Fragile Settlements

Aboriginal Peoples, Law, and Resistance in South-West Australia and Prairie Canada

Amanda Nettelbeck, Russell Smandych,
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Introduction: Settler Colonialism and Its Legacies

In former British white settler colonies, there have been increased efforts to reconcile histories of settler colonialism and their continuing legacies for Indigenous-settler relations in the twenty-first century. In Australia and Canada, the comparative points of the transcolonial historical analysis in this book, recent decades have witnessed a number of shared developments tied to the legacies of their settler colonial histories. One of these is the symbolic recognition of historical injustices, reflected, for instance, in the parliamentary apologies made in 2008 in each country to Aboriginal peoples for their treatment in earlier decades in mission and residential schools.[1] In his speech on 13 February 2008 to the Australian Parliament, Prime Minister Kevin Rudd said that it was time to "say sorry to the stolen generations" and begin a genuine process of healing and reconciliation in order to enable all Australians "to go forward with confidence to embrace their future."[2] Also in 2008, Prime Minister Stephen Harper apologized to Aboriginal peoples for the "sad chapter" in Canadian history of "the treatment of children in Indian residential schools" for over a century from the 1870s, which he acknowledged had been premised on the faulty and damaging assumptions that "[A]boriginal cultures and spiritual beliefs were inferior and unequal" and that residential schools were needed to "kill the Indian in the child."[3]

Since 2008, a number of widely publicized initiatives have been undertaken in both countries, the ostensible aim being to promote reconciliation and build more positive relationships between Indigenous and non-Indigenous peoples. In Australia, these have included the establishment in 2009 of an Indigenous-run Healing Foundation "to support community-based healing

initiatives to address the traumatic historical legacy on Aboriginal and Torres Strait Islander peoples of colonization, forced removals and other past governmental policies."[4] They have also included the passing of a federal *Act of Recognition*, symbolically on 13 February 2013, that outlines a process for holding a future national referendum on the recognition of Aboriginal and Torres Strait Islander peoples in Australia's Constitution. In 2014, a new Australian federal government under Tony Abbott's leadership announced its intention to hold a national referendum on the constitutional recognition of Indigenous peoples in 2017, vowing to "sweat blood" to get it achieved.[5] Although Canada's Aboriginal peoples have had this type of constitutional recognition since 1982, Harper's speech, delivered a few months prior to Rudd's speech in 2008, was also intended to symbolize increased movement toward "healing, reconciliation and resolution." Across Canada, efforts in this direction have been guided by ongoing initiatives, including the implementation of a complementary, compensation-based Indian Residential Schools Settlement agreement in 2007, and a national Indian Residential Schools Truth and Reconciliation Commission mandated with the task of uncovering and documenting the intergenerational legacy of residential schools.[6]

In recent years in Canada, these initiatives, alongside politicized debates on the relationship and status of Indigenous and non-Indigenous peoples, have influenced some Canadians to begin to reflect more critically on their colonial past.[7] However, this process of critical personal and national reflection on the legacies of settler colonialism appears to be more advanced in Australia, where, at least since the early 1990s, revisionist historians and critical settler colonial scholars have been pitted against more conservative historians and politicians in a highly publicized series of "history wars" centred on how white Australians remember the national past.[8] This more critical, albeit divisive, awareness of the contested nature of the nation's past might be due, at least in part, to the contributions of Australian researchers in the broad field of memory studies, which explores the ways in which collective groups remember, forget, and memorialize their pasts.[9] Australian historians and settler colonial scholars have also been at the forefront of recent, and more comparative, research – including Australian-Canadian comparisons – aimed at reflecting on how Indigenous and non-Indigenous peoples in settler societies remember and attempt to reconcile their colonial pasts.[10]

Australia and Canada reveal other important parallels and divergences in political and legal developments surrounding Native title and sovereignty. Whereas Canada formally recognized Aboriginal peoples among the found-

ing peoples of Canada in the *Constitution Act* of 1982, after more than 200 years of settlement Australia has yet to grant similar constitutional recognition to its Indigenous peoples, though the window is now open wider for this future possibility. At the same time, in neither country has the recognition of Aboriginal rights been extended unambiguously to the ownership of land (Native or Aboriginal title) or unrestricted and independent self-governance (sovereignty).[11] One of the defining differences of the political and legal relationship that Indigenous peoples have had with the settler colonial states of Australia and Canada since the time of early settlement is the negotiation of land cession treaties in Canada, which continues to this day, and the absence of a similar history of treaty making in Australia.[12] However, in neither country have state/provincial and federal governments ever succeeded in reaching comprehensive political and legal accommodations with Indigenous peoples. Indeed, it remains the case that in both countries issues of Native title and sovereignty are at the heart of historical and unending resistances, protests, and counterclaims made by Indigenous peoples regarding who should rightfully assert jurisdiction and sovereignty.[13]

