Penal nationalism in the settler colony: On the construction and maintenance of ‘national whiteness’ in settler Canada

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Abstract
The summer of 2020 was one of unprecedented mass protest and a growing critical awareness around the racist operation of criminal justice systems in North America. Consequently, criminal justice systems have been placed squarely at the forefront of struggles for racial equality and social change. While activists, critical researchers, and legal experts have argued racial justice requires a diversion of communities and resources away from criminal justice systems, the focus in mainstream policy, media, and academic circles has been on reform. In Canada, a focus on reformist responses to this racial violence has been justified through a distorted view of Canada’s criminal justice system. Drawing on the concept of penal nationalism, I argue that Canadian carceral practices must be understood as constitutive of the settler-colonial state and its ideological, material and institutional mooring in racial whiteness as the locus of settler power and sovereignty. To this end, it is not enough to reform specific penal practices, while leaving intact the legitimacy of the criminal justice system in general. What is at stake is the very definition and protection of a national identity, which in the settler colony is predicated on colonial whiteness, Indigenous erasure, and racialized exploitation.

Keywords
nationalism, penal nationalism, penal reform, settler colonialism, white supremacy

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Introduction

The summer of 2020 was one of unprecedented mass protest and a growing critical awareness around the racist operation of criminal justice systems in North America. While the police murder of George Floyd in Minneapolis catalyzed mass protests across the U.S., similar protests erupted in Canada in response to the police murders of D’Andre Campbell, Rodney Levi, and Ejaz Choudry, among others (Flanagan, 2020). Consequently, 2020 was a year in which criminal justice systems were placed squarely at the forefront of struggles for racial equity and social change (Fernandez, 2020; Willis, 2020). While activists, critical researchers, and legal experts have argued racial justice requires a significant (if not complete) diversion of communities and resources away from criminal justice systems the focus in mainstream policy, media, and academic circles has been on reform.

In Canada, discourse around the need for prudent (reformist) responses to the criminal justice systems’ racial violence has been justified by a distorted view of Canada’s criminal justice system. This sanitized reading of Canadian history is grounded in a form of exceptionalism which claims Canada’s penal system does not have the same roots in slave patrols, segregation, lynching and voter suppression as in the United States, so is not systemically racist, and therefore reformable (Connolly, 2020; Murphy, 2020). This ‘Canadian exceptionalism’ is patently false, and it is misleading to use the U.S. as a baseline for assessing the degrees of systemic racism in Canada’s penal system (Jones, 2020; Maynard, 2020). Indeed, as Katherine McKittrick has shown, Canada’s selective and comparative narratives surrounding racism and the disappearance of racialized bodies from Canadian popular memory is functional to settler nation building itself (McKittrick, 2006). As such, it is necessary to understand the historically and geographically specific roles criminal justice systems play in constructing and reproducing white supremacy in Canada. It is on this basis – showing the enduring and constitutive relationship between policing, prisons, and the elevation of white rule – that arguments for penal reform might be dismantled, in the interests of enduring change through alternative justice systems.

The argument I advance is that Canadian carceral practices must be understood as constitutive of the settler-colonial state and its ideological, material and institutional mooring in racial whiteness as the locus of settler power and sovereignty (Evans, 2018). Taking settler colonialism as the starting point reveals the ways in which penal practices are central in the shaping of national membership. Carceral systems are, at base, systems for sorting between those deserving of membership to the ‘nation’ and those whose membership must be mediated, suspended, or removed entirely. These practices - from policing, to sentencing, prisons and correctional practices - are not simply a reflection of ‘the nation’ but are instead central in constituting ‘the nation’ itself. This focus on the constructive power of penal systems adds to the sizeable body of critical race and settler colonial scholarship documenting the destructive power of penal systems. The seemingly contradictory and dual role of penal systems – as both productive and destructive,
reflects a broader duality in the history of race-making. As McKittrick deftly argues, practices of “...vanishing, classifying, objectifying, relocating, and exterminating subaltern communities...” are, in fact, central to the “...‘making’ of Canada (which) situates a struggle that enmeshes race, whiteness, and soil as they are attached to the nation’s legal, political, and ideological claims of colonial superiority” (2006: 95). Through a reworking of the concept of penal nationalism (Barker, 2017, 2018; Haney, 2016), I show how Canada’s criminal justice system has been, and continues to be, mobilized to construct the nation as one of whiteness. This is done, through the disappearance and/or subordination of BIPOC bodies, cultures and practices, as well as through the classification and identification of the ‘reformed’ or ‘reformable’ with proximity to ‘white’, ‘rational’ individualism.

