Criminal Empire: The Making of the Savage in a Lawless Land

Heidi Kiiwetinepinesiik Stark

Theory & Event 19.4 (October): in press.

Indigenous resistance in the 19th century was recast as criminal activities, enabling the U.S. and Canada to avert attention from their own illegality. The imposition of colonial law, facilitated by casting Indigenous men and women as savage peoples in need of civilization and constructing Indigenous lands as lawless spaces absent legal order, made it possible for the United States and Canada to *reduce* Indigenous political authority, domesticating Indigenous nations within the settler state, shifting and expanding the boundaries of both settler law and the nation itself by judicially proclaiming their own criminal behaviors as lawful.

On December 26th, 1862, 38 Dakota men were hanged before a crowd of some 4,000 spectators in Mankato, MN.[1] Thirteen years later at Battleford, Saskatchewan, 6 Cree and 2 Assiniboine leaders were hanged in front of hundreds of witnesses.[2] These would mark the largest mass executions in both countries.

Yet, these were neither isolated nor exceptional events. Various Indigenous leaders, such as Modoc[3], Tlingit[4], and Nisqually[5] leaders in the United States along with Tsilquotin[6], Ojibwe[7] and Metis[8] leaders in Canada would also be executed under the pretense of criminality within colonial law. Countless individuals would find themselves under the jurisdiction of these two states, prosecuted and imprisoned for alleged criminal activities.[9] This article traces how Indigenous resistance in the 19th century was recast as criminal activities, laying out the techniques and taxonomies of empire that enabled these two states to *reduce* Indigenous political authority, domesticating Indigenous nations within the settler state, while *producing* the settler nation-state and its accompanying legitimating juridical narratives.

I do so by charting the construction of Indigenous criminality and subsequent imposition of colonial law that enabled the United States and Canada to not just imagine but actively produce their claims of sovereignty.[10] This required distinct configurations of Indigenous criminality along gender lines. As Indigenous men's political authority had already been recognized in the public sphere by the United States and Canada via the treaty making process, their domestication into the nation-state required forceful violent constructions of Indigenous men as savages, criminals, and lawless figures. Indigenous women's political authority had largely been discounted in the treaty process by the US and Canada, which, not surprisingly, afforded limited to no recognition of white women's political authority in the 19th century. Therefore, the continued domestication of Indigenous women political authority was carried out with focus given to the private sphere, constructing Indigenous women as deviant, immoral beings who needed to learn proper forms of domesticity.

Framing Indigenous peoples as criminals enabled the US and Canada to avert attention from their own illegality. By discursively transforming treaties from relationships to land cession contracts, these two states sought to disguise the illegitimacy of their settlement, which had been rendered unlawful the moment they violated the treaty relationships and commitments that authorized their presence across Indigenous lands. The imposition of colonial law, facilitated by casting Indigenous men and women as savage peoples in need of civilization and composing Indigenous lands as lawless spaces absent legal order, made it possible for the United States and Canada to shift and expand the boundaries of both settler law and the nation itself by judicially proclaiming their own criminal behaviors as lawful. The federal Indian and aboriginal laws and policy these shifts produced occupied the dark shadows of empire. Indigenous nations and their attending sovereignty became contained in this liminal space, cast as foreign and then violently remade as domestic in order to subsume Indigenous sovereignty within the bounds of the state.[11] The United States and Canada continually drew and redrew boundaries while crafting and revising the juridical narratives that gave legality to these spaces.

It is in these shadows that we can see the making of a criminal empire. Within these liminal spaces, we can see how colonialism continuously transforms and realigns as proclaimed settler sovereignty is challenged and resisted by Indigenous nations. As Amy Kaplan reminds us, "imperialism does not emanate from the solid center of a fully formed nation; rather, the meaning of the nation itself is both questioned and redefined through the outward reach of empire."[12] Blurring the distinctions between sovereignty, territory, and jurisdiction that barred unfettered acquisition

and settlement of Indigenous lands, the United States and Canada harnessed the constructions of criminality to assert jurisdiction over sovereign Indigenous lands and bodies in order to remake the foreign (Indigenous nations) into the domestic (individual Indigenous subjects).

I conclude by arguing that the political authority of the United States and Canada paradoxically required the recognition of Indigenous sovereignty. These two nation-states could not, or would not, unequivocally dismiss or deny the existence of Indigenous sovereign authority. Instead, both nations developed and drew on legal narratives that discursively transformed and anchored the political attributes of Indigenous nations by framing treaties away from ongoing relationships to contractual events that were temporally and geographically fixed. By tethering treaties to a specific historical moment and framing these relationships as contractual events, the United States and Canada were able to preserve their own legitimacy that was contingent on these treaties while enabling the courts to demarcate the bounds of Indigenous sovereignty and contemporaneously chip away at Indigenous political authority by criminalizing and domesticating Indigenous nations.

Transformation of the Treaty Relationship

The Dakota – starving and aggravated by the criminal neglect of the United States to adhere to previous treaties, fraudulent treaty payouts that privileged corrupt traders and delayed annuities desperately needed to ameliorate deplorable reservation conditions – declared war on MN, initially targeting agency employees, traders, and clerks. Surrendering thirty-seven days after the war began, the Dakota were not treated as prisoners of war. Instead, Former MN governor Henry Sibley decided to convene a five-person military commission, an action outside his authority, to try the Dakota for "murder and outrages." The commissioners Sibley appointed were all military officers who had fought against the Dakota just days earlier and who were now being called upon to dispense impartial justice. Each trial averaged ten minutes, with some lasting less than five minutes. By November 5, 1862, 392 Dakota were tried for "crimes" connected to war, 323 of whom were convicted and 303 condemned to death.[13]

President Lincoln, wanting to temper the draconian sentences Sibley had hoped to impose while still imparting sentences severe enough to discourage Indigenous resistance and satisfy Minnesotan's call for revenge, ultimately ordered the execution of 38 Dakota. The hanging of 38 Dakota men occurred the same week that Lincoln issued the Emancipation Proclamation freeing the slaves.[14]

Twelve years later, in 1877, in the aftermath of the Battle at the Little Big Horn, in the Speech from the Throne, Canadian Prime Minister Alexander Mackenzie alluded to the violent military campaign against Indigenous nations in the United States. Defending the recently negotiated Treaty 6, a diplomatic accord between the Crown and Cree and Assiniboine First Nations across central Saskatchewan and Alberta, despite provisions he characterized as "of a somewhat onerous and exceptional nature," Mackenzie asserted, "the Canadian policy is nevertheless the cheapest, ultimately, if we compare the results with those of other countries; and it is above all a humane, just and Christian policy."[15] Mackenzie brought this point home, stating "Notwithstanding the deplorable war waged between the Indian tribes of the United States territories and the Government of that country during the last year, no difficulties has arisen with the Canadian tribes living in the immediate vicinity of the scene of the hostilities." This speech marked the beginning of one of the most deep-seated myths in Canadian history- that Canada was a benevolent and just nation.[16] Especially in comparison to the United States, who, by implication, was not.

