held in the Stoney Mountain penitentiary, whereas other nehiyaw (Cree) individuals who resisted the Canadian government during negotiations around Treaty 6 were hanged.<sup>150</sup>

This highly managerial and no-less violent approach to regulating the behaviours, movement and lifeways of Indigenous people was, therefore underpinned by a carceral logic during the same period that Canada was establishing its *Criminal Code*, police force, national courts, and federated prison system. It was the period during which residential schools were established as other carceral institutions as well, with their genocidal practices that targeted the destruction of Indigenous families, communities, nations, and culture, according to assimilationist ideologies of daily micro-management and corporeal punishment, including death.<sup>151</sup> Residential schools were directly intertwined with the emerging penitentiaries. Children living in residential schools were forced to do manual labour, including to make clothing and uniforms for prisoners, while prisoners made goods for Indigenous children, such as uniforms and desks.<sup>152</sup> Crucially, Patricia Monture-Angus explains that residential schools and the later Canadian child 'welfare' system are a source of intergenerational trauma and thus tied to Canada's mass imprisonment of Indigenous people today.<sup>153</sup>

In a moment, we will turn to how Indigenous and Black people came to be integrated into the *mainstream* Canadian criminal law system. However, it is important to remark as well, that migrants of diverse backgrounds were also subject to settler carceral techniques developed for national identity, population control, and capital. As mentioned before, Canada's immigration policies in the 19<sup>th</sup> and early 20<sup>th</sup> centuries created incentives for the mass influx of white settlers, primarily from Western Europe.<sup>154</sup> Other migrants, including from Asia, Ireland, and Eastern and Southern Europe, were also variously admitted to the new nation at different points; however, they were subject to conditions of poverty, discrimination in labour, and forms of carceral management and punishment. This was true, for example, of the primarily Chinese migrants who built the trans-Canada railroad under horrible conditions of indentured labour.<sup>155</sup> It was also true of the Eastern European prisoners who were criminalized for vagrancy and forced to build the Canadian National Park system through excruciating manual labour.<sup>156</sup> Available records of criminal sentences from the mid-19<sup>th</sup> to the mid-20<sup>th</sup> century show that Black people received the most death sentences, second only to Ukrainians.<sup>157</sup>

Ending, now, with the present-day mass criminalization and incarceration of racialized people, and overwhelmingly Black and Indigenous people among them, this is widely understood to have occurred

---

<sup>149</sup> Chartrand, note 81.

<sup>150</sup> See e.g., Sharon Venne, 'Understanding Treaty 6: An Indigenous Perspective' in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada* (1998).

<sup>151</sup> Chartrand, note 81; Thibault, note 81.

<sup>152</sup> Chartrand, *Ibid.* On the racialization of Indigenous labour in prisons today see: House and Rashid, note 105.

<sup>153</sup> Patricia Monture-Angus, *Thunder in My Soul: A Mohawk Woman Speaks* (1995), p. 194; Thibault, note 81, p. 20.

<sup>154</sup> Bhatia, note 16.

<sup>155</sup> Riley Case, 'Homelands', note 87.

<sup>156</sup> Jones, note 20.

<sup>157</sup> Walker, *Race on Trial*, note 137.

from the mid-20<sup>th</sup> century (1960s) and onward, because of a shift in Canada's approach to assimilation, which was couched in the veneer of equality.<sup>158</sup>

As we saw in Part II of this paper with Canada's White Paper, beginning in the mid-20<sup>th</sup> century, Canada shifted its policy toward Indigenous people to prioritize assimilation into the general population under the guise of equality, proposing, for example, to eliminate the reserve system and Indian status under the *Indian Act*. Indigenous people resisted the White Paper, and Canada's new form of assimilation, as they had always done, in this case launching campaigns through direct action, land title cases, and engagement in negotiating the *Constitution of 1982*.<sup>159</sup> Even so, one of the consequences of this drive on the part of Canada was to integrate Indigenous people increasingly into the mainstream criminal law system, including through the equality of mass incarceration.<sup>160</sup> The notion was that the prison would now be a site of reform, of corrections, for the precarity and social challenges that Indigenous people experience,<sup>161</sup> leaving aside that settler colonialism gave rise to these in the first place.

The rates of Black incarceration also mounted exponentially during this period. In particular, from the 1960s until today, Black people have been targets of the Canada's crack-down on drugs. Although the 'war on drugs' is grounded in prohibitions that do not use explicitly racial language (and are therefore *formally equal*), these campaigns are premised on stereotypes of Black people as dangerous traffickers.<sup>162</sup> As mentioned before, Canada's anti-gang legislation some years later also began to target racialized neighbourhoods where Black people live, and to condemn Black kinship and access to public space.<sup>163</sup> The systematic increase of police in and around schools, largely in these neighbourhoods, has also created a school-to-prison pipeline, especially for Black children and youth.<sup>164</sup> Again, these campaigns are backed by laws that are not racially explicit, and couched in the guise of safety.

Such processes of bringing Black and Indigenous people, especially, into Canada's criminal law system in the name of benevolence (equality and social reform) have led to our present-day situation, where the proportion of Black and Indigenous imprisonment is steadily increasing relative to other prisoners.<sup>165</sup> Yet this transformation of how Canada's criminal law is used should not be seen as a major shift.

Rather, the rise in criminalized and incarcerated persons of colour, their harsher treatment in prisons, and other disparities under Canada's criminal law, must be understood as part of a *longue durée* that extends from settler carcerality, from the gaols, workhouses, slavery, reserves, and residential schools. These laid the grounds for Canada's Western democratic 'social contract' to effectively be a 'racial contract'<sup>166</sup> that is also anti-migrant, sexist, ableist, homophobic, anti-trans, and anti-poor. Settler carcerality is therefore dehumanizing not only for racialized people but for everybody – *including even those whose humanity is undermined by sustaining oppression*.<sup>167</sup> Hence, many activists and

---

<sup>158</sup> Chartrand, note 81; Batelaan, note 81.

<sup>159</sup> Yellowhead Institute, note 56; Coulthard, note 46.

<sup>160</sup> Chartrand, note 81.

<sup>161</sup> *Ibid.*

<sup>162</sup> Batelaan, note 81; Maynard, note 57.

<sup>163</sup> Walters, 'Kinship', note 52.

<sup>164</sup> See e.g., Akwasi Owusu-Bempah and Storm Jeffers, 'Black Youth and the Criminal Justice System: Summary Report of an Engagement Process in Canada' (Department of Justice Canada, 2021); Jeffers, note 62, p. 17.

<sup>165</sup> OCI, *Black Inmate Experience*, note 4, p. 4–5; Zinger, note 4, p. 5.

<sup>166</sup> Mills, note 17.

<sup>167</sup> Fanon, note 40; Paulo Freire, *Pedagogy of the Oppressed* (1970).

marginalized individuals and communities resist Canada's criminal law system, calling for alternative imaginaries rooted in the desires, the freedom dreams, of oppressed people.

#### IV Abolition and Reparatory Justice in Theory and Practice

You will see the victims that say, 'there is no justice for the victims,' and then you see the so-called offenders saying 'well, the justice is not working. It is warped.' If you have everybody on all sides saying the system isn't working or balancing out, then I say go back to the way the native people did it. When I was in court, I wanted so much to get up there and tell them exactly what happened in my perspective. That couldn't be done in a court of law the way that was done.

- Yvonne Johnson<sup>168</sup>

...the system you feel so attached to and that you seem to invest in preserving is not delivering on what you say you want, which is presumably safety and an end to violence. Worse than that, it is causing inordinate additional harm.... so, let's figure out together, across our communities, what would be a just system for adjudicating and evaluating harm. That's a very different posture to take. It's a question that invites people in, that invites people to offer their ideas. It invites us to argue with each other, to say, 'this will work better' and 'no, this is the best way', rather than accepting as permanent and always necessary the current oppressive institutions that we have.

- Mariame Kaba<sup>169</sup>

The quotations above by Mariame Kaba, an organizer, educator, archivist and curator, and by Yvonne Johnson, a great-great-granddaughter of Chief Big Bear, former prisoner, and storyteller, express the methodology of this research – which is to tell truths *and* exceed narratives of damage, focusing on our *desires* for something other than our present condition.

So far this paper has traced Canada's oppression of racialized people under the criminal law to Anglo-Eurocentric worldviews and techniques that were imposed historically on people living on these lands. Recounting this history also helped to show that carceral systems are dehumanizing for everybody. Although Canada's criminal law is often justified by governments and theorists based on the pretense that it can achieve safety, order and justice, an honest account that ties the past to the present helps to understand how these justifications came to be, and why they are ineffective. With its carceral logics of criminalization and punishment, Canada's law is built on skewed foundations. This means that piecemeal changes will be insufficient to ease its oppressive force, which is structural.

---

<sup>168</sup> Jacobs, Johnson and Twins, note 11, p. 246.

<sup>169</sup> Mariame Kaba and John Duda, 'Towards the Horizon of Abolition: A Conversation with Mariame Kaba' *The Next System Project* (November 9, 2017).

Below, we will turn to alternatives rooted in the desires of marginalized people, as a result. The question is how marginalized people are envisioning safety, accountability, responsibility and healing. Because eliminating hurt and harms altogether among human beings is farfetched, and given that human societies will agree some behaviours are wrong, alternatives to criminal law are premised on minimizing violence and fostering good relations. Desired alternatives are also premised on reducing *state* violence, often through the redistribution of authority and funding over how conflicts are managed.

There are many accounts of how this can be done, while this paper explores the two frames of *abolition* and *reparatory justice*. The modest aim in using these frames is to inspire reflections among community agencies, and directly affected individuals and communities, on the many initiatives that are already underway, including revitalizing Indigenous legal traditions. To that end, this section will also explore some initiatives, while highlighting the need for diligence in engaging reflectively and carefully, especially when government becomes involved.

### *i. Why Abolition and Reparatory Justice*

As mentioned above, the language of abolition and reparatory justice used here is intended to inspire conversations about diverse approaches that readers, and directly affected individuals and communities, may already be pursuing. To be clear, the aim is *not* to suggest that these two concepts are better than ongoing initiatives that go by other names, such as ‘restorative justice’. Abolition and reparatory justice have particular histories and ideals, as do initiatives such as restorative justice, transformative justice, diversion programs, and so on, which are not objective ‘goods’ but are likewise concepts that refer to a historically situated set of ideals and practices that we can engage with reflectively. The point then is to highlight key commitments of abolition and reparatory justice that may help to reflect on a variety of other approaches.