Because settler colonialism is a structure, not an event (Wolfe, 2006), these practices are not remnants of an historical past, but are actively reconfigured as the currents of national politics transform. As I show, the history of penal reform in Canada has been a history of refining and redefining the scope and gradations of belonging to whiteness, rather than actually posing substantive challenges to whiteness as the defining characteristic of legal and national acceptability. To this end, if we wish to critique the coercive mechanisms that shape and maintain racialized conceptions of ‘nationhood’, it is not enough to reform specific penal practices, while leaving intact the legitimacy of the criminal justice system in general. What is at stake is the very definition and protection of a national identity, which in the settler colony is predicated on colonial whiteness, Indigenous erasure, and racialized exploitation.

In the next section I review the framework of penal nationalism, elaborating my critiques and advancing my own reformulation. I then turn to an historical analysis of penal nationalism through three phases of Canadian nation-building: the era of Confederation, marked by ‘retributive’ justice structures, the post-war era’s turn to a rehabilitative model of criminal policy, and finally the turn to neoliberalism and a ‘depoliticized’ approach to crime and nation which emphasizes personal responsibility. I show how in each phase, as the content and objectives of ‘white’ nation-building changed in response to external and internal tensions, the rhetoric of correctional mandates transformed as a key mechanism for communicating and reproducing ideas of nationhood. I close by arguing the concept of penal nationalism offers a great deal of analytical insight and bears importantly on present debates around how to respond to contemporary reckonings with the racist operation of our criminal justice systems.

On penal nationalism

As a concept, penal nationalism was first articulated to analyze the development of a set of discourses and practices in Europe which bore resemblance to, yet were distinguishable from, the penal populism of the 1990’s (Pratt, 2007). In 2016 Lynne Haney argued Central European countries were experiencing something akin to
penal populism, which nevertheless warranted a distinct analytical framework. Haney suggested in Central Europe, substantial socio-economic inequality and declining political legitimacy emerged alongside the need to rebuild and reimagine social solidarities in the context of post-Soviet transformations. These legitimacy problems became pronounced in the transition to democracy, where external constraints on national sovereignty posed by EU integration combined with intense political, economic and social uncertainty. Nationalism, in this context, became a strategy for dealing with such upheavals – it served the illusion of social protection through a redefinition of social solidarities. However, to be capable of stabilizing state legitimacy, this nationalism would need more than ideological appeal. Penal mechanisms and discourse afforded a powerful symbolic currency – the prison, which visibly delineated between ‘us’ and ‘them’. Penal policy, Haney argued, became deeply wedded to narratives of national well-being: when directed towards migrants, it aimed to ‘secure’ national sovereignty, and when directed internally, it linked general crime with specific historical crimes against the nation (2016).

Haney’s analysis usefully conceptualizes the link between socio-economic crisis, political legitimacy, and penal practice. While helpfully pointing to the linked internally and externally oriented manifestations of penal nationalism, however, there is a temporal exceptionalism in the argument which links penal nationalism to a contingent historical moment. I want to suggest in the settler colony penal nationalism is a condition of possibility for the nation-state. In the settler colony the prison and criminal punishment systems emerge in tandem with the development of the national state. Understanding the enduring, rather than exceptional relationship between penal practices and the nation, it becomes necessary to confront the inherently and necessarily racist and racializing role criminal justice systems play in Canada.