Yet, Indigenous nations north of the border had also been actively resisting encroachment and settlement on their lands.[17] This had been a major impetus for the Numbered Treaties, including the hurried signing of Treaty 6. Chief Poundmaker had been blocking progress on telegraph lines near Battleford, making it clear that "lines could not be strung across Cree lands without a treaty."[18] A number of prominent leaders, including Poundmaker and Big Bear, refused to sign onto the treaty until they saw the Canadian Government live up to their promises.[19] Chief Big Bear expressed one of his central concerns to Commissioner Morris in 1876, stating "I will make a request that he (Morris) save me from what I most dread, that is the rope about my neck…. It was not given to us to have the rope about our neck."[20] While Morris would interpret these words to be a reference to hanging, others have argued Big Bear feared Canadian officials were trying to restrict indigenous political authority, and that "he feared being controlled or 'enslaved,' just as an animal is controlled when it has a rope around its neck."[21] In the years that immediately followed, however, Chief Big Bear's fears would come to fruition. Indigenous political autonomy and authority would be increasingly constrained by colonial policy and law, made possible literally by tightening ropes around the necks of Indigenous leaders.

Across Treaty 6 territory, growing tensions spurred by settler encroachment on Indigenous lands and the implementation of policies to starve Indigenous nations in order to coercively promote their adhesion to the treaty[22], resulted in the Frog Lake Resistance (also known as the Northwest Rebellion) in 1885. Stemming from Cree resentment at their mistreatment by Canadian Indian Department employees on their reserve, Indigenous warriors killed 9 settlers. The trials that followed were no less fraught then the trials in Minnesota. Initially charged with treason, the inability to accurately translate the term in Cree rendered a defense impossible. Even the Crown recognized this fact and reduced many of the charges. Nonetheless, the Crown failed to question or answer how and when Indigenous peoples had been incorporated into Canada, as a charge of treason presumed. Weak evidentiary support[23] coupled with a partial judge and jury[24] resulted in hasty guilty verdicts.

In addition to the 8 Indigenous leaders hanged in1885, an additional 40, including Chiefs Big Bear and Poundmaker, were sentenced to the Stony Mountain Penitentiary for treason. Another 100 Indigenous people were tried for criminal offenses with 60 convicted. In fact, so many Indigenous people were sentenced following the 1885 resistance that a new wing was built onto the Stony Mountain Penitentiary, and kept full with Indigenous peoples in the years that followed.[25]

Indigenous resistance and its subsequent criminalization was indicative of the ruptures in Indigenous-state relations in the 19th century as the US and Canada sought to expand their national borders in violation of their treaty relations with Indigenous nations. Legal Scholar Sidney Harring found "The North-West Rebellion looms large in western Canadian history as the most important Indian war in a country largely without them. " He notes that "wars are not ordinarily the subjects of legal history, but Canada insisted on treating the rebellion as an internal act of treason, trying dozens of Indians for criminal offences in order to impose the legal framework of its Prairie Indian policy on the aftermath of the uprising."[26] The United States and Canada, in constructing Indigenous resistance as criminal activities, deflected their own criminality, or at least illegality in failing to honor and uphold their treaty commitments that had served as the impetus for this warfare.

Instead, both countries utilized Indigenous resistance as the rationale for the subsequent abrogation of treaty commitments. The 264 Dakota who had their executions commuted by Lincoln were imprisoned, with an additional 1600 Dakota women, children and elderly men held in an internment camp, with over 300 Dakota dying from the severe conditions. In 1863 the US congress abolished their reservation, declared all previous treaties with the Dakota null and void and began expelling the Dakota from MN.[27] Canadian Assistant Commission Hayter Reed, labeling Indigenous participants as disloyal, also insisted the Indigenous nations involved in the Resistance in Canada had violated their treaties, obscuring both the cause of Indigenous protest and further negating government responsibility to carry out these treaty relationships in good faith. Historian Sarah Carter notes, "In the case of the disloyal bands, he recommended that the tribal system be abolished and that the chiefs and councilor be deposed and deprived of their treaty medals. By the 'careful repression' of the leaders, [Reed determined] 'a further obstacle will be thrown in the way of future united rebellious movements.'"[28]

The United States and Canada sought to impress their power and authority onto Indigenous nations, by whatever means necessary. The public nature of the hangings was intended to induce Indigenous nations and their leaders to heel to the US and Canada. As Harring notes, "The political decision to try Indians and as well as the Metis for the rebellion showed that the Crown intended to stage these trials with the intent of breaking the back of Indian resistance to the federal government's Indian policy. The trials were show trials, designed to convince the Indians of the futility of further resistance and also to send dozens of Indian leaders, almost all Cree, to prison until they were no longer a threat to Canadian officials."[29] Indeed, Assistant Indian Commissioner Reed stated as much, writing to Indian Commissioner Edgar Dewdney, "I am desirous of having the Indians witness it- No sound threshing having been given them I think a sight of this sort would cause them to meditate for many a day."[30]

Prime Minister John A. Macdonald would also use the Resistance to silence Indigenous objections to Canadian settlement on their lands, failed treaty implementation and deplorable reserve conditions. He asserted, 'The execution of the Indians … ought to convince the Red man that the White man governs.'"[31] Indigenous resistance became the rational and justification for the development and application of greater colonial control over Indigenous bodies and lands that sought to dismantle the tribal system and restrict Indigenous mobility.[32]

State law, both through the development of policies and the ability of local agents to act outside the parameters of legality, became the mechanism that would animate the machinery of empire. Legal historian Shelley Gavigan notes, "In the aftermath of the events of 1885, the seemingly impossible occurred: Things became even more dire…"[33] Indigenous nations across Canada and the United States were increasingly being stripped of their political authority and brought under the long arm of colonial law. While fitting in both settler contexts, Harring notes that for Indigenous nations in Canada, "full access to the privileges of British law' more often meant the opposite of legal protection of their lands rights: *they went to prison*."[34]

Settler Law as the Machinery of Empire

The reconfiguration of Indigenous sovereign political authority followed the path of westward expansion, with colonial law laying the stage to legalize the violent atrocities visited on Indigenous nations at the hands of settlers and government actors who framed Indigenous resistance as criminal activity, restricted Indigenous mobility and imprisoned Indigenous political leaders. The local, material effects of this reconfiguration both produced and were produced by legal doctrines that configured the unlawful usurpation of Indigenous territory and political authority as lawful.