Unpacking the tangled history of Native land title and sovereignty issues in Australia and Canada has preoccupied historians and lawyers in both countries, who have tended to work on the side of either the Crown (federal and state/provincial governments) or Indigenous peoples. However, as consequential as these litigated cases are for the contemporary lives of affected Indigenous and non-Indigenous peoples, arguably they have not produced a clear lens through which either to interrogate the role of law in mediating Indigenous-white relations in the past or to explore the legacies of these relations in settler colonial societies today. In a recent study that sets out to reinterpret how Indigenous interests in land were understood and negotiated by the British Colonial Office and colonizers in South Australia when the colony was founded in the 1830s, Bain Attwood points to the shortcomings of what he refers to as "juridical history" carried out to date by those who have "sought to both address and redress the ways in which Indigenous people's rights in land have been treated historically by colonisers in Anglophone settler societies" such as Australia, Canada, and New Zealand.[14] Attwood contrasts juridical history with "legal history," noting that whereas "juridical history is a kind of historical work that seeks to present past events in such a way as to enable a court of law or some such legal tribunal to address and redress historical processes in which the law has been historically implicated," legal history, at least ideally, "involves a disinterested inquiry into how the law actually worked in the past and thus amounts to an attempt to recover and recount the past in order to understand rather than pass judgment upon it."[15]

Attwood's comparison of juridical history and legal history is central to understanding our intentions in writing this book, for one of its important goals is to re-examine the role that law played in the appropriation of Indigenous lands in comparable Anglo settler colonial societies over the nineteenth century, and how this process was inherently bound up in historical debates over jurisdiction and sovereignty. Perhaps coming close at times to what Attwood might call juridical history, we also engage with ongoing debates about the nature and relative success of efforts to redress the now acknowledged harms inflicted on Indigenous peoples in settler colonial states such as Australia and Canada. As Richard Hill and Brigitte Bönisch-Brednich remind us in their parallel Aotearoa/New Zealand examination of contrasting Māori and pakeha historico-cultural worldviews and the state's treatment of claims relating to Māori dispossession, debates about reconciliation have become "part of a global trend in former settler colonies."[16]

This book explores the question of what we can learn from a more detailed cross-colonial study of the history of settler colonialism and current efforts at Indigenous-settler reconciliation in Australia and Canada. The more specific foci of the historical part of this study are the shared settler colonial histories of south-west Australia, incorporating the current states of South Australia and Western Australia, and prairie Canada, which includes the lower portions of the provinces of Manitoba, Saskatchewan, and Alberta. The histories of these settler colonies are notably similar in terms of demographic, temporal, and legal/institutional development. However, their divergences, as much as their similarities, make them ideal comparative settings for unravelling broader transcolonial historical processes associated with the subjugation of Indigenous peoples through law, their resistance to it, and the legacies of settler colonial histories in the twenty-first century. Fundamentally, this book tries to answer the following question: in what ways and to what degrees do the shared contemporary histories of imperfect sovereignty in Australia and Canada spring from their parallel histories of past (and some would argue ongoing) attempts to subjugate and manage Aboriginal populations through law and other forms of settler colonial governance?

First, this question needs to be situated within the larger context of recent scholarship on imperial and colonial history and the law. Over the past two decades, historians and critical interdisciplinary scholars have contributed to a fundamental rethinking of colonialism and settler colonialism. Over the same period, there has emerged an equally important, but until recently largely separate, literature concentrated primarily in the field of British colonial legal history that has generated new critical insights into how

Indigenous peoples were brought under government control in Anglo settler colonies over the nineteenth century, both through the assertion of legal sovereignty and criminal law jurisdiction and through the application of other forms of colonial governance. These developments in scholarship offer an analytical framework for re-examining the dispossession of Indigenous peoples through law over the nineteenth century and the continuing contested assertion of sovereignty and criminal law jurisdiction over Indigenous peoples in settler colonial societies today.