Vanessa Barker’s work (2017, 2018) similarly develops the concept of penal nationalism complementing a rich body of literature concerning the growing use of penal mechanisms to ‘manage’ citizenship (Aas, 2014; Ackerman and Furnam, 2013; Bigo, 2007; Kauffman and Bosworth, 2013; Bourbeau, 2018; Douglas and Saenz, 2013; Golash-Boza, 2015; Stumpf, 2006). Central in Barker’s work is the identification of neoliberalism alongside increased mobility which challenges state sovereignty and the ability of states to maintain robust welfare protections, leading to a “welfare chauvinism...expressed in penal form” (2017: 448). For Barker, penal nationalism is an aspect of state power which mobilizes criminal justice systems to manage and respond to ‘unwanted mobility’, viewed as a threat to national interests (2018: 89). More specifically, tools such as expulsion, eviction, and criminalization help to shore up state power by giving shape to the territorial boundaries of authority and those who are entitled to exercise power over said territory. Thus, criminalizing practices occurring at the border produce and reproduce ideas of the nation, national authority, and membership. The confinement and expulsion of ‘unwanted’ migrants, in turn, is justified by the purported threats migrants pose to the values and protections of the nation.
In contrast to Haney’s work, Barker’s posits a form of geographical exceptionalism – the ‘place’ of penal nationalism is ‘the border’. While an important intervention, I suggest penal practices are just as responsible for shaping ‘the nation’ when directed at internal populations. Though contesting the application of penal policies to border/administrative matters, the analysis implicitly leaves intact the legitimacy of penal practices in general. However, Barker’s analysis helpfully broadens the temporal horizon of the concept, noting penal power has always been central in the making and remaking of state power and frontiers of sovereignty.

Tying these two contributions together is the argument that penal nationalism emerges when social solidarities and boundaries either do not exist or are being challenged and destabilized. Criminality is thus framed as a threat to national health – understood socially, politically, and economically- and in naming the criminal a stark line between the deserving ‘we’ and the underserving ‘them’ is drawn. In this context, discourse about ‘the nation’ is regularly and thoroughly conflated with discourses about punishment. Criminal policy is not just about the protection of potential victims but is instead about the protection of ‘us’ as a people. Criminal policy purports to protect a ‘way of life’ and it both expresses and reflects the morals, interests and values of a nation (Barker, 2018).

Neither Barker nor Haney exclude the possibility of thinking through penal nationalism in its application to both internal and external ‘others’ across different historical periods, though this framework remains to be fleshed out. In my deployment of penal nationalism, I advance a framework historically and spatially more expansive. The regulating capacity of penal nationalism is dual – it both ‘domesticizes’ and ‘externalizes’ purported threats. It serves to regulate the physical movement of bodies across territorial borders in the name of protecting the nation, and it selectively contains, reforms and/or expels those already counted within the territorial nation-state, but whose identities and actions pose a threat to the national imaginary. This alternative deployment of penal nationalism reveals the violence of criminal justice systems as neither temporally nor spatially contingent and consequently, problematizes reformist discourse. Importantly, attending to the dual spatial functions of penal nationalism in the settler colony makes it possible to identify common structural points of oppression – and potential resistance – for both external and internal ‘others’ (Evans, 2020).

Examining the history of the criminal justice system in the settler colony I argue, reveals the ways in which penal power has long been (and continues to be) instrumental in the structuration of the settler nation state. Nationalism, in Canada, was (and continues to be) realized through the coercive and symbolic power of policing and prisons (Chartrand, 2019; Kiiwetinepinesiik Stark, 2016; Shantz, 2016). This research began by conducting a review of the literature on correctional reform in Canada, which allowed me to identify key documents marking out distinct periods of correctional transformation. I then conducted a critical discourse analysis of the key historical government documents identified by the literature, including Royal Commissions, Parliamentary Committee Reports, and Annual Penitentiary
Reports. Drawing on my previous research on the constitution of national identity in Canada, I found a significant overlap in the phases of correctional practice with those of Canadian national identity. As such, I analyzed my data for common socio-political and economic contexts which might provide a broader narrative for these reforms. In what follows, I demonstrate the constitutive relations between three periods of penal practice in Canada and transforming conceptions of nationhood.