Robert Williams contends "that law, regarded by the West as its most respected and cherished instrument of civilization, was also the West's most vital and effective instrument of empire…"[35] Local agents and officials increasingly presumed jurisdiction over Indigenous peoples. For example, while Indigenous peoples on the Canadian prairies were arrested at a rate of less than 5 per year in the 1870's, this number drastically increased within a decade to 40-50 arrests per year. While perhaps a low number in relation to the Indigenous population, one scholar notes, "the significance of this large increase of arrests and imprisonment of Indians is not measured in simple numbers: imprisonment was an enormously powerful symbol of the meaning of police authority."[36]

The assertion of state jurisdiction over Indigenous peoples of the Canadian prairies was facilitated primarily through the creation of the North-West Mounted Police (NWMP). The NWMP were far more than a national police force. "It was a self-contained legal institution organized on a quasi-military model: Mounties arrested, prosecuted, judged, and jailed offenders under their jurisdiction. The commissioner and assistant commissioners were appointed stipendiary magistrates with full judicial powers extending even to capital crimes. Inspectors and captains were appointed justices of the peace (JPs) with authority to summarily try minor crimes." Harring found, "This legal function was not incidental to the force but was conceptualized at its core."[37]

The NWMP was a hybrid of military and law, deployed to ensure law preceded settlement, promoting an image of protection for the settlers needed to carry out westward expansion.[38] Popular mythology connotes the mounted police "established law where no law existed, spoke order into existence wherever order was threatened and laid broad and deep the foundations of peace and prosperity in the wide reaches of the Western country."[39] Yet, the NWMP facilitated the imposition of assimilative policies as they were uniquely poised to domesticate Indigenous nations. As Harring notes, "any kind of military fore could have asserted Canadian sovereignty in the west… But only a federal police force could bring Indians and Métis within the reach of Canadian law." (94)

While local agents and colonial officials at all levels of the Department of Indian Affairs (DIA) and NWMP had sought to restrict Indigenous mobility in the early 1880's, following the 1885 resistance, increased attention was given to supervision, restriction and control of Indigenous leaders.[40] Local agents were especially sensitive to any actions that were perceived as possibly leading to political mobilization. Thus, the pass system became instrumental in controlling Indigenous mobility and confining Indigenous peoples to their reserves by constructing Indigenous political action as criminal activity.[41] As Keith Smith remarks, "This restriction [on the rights of Indigenous peoples to travel freely] is best seen as a matric of laws, regulations and policy meant to 'elevate' Indigenous people while simultaneously securing the interests of non-Indigenous newcomers. Like colonialism itself, this restrictive complex was creative and adaptable and so could adjust as political, economic, or social conditions changed." He notes "the most notorious element of this network was the 'pass system,' a DIA policy that had no legal basis, but nonetheless required reserve residents to secure a pass from their Indian agents before leaving their reserve for any reason."[42]

While recognizing that local agents were acting beyond the purview of their authority, Assistant Indian Commissioner Hayter Reed nonetheless continued to press for the enforcement of the pass system, arguing that the

"moral responsibilities of the Indian Department transcended treaty obligations.'" Reporting from Battleford in August 1885, Reed insisted, "I am adopting the system of keeping the Indians on their respective Reserves + not allowing any leave them without passes- I know this is hardly supportable by any legal enactment but one must do many things which can only be supported by common sense and by what may be for the general good- I get the Police to send out daily and send any Indians without passes back to their Reserves."[43] The pass system restricted Indigenous leaders by constructing their mobility as a measure of loyalty, labeling Indigenous men as hostile and disloyal if they left their reserves.

"The Majestry of Civilized Law" and the Making of a Lawless Land

The United States also sought to quell Indigenous political mobilization and restrict Indigenous mobility. Indian agents and Commissioners called for legislation that would enable the imposition of colonial laws over Indigenous lands and bodies to achieve this aim. Early treaties often made it clear that US authority didn't apply over Indians or their lands, thus it would take congressional legislation to legalize the imposition of colonial law over Indigenous nations.[44] However, by 1789, treaties would begin to contain clauses that brought Indigenous people under US jurisdiction for crimes against US citizens, moving away from a territorial based model toward a citizenship driven model.[45] While the early Indian trade and intercourse acts[46] (collectively referred to as the NonIntercourse Act) sought to implement treaties and enforce these treaties against settlers intent on violating the rights and lands of Indigenous nations, American criminality generated calls for greater imposition of colonial law within Indian country, a space that had been largely constructed as lawless (both construed as a space absent law because Indigenous legal traditions were deemed illegitimate and a space of illegality due to the unscrupulous activities of American traders and speculators). By 1817, the trade and intercourse act uniformly extended US jurisdiction over crimes committed by Indigenous peoples against American citizens.[47]

Yet, the trade and intercourse acts did little to dispel settler criminality. Commissioner of Indian Affairs George Manypenny, for example, detailed how illegality structured Indigenous-state relations in his annual report in 1856. He stated, "Humanity, Christianity, national honor, united in demanding the enactment of such laws as will not only protect the Indians, but as shall effectually put it out of the power of any public officer to allow these poor creatures to be despoiled of their lands and annuities by a swarm of hungry and audacious speculators, attorneys, and others, their instruments and coadjutors."[48] Manypenny urged the development of more stringent statutes, as the response to American criminality, arguing "the relation which the federal government sustains toward the Indians, and the duties and obligations flowing from it, cannot be faithfully met and discharged without ample legal provisions, and the necessary power and means to enforce them."[49]

Yet, initial calls for clearer and stricter laws in response to American criminality also generated proposals for the imposition of US law onto Indigenous bodies and lands, At the same time, the federal government was eager to decrease military expenditures and amplify their efforts to "civilize" American Indians. This ignited an aggressive campaign to get Congress to enact more assimilative laws. Seeing westward expansion as inevitable, Commissioners urged the federal government that western law was the only way to protect Indigenous peoples from settlers, but also a necessary weapon to wield if Indigenous peoples were going to be saved from their own savagery.

For example, in 1872 Commissioner Walker stated:

> The government should extend over them a rigid reformatory discipline, to save them from falling hopelessly into the condition of pauperism and petty crime. Merely to disarm the savages, and to surround them by forces which it is hopeless in them to resist, without exercising over them for a series of years a system of paternal control… is to make it pretty much a matter of certainty that by far the larger part of the roving Indians will become simply vagabonds in the midst of civilization, forming little camps… which will be festering sores on the communities near which they are located, the men resorting for a living to basket-making and hog-stealing; the women to fortune-telling and harlotry.[50]

This sentiment for the imposition of settler law over Indigenous peoples was the driving force of proposals put forward by the US Board of Indian Commissioners. In their 1871 report, they urged, "A serious detriment to the progress of the partially civilized Indians is found in the fact that they are not brought under the domination of law,

so far as regards crimes against each other." They further pleaded, "We owe it to them, and to ourselves, to teach them the majesty of civilized law, and to extend to them its protection against the lawless among themselves."[51]

Drawing on Canada's success with their police force and wanting to fill the power vacuum created by the withdrawal of troops while expediting the assimilation of American Indians, Congress authorized police units in 1878. This proposal had been strongly supported by United States Commissioner of Indian Affairs Ezra Hayt, who claimed, "A civilized community could not exist as such without law, and a semi-civilized and barbarous people are in a hopeless state of anarchy without its protections and sanctions."[52] The solution was a police force, made up of Indigenous peoples, to impose colonial laws onto their own people. These quasi-military units proliferated. Within three years, this experiment operated on forty-nine reservations and included eighty-four commissioned officers and 786 non-commissioned officers and privates.[53] Harring found, "the [US Bureau of Indian Affairs (BIA)] created a substantial system of policing and punishment that was administrative rather than legal, therefore effectively beyond the reach of federal or state courts."[54]