Postcolonialism and Transcolonial History

In his 2005 book *Colonialism in Question: Theory, Knowledge, History,* Frederick Cooper notes that "[t]he burst in scholarship on colonial studies in the last two decades – crossing the disciplinary boundaries of literature, anthropology, and history – has begun to fill one of the most notable blind spots in the Western world's examination of its past."[17] Cooper points to postcolonial studies, developed primarily in literature and anthropology, as the critical "interdisciplinary scholarship" of the past two decades that has done the most to reinvigorate the fields of colonial history and imperial history. Yet he points out that a significant part of this scholarship has moved problematically in the direction of regarding colonialism as a generic category that can be "juxtaposed with an equally flat version of European 'modernity.'" In response, he argues that "a reconsideration of colonialism's place in history should both engage deeply with the critical scholarship of the last two decades and insist on moving beyond the limitations that have emerged within it," in particular by taking account of its deep-seated, transnational dimensions.[18]

A notable example of how histories of individual colonial and settler colonial societies are now being viewed as part of sweeping transnational developments embedded in global or world history is the work of Chris Bayly, especially his book *The Birth of the Modern World, 1780–1914: Global Connections and Comparisons*.[19] Bayly encourages traditional British colonial and imperial historians to look beyond the British Empire and examine the broader transnational and global connections linked, especially in the nineteenth century, to the development of "many hybrid polities, mixed ideologies, and complex forms of global economic activity"; in this respect, he argues, "all local, national, or regional histories must ... in important ways ... be global histories." Bayly ties this process of interconnection to the global spread of Western ideas and practices associated with modernization (approximately 1780 to 1914), and in so doing he attempts to show "how historical trends and sequences of events, which have been treated separately in regional or national histories, can be brought together." In his view, the

global connections and comparisons generated throughout the nineteenth century are fundamental for rethinking modern world history, for they help to reveal "the interconnectedness and interdependence of political and social changes across the world well before the supposed onset of the contemporary phase of 'globalization' after 1945."[20]

In particular, Bayly "traces the rise of global *uniformities* in the state, religion, political ideologies, and economic life as they developed through the nineteenth century," arguing that this uniformity became manifest in multiple ways across institutional, public, and domestic domains.[21] However, as he indicates, the move toward global modernity was by no means a uniformly embraced or "progressive" one-way historical process because, for Indigenous peoples, it was catastrophic. With the "deluge" of settler migration between 1830 and 1890, which led to the large-scale expropriation of Indigenous lands across the imperial world, Indigenous peoples became increasingly subjected to assimilative programs designed to eradicate their traditional cultural, socio-political, economic, and legal practices, at the same time as they "were corralled off into reservations and special homelands to be exploited as pools of labor for capitalist farms and mines."[22] As we will see in subsequent chapters of this book, this is essentially what happened to the Aboriginal peoples of both south-west Australia and prairie Canada, though Bayly does not deal at length with the specific instruments, including law and other forms of governance, used in attempts to subjugate and manage Indigenous peoples in nineteenth-century settler colonies.

In his book *Replenishing the Earth: The Settler Revolution and the Rise of the Anglo-World, 1783–1939,* James Belich provides a similarly rich transnational assessment that can inform research on the treatment of Indigenous peoples in settler colonial societies in the nineteenth century and its legacies in the twenty-first century.[23] His work points to the potential value of assessing comparable as well as divergent trends in Anglo and other European settlements during the last half of the nineteenth century, and in this respect, despite being on opposite sides of the world, south-west Australia and prairie Canada deserve particular attention as culturally interconnected sides of what Belich refers to as "a non-contiguous 'British West.'"[24]

In his attempt to reshape our understanding of the settlement of North America and Australasia in the nineteenth century, Belich proposes an imaginary reshuffling of the map of the Anglo world to bring the world map in line with "the actual close relationship between the old and new Britains of the nineteenth century," the old being the British Isles and "Atlantic America" (or "the territory to the east of the Appalachians"), the new being the "American West" and a reimagined "British West," made up primarily of the Anglo settler colonies of Australia, New Zealand, and