The rationale for choosing these two frames is, precisely, that abolition and reparatory justice are very *broad concepts*, big tents that welcome so many different efforts, so long these efforts *tend toward a horizon of emancipation from domination*, especially the afterlives of slavery and colonialism. Given that Canada’s criminal law is grounded in slavery and colonialism, these two frames are responsive to the problem at hand.

As well, abolition and reparatory justice were chosen because they attempt to grapple with *how to intervene productively in existing systems* in ways that are consistent with an overall refusal of oppression and the desires of marginalized people. In other words, although we cannot fully escape the structures that we are born into immediately, including the force of Canada’s settler carcerality, abolition and reparatory justice offer practical tools to differentiate between interventions that tend toward liberation and those that reinforce the status quo.

Briefly summarized, abolitionists desire a world without policing and prisons, which requires taking proactive steps to decrease violence through social wellbeing and simultaneous processes to address wrongdoing, hurt and harm when they occur.<sup>170</sup> As such, abolitionists value safety and justice, which are

---

<sup>170</sup> Deva R. Woody, *Reckoning: Black Lives Matter and the Democratic Necessity of Social Movements* (2022); adrienne maree brown, *Holding Change: The Way of Emergent Strategy Facilitation and Mediation* (2021).

stated goals of Canada’s criminal law, however, they do not purport to address these goals, as carceral systems do, through criminalization and punishment, including surveilling people and putting them in cages. Rather, abolitionists focus on principles such as social wellbeing, accountability, responsibility and healing, at individual, interpersonal and collective levels.<sup>171</sup>

Reparatory justice is closely aligned with abolition in that its proponents value honesty,<sup>172</sup> the redistribution of funding and social supports,<sup>173</sup> and healing. Nonetheless, reparatory justice basically stands for the notion that racial justice in the present demands redress for the past. This partly demands that advocates and communities ‘look to the bottom’ to marginalized people themselves for guidance,<sup>174</sup> constantly and consistently, when undertaking any initiatives, which means being adaptable, contextual, and deferential, rather than imposing a strict framework, whatever it may be, top-down, as the Canadian state does.

In this sense, key to reparatory justice is an emphasis on the human capacity to transform our realities through telling and retelling our own stories.<sup>175</sup> That is to say, the stories we tell ourselves about who we are and wish to be – about our ancestors and our ongoing relationships – matter. They guide our conduct, institutions and structures. Fundamentally, reparatory justice, then, strives toward a *horizon of humanity*, where a multitude of ways of being human prosper without some people being made expendable for the benefit of others.<sup>176</sup>

It will be helpful to expand on abolition and reparatory justice below with some examples. Indeed, both are not meant to be purely theoretical: they are about figuring out how to plot and realize concrete strategies and tactics in daily life that realize the desires they express. It will be important to keep in mind that these examples are meant to illustrate commitments of abolition and reparatory justice intuitively, not to be definitional. In that sense, the examples may overlap between abolition and reparatory justice, bridge them, and could likely be used to illustrate both.

## ii. *Abolition: Mindful Actions Beyond Police and Prisons*

Taking abolition first, this term was adopted in an intentional way to capture the ethics and practices of community organizers who had been advocating since the 1970s *against* policing and prisons in the

---

<sup>171</sup> Woodly, note 170; Angela Y. Davis, Gina Dent, Erica R. Meiners, and Beth E. Richie, *Abolition. Feminism. Now.* (2022). Woodly, *Ibid.*

<sup>172</sup> Usha Natarajan, ‘Climate Reparations as Truth’ (Paper delivered at the University of Zurich, April 2024) [forthcoming 2025]; David Scott, *Irreparable Evil: An Essay in Moral and Reparatory History* (2024).

<sup>173</sup> Olúfẹ̀mí O. Táíwò, *Reconsidering Reparations: Why Climate Justice and Constructive Politics Are Needed in the Wake of Slavery and Colonialism* (2022); *Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Racial Intolerance*, UNGA, 74<sup>th</sup> Sess, UN Doc A/74/321 (2019) [*Special Rapporteur*].

<sup>174</sup> Mari J. Matsuda, ‘Looking to the Bottom: Critical Legal Studies and Reparations’ (1987) 22 Harv CR-CLL Rev 323 [Matsuda, ‘Looking’].

<sup>175</sup> Usha Natarajan and Sarah Riley Case, ‘Race, Ecology, Nature and International Law: A Dialogue with Sarah Riley Case’ *TWAILR: Dialogues* [forthcoming, 2025]; Thibault, note 82.

<sup>176</sup> Marie Petersmann, Sarah Riley Case, and Juliana M. Streva, ‘The Inhuman as Refusal’ (2024) *Critical Legal Thinking*; Sarah Riley Case, ‘Looking to the Horizon: The Meanings of Reparations for Unbearable Crises’ (2023) 117 *AJIL Unbound* 49 [Riley Case, ‘Horizon’], drawing on the work of Franz Fanon and Sylvia Wynter. See note 40.

United States and *for* rebuilding marginalized communities so that they might prosper.<sup>177</sup> The language of abolition was chosen partly to celebrate an inheritance of the struggle against slavery. This was because organizers saw the antecedents of carceral systems in the plantation economy, not unlike our discussion above about how Canadian prisons reflect slavery and colonialism.<sup>178</sup>

As well, organizers drew on the writings of W.E.B. Du Bois, who had proposed that America move toward ‘abolition democracy’ after legal emancipation from slavery, which would entail a radical redistribution of wealth, decision-making authority and wellbeing to account for the structural effects of plantation slavery on society, in particular the dire ramifications for Black people of eliminating slavery in name only.<sup>179</sup> Crucially, Du Bois identified labour under capitalism as a fundamental cause for hierarchy and dispossession across the globe, including under slavery and its afterlives.<sup>180</sup> Du Bois turned to a productive vision, then, of a forward-looking program for substantive equality.<sup>181</sup>

Drawing on such an inheritance, advocates in the 1970s, who seeded today’s prison abolition movement, were often Black feminists, other feminists of colour, and queer folk, who organized to demand the release of people persecuted by the state, in this case, originally incarcerated women in the Black Panthers.<sup>182</sup> They, and other organizers around the time, founded bail programs, held protests, published newsletters, and engaged in self-study.<sup>183</sup> Prisoners as well had been leading uprisings from the inside, as in Attica, and organizing labour struggles, as in Walpole Prison.<sup>184</sup> In Canada, advocacy on behalf of accused persons, prisoners, and migrants facing deportation forms part of this longstanding radical tradition, for example through the Black Action Defense Committee.<sup>185</sup> Such kinds of organizing, which involved collaboration between people on the inside and outside, continued into the following decades across Turtle Island, when activism consolidated around the end of the 1990s into a widespread movement, self-identifying as ‘abolitionist’, and still largely led by women, queer, and nonbinary folk of colour.<sup>186</sup>

Coining terms such as ‘abolition’ and ‘prison-industrial-complex’ served the important function of signaling key commitments of the movement.<sup>187</sup> Whereas this section as a whole explores the meanings of abolition, the term ‘prison-industrial-complex’ signaled the fact that carceral systems are intertwined with oppression under capitalism, and that capitalism and carceral systems, both, depend on intersectional disparities (‘racial capitalism’).<sup>188</sup>

---

<sup>177</sup> Davis et al., note 171, p. 43.

<sup>178</sup> *Ibid.*, pp. 52-65.

<sup>179</sup> *Ibid.*; W. E. B. Du Bois, *Black Reconstruction in America: An Essay Toward a History of the Part Which Black Folk Played in the Attempt to Reconstruct Democracy in America, 1860-1880* (1935); Dorothy E. Roberts, ‘Abolition Constitutionalism’ (2019) 133:1 Harv L Rev 1.

<sup>180</sup> Davis et al., *Ibid.*; Du Bois, *Ibid.*; Roberts, *Ibid.*

<sup>181</sup> Davis et al., *Ibid.*; Du Bois, *Ibid.*; Roberts, *Ibid.*

<sup>182</sup> Davis et al., note 171; Parkes, ‘Starting with Life’, note 57.

<sup>183</sup> Davis et al., *Ibid.*

<sup>184</sup> *Ibid.*

<sup>185</sup> Tamari Kitossa, Erica Lawson, Philip S. S. Howard, *African Canadian Leadership: Continuity, Transition, and Transformation* (2019); Riley Case, ‘Homelands’, note 87.

<sup>186</sup> Davis et al., note 171.

<sup>187</sup> *Ibid.*

<sup>188</sup> Cedric Robinson, *Black Marxism: The Making of the Black Radical Tradition* (1983). For an accessible source that explains racial capitalism, see: Kenton Card, ‘Geographies of Racial Capitalism with Ruth Wilson Gilmore’ (2020), online (video).

Although the nature of the relationship between capital and prisons in the United States is not exactly the same as in Canada (because of the scale of imprisonment and the use of private prisons in the United States, for instance),<sup>189</sup> it is possible to see, from the previous section, just how integral precarious labour has been historically, and still is, to prisons in Canada, where large contracts benefit mostly government parties to the detriment of incarcerated workers.<sup>190</sup> Canadian investors also capitalize private prisons to the south. For example, McGill University invests in BlackRock, which is one of the largest investors in private prisons and immigration detention centers.<sup>191</sup>

The naming of the prison-industrial-complex has been important because abolitionists strive to replace predatory capitalism with *economic redistribution for social supports that minimize violence*, such as education, housing, and healthcare, including mental healthcare.<sup>192</sup> In other words, abolitionists try to identify the root causes of violence and conflict and to *respond with care*.<sup>193</sup> Abolition then has always been ‘about presence, not absence. It’s about building life-affirming institutions’, in the words of Ruth Wilson Gilmore.<sup>194</sup> And, as a strategy, abolitionists wish to foster ‘care not cops’.<sup>195</sup>

Care is not a lofty ideal, then, but an everyday, practical set of actions that seek to overcome the structural disadvantages that racialized people face to the benefit of a propertied, largely white, class: ‘it means the provision of what is necessary for health, welfare, maintenance, and protection, and also serious attention to doing something correctly in order to avoid unnecessary damage or risk.... A politics of care begins with the notion that it matters if we’re hurting – that we must attend to that in the conception and carrying out of our activities toward governance’.<sup>196</sup>

The idea, not unlike Du Bois’ abolition democracy, is to shift the massive budgets that go to police and prisons to community service providers to *rebalance our relations collectively* with a view to substantive equality. And, it is because of this that the Defund the Police movement can be situated within a broader abolitionist frame.<sup>197</sup> Although redistributing funding from different branches of the criminal law system is only one example of the concrete measures that abolitionist espouse, it is a vital one, because the question of economics addresses practical concerns about how to fund the social supports that abolitionists say must be strengthened to alleviate the precarity that criminal law exploits.