Policy and law worked in tandem with the shared aim of assimilating Indigenous peoples and subjugating Indigenous sovereignty. "Law for the Indians" became a slogan of the BIA, arguing that the imposition of settler law would expedite the civilization and assimilation of Indigenous peoples. Harring argues "the image of US law replacing the gun as the agent of civilization reveals the coercive core of the application of criminal law to Indians."[55] This shared aim of absorbing/domesticating Indigenous peoples into the United States and Canada, and diminishing or severing Indigenous sovereignty, was achieved through the assertion of criminal jurisdiction over individual Indigenous peoples. [56] This is seen by the fact that case law pertaining to Indigenous peoples in the 19th century focused primarily on two tenets: land title and criminal law.[57]

At the same time, settler law failed to protect Indigenous nations or punish settlers for depredations or murder of Indigenous people. In the US, violence against Indigenous nations was not just outside the restriction of law, but was partially funded by Indigenous treaty annuities as tribal money was allocated to pay out depredation claims. Indeed, "this legal process was so efficient and so many claims were granted that it came into conflict with the BIA's assimilation policy" by diverting treaty money away from assimilatory programs.[58] Law became a direct threat to Indigenous nations, both suppressing Indigenous legal and political institutions and failing to provide protection under American or Canadian law.[59] The construction of Indigenous resistance as criminal activity produced an environment where Indigenous lands could be legally stolen and Indigenous leaders could be legally murdered under the dominion of settler laws.[60]

Gendered Domestication in the Making of a Criminal Empire

Much like their male counterparts, Indigenous women also found their mobility restricted and their activities constructed through the lens of criminality and savagery. While Indigenous men's political authority had to be transformed within the public sphere, Indigenous women's authority would be relegated to the private sphere, configured through domesticity. Domesticity, "monitor[ing] the borders between civilized and the savage as it regulates the traces of savagery within its purview,"[61] became another mechanism to bring Indigenous bodies and lands inside the state system. Through Anglo-American conventions of modern domesticity, Indigenous women could be liberated from their "natural" yet "unreasonable" state of "savagery".[62]

The discourse of domesticity sought to determine boundaries and delineate defined spaces, as imperialism had produced a fear of catastrophic boundary loss that generated discourses centered on "an *excess* of boundary order coupled with fantasies of limitless power."[63] In this environment, Indigenous women's bodies, much like Indigenous lands, became marked as both criminal and lawless spaces, solely because of their racialized-gender and its accompanying western constructions of Indigenous women's sexuality. Gavigan notes "One theme in the historical literature concerning Aboriginal women and Canadian law and society concerns the rapid and pervasive construction, by settlers, missionaries, and government officials alike, of Aboriginal women as a menace and as sexually promiscuous, such that any expression of sexual independence or agency was interpreted as illustrative of a "wildness" that had to be "tamed" while being simultaneously exploited by male newcomers."[64] As such, Indigenous women's bodies were constructed as inherently deceptive, cunning terrains, lawless frontiers, virgin territory, in need of conquest and civilization, that were to be strictly controlled through law because of the perilousness these lawless spaces posed.

Policies aimed at the assimilation of Indigenous nations targeted Indigenous family-life. Sex, marriage, and domesticity rapidly fell under colonial surveillance.[65] Progress toward civilization became measured by home life. Government agents and the church sought to impose virtues that were seen as tethered to domesticity, such as modesty and cleanliness.[66] As Adele Perry notes, "Christian missionaries of all denominational stripes were interested in Aboriginal women and, more particularly, in reforming their relationships to domesticity, to conjugality, and to work." She asserts "This triple program reflected missionaries' profound unease with the different ways that First Nations people experienced and understood manliness and womanliness. The collective, moveable, and matrilineal households; their plural, mixed-race, or consensual relationships; and their physical labour or apparent lethargy all signaled a world of irreparable and dangerous difference."[67]

Government officials, much in the same way they invoked Indigenous resistance to distract from inept policies and corrupt practices, fixated on Indigenous women's "backward conditions." As Carter finds "Indian women were often blamed for the squalid living conditions and poor health of reserve residents; their abilities as housewives and mothers were disparaged as were their moral standards."[68] This depiction of Indigenous women and their sexuality as "out of control" became an attractive explanation for failing government policies and missionary work.[69] Furthermore, the sexualization of Indigenous women became a mechanism for colonial officials in power to justify the imposition of the settler law and policy that sought to reorder Indigenous life and subordinate indigenous authority with impunity.[70]

The perception of deviancy applied to Indigenous women and the concomitant need to save, not only these women, but all Indigenous peoples, from their demoralizing family structures, gave rise to a number of restrictive policies that stripped Indigenous women of their political authority.[71] Under the Indian Act, the principle legislation through which Canada administers its paternalistic relationship with Indigenous nations, widows could only inherit their husband's property if they could prove they were of a good, moral character.[72] Indian agents would decide what constituted a valid family unit in distributing treaty annuities. While neither state had the capacity to fully administer marriage, Indigenous law would only be recognized if these marriages followed western, Christian norms. Furthermore, both countries sought to expel polygamy, charging Indigenous men and women alike. Indigenous people were also accused of bigamy when they remarried, as Indigenous divorce law was not recognized.[73] In Canada, the ultimate domestication of Indigenous women's political authority occurred through the severance of their political status as Indians under the Indian Act when they married non-Indians.[74]

Kaplan finds that this spatial representation of domesticity and manifest destiny is exemplar of these gendered divisions; with the home a feminized safe haven, that is constructed as a bounded and ordered interior space while the male sphere is comprised of a boundless, infinitely expanding frontier in want of territorial conquest. She states, "To understand this spatial and political interdependence of home and empire, it is necessary to consider rhetorically how the meaning of the domestic relies structurally on its intimate opposition to the notion of the foreign. *Domestic* has a double meaning that links the space of the familial household to that of the nation, by imagining both in opposition to everything outside the geographic and conceptual border of the home."[75] While on the one hand, drawing strict boundaries between the private and the public, domesticity, on the other hand, served as the engine of national expansion, reaching beyond its bounds to render the exterior as interior through the violent appropriation of Indigenous lands.[76] This appropriation of Indigenous lands required Indigenous nations, foreign entities whose sovereign political authority was requisite for treaty-making, to be reconstituted as individual subjects of the state, made internal through the construction of Indigenous political authority as criminal, facilitating the imposition of settler law. Through the extension of criminal jurisdiction, the settler state was able to bring Indigenous bodies, through colonial gendered norms, into the national polity, and in the process, domestic Indigenous nations and their lands.