Canada.[25] Belich argues that the settler revolution of the Anglo nineteenth-century world was characterized by overlapping periods of "explosive colonization" and "recolonization," the first reflected in the massive growth of white settler populations, the second reflected in the process that led to the reintegration and close linking of newly settled territories with the imperial metropolis (of either old Atlantic America or old Britain).[26] According to Belich, this largely unique "Anglo divergence" in the speed and success of settler societies, relative to other European and non-European imperial powers, began after 1783, when the United States achieved independence from Britain; from that time on, "[a]nglophones were never again to share a single state"; instead, they became members of a far-flung, politically diverse, yet "interconnected mélange of partners and subjects," a broader Anglo world in which changes, including the transfer of "things, thoughts, and people," flowed more easily within the system than from without it.[27] It is clear that the Anglo settler revolution equally affected the colonial settler sites that are the main focus of this study, as attested to in the dramatic reversal in Indigenous and settler populations over the nineteenth century (see Table 1).

Like Bayly, Belich recognizes that the nineteenth-century Anglo settler revolution took place against the resistance of Indigenous peoples; however, unlike his earlier work on the Māori-pakeha experience in New Zealand, he does not deal at length in *Replenishing the Earth* with the nature and long-term consequences of Indigenous resistance to settler colonization.[28] Nevertheless, his description of "the human tsunami of explosive colonization" that marked Anglo settler colonies, and its consequences for Indigenous peoples, helps us to re-examine the tensions between colonial governance and Indigenous resistance to it within a broader transcolonial context. According to Belich, "tribal peoples were very often a match for normal colonization," but "it was explosive colonization that was too much for them"; consequently, their "subjugation was due not to the weaknesses of the defence but to the strength of the attack."[29] His thesis of explosive settler colonization as an important cause of the eventual subjugation of Indigenous peoples to legal and other forms of government authority in Anglo settler colonies is well grounded in the data included in *Replenishing the Earth.*

However, more detailed examinations of the comparative and divergent conditions of settlement are needed to test the general applicability of this thesis across the non-contiguous British West. In this study, we attempt such an examination by investigating the essential nature of settler colonialism and in particular the role played by law in the management and control of Indigenous peoples in south-west Australia and prairie Canada, and the different legal conditions that affected how colonial policy on Indigenous subjects unfolded over the nineteenth century. For instance, just one of the

Table 1 Population of prairie Canada and south-west Australia, 1871–1911

	*Prairie Canada**			*South Australia*			*Western Australia*		
Year	*Abs*	*Settlers*†	*%*	*Abs*	*Settlers*	*%*	*Abs*	*Settlers*	*%*
1831				15,000			62,000	1,341	
1841					45,485			7,186	
1851					66,538			2,760	
1861				9,000	130,810	7.0	44,500	15,936	74.0
1871	46,500	27,228	63.0	7,500	188,644	4.0	40,000	25,177	62.0
1881	46,767	81,260	37.0	6,350	285,721	2.3	35,500	30,156	54.0
1891	40,575	216,506	16.0	5,600	324,257	1.7	31,000	53,177	37.0
1901	34,321	388,211	8.0	4,890	364,003	1.3	26,500	193,601	12.0
1911	35,876	1,297,394	3.0	4,700	419,392	1.1	22,500	293,923	7.0

* Manitoba and the North-West Territories 1871–1905; Manitoba, Saskatchewan, and Alberta 1905–11.

† Includes Métis.

Source: The Canadian statistics are from Statistics Canada online sources accessed by the University of Calgary through its DLI Partnership; the Australian statistics are from the Australian Bureau of Statistics, 3105.0.65.001, "Australian Historical Population Statistics," for each census year. Because many authors distinguish the North-West Territories as prairie Canada, whereas it is a subsection, the population figures for three important dates of the North-West Territories are as follows: for 1870, 35,000 Aboriginals, 12,000 Métis, and 1,500 Caucasians; for 1885, 20,170 Aboriginals, 13,235 Métis, and 21,990 Caucasians; for 1901, 14,699 Aboriginals, 11,135 Métis, and 133,106 Caucasians. See Gavigan, "Of Course No One Saw Them," 72–74. The Aboriginal figures for Manitoba have been obtained from the Statistics Canada database accessed by librarian Peter Peller at the University of Calgary.

many local conditions that differentially affected developments on these frontiers was that the settlement of prairie Canada in the last part of the nineteenth century was uniquely affected by events that occurred south of the forty-ninth parallel.[30] These events, in turn, had direct repercussions on evolving relations among Aboriginal peoples, legal authorities, and settler colonists.