As mentioned before, this idea is that dismantling carceral systems while increasing the community supports that ordinary people need will foster *structural transformation* – it promises to break the chain in how carceral systems prey upon, then compound, intersectional precarity, because social supports can address intergenerational trauma, sustenance, and decent work, for instance.<sup>198</sup>

---

<sup>189</sup> Gilmore et al., note 12; Gilmore, *Abolition Geographies*, note 24.

<sup>190</sup> House and Rashid, note 105; Batelaan, note 81.

<sup>191</sup> Paul R. La Monica, ‘BlackRock and Vanguard are the Biggest Investors in Private Prisons’ (2019) CNN Business.

<sup>192</sup> Gilmore et al., note 12; Gilmore, *Abolition Geographies*, note 24.

<sup>193</sup> Woodly, note 170; Davis et al., note 171; Riley Case, ‘To Protest’, note 14.

<sup>194</sup> Ruth Wilson Gilmore, Address (Making and Unmaking Mass Incarceration Conference delivered at the University of Mississippi, December 2019) [unpublished].

<sup>195</sup> Davis et al., note 171, p. 65.

<sup>196</sup> Woodly, note 170, pp. 92-93.

<sup>197</sup> See Rodey Diverlus, Sandy Hudson, and Syrus Marcus Ware, eds, *Until We Are Free: Reflections on Black Lives Matter in Canada* (2020).

<sup>198</sup> Woodly, note 170.

Simultaneously, as mentioned before, abolition implies *replacing carceral systems with other ways of managing violence and conflict*, which inevitably occur. Therefore, on the one hand, the redistribution of wellbeing is a *proactive* measure to minimize wrongs, hurt and harms, and on the other hand, new institutions must be built to *respond*, should these occur, for healing, still according to the ethic of care. Healing has the added benefit of decreasing violence in turn.

This is a way to re-conceptualize and transform the self-fulfilling prophecy of carceral systems, based on the notion that *deepening care will have rebounding effects* – what adrienne maree brown calls a ‘fractal’ effect.<sup>199</sup> She explains, ‘Helping two people, or a small group, resolve conflict in ways that don’t involve violence, prison, the police, or public shaming, is crucial for our species learning to practice justice at a collective level’.<sup>200</sup>

One aspect of collective care involves prioritizing the reintegration into communities of those who cause hurt and harms by creating spaces for them to take responsibility and be accountable to victims, and the community at large, which has the fractal effects of healing described above. Deva Woodly explains this further,

... the concern with restoration and repair is a way both to care for people who have been harmed by seeking ways to repair the hurt caused or restore them a measure of what was lost *and* to care for the person who has committed harm by asserting that even as the perpetrator of harms, they are not disposable, and *because* they will not be thrown away and are still part of the society, they are required to be accountable for their actions by repairing and restoring, as much as possible, what they have damaged or destroyed. This impetus toward repair is not only operative on an interpersonal level or as a mediation between individuals mediated by institutions or the state, it is also an orientation that is meant to be taken up at scale. A politics of care requires us to consider what harms society ought to account for and how we should reckon with the need for reparation.<sup>201</sup>

Readers will likely see in this kind of program tenets of restorative justice, which we will return to below, as well as some aspects of Indigenous legal traditions, upon which restorative justice draws.<sup>202</sup> And, indeed, as a primary position, in a settler colonial state, such as Canada, abolition implies respecting and supporting Indigenous sovereignty over matters that the criminal law steps in to address, such as rebalancing relations among individuals and communities when wrongs, hurt and harms occur (as defined by Indigenous peoples themselves).<sup>203</sup> This is not only important because of the weight of the

---

<sup>199</sup> maree brown, note 170

<sup>200</sup> *Ibid.*, p. 110. See also Reakash Walters, ‘Abolitionist Lawyers: Making Prisons Obsolete’ in Kyle Kirkup & Anne Levesque et al., eds, *Critical Conversations in Canadian Public Law* (forthcoming) [Walters, ‘Abolitionist Lawyers’].

<sup>201</sup> Woodly, note 170, p. 88.

<sup>202</sup> See Larry Chartrand and Kanatase Horn, *A Report on the Relationship Between Restorative Justice and Indigenous Legal Traditions in Canada* (2016).

<sup>203</sup> Jacobs, Johnson and Twins, note 11; Emily Riddle, *Abolish the Police: The Financial Cost of Law Enforcement in Prairie Cities* (2020).

criminal law system on Indigenous peoples, but because *decolonization* demands the repatriation of Indigenous lands and life, including through self-determination over such matters.<sup>204</sup>

It is important to acknowledge, as Emily Riddle does, that First Nations do not always engage with the frame of abolition as a path to liberation.<sup>205</sup> She chooses to use this language, nevertheless, to frame a ‘movement toward our own liberation and land restitution’, against the background of ‘legislated’ poverty for Black and Indigenous people.<sup>206</sup> In this way, the revitalization of Indigenous legal traditions could be said to align with commitments of broader abolition movements, because they both desire the dismantling of carceral systems, and the redistribution of government funding, to respect and support Indigenous sovereignty.

Beverley Jacobs, former President of the Native Women’s Association of Canada, explains that decades of reports and reforms to address the mass incarceration of Indigenous women and two-spirit people have clearly been ineffective.<sup>207</sup> Nor have these initiatives within Canada’s criminal law system addressed police violence against Indigenous women and two-spirit persons, nor the neglect of Missing and Murdered Indigenous Women, Girls and 2SLGBTQIA persons.<sup>208</sup> Reflecting on the personal narratives of former Indigenous prisoners, Jacobs also uses the language of abolition to raise issues such as ‘support to the women, acknowledging the intergenerational traumas, including all types of violence against Indigenous women and their children, and finally, solutions to change the system’.<sup>209</sup> She argues, ‘that there has to be a complete transition and transformative change to a complete abolition of the prison systems for Indigenous women’.<sup>210</sup>

Moreover, Jacobs shares that, even with variation across manifold Indigenous legal traditions, prior to colonization:

Indigenous peoples had ways and means of addressing conflict according to their sources of Indigenous laws. Indigenous laws are about balance in all of creation and among and amongst human beings. Indigenous peoples, through the practice of Indigenous laws, had a way of understanding someone who may have missed something, a teaching or a purpose that had been missed in their teachings which may have caused harm to someone else for some reason. To utilize an Indigenous conflict system goes directly to the core of that and to understand why a person would want to cause harm to someone else. Starting with that, it was about an imbalance if something was put out of place or if something was done wrong. There was always ceremony, for example, that brought Indigenous peoples back to their original life path.<sup>211</sup>

In terms of reforms, readers may know that there have been various initiatives to address the position and experiences of Indigenous peoples within Canada’s criminal law system, often framed in the

---

<sup>204</sup> Eve Tuck and K. Wayne Yang, ‘Decolonization is Not a Metaphor’ (2012) 1:1 *Decolonization* 1; Maynard, note 57; Robyn Maynard and Leanne Betasamosake Simpson, *Rehearsals for Living* (2022).

<sup>205</sup> Riddle, note 203, p. 2.

<sup>206</sup> Riddle, *ibid.*, p. 3.

<sup>207</sup> Jacobs, Johnson and Twins, note 11.

<sup>208</sup> *ibid.*

<sup>209</sup> *ibid.*

<sup>210</sup> *ibid.*

<sup>211</sup> *ibid.*, p. 241.

language of restorative justice, some drawing on Indigenous law and others not, such as *Gladue* reports, healing circles, and healing lodges (which are a residential alternative to prisons that provide Indigenous teachings and programs).<sup>212</sup> However, as alluded to by Jacobs, reforms have been insufficient to address the unilateral force of Canada's criminal law onto Indigenous peoples. Implementation has been exceptional, it relies on government representatives as the final arbiters of decisions about how Indigenous people are treated (e.g., judges, Correctional Services Canada),<sup>213</sup> implementation has at times been rolled back,<sup>214</sup> and it is wanting in terms of resources and bureaucratic hurdles.<sup>215</sup>

Yet, legislative reforms that opened the doors to such initiatives imply *substantively more* deference and delegation to Indigenous communities than Canadian government representatives currently permit.<sup>216</sup> And, crucially, as acknowledged in the TRC Calls to Action and the *UN Declaration on the Rights of Indigenous Peoples*, Indigenous jurisdiction over rebalancing the kinds of wrongs, hurt and harms that Canada claims authority over falls squarely within the *inherent sovereignty* of Indigenous peoples to govern themselves.<sup>217</sup> That is, *with due restitution from the Canadian state* through funding and other practical support, as may be requested by Indigenous peoples.

The Royal Commission on Aboriginal Peoples, and the TRC Calls to Action, essentially describe a two-track approach that involves deferring to and supporting Indigenous sovereignty through funding and agreements and, in parallel, working within and against Canada's criminal law system.<sup>218</sup>

Ongoing initiatives of the BC First Nations Justice Council provide an example of this approach as it sets out to establish a network of alternatives to prisons in community, while providing services such as helping to prepare *Gladue* reports.<sup>219</sup> Transferring full authority for healing lodges away from Corrections Services Canada and to a given Indigenous nation or community (and their chosen allies), provides another example (that has been denied in practice).<sup>220</sup> As does allowing people access to healing lodges or other self-determined Indigenous alternatives to prison *before* a security classification and placement in prison occurs (here, again, this is more aspirational than current practice).<sup>221</sup>

Similar principles of, first and foremost, respecting Indigenous sovereignty, while simultaneously working toward decreasing state violence from within and against Canada's colonial law, could be applied to other stages in the lifecycle of criminal law system as well, providing a horizon of possibility for grassroots agencies, individuals and communities.

Kanatase Horn, for instance, describes how the work of the Odawa Native Friendship Centre in Ottawa extends across multiple entry points into Canada's criminal law system *and beyond*, reorienting around

---

<sup>212</sup> See Chartrand and Horn, note 202; Prisoners' Legal Services, *Decarceration Through Self-Determination: Ending the Mass Incarceration of Indigenous People in Canada* (2023).

<sup>213</sup> Prisoners' Legal Services, *Ibid.*

<sup>214</sup> *R. v. Sharma*, 2022 SCC 39.

<sup>215</sup> Prisoners' Legal Services, note 212.

<sup>216</sup> Notably s. 81 of the *Corrections and Conditional Release Act*, see Prisoners' Legal Services, *Ibid.*; Zinger, note 4, p. 9.