Narrating State Legitimacy and the Making of the Savage

Western law served as a violent tool for the United States and Canada to strip Indigenous nations of a vast majority of their lands and much of their political authority. In the United States, individual states increasingly asserted their jurisdiction over Indigenous peoples and their lands, in violation of treaties, the US Constitution, and Supreme Court decisions that explicitly recognize Indigenous political authority over the criminal matters of their own citizens as well as federal supremacy in dealing with Indian tribes and their citizens.[77] Indigenous peoples not only found themselves being prosecuted under state law but also found litigation to be the new site for the negotiation of their political relationship with the federal government, with the US as the ultimate arbitrator. For example, during the

fifty-two years between *Cherokee Nation* in 1831, in which Chief Justice John Marshal defined Indigenous nations as "domestic-dependent nations," and the expressed recognition of tribal political authority over criminal matters in *Crow Dog,* the Supreme Court would hear approximately 20 Indian law cases. In the twenty years following *Crow Dog,* the court would hear nearly 100 Indian law cases. This sharp increase followed the application of federal Indian policies that were produced in the shadows of legality, made lawful by judicial proclamation. As Harring notes, "Americans were not bound by Old World legal traditions or by abstract notions of morality; they felt free to write laws that would unleash the productive forces needed to develop a new land. The application of this legal order to Indian tribes ranks as a test of the absolute limits of legality and constitutionalism."[78] An analysis of these moments reminds us that neither these outcomes nor the nation-states they produced were inevitable but instead were in continuous flux.

Settler law and its formations of criminality served as the organizing taxonomy of the settler state. The United States and Canada, alike, framed Indigenous resistance as criminal. They used these depictions of Indigenous peoples as savage, lawless, and disloyal to act outside the bounds of the law, imposing policies and practices at the local level that had little basis in law. Subsequently, these two settler states deployed the same constructions of Indigenous savagery and lawlessness to expand the boundaries of settler law in order to bring their actions within its parameters. Nonetheless, the language mobilized by the United States and Canada to legitimate the imposition of settler law in response to criminality would take a slightly different form. The US would use the explicit language of savagery to diminish tribal sovereignty and subordinate Indigenous peoples.[79] While the language of savagery would result in the US Supreme Court upholding Indigenous sovereignty in *Ex Parte Crow Dog* in 1883, the Court would signal that a departure from this long-standing policy in dealing with Indigenous nations would require a "clear expression of the intention of Congress." Judicial acknowledgement of Indigenous political authority[80] and the constitutional entrenchment of the supremacy of treaties required a forceful approach in order to dislodge the political authority already attributed to Indigenous nations. The language of Indigenous savagery and lawlessness would provide the courts the rational for stripping Indigenous nations of important attributes of their sovereignty, as long as this intention was clearly expressed by Congress. Thus, the language of savagery would pave the way for Congress to enact the Major Crimes Act in 1885. The subsequent Indigenous resistance to this imposition of federal jurisdiction would give judicial birth to perhaps the most destructive legal doctrine of Federal Indian law, plenary power, with the courts arguing Congress has absolute, unlimited power of Indian affairs.[81] Declaring in *US v Kagama* (1886) "the power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protections, as well as to the safety of those among whom they dwell," the language of dependency would be continually relied on to strip Indigenous nations of their political authority by deeming these powers "inconsistent with their status as dependent nations."

In Canada, the absence of explicit judicial recognition of Indigenous sovereignty and a continuous desire to see itself as a more humane and just nation than the United States, necessitated a more subtle- though equally violent and paternalistic- approach to subordinating Indigenous political authority within the settler state. Canada relied on the civilized/uncivilized binary to contend that Canadian policies and practices were in the best interest of Indigenous peoples. The push to civilize Indigenous nations would primarily be carried out through the Indian Act, which restricted Indigenous nations from seeking judicial remedies until 1951. Instead of diminishing Indigenous sovereignty through the trope of savagery, the Canadian Supreme Court primarily frames aboriginal and treaty rights through the language of culture, eschewing discussion of Indigenous sovereignty altogether.[82]

The juridical narratives produced by US and Canadian Supreme Court justices sought to fashion the settler state as capable of boundless expansion that was outside the restraints of law. At the same time, these narratives drew on this image of a lawless space, arguing the necessity of imposing western law over foreign territories and bodies. This enabled the settler state to transgress the boundaries of both law and the nation-state in order to map external, foreign spaces and peoples as internal, continuously and expansively affirming the boundaries of the settler nation. This is seen in the transgression of not just settlers into Indigenous territories but also their laws onto Indigenous lands.

In articulating their specificities and unpacking the formulations of Indigenous peoples that become fixed in these moments, we can see that the United States and Canada were not "fixed taxonomies" but rather "states of becoming," not "empires in distress" but instead "imperial polities in active realignments and formation."[83] The borderlands of empire, the liminal spaces occupied by Indigenous peoples, both in law and on the land, are sites of this active realignment. It is in these liminal spaces, through this active realignment that the settler state is *producing*

itself. Settler colonialism, then is not just reductive, it is productive, actively producing both the settler state and its accompanying legitimating narratives.

As Patrick Wolfe has noted and many others have taken up, nuanced, and expanded upon "settler colonialism is inherently eliminatory." This eliminatory logic is driven by the desire to acquire Indigenous lands. He notes "Territoriality is settler colonialism's specific, irreducible element."[84] Yet Wolfe recognizes that "on the one hand, settler society required the practical elimination of the native in order to establish itself on their territory. On the symbolic level, however, settler society subsequently sought to recuperate indigeneity in order to express its difference- and, accordingly, its independence- from the mother country."[85] As the editors of this collection remind us, settler colonialism, as an analytic, risks eliding both power relations and decolonial possibilities if too much focus is given to a Native/Settler binary. I argue this analytic also risks becoming over determined if focus is given exclusively to the eliminatory logic that Wolfe draws out to the exclusion of the productive nature of settler colonialism. Indeed, settler colonialism doesn't just try to eliminate but in its place, seeks to actively produce something new. In their attempts to "eliminate," or at least significantly diminish Indigenous political authority, the United States and Canada also sought to produce their own legality by reframing their criminal activities as lawful.

Indeed, the precarity of settler colonialism as an enabling logic of the state becomes visible when we look to the backdrop that led to the hangings this essay opened with. It was everyday assertions of Indigenous nationhood that would serve as the impetus for treaty making and would respond to the failures of these two states to implement these treaties in accord with Indigenous perspectives. Indigenous protest disrupted and destabilized the settler state. While Britain asserted sovereignty over North America in 1763 with the Royal Proclamation, this wildly imaginative attempt to reorder Indigenous space would have little effect on the ground, as Indigenous nations exercised political authority over their lands.

But importantly this assertion of British sovereignty constrained the settler states that sprang from this will for empire. The Royal Proclamation clearly articulated the process through which settlers could acquire Indigenous lands. It was only through the apparatus of treaty making that these colonial governments could legitimately acquire lands. These two nation-states required Indigenous sovereignty as this recognition of Indigenous sovereignty activated the authority of the treaties that give legitimacy to United States and Canadian settlement. Furthermore, Indigenous resistance quickly made it clear that British proclamations of sovereignty had little weight or bearing on the ground. The United States quickly turned to the treaty process, realizing this was the only legal and just method for land acquisition. Indigenous blockades and protests coupled with desires to mirror the rapidity of western expansion south of the border would also be the impetus for Canadian treaty making.