One of the key questions taken up in our study is that of the place of liberal humanitarian ideology in the dispossession and subjugation of Indigenous peoples. In recent years, this has become a prominent theme in the writing of leading world historians, and increasingly in the work of comparative British colonial legal historians. In *The Birth of the Modern World*, Bayly argues that the ideology of Euro-American liberalism spread increasingly across the world after 1815 along with the associated ideologies of socialism and science. Despite the links of liberalism with ideals of representative government, free trade, legal equality, and "universal rights," Bayly notes that in the colonial context it confronted a perennial internal conflict "between the ideals of universal rights and the idea of 'moral independence,' which limited [liberalism's] capacity to effect real political change."[31] There is abundant evidence that this tension was reflected in the behaviour of many colonial administrators and legal officials who careered across the British Empire in the nineteenth century.[32] There is also considerable evidence that this was the case in south-west Australia and prairie Canada.

However, with the exception of the attention that it receives in P.G. McHugh's important work *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination*, only recently has the role of the ideology of liberalism in the subjugation of Indigenous peoples in the nineteenth century, or its potential role in mitigating the effects of settler colonialism, been explicitly addressed by colonial legal historians.[33] McHugh argues that, across all early- to mid-nineteenth-century British white settler colonies and more generally throughout the British Empire, an "emerging and increasingly prevalent liberalism heavily influenced the approach towards relations with and governance of non-Christian peoples." He also recognizes that if there "was one area where liberal values with their emphasis on the individual's capacity for improvement were relatively unopposed in England it was in their applicability elsewhere. All Englishmen agreed that the uncivilized non-Christian peoples under British dominion were demonstrably inferior and in need of improvement."[34] Like Bayly, McHugh develops the theme of the increasingly uniform manner in which the English common law came to be applied to Indigenous peoples across different Anglo settler societies in the nineteenth century, and he

highlights the influence of the spread of Euro-American liberal ideology on this developing legal uniformity. However, he also recognizes that the influence of the initial humanitarian liberalism of mid-nineteenth-century colonial government and legal officials was short lived, and gave way to developments in settler colonies that heightened Indigenous peoples' unequal treatment in the legal system.[35] This perennial conundrum of "the struggle between Liberty and Authority," along with attempts to impose a uniform state sovereignty on Indigenous peoples, was equally reflected in the experiences of south-west Australia and prairie Canada from the mid-nineteenth century on.[36]

Sovereignty and the Legal Spaces of Empire

In part inspired by the themes raised in McHugh's work *Aboriginal Societies and the Common Law,* recent transcolonial studies of the use of law and legal institutions in the dispossession of Indigenous peoples have focused on the rise of settler sovereignty and its legal uniformities during the nineteenth century and on how the legal spaces of empire continued to be contested.[37] It is not possible to synthesize here all of the new critical insights generated in these studies relevant to the subjugation of Aboriginal peoples in south-west Australia and prairie Canada. However, it is particularly important at the outset to acknowledge how this study draws on key themes and arguments reflected in the relatively recent transnational legal-historical literature.

In her sweeping study of the articulation of claims to sovereignty made across different European empires from 1400 to 1900, Lauren Benton problematizes the study of attempts to assert sovereignty and formal legal jurisdiction over Indigenous and other subjugated peoples. She points to "the continued creation of spaces of uneven sovereignty," or "the inherent lumpiness" of European imperial formations, well into the nineteenth century.[38] Her analysis reinforces the importance of studying attempts to exercise legal authority over Indigenous peoples across the geographical settings, or legal spaces of empire, where they occurred. Specifically, Benton points out that, throughout the vast and uneven history of European colonial projects from the fifteenth century to the nineteenth century, law and the delegation of legal authority "represented a particularly important factor in the social construction of this variegated colonial world." Her attention to the concepts of "quasi-sovereignty" and "anomalous legal spaces of empire," and historical examples of how they were manifested across European imperial formations, point to the inherent complexity of law and its relation to assertions of authority and sovereignty over Indigenous peoples.[39]

In particular, Benton argues, anomalous legal spaces emerged from a combination of processes that included encounters between colonizers

and Indigenous peoples and the ways that European jurists "responded directly to particular problems in inter-imperial relations and in the process struggled to make sense of legal and territorial variations within and across empires"; these processes, in turn, often "presented new challenges to the project of defining imperial sovereignty and establishing its relation to emerging global law."[40] Although, unlike Benton, we do not deal with inter-imperial relations or rivalries between nations that historically raised issues of sovereignty and jurisdiction, we draw significantly on the core concepts and arguments that she and other transcolonial legal historians have developed in order to help capture a sense of the legal complexities and lingering expressions of legal pluralism that characterized legal encounters among colonial authorities, settlers, and Indigenous peoples in the British settler colonies of south-west Australia and prairie Canada.