<sup>217</sup> E.g., TRC Calls to Action, 31, 42-45; Chartrand and Horn, note 202; Prisoners' Legal Service, *Ibid.*; *United Nations Declaration on the Rights of Indigenous Peoples*, UNGA, UN Doc A/RES/61/295 (2007), Art. 5 [UNDRIP].

<sup>218</sup> TRC, *Calls to Action*, note 13; RCAP, *Report*, note 29.

<sup>219</sup> Prisoners' Legal Services, note 212.

<sup>220</sup> *Ibid.*, pp. 61-62.

<sup>221</sup> *Ibid.*, p. 125.

Indigenous law.<sup>222</sup> The Centre, part of the network of Indigenous Friendship Centres, operates a diversion program through a government agreement,<sup>223</sup> which includes bringing Indigenous legal protocols to the Indigenous Peoples Court of the Ottawa Provincial Courthouse, thus ‘push[ing] the administration of Indigenous law out into the community’, and the Centre uses Anishinaabe legal principles for ‘healing, knowledge sharing, role modelling, and building kinship relationships’ among people directed there from the Court.<sup>224</sup> At the same time, the Centre provides outreach to persons experiencing homelessness.<sup>225</sup> Through proactive *and* responsive offerings, the Centre thus ‘demonstrates that Indigenous law is vibrant, robust, and has the capacity to order urban space, movement, and other important relationships’.<sup>226</sup> Despite necessary critical reflection on the colonial law within which the Centre operates, Horn believes, ‘this structural framework does not overdetermine the kinds of relationships that blossom and manifest inside these spaces... Indigenous laws and legal orders exist in urban centres’.<sup>227</sup>

The discussion above raises another key commitment of abolition, including and beyond the Indigenous context, which is about how to *distinguish between interventions in settler carceral systems that are emancipatory and interventions that reinforce the status quo*. This becomes especially important where agencies receive government funding or partner with government, or where advocates, individuals, families and communities must engage with Canada’s criminal law system, which the example of the Odawa Native Friendship Centre illustrates.

Abolitionist lawyers working within the territories that Canada claims, such as Debra Parkes and Reakash Walters, drawing on an inheritance of others who have come before, argue that direct engagements with the criminal law system can indeed risk being coopted by the state, and therefore undermined, making it necessary to pursue actions that *diminish the power of the settler carceral state, rather than legitimizing it*.<sup>228</sup> In other words, simple acts such as defending a person from imprisonment can be abolitionist as a form of immediate justice, and yet *how* this is done matters.

Abolitionists, in this respect, turn to the framework of ‘non-reformist reforms’, first articulated by the Marxist André Gortz, and elaborated on by thinkers and activists such as Mariame Kaba, Angela Davis, Ruth Wilson Gilmore, and Dorothy Roberts.<sup>229</sup> The idea here is that, short of sovereignty from the state (which should not be discounted, as discussed above), people living under the jurisdiction that states claim will necessarily have to maneuver around dominant structures and institutions, whether by consent or imposition. We must therefore design strategies and tactics with this in mind. Responding to Canada’s overwhelming force, however, does not require conceding to it, and it is possible to operate *against* the system from within.

Examples of reforms that would *not* count as abolitionist because they legitimize the criminal law, instead of diminishing its power, include advocating for more policing, for example through ‘community

---

<sup>222</sup> Kanatase Horn, *Indigenous Law is Already Here: Law, Kinship, and Mobile Obligations at the Odawa Native Friendship Centre* (Thesis, Carleton University, 2024).

<sup>223</sup> *Ibid.*, p. 224.

<sup>224</sup> *Ibid.*, p. x.

<sup>225</sup> *Ibid.*

<sup>226</sup> *Ibid.*, p. x.

<sup>227</sup> *Ibid.*, p. 246-247.

<sup>228</sup> Parkes, ‘Abolitionist Lawyering’, note 106; Walters, ‘Abolitionist Lawyers’, note 200.

<sup>229</sup> Gilmore, *Abolition Geographies*, note 24, p. 467; Roberts, note 179; Dan Berger, Mariame Kaba, and David Stein, ‘What Abolitionists Do’ (2017) *Jacobin*.

policing’ and greater funding;<sup>230</sup> technological fixes, such as bodycams, which do not reduce police presence, criminalization or incarceration;<sup>231</sup> establishing dialogues between police and communities to ‘sensitize’ police or give them ‘cultural competence’;<sup>232</sup> and establishing review bodies within the very carceral institutions that require oversight, rather than through independent, community-based bodies. As well, an abolitionist frame would reject the use of restorative justice by carceral institutions, such as prisons and courts, for victim-offender mediations, when this legitimizes the state’s underlying mistreatment of the parties.<sup>233</sup>

Implicit bias training can be another problematic reform for reasons that are more complex. Although people are biased, and importantly, decision-makers, such as judges, police officers, parole officers, prison guards, and others, wield discretion in racist ways, as discussed earlier in this paper, implicit bias training can reinforce the narrative that racism is an individual problem, a matter of a few ‘bad apples’, as opposed to being structural, and requiring transformation.<sup>234</sup> Human rights commissions have easily recommended implicit bias training for decades to no avail, often partnering with police and bolstering their image in the process.<sup>235</sup> This strategy, however, also characterizes racism as *natural*, a biological response to difference that can be rewired, which of course it is not.<sup>236</sup> Crucially, implicit bias training diverts attention, and actual resources, away from transferring funds and authority to bottom-up alternatives to carceral systems.<sup>237</sup> So, although it is helpful to tell truths about how history, racialization and state wrongs bear upon the present, including upon our relationships with one another, implicit bias training does not usually do this, and is at best ambivalent.

In contrast, one abolitionist strategy is to consistently raise awareness about structures of settler carcerality, for example as El Jones does on her Nova Scotia radio show, *Black Power Hour*, where prisoners share their experiences.<sup>238</sup> She does this in her tireless, grounded work supporting people on the inside and in public campaigns to halt cases of persecution.<sup>239</sup> Prisoners do this kind of work themselves, leading labour movements, organizing uprisings, and partnering with folks on the outside.<sup>240</sup> Prison lawyers do this kind of work too, advocating for individuals, while calling for legislative changes that would diminish rather than bolster state power – seeking to eliminate drug offenses, for example, and offences that make sex work precarious, given the intersectional disparities that these definitions of crime reinforce.<sup>241</sup> Educators are hosting prison law courses and prison law clinics for future generations (of a professional class).<sup>242</sup> Organizations, such as the Elizabeth Fry Societies and *Communitas* in Montréal, offer a range of programming for prisoners, formerly incarcerated persons and their loved ones,

---

<sup>230</sup> Kaba, note 79, p. 71.

<sup>231</sup> Kaba, *ibid.*; Maynard, note 57.

<sup>232</sup> Kaba, *ibid.*

<sup>233</sup> Reakash Walters & Alicia Virani, ‘A Transformative Path Forward for Restorative Justice’ in Jennifer Llewellyn & Ivo Aertsen, eds, *International Encyclopedia of Restorative Justice* (forthcoming), p. 5.

<sup>234</sup> Bridges, note 67, pp. 173–174.

<sup>235</sup> Nicole Bernhardt, ‘Refusing Human Rights Police Partnerships’ (2024) 58:3 *J Can Studies* 624.

<sup>236</sup> Bridges, note 67.

<sup>237</sup> *Ibid.*

<sup>238</sup> E Jones, note 20.

<sup>239</sup> *Ibid.*

<sup>240</sup> Walters, ‘Abolitionist Lawyers’, note 200; Davis et al., note 171; House and Rashid, note 105.

<sup>241</sup> Prisoners’ Legal Services, note 212; Parkes, ‘Abolitionist Lawyering’, note 106. See also Maynard, note 57, on drug and sex offences.

<sup>242</sup> PUB2 507: Prison Law and Policy (McGill University, Faculty of Law); Queen’s University’s Prison Law Clinic.

including diversion, housing supports, bail, and supporting people with pardons or criminal record suspensions.

Agencies that support individuals and communities with *broader wellbeing*, and those persons directly affected, are also essential in the abolitionist struggle, given the constructive and transformative vision of care that abolitionists have. Grassroots agencies and community networks that support migrants, persons experiencing precarious housing, mental health challenges, intimate partner violence... Fostering the wellbeing of people who feel the brunt of settler colonialism and capitalism, including as a result of migration,<sup>243</sup> minimizes state violence and interpersonal conflicts, and simply helps people to prosper, regardless of whether they are caught up in Canada's criminal law at a given moment.

For settlers and migrants,<sup>244</sup> advocating for decarceration and the redistribution of funding to Indigenous peoples for self-determination might also possibly help to fulfil our responsibilities of non-interference and reciprocity according to treaty relations.<sup>245</sup> This means working *alongside* Indigenous peoples, acknowledging that non-Indigenous peoples cannot know experiences they/we have not lived,<sup>246</sup> and that Indigenous sovereignty includes defining desires, strategies, tactics, and initiatives for themselves. An example of this kind of abolitionist solidarity was a partnership between NWAC, the Elizabeth Fry Societies, Senator Kim Pate, and Strength in Sisterhood, which involved Circle Talks with women inside, and resulted in a report on alternatives to incarceration.<sup>247</sup>

Such everyday actions, big and small, may indeed be part of a longstanding abolitionist tradition, precisely because they are not novel, but are constantly being 'renewed and refreshed over time', maintaining 'strength, speed, stamina, agility, flexibility, balance'.<sup>248</sup> Even so, as the recurring message goes, any such actions must be 'mindful'.<sup>249</sup> This is to say, again, *the how matters*. The how entails evaluating strategies and tactics to ensure that they do not reinforce Canada's criminal law system, but instead promote alternatives that actually realize safety, accountability, responsibility, and healing. These are commitments not only of abolition, but also of reparatory justice.

### iii. *Reparatory Justice: Redress for the Past and Seeking Guidance from Below*

Reparatory justice, at its most basic, stands for the notion that *redress is due for the weight of history on the present*.<sup>250</sup> Like abolition, the concept of reparatory justice has long been articulated by racialized

---

<sup>243</sup> Harsha Walia, *Border & Rule: Global Migration, Capitalism and the Rise of Racist Nationalism* (2021); Harsha Walia, *Undoing Border Imperialism* (2013).

<sup>244</sup> For a definition of settlers and migrants, see Tuck and Yang, note 204; Saito, note 16.

<sup>245</sup> On revitalizing treaty relations, see Aaron Mills, 'Rooted Constitutionalism: Growing Political Community' in John Borrows, and James Tully, eds, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (2018). See also on the denial Canada's jurisdiction over criminal law in favour of treaty relations: *R. c. Montour*, 2023 QCCS 4154.