Indigenous nations primarily saw treaties as living relationships, diplomatic processes that enabled the expansion of intricate kin-based networks situated within a relational paradigm that saw the world as a deeply interconnected and interdependent place. While treaty-making prior to the nineteenth century was primarily centered on the establishment of political, military and economic alliances between Indigenous nations and newcomers, by the nineteenth century treaty making had become a vehicle for nation-building for the US and Canada as these polities began articulating a national identity through the creation and expansion of a bounded state. Treaty making became the primary apparatus through which the US and Canada sought to legitimate and expand their land base. Nineteenth century treaty making became tied up in state interest to quiet Indigenous title. Thus treaties became about extinguishment of Indigenous title, with cession becoming the given, the presumed.

This transformation of the treaty process follows the eliminatory logic of settler colonialism. They reconstructed treaties away from Indigenous visions of living relationships toward a contractual event. Treaty became about certainty and finality for the two states. Yet I argue that in this moment, with the treaty constructed as an event, we can see the double bind of settler colonialism.[86] Settler colonialism is both conditioned by the perceived need to eliminate the native while at the same time this eliminatory aspect of settler colonialism can never be fully achieved. While this eliminatory logic can never be fully achieved because Indigenous resistance and persistence would never permit it, I argue the eliminatory nature of settler colonialism can also never be fully achieved because state sovereignty is constituted through the recognition of Indigenous sovereignty.

The United States and Canada require Indigenous sovereignty as their own legitimacy as nation-states is constituted through the treaties that are intended to at least provide the perception of legality. This discursive function of treaties for these two states is part of the double bind of the settler colonial logic. The US and Canada are deeply concerned

with a perception of legality (which is coded to mean just and humane) that requires them to traverse to boundaries of law (and indeed stretch and reconfigure law so as not to step outside its bounds) in order to reconfigure Indigenous nations through this logic that is not so much eliminatory as it is concomitantly reductive and productive. Indeed, this is why I think Robert Williams contends that law was and remains the West's most vital and effective instrument of empire. He notes "laws utility in generating legitimating arguments for the acquisition, maintenance, and defense of colonial spheres of influence was seized on as a principal instrument of empire."[87] It is in these moments that we can see how settler logics operate to keep state sovereignty discursively intact while implementing and mobilizing settler sovereignty in increasingly material ways.

These are the moments when we can see how Canada and the US begin to make *real* that which has only been *imagined.* It is in these moments that these two states attempt to perfect settler sovereignty; they do so by claiming jurisdiction over Indigenous bodies, facilitated through the construction of Indigenous political activities as criminal. Yet, in both the US and Canada, the material and discursive implications of the domestication of Indigenous political authority fails to eliminate Indigenous sovereignty. Plenary power, while increasingly constraining how Indigenous nations in the United States are able to exercise their political authority, fails to obscure Indigenous sovereignty altogether. Instead it sits beside judicial recognition of tribal sovereignty. The Indian Act, while continuing to paternalistically order Indigenous life, nonetheless also inherently recognizes-by its very existence- the unique, political relationship Canada has with Indigenous nations. The production of Indigenous criminality that make "savages" and the "uncivilized" in a "lawless" land, while having material implications for Indigenous peoples as seen with high rates of incarceration and the continued subjugation of their sovereign authority, also brings forward the conditions and contexts that enabled these narrations, reminding the settler state that it remains a criminal empire.

Acknowledgements

I would like to express my gratitude to Juliana Hu Pegues, Alyosha Goldstein and Manu Vimalassery both for the invitation to present the beginning kernels of this work on one of the two panels they had organized around Jodi Byrd's *Transit of Empire* at the Native American and Indigenous Studies Association annual meeting in Austin, Texas in 2014, and further for the inclusion into this collection that sprang from those original panels. I am also indebted to Mishuana Goeman and the Women's Networking Brunch sponsored by the Committee on Gender and Sexuality Studies for inviting me to present a portion of this work at the American Studies Association Annual Meeting in Toronto, Ontario, October 7-11, 2015. I also received meticulous feedback from David Wilkins, which has significantly improved this work. I am also grateful to Jeani O'Brien and the American Indian Studies workshop at the University of Minnesota for their comments and suggestions.

Notes

[1] Kristian Berg et al., *Dakota Conflict* (St. Paul: KTCA/Video,, 1993), 1 videocassette (VHS) (60 min.); Carol Chomsky, "The United States-Dakota War Trials: A Study in Military Injustice," *Stanford Law Review* 43, no. 1 (1990).

[2] Sidney L Harring, ""There Seemed to Be No Recognized Law": Canadian Law and the Prairie First Nations," in *Laws and Societies in the Canadian Prairie West, 1670-1940*, ed. Louis A. Knafla and Jonathan Swainger (Vancouver: University of British Columbia Press, 2005); Sidney L. Harring, *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence* (Toronto ; Buffalo: Osgoode Society for Canadian Legal History by University of Toronto Press, 1998); Blair Stonechild and W. A. Waiser, *Loyal Till Death: Indians and the North-West Rebellion* (Calgary: Fifth House, 1997).

[3] Boyd Cothran, *Remembering the Modoc War: Redemptive Violence and the Making of American Innocence*, 1st edition. ed., First Peoples: New Directions in Indigenous Studies (Chapel Hill, NC: The University of North Carolina Press, 2014).

[4] Sidney L. Harring, *Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century*, Cambridge Studies in North American Indian History (Cambridge ; New York: Cambridge University Press, 1994).

[5] Lisa Blee, *Framing Chief Leschi: Narratives and the Politics of Historical Justice*, First Peoples, New Directions in Indigenous Studies (Chapel Hill: The University of North Carolina Press, 2014).

[6] Case citation, lower court.

[7] Harring, *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence*.