In another recent important work, Lisa Ford offers a nuanced comparative analysis of attempts by colonizers in New South Wales and Georgia to assert "perfect territorial sovereignty" while faced with the persistence of "plural legal practices" of Indigenous peoples. In particular, Ford examines how criminal jurisprudence was applied to Indigenous peoples in these evolving jurisdictions between 1788 and 1836. In her analysis, the story of how settler sovereignty was fashioned in these territories is part of a much broader global story because it reflected similar patterns across the anglophone colonial world and elsewhere over roughly the same period, and had the effect everywhere of pitting "settler sovereignty against the rights of Indigenous peoples."[41] Like other recent but more distinctly transcolonial common law legal historians,[42] Ford shows that attempts to assert criminal law jurisdiction over Indigenous peoples, including the process of drawing them into criminal courts as both offenders and victims of crimes, were at the core of redefining "sovereignty and its relationship to territory and jurisdiction." The "moment of settler sovereignty," she argues, became concentrated in the 1820s and 1830s because settler polities "imagined for the first time that it was necessary to shore up the legitimacy of settlement." She reasons that this happened because, "at the same time and in similar ways, Indigenous violence came to pose an intolerable ideational challenge to sovereignty in North America and Australia." Consequently, after 1800, acceptance of plural legal practices increasingly diminished, and, "[i]n just two decades, settler and Indigenous violence became the crucibles of sovereignty talk, as the idea of perfect territorial sovereignty clashed with tenacious pluralities."[43]

Ford's model of the imperfections of sovereignty provides an important starting point for the comparative study undertaken in this book. One reason is that her study ends in the 1830s, precisely at the time that ours begins,

with the founding of Western Australia and South Australia at the same time that British liberal humanitarians were influential in shaping British colonial legal regimes and Native policies. As we will see in the following chapters, a shift from legal pluralism to contested assertions of sovereignty and criminal law jurisdiction also characterized the experience of south-west Australia and later prairie Canada, though those assertions continued to be challenged by the persistence of Indigenous resistance and unofficial expressions of legal pluralism.[44]

Although we draw in the following chapters on the work of many earlier regional, national, and transcolonial legal historians, we emphasize here the need to consider a longer-term view that situates the past in direct relationship with the present. The work of Mark Finnane on "the limits of jurisdiction" in colonized Australia provides an example of this kind of needed longer-term perspective.[45] His analysis is written in light of the legacies of transcolonial legal histories, against which he juxtaposes the controversial and highly symbolic decision by the Howard government in 2007 to amend the Australian *Crimes Act* to explicitly prohibit Australian criminal courts from any longer taking into account the "cultural background" of a convicted person in criminal sentencing decisions.[46] Finnane argues that this "determined government attack on 'customary law and cultural practice' more than two centuries after the British settlement of Australia" should prompt us "to consider how such traces of Indigenous authority and even assertion of jurisdiction have survived."[47] In other words, he raises the issue of how settler colonists have not been able to succeed fully in asserting "perfect sovereignty" and criminal law jurisdiction over Indigenous peoples.[48] The failure of settler colonial states such as Australia and Canada, even today, to assert sovereignty and jurisdiction unequivocally in the face of "persisting Aboriginal difference in customs, norms, and perspectives" opens up additional possibilities for understanding the desire for "jurisdictional uniformity" that has characterized colonized Australia and other British settler societies since the early nineteenth century.[49]