<sup>246</sup> Laura Sharpe, 'Indigenous Allyship at Osgoode: Reflections', *Obiter Dicta* (23 Oct 2018). See also on solidarity, Akbar et al., note 48.

<sup>247</sup> Jacobs, Johnson and Twins, note 11, p. 255.

<sup>248</sup> Gilmore, *Abolition Geographies*, note 24, pp. 490-491 (referring specifically to the *Black radical tradition of abolition*).

<sup>249</sup> *Ibid.*

<sup>250</sup> *Special Rapporteur*, note 173.

people themselves. Discourses of ‘reparations’ have origins that include Pan African, Indigenous and Global South calls for redress for the afterlives of slavery and colonialism.<sup>251</sup> These all emphasize that reparatory justice ultimately liberates everyone from the bind of domination by rebalancing human relations.<sup>252</sup>

Given this view onto humanity, calls for reparations are being made worldwide for a variety of measures, not only for apologies and monetary payments, and they can be considered part of a radical global project.<sup>253</sup> In this sense, reparatory justice desires what abolition does in terms of a life beyond imperialism in all its forms, including carceral systems and racial capitalism.<sup>254</sup>

Reparations across the territories that Canada claims have acknowledged and provided compensation for Japanese internment and the Chinese head tax.<sup>255</sup> Black communities have been calling for reparations from Canada for slavery and colonialism, including ongoing anti-Black racism across carceral systems, unsuccessfully.<sup>256</sup> And Indigenous demands from Canada have been framed in the language of reparation, for land theft, residential schools, the child ‘welfare’ system, and the denial of self-determination over economic life.<sup>257</sup> It is worth noting that the UN has recognized that Black and Indigenous peoples living in Canada are entitled to reparatory justice that is outstanding.<sup>258</sup>

Against this background, it is also important to acknowledge that Indigenous law includes traditions and languages of reparation. Darlene Johnson describes Indigenous reparation in terms of ‘righting collective wrongs’ by taking ‘collective responsibility’.<sup>259</sup> She considers, ‘Perhaps a renewal of Aboriginal traditions of reparation can foster a collective willingness to redress the colonial imbalance which plagues Aboriginal communities and Canadian consciences alike’.<sup>260</sup> This recalls Beverley Jacobs’ words in the context of abolition that ‘Indigenous laws are all about balance in all of creation and among human beings’.<sup>261</sup>

Indeed, the discussion of reparatory justice here builds on what has already been shared about the abolition of carceral systems to a great degree. For instance, the last section explored the abolitionist

---

<sup>251</sup> See e.g., Riley Case, ‘Horizon’, note 173.176; Antony Anghie, ‘Rethinking International Law: A TWAAIL Retrospective’ (2023) 34:1 Eur J Intl L 7; Táiwò, note 176.

<sup>252</sup> Riley Case, *Ibid.*

<sup>253</sup> *Ibid.*

<sup>254</sup> *Ibid.*

<sup>255</sup> Elizabeth McSheffrey, ‘Intangible Losses’: B.C. Announces \$100M Redress Package for Japanese Canadians’ (2022) Global News; Jimmy Thomson, ‘Reparations for Japanese Canadians Imprisoned During World War II Viewed by Many as Too Little, Too Late’ (2023) The World; Peter Li, ‘Reconciling with History: The Chinese-Canadian Head Tax Redress’ (2008) 4:1 J China Overseas 127; Government of British Columbia, ‘BC Government Issues Formal Apology to Chinese Canadians’ (2016).

<sup>256</sup> David Este, Christopher Walmsley, and Wanda Thomas Bernard, ‘It’s Time to Make Reparations for the Transatlantic Slave Trade’ (2024) Canadian Centre for Policy Alternatives.

<sup>257</sup> See. E.g., Yellowhead Institute, *Cash Back* (2021).

<sup>258</sup> *Report of the Working Group of Experts on People of African Descent on its Mission to Canada*, UNHRC, 36<sup>th</sup> Sess, UN Doc A/HRC/36/60/Add.1 (2017); UNDRIP, note 217.

<sup>259</sup> Darlene Johnston, ‘Aboriginal Traditions of Tolerance and Reparation: Introducing Canadian Colonialism’ in Micheline Labelle, Rachad Antoinius, Georges Leroux, eds, *Le devoir de memoire et les politiques du pardon* (2005), p 156.

<sup>260</sup> *Ibid.*, p. 159.

<sup>261</sup> Jacobs, Johnson and Twins, note 11, p. 241.

commitment to addressing wrongdoing, hurt and harm interpersonally and by the state. It emphasized the importance of reintegrating people who have caused hurt and harm back into community, rather than subjecting them to violence, to foster collective healing. The previous section discussed the structural redistribution of wellbeing through social supports, which can prevent violence from reoccurring and is a good. And, it was said, this demands the transfer of funding and authority to define law and justice from the colonial state toward self-determining communities, including sovereign Indigenous nations. These all have reparatory dimensions.

Considering such overlaps between abolition and reparatory justice, the focus in this section will turn to a quite limited, in-depth discussion. Namely, about the possibilities for *reparatory narratives* within and against Canada's criminal law system.<sup>262</sup> This therefore returns us to Part II of the paper on framing. In that section, the question was about the methodology for this research. Whereas now, the question is about how affected individuals and communities, and their supporters, might tell truths and exceed narratives of damage. On these questions, this paper has drawn inspiration from Caribbean thinkers Franz Fanon and Sylvia Wynter to reinforce the understanding that knowledge produces our world, which means that telling stories *differently* is crucial to transformation.<sup>263</sup>

Being truthful about the setter carcerality of Canada's criminal law – even while intervening in the system – could, for instance, force the government's hand in taking responsibility to make amends. This communicative function of focusing on state wrongs,<sup>264</sup> can also help to depathologize portrayals of racialized people, who are targeted by Canada's criminal law, as broken and needing state beneficence (including 'correction' and punishment). Moreover, being honest about structural racism can humanize all people engaging with each other across the criminal law system, however they are positioned, by acknowledging that this system is recreated daily by *actual people, who can do things otherwise*.

At quite a practical level, this signals a responsibility among professionals and advocates involved in the criminal law system to look to marginalized people for guidance on how to describe reality. As we saw in Part II, there are pervasive reports and media that cast a deficit lens onto racialized people through the centuries-long gaze of white supremacy. While, of course, racialized and other marginalized people caught up in the system have experiential knowledge about the fact of their oppression. Ample research shows that Black and Indigenous people do not trust the police, for instance.<sup>265</sup> Deferring to Black, Indigenous and further people who are criminalized and punished to convey their own lived experiences, and their desires, may thus be one way to pursue reparatory justice within their/our capacity.

The quote that opened this section anticipated such an approach when Yvonne Johnson said, 'When I was in court, I wanted so much to get up there and tell them exactly what happened in my perspective. That couldn't be done in a court of law the way that was done'.<sup>266</sup> She later published her story in the book, *Stolen Life: The Journey of a Cree Woman*.<sup>267</sup>

---

<sup>262</sup> This idea of reparatory narrative is inspired by David Scott's concepts of reparatory history and reparatory critique, which he says implicitly call out for redress. See Scott, note 172.

<sup>263</sup> Fanon, note 40; Wynter, note 40. See also Thibault, note 81.

<sup>264</sup> Manikis, note 75.

<sup>265</sup> Statistics Canada, 'Black and Indigenous People's Confidence in Police and Experiences of Discrimination in Their Daily Lives' (2022) *The Daily*; House of Commons, *Systemic Racism in Policing in Canada: Report of the Standing Committee on Public Safety and National Security* (June 2021) (Chair: John McKay), p. 55.

<sup>266</sup> Jacobs, Johnson and Twins, note 11.

<sup>267</sup> Yvonne Johnson and Rudy Wiebe, *Stolen Life: The Journey of a Cree Woman* (1998).

Although some may question whether honesty is a helpful tactic in each case, as a longer-term strategy, when done thoughtfully, it might possibly force people with power across the criminal law system, such as judges, parole officers, service providers, and lawyers, to reckon with their *own* accountability and responsibilities as individuals making decisions. In the very least, a reparative narrative would bring visibility to, and document, the choices of decision-makers to reinforce carceral systems.

Above all else, directly affected individuals and communities should be given the option of representing their lives honestly without prejudice from those purporting to support them and to know better. Mari Matsuda explains that racialized people, poor people, those experiencing mental health challenges, have ‘multiple consciousness’.<sup>268</sup> Similarly, Eve Tuck and Adrian Smith helped to understand earlier in the paper, as well, that although marginalized people are forced to navigate oppression, we are no less self-actualizing.<sup>269</sup> The option of telling human narratives, rather than forcing people into stereotypes that the government contrives, may be symbolic, and yet it may restore agency by ‘looking to the bottom’.<sup>270</sup> Matsuda’s timeless definition of reparation is a constant orientation of looking to the bottom, to marginalized people them/ourselves, for guidance.<sup>271</sup>

The example that will be explored below is that of Impact of Race and Culture Assessments used in sentencing Black people. Scholars, such as Michelle Williams, Maria Dugas and Danardo Jones have been considering the benefits and challenges of these assessments in practice,<sup>272</sup> and their insights might have readers reflect on *Gladue* processes as well, bearing in mind that these are distinctive contexts. IRCAs are similarly being used, nonetheless, during criminal proceedings to determine whether a sentence is proportionate. The idea is that the sentencing judge may consider evidence of racism, culture and other factors across Canadian society that is casually connected to the offence in determining the conditions of imprisonment or alternatives.

Legal procedures aside, IRCAs have been a bottom-up community initiative, especially among Black communities seeking to foster diversion and decrease prison sentences. These are well-intentioned goals, and they are reparatory in principle, given Canada’s mass criminalization and imprisonment of Black people, which extends from slavery and colonialism, and thus demands redress.

At the same time, Maria Dugas remarks that it is questionable whether ‘any sentence imposed on a Black or Indigenous person is “just”’.<sup>273</sup> And Danardo Jones likewise proposes, ‘we must confront the possibility that the notion of fit and proportionate sentences for Black people cannot be achieved without a wholesale dismantling and restructuring of the current institution of punishment’.<sup>274</sup> And yet they acknowledge, as do others, that criminal sentencing, as a matter of fact, ‘operate[s] within the cruel

---

<sup>268</sup> Mari J. Matsuda, ‘When the First Quail Calls: Multiple Consciousness as Jurisprudential Method’ (1989) 11:7 *Women’s Rts L Rep* 7.

<sup>269</sup> Tuck, note 26; Smith, note 31.

<sup>270</sup> Matsuda, ‘Looking’, note 174.