[8] Ibid.
[9] See, for example, *Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century*; *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence*. Also see, Thomas Fiddler and James R Stevens, *Killing the Shamen* (Newcastle Penumbra Press, 1985). Joseph Fiddler died Sept 1, 1908 in the infirmary at the Stony Mountain Penitentiary, convicted of murder under Canadian law. His sentence was commuted three days later.
[10] Lisa Ford has argued that "perfect settler sovereignty rested on the conflation of sovereignty, territory and jurisdiction." Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous Peoples in America and Australia 1788-1836* (Cambridge: Havard University Press, 2010), 2.
[11] Jodi A. Byrd, *The Transit of Empire: Indigenous Critiques of Colonialism*, First Peoples : New Directions Indigenous (Minneapolis: University of Minnesota Press, 2011), 136.
[12] Amy Kaplan, *The Anarchy of Empire in the Making of US Culture*, Convergences (Cambridge, Mass.: Harvard University Press, 2002), 12.
[13] Carol Chomsky, "The United States-Dakota War Trials: A Study in Military Injustice," *Stanford Law Review,* 43, no. 1 (Nov 1990), pp.13-98. Also see Mary Lethert Wingerd, *North Country: The Making of Minnesota* (Minneapolis: University of Minnesota Press, 2010); Gwen Westerman and Bruce M. White, *Mni Sota Makoce: The Land of the Dakota* (St. Paul: Minnesota Historical Society Press, 2012); Gary Clayton Anderson, *Little Crow, Spokesman for the Sioux* (St. Paul, MN: Minnesota Historical Society Press, 1986); Gary Clayton Anderson and Alan R. Woolworth, *Through Dakota Eyes: Narrative Accounts of the Minnesota Indian War of 1862* (St. Paul: Minnesota Historical Society Press, 1988); Kenneth Carley, *The Dakota War of 1862*, 2nd ed. (St. Paul: Minnesota Historical Society Press, 2001).
[14] For additional information on the US-Dakota War of 1862, see Colette Routel, "Foreward," *William Mitchell Law Review* 39, no. 2 (2013); Paul Finkelman, ""I Could Not Afford to Hang Men for Votes." Lincoln the Lawyer, Humanitarian Concerns, and the Dakota Pardons.," ibid.; Howard J Vogel, "Rethinking the Effect of the Abrogation of the Dakota Treaties and the Authority for the Removal of the Dakota People from Their Homeland. ," ibid.
[15] Speech from the Throne, in House of Commons, *Debates,* February 8, 1877, p.3. and add quite about money
[16] Jill St. Germain, *Indian Treaty-Making Policy in the United States and Canada 1867-1877* (Toronto: University of Toronto Press, 2001). Sarah Carter has noted, "Favourable comparisons were drawn between Canadian and American Indian policy, and these became particularly self-congratulatory after 1890 when the battle of Wounded Knee, the murder of Sitting Bull, and the "messiah craze" in the United States all appeared to point to the fact, on contrast, the Indians of Canada had been treated with justice," Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy*, Mcgill-Queen's Series in Native and Northern Studies (Montreal ; Buffalo: McGill-Queen's University Press, 1990), 134.
[17] Heidi Kiiwetinepinesiik Stark, "Marked by Fire: Anishinaabe Articulations of Nationhood in Treaty-Making with the United States and Canada," *American Indian Quarterly* 36, no. 2 (Spring 2012).
[18] Harring, ""There Seemed to Be No Recognized Law": Canadian Law and the Prairie First Nations," 93.
[19] Shelley A. M. Gavigan, *Hunger, Horses, and Government Men: Criminal Law on the Aboriginal Plains, 1870-1905*, Law & Society, (Vancouver: UBC Press, 2012).
[20] Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories: Including the Negotiations on Which They Were Based, and Other Information Relating Thereto* (Toronto: Belfords, Clarke & Co., 1880).
[21] John L. Tobias, "Canada's Subjegation of the Plains Cree, 1879-1885," *Canadian Historical Review* 64, no. 4 (1983).
[22] James W. Daschuk, *Clearing the Plains: Disease, Politics of Starvation, and the Loss of Aboriginal Life*, Canadian Plains Studies, (Regina, Saskatchewan, Canada: U of R Press, 2013); Gavigan, *Hunger, Horses, and Government Men: Criminal Law on the Aboriginal Plains, 1870-1905*.
[23] Harring, ""There Seemed to Be No Recognized Law": Canadian Law and the Prairie First Nations."; Gavigan, *Hunger, Horses, and Government Men: Criminal Law on the Aboriginal Plains, 1870-1905*.
[24] For example, Judge Charles-Borromée Rouleau of Battleford had his own house looted and burned in the resistance. See Harring, ""There Seemed to Be No Recognized Law": Canadian Law and the Prairie First Nations," 99.
[25] Ibid.
[26] Ibid., 110-11.
[27] Except the 208 Mdewakanton exempted from this legislation.
[28] Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy*, 145.

[29] Harring, *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence*, 247.
[30] Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy*, 145. See also, NA, RG10 Vol. 3710 F.19 550-3
[31] Harring, *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence*, 245-6.
[32] Jeffrey Monaghan, "Mounties in the Frontier: Circulations, Anxieties, and Myths of Settler Colonial Policing in Canada," *Journal of Canadian Studies* 47, no. 1 (Winter 2013): 123.
[33] Gavigan, *Hunger, Horses, and Government Men: Criminal Law on the Aboriginal Plains, 1870-1905*, 135.
[34] Harring, *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence*, 109. Emphasis mine.
[35] Robert A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990), 6.
[36] Harring, ""There Seemed to Be No Recognized Law": Canadian Law and the Prairie First Nations," 96.
[37] Ibid., 94.
[38] Harring, *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence*, 239.
[39] John Peter Turner, *The North-West Mounted Police, 1873-1893*, 2 vols. (Ottawa,: E. Cloutier, King's Printer, 1950). Cited in Keith D. Smith, *Liberalism, Surveillances and Resistance: Indigenous Communities in Western Canada, 1877-1927*, The West Unbound: Social and Cultural Studies Series, (Edmonton: AU Press, 2009), 58.
[40] *Liberalism, Surveillances and Resistance: Indigenous Communities in Western Canada, 1877-1927*, 63.
[41] Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy*, 141.
[42] Smith, *Liberalism, Surveillances and Resistance: Indigenous Communities in Western Canada, 1877-1927*, 61.
[43] Hayter Reed to Edgar Dewdney, 16 August 1885, LAC, Edgar Dewdney Fonds, MC 27-ICA, reprinted in *Strange Visitors: Documents in Indigenous-Settler Relations in Canada from 1876* (Toronto: University of Toronto Press, 2014).
[44] Initially, the United States recognized the validity of Indigenous legal traditions and jurisdiction in their treaties with Indigenous nations. For example, the Delaware Nation Treaty called for the application of both Delaware and US law over criminal matters between their respective citizens. The early treaties between 1778-1796 would primarily continue this tradition, utilizing a territorially based model to determine jurisdiction, despite the move in 1789 to begin including clauses that increasingly brought Indigenous peoples under US jurisdiction for crimes committed against US citizens. See Robert N. Clinton, "Development of Criminal Jurisdiction over Indian Lands: The Historical Perspective," *Arizona Law Review, Vol. 17, No.4* (1975), pg. 951-991.
[45] Francis Paul Prucha, *The Great Father: The United States Government and the American Indians*, 2 vols. (Lincoln: University of Nebraska Press, 1984).
[46] For a history of these acts, see *American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts, 1790-1834* (Cambridge: Harvard University Press, 1962).
[47] Absent treaty stipulations securing this authority to the tribes.
[48] Geo. W. Manypenny, "Report of the Commissioner of Indian Affairs," Nov. 22, 1856 Sen. Exec, Doc. 34th Cong., 3 sess., vol. 2, Doc 5, pp.554-580, 575.
[49] Ibid., 572.
[50] Smith to Secretary of the Interior, 1 November 1872, in United States, Office of Indian Affairs, *Annual Report of the Commissioner of Indian Affairs to the Secretary for the Year 1872* (Washington: Government Printing Office, 1872), 3-22, NADP Document R872001A. http://public.csusm.edu/nadp/r872001a.htm
[51] Colyer to President, 15 November 1871, in United States, Office of Indian Affairs, *Annual Report of the Commissioner of Indian Affairs to the Secretary for the Year 1871* (Washington: Government Printing Office, 1872), 12-22, NADP Document RB1871.
http://public.csusm.edu/nadp/r871002.htm
[52] David E. Wilkins, *Documents of Native American Political Development : 1500s to 1933* (Oxford ; New York: Oxford University Press, 2009), 161.
[53] Prucha, *The Great Father: The United States Government and the American Indians*.
[54] Harring, *Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century*, 206.
[55] Ibid., 13.
[56] *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence*, 119.
[57] Harring notes, "laws for nineteenth-century Ontario Indians, meant either the legal basis for settler claims to their lands or the reason for their being locked in a jail cell Indian traditions." Ibid., 93.For an example of the extension of criminal law onto Indigenous peoples, see Thomas Fiddler and James R. Stevens, *Killing the Shamen* (Moonbeam, Ont., Canada: Penumbra Press, 1985).