In their more recent co-authored book *Indigenous Crime and Settler Law: White Sovereignty after Empire*, Heather Douglas and Mark Finnane examine in greater detail how the criminal law system has determined the nature of settler-Aboriginal encounters in Australia. They propose that, unlike in Canada and the United States where questions of jurisdiction over *inter se* violence were largely settled by the turn of the twentieth century, in Australia the more "prolonged colonization" of Indigenous peoples, especially in the Northern Territory, has been tied to a longer period of open contestation and negotiation between state authorities and Indigenous peoples over criminal law jurisdiction.[50] Douglas and Finnane make a good argument

based on the Australian historical and contemporary data that they examine. However, as will be seen in the following chapters, the history and outcome of attempts to reconcile competing Indigenous and non-Indigenous beliefs and practices regarding law and justice in the settler colonial states of Australia and Canada might not be as divergent as Douglas and Finnane suggest. Indeed, a key argument of this study is that imperfect sovereignty and jurisdiction over Indigenous peoples continue to this day in both settler colonial states, and acknowledging this continuation can help us to engage with the current transcolonial politics of Indigenous-settler reconciliation. In order to do this adequately, however, we need to appreciate more fully the critical insights offered in the work of contemporary settler colonial scholars.

Settler Colonialism and Reconciliation

Various uses of the concept of settler colonialism by historians and other researchers can be traced back to the early twentieth century. Only since the mid-1990s, however, have critical historians and interdisciplinary scholars from a number of countries begun to contribute to the development and consolidation of settler colonial studies as a specific field.[51] Although settler colonialism is often aligned with postcolonialism, it is necessary, as Patrick Wolfe points out, to distinguish between postcolonial states as former colonial states that won their independence from European imperial powers, and settler colonial states as those where the colonizers of Indigenous peoples "never went home."[52] Lorenzo Veracini demarcates the field of settler colonial studies, noting that "settler colonial phenomena," which embody "circumstances where colonisers 'come to stay' and to establish new political orders for themselves," are "inherently trans-national and transcultural": transnational "because the relationship between 'home' and the settler locale institutes a dialectical tension" between the metropole and the settler colony, and transcultural because this relationship "is routinely understood as inherently dynamic."[53] These core insights, among others offered in burgeoning literature in the field of settler colonial studies, are fundamental to understanding the broader context within which law developed historically in settler colonial states and the challenges of Indigenous-settler reconciliation today.

Over the past two decades, numerous scholars from different countries have taken up critical historical and contemporary analyses of setter colonialism and its ongoing repercussions.[54] At the centre of this intellectual movement are the foundational analyses of Wolfe and Veracini.[55] In particular, Wolfe has argued that the "invasion" of "settlers" needs to be conceptualized as "a structure not an event."[56] Wherever settler colonialism

occurs, Wolfe suggests, its primary logic "can be characterized as one of ... elimination."[57] From this vantage point, the concept of settler colonialism is both transtemporal and transnational or global, and it is qualitatively different from colonialism. Whereas colonialism has often unfolded historically without permanent settlement and without disposing Indigenous peoples, settler colonialism does not end, arguably, until either the settler colonists or their descendants are removed en masse, which rarely if ever happens, or until the colonized are effectively eliminated.[58] Wolfe does not imply, however, that settler colonialism is inherently "genocidal."[59] Rather, the logic of elimination includes "both negative and positive dimensions." Negatively, it works toward the "dissolution" of Indigenous societies. At the same time, its "positive aspect" is an organizing principle of transformation that can include "officially encouraged miscegenation, the breaking-down of native title into alienable individual freeholds, native citizenship, child abduction, religious conversion, resocialization in total institutions such as missions or boarding schools, and a whole range of cognate biocultural assimilations. All these strategies, including frontier homicide, are characteristic of settler colonialism."[60]

Recognizing the eliminative principles of settler colonialism leads to the need to examine programs of Indigenous "amelioration" introduced through the influences of colonial liberal humanitarianism, including religious conversion and confinement in mission and residential schools, in addition to other, more coercive, forms of legal authority such as colonial police and criminal law. The implications of adopting the concept of settler colonialism as a starting point for historical research are sweeping, arguably especially so for colonial legal historians, since law is essentially both "subject and lens" through which we can study colonialism and settler colonialism.[61] Despite this, colonial legal historians often tended in the past to adopt a narrower doctrinal approach that made the study of "colonial law and its effects" the main focus of attention.[62]