<sup>271</sup> *Ibid.*

<sup>272</sup> Michelle Williams, ‘African Nova Scotian Restorative Justice: A Change Has Gotta Come’ (2009) 27:4; Dugas, ‘Sentencing’, note 15; Maria C. Dugas, ‘Committing to Justice: The Case for Impact of Race and Culture Assessments in Sentencing African Canadian Offenders’ (2020) 43:1 *Dal LJ* 103; Danardo Jones, ‘Morris: A Modest Step Forward and a Call to Action’ (2022) 75 *CR* (7<sup>th</sup>) 29; Danardo Sanjay Jones, ‘Probing The Data: Perspectives on Race Visibility in Canadian Sentencing Proceedings’ (2024) 40 *Windsor YB Access Just* 131.

<sup>273</sup> Dugas, ‘Sentencing’, note 15, p. 650.

<sup>274</sup> Jones, ‘Paradoxical’, note 25, p. 423.

illogic of white supremacy',<sup>275</sup> which means grappling with how race-conscious sentencing is presently affecting those whom it purports to benefit.

Although there is much to say about the outcomes of these cases (in terms of whether they are tangibly non-reformist abolitionist reforms), on the question of *reparatory narrative*, it is distressingly clear that race and cultural assessments have more often than not re-entrenched stereotypes about Black people as predisposed toward criminality, in gendered ways.<sup>276</sup> From a review of almost 100 available cases, Jones concludes:

...the offenders' journeys, as described by the courts, are almost identical. They are the product of a single-mother household, grew up in abject poverty, were exposed to violence at an early age, and their crime of choice usually involves violence, using a firearm, or trafficking controlled substances. At first glance, it appears that those called upon to sentence, prosecute and defend Black offenders are engaged in a veritable race to the bottom – to highlight the most wretched and pathological image of Blackness as a way of provoking an institutional response to anti-Black racism when those tropes are themselves both a cause and a symptom of anti-Black racism.<sup>277</sup>

Readers might recall at this point that precursors to race and culture assessments can be seen in the arguments made about Black and Indigenous defendants under the British colonial administration, then under Canada's criminal law, from the 19<sup>th</sup> to the mid-20<sup>th</sup> century. During that earlier period, while Canada was asserting its claim to settler statehood on these lands through Indigenous, Black and migrant dispossession, Black and Indigenous defendants in criminal trials were sometimes given a pardon or the charges were dropped, following arguments that they were 'childlike' and in need of salvation from the colonial government.<sup>278</sup> At the same time, they were portrayed as 'dangerous Others'.<sup>279</sup> Although their advocates and the judges, in this respect, may have been working strategically with good intentions, the repetition of these, paradoxical, stereotypes is therefore a colonial inheritance that persists in today's narratives of damage in weighing the proportionality of a sentence.

Jones' review of practices ongoing today thus raises 'concerning trends whereby racism-conscious sentencing practices and strategies may inadvertently reinforce some of the anti-Black stereotypes they are intended to confront'.<sup>280</sup> From the perspective of Black defendants, risks of this approach include the possibility of a *higher* sentence, including longer and stricter prison sentences, and 'an affront to their dignity':<sup>281</sup> They have expressed that,

...their dignity as individuals and their families' or communities' dignity would be negatively impacted by efforts to secure a lower sentence by spotlighting their social and racial disadvantage. Relatedly, some suggested that advocating for a lower sentence in this would be akin to begging for mercy

---

<sup>275</sup> *Ibid.*, p. 424.

<sup>276</sup> *Ibid.*

<sup>277</sup> *Ibid.*, p. 450.

<sup>278</sup> Walker, *Race on Trial*, note 137.

<sup>279</sup> *Ibid.*

<sup>280</sup> Jones, 'Paradoxical', note 25, p. 423.

<sup>281</sup> Jones, 'Probing', note 272, p. 131.

since it could be regarded as a bid for special treatment and, as such, would be abasing.<sup>282</sup>

Crucially, missing from these sentencing cases are narratives addressing the role of the state in perpetuating wrongs, harm and hurt in intersectional ways.<sup>283</sup> Worse, in one decision, *R v Morris*, the Ontario Court of Appeal went so far as to use race and culture assessments to *justify and therefore reinforce Canada's criminal law system*, stating that these sentencing practices, while recognizing 'societal' systemic racism and the disproportionate treatment of Black people across the criminal law system, does not necessitate a reconsideration of Canada's criminal law.<sup>284</sup>

Moreover, *R v Morris* made sweeping, unfounded claims about the notion that Black people in Canada do not have alternative conceptions of justice to Canada's settler carcerality.<sup>285</sup> This statement is clearly baseless, as the discussions in this section on reparatory justice and the previous one on abolition have shown. *Morris* therefore re-racialized Black people by characterizing us as a monolith, with one mind that is essential and fixed, specifically to an *absence of intellect and liberatory values*.<sup>286</sup> This reproduced the paternalism of the Canadian government, and its mostly white judicial representatives, speaking *for Black people*.<sup>287</sup> Another example of this paternalism, well-intended defense lawyers prioritize race data in this context, under the pretense that it will achieve the Black person's goals.<sup>288</sup>

A reparatory narrative, in contrast, would be honest about the weight of history on the present within Canada's settler carceral system. It would draw attention to how Blackness is constructed in paradoxical ways as a process of racialization, including in these precise circumstances of actual individuals repeating narratives of damage. It would 'avoid monolithic, flat narratives of Blackness' and thus 'expose judges to Blackness as a diverse, multifaceted, intersectional phenomenon'.<sup>289</sup> It would call upon those who are engaged with Canada's criminal law system to account for the role that they play, as individuals in everyday life, reinforcing the racial dispossession of especially Black and Indigenous individuals and communities – and to take responsibility, as human beings, for our collective futures. There are examples of how this can be done,<sup>290</sup> and people working within and against Canada's criminal law system have a responsibility to learn from them to harness the 'fractal effects' of reparatory justice.<sup>291</sup>

This kind of confrontation, while risky, would be no more risky than perpetuating narratives of damage, which have had ambivalent tangible results.<sup>292</sup> It would be truthful, without shying away from the life of the person and the community at the center. As the above account of race and sentencing illustrates, to assume that marginalized people are unaware of their own lives and cannot make choices about their dignity is to maintain the core of settler carcerality.

---

<sup>282</sup> *Ibid.*, p. 144.

<sup>283</sup> *Ibid.*; Dugas, note 15.

<sup>284</sup> For a discussion, see Riley Case, note 14; Jones, *Ibid.*; Dugas, *Ibid.*

<sup>285</sup> Riley Case, *Ibid.*, Dugas, note 15.

<sup>286</sup> Riley Case, *ibid.*

<sup>287</sup> Dugas, note 15.

<sup>288</sup> Jones, 'Probing', note 272.

<sup>289</sup> *Ibid.*, p. 154.

<sup>290</sup> See, for instance, on *R v Anderson*, 2020 NSPC 10; Riley Case, note 14; Dugas, note 15.

<sup>291</sup> maree brown, note 170.

<sup>292</sup> Jones, Probing, note 281; Jones, 'Paradoxical', p. 423; Dugas, note 15; Riley Case, note 14.

Above all else, a reparative narrative – whether at sentencing, during an immigration or parole hearing, when applying for social benefits, or in other engagements with Canadian colonial law – would therefore defer to the affected individual, their families and communities, Black, Indigenous or otherwise marginalized, in exercising agency over how they wish to convey their reality and desires, one way or another. This is anti-imperial in the instance, regardless of the outcome in Canada’s law, and is therefore reparatory.<sup>293</sup>

## V Conclusion: Sustaining Critical Reflection

This paper has responded to a call from the Canadian Network for Equity and Racial Justice rooted in the network’s anticolonial and antiracist orientation to fostering equity across the territories that Canada claims of Turtle Island. The primary audience has been grassroots agencies and advocates as well as the individuals and communities whom they support while engaging with Canada’s criminal law system.

The research has argued that racial justice can only be legitimately pursued when accompanied by informed and critical reflection on the colonial and exploitative foundations of Canada’s criminal law, which is a settler carceral system that sustains the dispossession of people in intersectional ways, especially Black and Indigenous individuals and communities across these lands.

The research has emphasized the importance of telling truths about these conditions in terms of state wrongs, while attending honestly to their complex ramifications on interpersonal lives. Through the frames of abolition and reparatory justice, the research has also shown that it is possible, and imperative, to exceed narratives of damage, re-rooting in the personhood of marginalized people and thus deferring to their/our desires and self-actualization.

To this end, the paper shared examples from across the lands that Canada claims of practical, everyday strategies and tactics, acknowledging nonetheless that a key commitment of abolition and reparatory justice is to be constantly reflective about whether any actions are mindful, whether they bolster or diminish the power of Canada to oppress.

The proposition has been that, as a result of long historical processes, nearly everyone around the world is implicated in settler carcerality, albeit in different intersectional ways. We are therefore all accountable and have responsibilities to ourselves and others to heal, so that we can realize alternative futures. Sustaining critical reflection in everyday life, as accountable and responsible individuals, notably means looking to the bottom, to those who are criminalized, imprisoned and otherwise marginalized, for guidance on what law and justice mean. This orientation, toward a horizon of humanity, is inherently freeing for everyone.

---

<sup>293</sup> Riley Case, note 176.

## References

- Akbar, Amna A, Samer M. Ashar and Jocelyn Simonson. 'Movement Law' (2021) 73 *Stan L Rev* 821.
- Anghie, Antony. 'Rethinking International Law: A TWAIL Retrospective' (2023) 34:1 *Eur J Intl L* 7.
- Armstrong, Byron. 'Police Apologies Are Meaningless When They Actively Invest in Surveillance of Black People' (2022), *Ricochet*.
- Aurélien, Maxime and Ted Rutland. *Out to Defend Ourselves: A History of Montreal's First Haitian Street Gang* (2023).
- Batelaan, Krystal. 'Tell Dem Wagwan Fanon: On [Colonial] Violence and Prison Labour in Canada' (Doctoral Thesis, University of Toronto, 2024).
- Berger, Dan, Mariame Kaba, and David Stein. 'What Abolitionists Do' (2017) *Jacobin*.
- Bernhardt, Nicole. 'Refusing Human Rights Police Partnerships' (2024) 58:3 *J Can Studies* 624.
- Betasamosake Simpson, Leanne. *As We Have Always Done: Indigenous Freedom Through Radical Resistance* (2017).
- Bhatia, Amar. 'Statehood, Canadian Sovereignty, and the Attempted Domestication of Indigenous Legal Relations' in Sujith Xavier, Beverley Jacobs, Valarie Waboose, Jeffery G. Hewitt, Amar Bhatia, eds, *Decolonizing Law: Indigenous, Third World and Settler Perspectives* (2021).
- Borrows, John. 'Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government' in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (1997).
- Brand, Dionne. *A Map to the Door of No Return* (2001).
- Bridges, Khiara M. *Critical Race Theory: A Primer* (2019).
- British Columbia, Government of. 'BC Government Issues Formal Apology to Chinese Canadians' (2016).
- British Columbia's Office of the Human Rights Commissioner. *Equity is Safer: Human Rights Considerations for Policing Reform in British Columbia*, (2021).
- brown, adrienne maree. *Holding Change: The Way of Emergent Strategy Facilitation and Mediation* (2021).
- Canadian Civil Liberties Association. *Anti-Black Racism in Canada's Criminal Justice System: Fact Sheet* (2021).
- Canadian Council for Refugees. 'Permanent Residents and Criminal Inadmissibility' (2018).