[58] Harring, *Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century*, 255. For a discussion of the Indian depredation acts, see David E. Wilkins, *Hollow Justice: A History of Indigenous Claims in the United States*, The Henry Roe Cloud Series on American Indians and Modernity (New Haven: Yale University Press, 2013).
[59] Erik M. Redix, *The Murder of Joe White: Ojibwe Leadership and Colonialism in Wisconsin*, American Indian Studies Series (East Lansing, MI: Michigan State University Press, 2014), 125-6 & 52. For Canada, see Harring, *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence*..
[60] For discussion of lands legally stolen see Jeffrey Ostler, *The Plains Sioux and US Colonialism from Lewis and Clark to Wounded Knee*, Studies in North American Indian History (Cambridge ; New York: Cambridge University Press, 2004). For discussion of Indigenous leaders being legally murdered, see Redix, *The Murder of Joe White: Ojibwe Leadership and Colonialism in Wisconsin*.
[61] Kaplan, *The Anarchy of Empire in the Making of US Culture*, 26.
[62] Anne McClintock, *Imperial Leather: Race, Gender, and Sexuality in the Colonial Contest* (New York: Routledge, 1995), 35.
[63] Ibid., 26.
[64] Gavigan, *Hunger, Horses, and Government Men: Criminal Law on the Aboriginal Plains, 1870-1905*, 106.
[65] Smith, *Liberalism, Surveillances and Resistance: Indigenous Communities in Western Canada, 1877-1927*.
[66] Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy*, 18-19.
[67] Adele Perry, "Metropolitcan Knowledge, Colonial Practice, and Indigenous Womanhood: Missions in Nineteenth-Century British Columbia," in *Contact Zones: Aboriginal and Settler Women in Canada's Colonial Past*, ed. Myra Rutherdale and Katie Pickles (Vancouver: UBC Press, 2005), 125.
[68] Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy*, 180.
[69] Jean Barman, "Taming Aboriginal Sexuality: Gender, Power, and Race in British Columbia, 1850-1900," *BC Studies* Autumn/Winter, no. 115/116 (1997/98): 257.
[70] Ibid., 258.
[71] Beth H. Piatote, *Domestic Subjects: Gender, Citizenship, and Law in Native American Literature*, The Henry Roe Cloud Series on American Indians and Modernity (New Haven: Yale University Press, 2013), 23.
[72] Sarah A. Carter, "Creating "Semi-Widows" and "Supernumerary Wives": Prohibiting Polygamy in Prairie Canada's Aboriginal Communities to 1900 " in *Contact Zones: Aboriginal and Settler Women in Canada's Colonial Past*, ed. Myra Rutherdale and Katie Pickles (Vancouver: UBC Press, 2005), 139.
[73] Ibid.; Harring, *Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century*.
[74] Pamela D. Palmater, *Beyond Blood: Rethinking Indigenous Identity* (Saskatoon: Purich Publishing, 2011).
[75] Kaplan, *The Anarchy of Empire in the Making of US Culture*, 25.
[76] Ibid., 29 & 50. Also see Piatote, *Domestic Subjects: Gender, Citizenship, and Law in Native American Literature*.
[77] Harring, *Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century;* Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous Peoples in America and Australia 1788-1836*; Erik M. Redix, *The Murder of Joe White: Ojibwe Leadership and Colonialism in Wisconsin*.
[78] Harring, *Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century*, 8.
[79] Robert A. Williams, *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America*, Indigenous Americas (Minneapolis: University of Minnesota Press, 2005).
[80] See *Cherokee Nation v Georgia* 30 US (5 Peters) 1 (1831); *Worcester v Georgia* 31 US (6 Pet) 515 (1832). These constructions of Indigenous political status are mired with various competing interpretations/definitions. See David E. Wilkins, "The Manipulation of Indigenous Status: The Federal Government as Shape Shifter," *Stanford Law and Policy Center* 12, no. 2 (Spring 2001).
[81] David E. Wilkins and K. Tsianina Lomawaima, *Uneven Ground: American Indian Sovereignty and Federal Law* (Norman: University of Oklahoma Press, 2001).
[82] Until *Haida Nation* when Aboriginal occupancy was recast as Aboriginal sovereignty. Felix Hoehn, *Reconciling Sovereignties: Aboriginal Nations and Canada* (Saskatoon: Native Law Centre, University of Saskatchewan, 2012).
[83]Ann Laura Stoler, "Intimidations of Empire: Predicaments of the Tactile and Unseen," in *Haunted by Empire : Geographies of Intimacy in North American History*, ed. Ann Laura Stoler (Durham: Duke University Press, 2006), 9.
[84] Patrick Wolfe, "Settler Colonialism and the Elimination of the Native," *Journal of Genocide Research* 8, no. 4 (2006): 387-8.

[85] Ibid., 389.
[86] Jean M. O'Brien, *Firsting and Lasting: Writing Indians out of Existence in New England*, Indigenous Americas (Minneapolis: University of Minnesota Press, 2010). O'Brien utilizes the phrase "the double bind of settler colonialism" to refer to the narrative erasure of Indigenous peoples that enables the subsequent erection of settler society; narratives that are always conditioned by and dependent upon the presence of Indigenous peoples. Along the same vein, I use "the double bind of settler colonialism" to refer to the ways in which the settler state's own legitimacy is conditioned and predetermined by the recognition of Indigenous sovereignty, and thus stands alongside settler state juridical and popular narratives that perceive settler-state stability requires the domestication of Indigenous sovereignty, making elimination of the native an impossibility.
[87] Williams, *The American Indian in Western Legal Thought: The Discourses of Conquest*, 59.