In contrast, approaching the study of forms of colonial law and legal authority from a settler colonial perspective requires the decentring of law and the inclusion of other means by which settler colonists attempted to eliminate or subjugate Indigenous peoples.[63] Wolfe and Veracini point out in their work that settler colonialism is a "complex social formation" that displays "continuity through time" and is not bound by geography or place.[64] Although the decentring of law in transnational contexts is already implicitly reflected, to a certain extent, in the work of some Foucauldian-inspired historians, employing the concept of settler colonialism more explicitly in the historical analysis of legal and other mechanisms of Indigenous subjugation (or elimination) adds a more structurally based, materialist, and

transnational analytical framework to guide both historical analysis and reflection on the current efforts at Indigenous-settler reconciliation.[65]

Attention to these complex structures and processes of Indigenous elimination is reflected throughout this book: from the influential politics in Britain and its settler colonies from the 1830s on that led to government and legal protection of Indigenous peoples as British subjects (Chapter 1); to the creation and operation of colonial police forces, Protectors of Aborigines, and criminal courts in south-west Australia and prairie Canada and the complementary roles that they played in Aboriginal people's moral education, containment, and punishment (Chapters 2–6); to the aligned strategies embodied in the work of agents of the church (Chapter 7); to Indigenous peoples' own modes of resistance to these efforts (Chapter 8).

Importantly, our study also engages directly with issues surrounding the politics of rights, redemption, and reconciliation in today's settler colonial societies, where the "logic of elimination" continues to affect Indigenous peoples (Chapter 9).[66] As Wolfe insightfully points out, "[i]n its positive aspect ... settler colonialism does not simply replace native society *tout court.* Rather, the process of replacement maintains the refractory imprint of the native counter-claim." In other words, "the logic of elimination [also] marks a return whereby the native repressed continues to structure settler-colonial society."[67] Both Wolfe and Veracini offer the added critical insight that "[r]esistance and survival are thus the weapons of the colonized and the settler colonized." That is, "it is resistance and survival that make certain that colonialism and settler colonialism are never ultimately triumphant."[68] Veracini explores the implications of these insights in detail in his recent work, questioning the ability of Indigenous peoples to achieve genuine reconciliation with settlers, given the currently intractable settler colonial situation.[69]

In his reflection on the intractability of settler colonialism, Veracini defines two fundamental traits of settler colonialism, which he refers to as "isopolitics" and "deep colonizing." He defines an isopolity as "a single political community joining separate jurisdictions" and isopolitical relationships as "the way in which people and rights can be transferred across constituent entities of a community of 'racial identity.'"[70] In turn, he refers to deep colonizing as "a situation in which the very attempt to bring forward the supersession of colonial practices actually entrenches their operation."[71] According to Veracini, British colonialism historically gave rise to isopolitical relationships that made it possible for colonizers (settlers) to have many of the civil and political rights that they possessed as British subjects in the old country transferred with them to the colonies, and for the metropolitan government formally to apply external political and legal control over British settler colonists.

Veracini maintains that initially the metropole and different settler locales were "united in an isopolitical relation" in which the former held sway over the latter.[72] However, with the rise of settler nationalisms and the move toward forms of colonial self-government, this shifted to a different isopolitical relationship reflecting the enhanced political and legal power of settler colonists to shape their own destinies as well as those of Indigenous peoples and non-British migrants who did not enjoy the same legally inherited rights as British subjects. In line with accounts offered by transcolonial legal historians such as McHugh in *Aboriginal Societies and the Common Law*, Veracini argues that "[s]ettler self-government ultimately denied the possibility of Indigenous appeal to the metropolitan sovereign against settler abuse" by effectively terminating "any external oversight of Indigenous policy." In turn, the new "independent status" of these settler polities led to the accelerated subjection of Indigenous people to colonial practices. Over time, this set of conditions gave rise to forms of deep colonizing that continue to permeate contemporary settler societies, making settler colonialism largely intractable.[73]

In the following chapters, we aim to understand the extent of settler colonialism's intractability by examining its violence and other strategies of Indigenous elimination as they were brought to bear on Indigenous peoples in south-west Australia and prairie Canada through and beyond the operation of settler law.[74] We meld key insights from the work of scholars who have influenced our thinking about Indigenous-settler histories and reconciliation with our own literature and archival research. In doing so, we attempt to offer a more nuanced account of how, in spite of the politics of denial and persistent failure formally to accommodate tenacious forms of legal pluralism, Indigenous peoples in colonized Australia, Canada, and elsewhere continue to exert agency in ways that have made it impossible to assert "perfect" settler colonial sovereignty and "jurisdictional uniformity" through law.[75]