- Card, Kenton. 'Geographies of Racial Capitalism with Ruth Wilson Gilmore' (2020), online (video).
- Chartrand, Vicki. 'Unsettled Times: Indigenous Incarceration and the Links Between Colonialism and the Penitentiary in Canada' (2019) 61:3 Can J Corr 67.
- Christie v The York Corporation* [1940] SCR 139.
- Clark, Scott. *Overrepresentation of Indigenous People in the Canadian Criminal Justice System: Causes and Responses* (2019).
- Commission des droits de la personne et des droits de la jeunesse Quebec. *Review of Implementation of the Recommendations Issued in the Report of the Consultation on Racial Profiling and its Consequences* (2020).
- Constitution Act, 1867* (UK), 30 & 31 Vict, c 3.
- Cooper, Afua. *The Hanging of Angélique: The Untold Story of Canadian Slavery and the Burning of Old Montréal* (2006).
- Correctional Service of Canada. *Creating Choices: The Report of the Task Force on Federally Sentenced Women* (1990).
- Corrections and Conditional Release Act*, SC 1992, c.20, s. 3.
- Coulthard, Glen Sean. *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (2014).
- Crenshaw, Kimberlé. 'Twenty Years of Critical Race Theory: Looking back to Move Forward' (2011) 43:5 Conn L Rev 1253.
- Davis, Angela Y., Gina Dent, Erica R. Meiners, and Beth E. Richie. *Abolition. Feminism. Now.* (2022).
- Diverlus, Rodney, Sandy Hudson, and Syrus Marcus Ware. Eds. *Until We Are Free: Reflections on Black Lives Matter in Canada* (2020).
- Draaisma, Muriel. 'Police Charge 3 People After Black Lives Matter Protesters Splatter Paint on Statues in Toronto' (2020) CBC News.
- Du Bois, W. E. B. *Black Reconstruction in America: An Essay Toward a History of the Part Which Black Folk Played in the Attempt to Reconstruct Democracy in America, 1860-1880* (1935).
- Dugas, Maria. 'Addressing Anti-Black Racism in Sentencing: A Critical Comparison of *R v Anderson* and *R v Morris*' (2024) 103:3 Can Bar Rev 644.
- Dugas, Maria. 'Committing to Justice: The Case for Impact of Race and Culture Assessments in Sentencing African Canadian Offenders' (2020) 43:1 Dal LJ 103.
- Duhaney, Patrina. 'Criminalized Black Women's Experiences of Intimate Partner Violence in Canada' (2021) 28:11 Violence Against Women 2765.

- Este, David, Christopher Walmsley, and Wanda Thomas Bernard. 'It's Time to Make Reparations for the Transatlantic Slave Trade' (2024) Canadian Centre for Policy Alternatives.
- Fanon, Frantz. *Les Damnés de la Terre* (1961).
- Ferreira da Silva, Denise. *Toward a Global Idea of Race* (2007).
- Foucault, Michel. *Discipline and Punish* (1975).
- Freire, Paulo. *Pedagogy of the Oppressed* (1970).
- Giannini, Alice. 'An Intersectional Approach to Homelessness: Discrimination and Criminalization' (2017) 19 Marq Benefits & Soc Welfare L Rev 27.
- Gilmore, Ruth Wilson, Alberto Toscano, and Brenna Bhandar. 'The Prison-Industrial Complex Goes Beyond Cops and Jails. It's All Around Us.' Interview. By Dan Denvir. *Jacobin* (2022).
- Gilmore, Ruth Wilson. *Abolition Geographies: Essays Towards Liberation* (2022).
- Gilmore, Ruth Wilson. Address (Making and Unmaking Mass Incarceration Conference delivered at the University of Mississippi, December 2019) [unpublished].
- Goodmark, Leigh. *Imperfect Victims: Criminalized Survivors and the Promise of Abolition Feminism* (2023).
- Grace, Anita. "'They Just Don't Care": Women Charged with Domestic Violence in Ottawa' (2019) 42:3 Man LJ 153.
- Haney López, Ian. *White by Law: The Legal Construction of Race* (1996).
- Harris, Angela P. 'Race and Essentialism in Feminist Legal Theory' (1990) 42:3 Stan L Rev 581.
- Hartman, Saidiya V. *Scenes of Subjection: Terror, Slavery, and Self-Making in Nineteenth-Century America* (1997).
- Henry-Dixon, Natasha. 'Racial Segregation of Black People in Canada' in *The Canadian Encyclopedia* (2021).
- Horn, Kanatase. *Indigenous Law is Already Here: Law, Kinship, and Mobile Obligations at the Odawa Native Friendship Centre* (2024).
- House, Jordan and Asaf Rashid, *Solidarity Beyond Bars: Unionizing Prison Labour* (2022).
- House of Commons. *Systemic Racism in Policing in Canada: Report of the Standing Committee on Public Safety and National Security* (June 2021) (Chair: John McKay).

- Jacobs, Beverley, Yvonne Johnson, and Joey Twins. 'Decolonizing Corrections' in Sujith Xavier, Beverley Jacobs, Valarie Waboose, Jeffery G. Hewitt, Amar Bhatia, eds, *Decolonizing Law: Indigenous Third World and Settler Perspectives* (2021).
- Jacobs, Beverley. 'International Law/The Great Law of Peace' (Master Thesis, University of Saskatchewan, 2000).
- Jeffers, Storm K. *Summary of Site Reports for Canada's Black Justice Strategy* (2023).
- Johnson, Holly and Deborah E. Conners. 'Negotiating Women's Safety: The Mandatory Charging Debate' in Kate Fitz-Gibbon, Sandra Walklate, Jude McCulloch, JaneMaree Maher, eds, *Intimate Partner Violence, Risk and Security: Securing Women's Lives in a Global World* (2018).
- Johnston, Darlene. 'Aboriginal Traditions of Tolerance and Reparation: Introducing Canadian Colonialism' in Micheline Labelle, Rachad Antoinius, Georges Leroux, eds, *Le devoir de memoire et les politiques du pardon* (2005).
- Johnson, Yvonne and Rudy Wiebe. *Stolen Life: The Journey of a Cree Woman* (1998).
- Jones, Danardo. 'Morris: A Modest Step Forward and a Call to Action' (2022) 75 CR (7<sup>th</sup>) 29.
- Jones, Danardo. 'Paradoxical Race Visibility in Canadian Sentencing Law' (2024) 102:2 Can Bar Rev 419.
- Jones, Danardo Sanjay. 'Probing The Data: Perspectives on Race Visibility in Canadian Sentencing Proceedings' (2024) 40 Windsor YB Access Just 131.
- Jones, El. *Abolitionist Intimacies* (2022).
- Kaba, Mariame. *We Do This 'Til We Free Us: Abolitionist Organizing and Transforming Justice* (2021).
- Kaba, Mariame and John Duda. 'Towards the Horizon of Abolition: A Conversation with Mariame Kaba' *The Next System Project* (November 9, 2017).
- Kaye, Julie and Alana Glecia. "'Why Do We Have to be Almost Dead to Qualify for Help?': Criminal Legal and Protection Systems Responses to Intimate Partner Violence Against Indigenous Women in Canada' (2025) Can Rev Sociol.
- Kelley, Robin D.G., *Freedom Dreams: The Black Radical Imagination* (2002).
- Kennedy, Jeffrey. 'Beyond Judicial Solitude: Listening in the Politics of Criminal Sentencing' (2024) 43:3 Crim Just Ethics 225.
- Kennedy, Jeffrey. 'Crimes as Public Wrongs' (2021) 27 Leg Theory 253.
- Kerr, Lisa Coleen. 'How the Prison is a Black Box in Punishment Theory' (2018) 69:1 UTLJ 85.
- Kerr, Lisa Coleen. 'The Origins of Unlawful Prison Policies' (2015) 4:1 Canadian Journal of Human Rights 89.

- Kerr, Lisa. 'The Place of *Gladue* in Constitutional Law (2024) 33 Constitutional Forum 1.
- Kitossa, Tamari, Erica Lawson, Philip S. S. Howard. *African Canadian Leadership: Continuity, Transition, and Transformation* (2019).
- Kleinbans, Martha-Marie and Roderick A. Macdonald. 'What is a *Critical Legal Pluralism*?' (1997) 12:2 CJS 25.
- La Monica, Paul R., 'BlackRock and Vanguard are the Biggest Investors in Private Prisons' (2019) CNN Business.
- Lewis, Stephen. *Report on Race Relations in Ontario* (1992).
- Li, Peter. 'Reconciling with History: The Chinese-Canadian Head Tax Redress' (2008) 4:1 J China Overseas 127.
- Luke's Place. *Call For a Review of Mandatory Charging Policies* (2024).
- Manikis, Marie. 'Recognizing State Blame at Sentencing: A Communicative and Relational Framework' (2022) 81:2 Cambridge LJ 294.
- Matsuda, Mari J. 'Looking to the Bottom: Critical Legal Studies and Reparations' (1987) 22 Harv CR-CLL Rev 323.
- Matsuda, Mari J. 'When the First Quail Calls: Multiple Consciousness as Jurisprudential Method' (1989) 11:7 Women's Rts L Rep 7.
- Matthews, Roger. *Doing Time: An Introduction to the Sociology of Imprisonment* (1999).
- Maynard, Robyn. *Policing Black Lives: State Violence in Canada from Slavery to the Present* (2017).
- Maynard, Robyn, and Leanne Betasamosake Simpson. *Rehearsals for Living* (2022).
- McKittrick, Katherine. 'Mathematics Black Life' (2014) 44:2 Black Scholar 16.
- McSheffrey, Elizabeth. "'Intangible Losses': B.C. Announces \$100M Redress Package for Japanese Canadians' (2022) Global News.
- Mills, Aaron. 'Rooted Constitutionalism: Growing Political Community' in Michael Asch, John Borrows, and James Tully, eds. *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (2018).
- Mills, Charles. *The Racial Contract* (1997).
- Monture-Angus, Patricia. 'Women and Risk: Aboriginal Women, Colonialism, and Correctional Practice' (1999) 19 Canadian Woman Studies 24.

- Monture-Angus, Patricia. *Thunder In My Soul: A Mohawk Woman Speaks* (1995).
- Morito, Bruce. *An Ethic of Mutual Respect: The Covenant Chain and Aboriginal-Crown Relations* (2012).
- Morrison, Toni. 'A Humanist View' (Public Dialogue on the American Dream Theme delivered at Portland State University, 30 May 1975) [unpublished].
- Mosher, Clayton James. 'Chapter 6 Drug and Public-Order Crimes' in *Discrimination and Denial: Systemic Racism in Ontario's Legal and Criminal Justice System, 1892-1961* (1997).
- Natarajan, Usha. 'Climate Reparations as Truth' (Paper delivered at the University of Zurich, April 2024) [forthcoming 2025].
- Natarajan, Usha and Sarah Riley Case, 'Race, Ecology, Nature and International Law: A Dialogue with Sarah Riley Case' *TWAILR: Dialogues* [forthcoming, 2025].
- Nelson, Charmaine. "'Ran Away from Her Master... A Negro Girl Named Thursday": Examining Evidence of Punishment, Isolation, and Trauma in Nova Scotia and Quebec Slave Advertisements' in Amy Swiffen and Joshua Nichols, eds, *Legal Violence and the Limits of the Law* (2018).
- Nichols, Robert. 'The Colonialism of Incarceration' in Amy Swiffen and Joshua Nichols, eds, *Legal Violence and the Limits of the Law* (2018).
- Office of the Correctional Investigator. *A Case Study of Diversity in Corrections: The Black Inmate Experience in Federal Penitentiaries* (2013).
- Ontario Human Rights Commission. *Eliminating Racial Profiling in Law Enforcement* (2019).
- Owusu-Bempah, Akwasi and Storm Jeffers, 'Black Youth and the Criminal Justice System: Summary Report of an Engagement Process in Canada' (Department of Justice Canada, 2021).
- Owusu-Bempah, Akwasi and Zilla Jones, *Canada's Black Justice Strategy: Framework* (2023).
- Parkes, Debra. 'Solitary Confinement, Prisoner Litigation, and the Possibility of a Prison Abolitionist Lawyering Ethic' (2017) 32:2 CJLS 165.
- Parkes, Debra. 'Starting with Life: Murder Sentencing and Feminist Prison Abolitionist Praxis' in Kelly Struthers Montford & Chloë Taylor, eds, *Building Abolition: Decarceration and Social Justice* (2021).
- Pasternak, Shiri. 'Jurisdiction and Settler Colonialism: Where Do Laws Meet?' (2014) 29:2 CJLS 145.
- Petersmann, Marie, Sarah Riley Case, and Juliana M. Streva. 'The Inhuman as Refusal' (2024) Critical Legal Thinking.
- Pitman, Walter. *Now Is Not Too Late* (1977).
- Prisoners' Legal Services. *Decarceration Through Self-Determination: Ending the Mass Incarceration of Indigenous People in Canada* (2023).

- Public Safety Canada. *Solitary Confinement and the Structured Intervention Units in Canada's Penitentiaries: The Final Report of the SIU IAP* (2024).
- R. c. Montour*, 2023 QCCS 4154.
- R. v. Sharma*, 2022 SCC 39.
- Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Racial Intolerance*, UNGA, 74<sup>th</sup> Sess, UN Doc A/74/321 (2019).
- Report of the Working Group of Experts on People of African Descent on its Mission to Canada*, UNHRC, 36<sup>th</sup> Sess, UN Doc A/HRC/36/60/Add.1 (2017).
- Riddle, Emily. *Abolish the Police: The Financial Cost of Law Enforcement in Prairie Cities* (2020).
- Riley Case, Sarah. 'Homelands of Mary Ann Shadd' in Immi Tallgren, ed, *Portraits of Women International Law: New Names and Forgotten Faces?* (2023).
- Riley Case, Sarah. 'Looking to the Horizon: The Meanings of Reparations for Unbearable Crises' (2023) 117 AJIL Unbound 49.
- Riley Case, Sarah. 'To Protest for Black Life during the Pandemic: Resistance and Freedom in a Settler State' (2024) 38:3 CJLS 316.
- Roberts, Dorothy E. 'Abolition Constitutionalism' (2019) 133:1 Harv L Rev 1.
- Robinson, Cedric. *Black Marxism: The Making of the Black Radical Tradition* (1983).
- Royal Commission on Aboriginal Peoples. *Report of the Royal Commission on Aboriginal Peoples* (1996).
- Saghbini, Charbel, Angela Bressan and Lysiane Paquin-Marseille. *Indigenous People in Criminal Court in Canada: An Exploration Using the Relative Rate Index* (2021).
- Saito, Natsu Taylor. *Settler Colonialism, Race, and the Law: Why Structural Racism Persists* (2020).
- Sealy-Harrington, Joshua. 'Righteous Student Activism and Evolving Anti-Palestinian Reprisal in Canada' (2024), Canadian Dimension.
- Scott, David. *Irreparable Evil: An Essay in Moral and Reparatory History* (2024).
- Sharpe, Christina. *In the Wake: On Blackness and Being* (2016).
- Smith, Adrian. 'Seeing Like a Clinic' (2022) 59:1 Osgoode Hall LJ 37.
- Standing Senate Committee on Human Rights. *Interim Report – Study on the Human Rights of Federally-Sentenced Persons: The Most Basic Human Right Is to Be Treated as a Human Being* (2019).

- Statistics Canada. 'Black and Indigenous People's Confidence in Police and Experiences of Discrimination in Their Daily Lives' (2022) *The Daily*.
- Stevenson, Verity. 'How the Myth of the Montreal Street Gang Led to More Street Checks on Black Youths' (2020) *CBC News*.
- Stevenson, Verity. 'McGill Moving Forward with Injunction Request Against Pro-Palestinian Encampment' (2024) *CBC News*.
- Thibault, Katie. 'The Canadian Carceral State: Violent Colonial Logics of Indigenous Dispossession (Master Thesis, Queen's University, 2016).
- Thompson, Debra. *The Schematic State: Race, Transnationalism, and the Politics of the Census* (2016).
- Thomson, Jimmy. 'Reparations for Japanese Canadians Imprisoned During World War II Viewed by Many as Too Little, Too Law' (2023) *The World*.
- Truth and Reconciliation Commission of Canada. *Truth and Reconciliation Commission of Canada: Calls to Action* (2015).
- Tuck, Eve. 'Suspending Damage: A Letter to Communities' (2009) 79:3 *Harvard Educational Rev* 409.
- Tuck, Eve, and K. Wayne Yang. 'Decolonization is Not a Metaphor' (2012) 1:1 *Decolonization* 1.
- Táíwò, Olúfẹ̀mí O. *Reconsidering Reparations: Why Climate Justice and Constructive Politics Are Needed in the Wake of Slavery and Colonialism* (2022).
- Valverde, Mariana, Kamari Clarke, Eve Darian Smith, and Prabha Kotiswaran. 'Contested Laws, Contested Societies' in Mariana Valverde, Kamari Clarke, Eve Darian Smith, and Prabha Kotiswaran, eds, *The Routledge Handbook of Law and Society* (2021).
- Valverde, Mariana. 'Liberalism' in Mariana Valverde, Kamari Clarke, Eve Darian Smith, and Prabha Kotiswaran, eds, *The Routledge Handbook of Law and Society* (2021).
- Venczel, Elizabeth. 'Settler Colonialism and Prisons: A Comparative Case Study of Canada, Palestine, and Australia' (2023) 14:2 *Settl Colon Stud* 140.
- Venne, Sharon. 'Understanding Treaty 6: An Indigenous Perspective' in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada* (1998).
- Walcott, Rinaldo. 'The Book of Others (*Book IV*): Canadian Multiculturalism, the State, and Its Political Legacies' (2014) *Can Ethnic Studies* 46:2 127.
- Walcott, Rinaldo. *On Property: Policing, Prisons, and the Call for Abolition* (2021).
- Walia, Harsha. *Border & Rule: Global Migration, Capitalism and the Rise of Racist Nationalism* (2021).
- Walia, Harsha. *Undoing Border Imperialism* (2013).

- Walker, Barrington. *Race on Trial: Black Defendants in Ontario's Criminal Courts, 1858-1958* (2010).
- Walker, Barrington. *The African Canadian Legal Odyssey: Historical Essays* (2012).
- Walters, Reakash and Alicia Virani. 'A Transformative Path Forward for Restorative Justice' in Jennifer Llewellyn & Ivo Aertsen, eds, *International Encyclopedia of Restorative Justice* (forthcoming).
- Walters, Reakash. 'Abolitionist Lawyers: Making Prisons Obsolete' in Kyle Kirkup & Anne Levesque et al., eds, *Critical Conversations in Canadian Public Law* (forthcoming).
- Walters, Reakash. 'The Criminalization of Black Friendship, Kinship and Belonging' (2025) 48:2 Dal LJ (forthcoming).
- Wasi, Waniza. 'Sacrifice and Silence Neoliberalism, Right-Wing Populism, and the Repression of Pro-Palestinian Student Movements at Alberta Universities' (2025) 2:2 Can J Academic Mind 109.
- Williams, Michelle. 'African Nova Scotian Restorative Justice: A Change Has Gotta Come' (2009) 27:4.
- Woodly, Deva R. *Reckoning: Black Lives Matter and the Democratic Necessity of Social Movements* (2022).
- Wortley, Scot and Akwasi Owusu-Bempah. *Appendix A: Street Checks, Racial Profiling and Police-Community Relations: A Review of the Research Literature* (2019).
- Wortley, Scot. *Halifax, Nova Scotia: Street Checks Report* (2019).
- Wynter, Sylvia. 'Unsettling the Coloniality of Being/Power/Truth/Freedom: Towards the Human, After Man, Its Overrepresentation—An Argument' (2003) 3:3 CR: New Centennial Rev 257.
- Yellowhead Institute, *Cash Back* (2021).
- Yellowhead Institute. *Land Back: A Yellowhead Institute Red Paper* (2019).
- Zinger, Ivan. *Ten Years Since Spirit Matters: A Roadmap for the Reform of Indigenous Corrections in Canada* (2023).