While in practice it is difficult to rigidly delineate a complete rupture between phases, owing to the institutional ‘stickiness’ and bureaucratic rigidity of correctional bodies (Moore and Hannah-Moffat, 2005), I argue that transformations in the discursive framing of criminality and corrections have been central in communicating the conceptual limits of the nation. These discursive shifts (re)legitimize systemic forms of racial inequality by progressively reframing criminality in ‘colour-blind’ terms. In brief, I delineate three ‘phases’ of penal nationalism, which should be understood as ideal types, rather than hermetically sealed models. These phases are; the Confederation era of explicit white supremacy and the use of criminal punishment to isolate, segregate, and displace ‘others’ so as to institutionalize settler sovereignty (Kiiwetinepinesiik Stark, 2016); the post WWII era of official pluralism and the use of criminal rehabilitation to compel assimilation into white cultural norms (Bohaker and Iacovetta, 2009; Mackey, 1999); and finally, the neoliberal period of abstract individualism which sought to define citizenship as a lack of state reliance and, subsequently, criminality as an excess of state dependence (Gavigan and Chunn, 2004; Moore and Hannah-Moffat, 2005). In analyzing each period, I point to three key elements of penal nationalism: the use of penal policy to (re)define social solidarities during crises of state legitimacy; the strategic use of penal policy to define a ‘good’ citizen in a racially coded manner; and the conflation of non-conformity to the ideal model of citizenship with threat to the nation, legitimizing the detention, isolation and often violent treatment of the ‘other’.

The definition of nationalism which I adopt is one advanced by Claudio Lomnitz who posits nationalism as “a community that is conceived of as deep comradeship among full citizens, each of whom is a potential broker between the national state and weak, embryonic or partial citizens whom he or she can construe as dependents” (2001: 338). Lomnitz’ definition allows us to theorize how those who meet the territorial definition of nationhood are nevertheless excluded from national identity. National inclusion is less a matter of belonging or not belonging than it is a matter of gradations of belonging. Such a definition is complemented by Sayer and Corrigan’s discussion of the role of moral regulation in processes of national state formation. Moral regulation, in the analysis which follows, is a critical conduit for sorting between full, partial, and excluded persons, and one which has been variably bolstered and enforced by criminal law (Corrigan and Sayer, 1985). In the settler colony carceral practices have been adopted to manage the full ‘inclusion’ of a range of bodies into the national imaginary. In some cases, these practices have aimed for the absolute exclusion or elimination of bodies.
deemed a threat (Indigenous peoples, particular categories of migrants and so-called violent offenders) while in other cases, carceral practices are used to limit the range and possibilities of membership, enforce state dependency, and heighten exploitability (temporary migrant workers, incarcerated peoples, communities under psychiatric detention, etc.) (Bashford, 2004; Lawrence, 2003; Veracini, 2015; Walia, 2010; Wolfe, 2015).

Scholarship in the area of settler colonial and critical race studies have long recognized the centrality of national identity in the development and maintenance of colonial states. As Patrick Wolfe (2006, 2015) has shown, because the settler project is one of replacement, colonists must legitimize their claim to sovereignty through the erasure of original peoples, and the construction of a new identities binding diverse settlers in a fabricated relationship to the land. Yet, as Nahla Abdo shows, settler colonialism, by its nature, lacks any organic touchpoints for such an identity (shared history, lineage, etc.) (Abdo, 2016). Lacking these more immediate bases for imagining national belonging, racial whiteness became the essential quality of settler nationalism (Evans, 2018). The use of ‘whiteness’ to ground settler nationality allows settlers to achieve related but distinct goals: the alienation of Indigenous land (Barron, 1988; Coulthard, 2014; Cuneen, 2014; Dafnos, 2014; Gavigan, 2012; Lawrence, 2003; Moreton-Robinson, 2015; Nettelbeck and Smandych, 2010; Pasternak et al., 2013), and the production of surplus-value through the discipline of a hyper-exploitable, and territorially precarious, racialized workforce (Ferguson and McNally, 2014; Gilmore, 2007; Golash-Boza, 2015; Thobani, 2007; Walia, 2010).

Scholarship on the racial state (Goldberg, 2001) has, likewise, argued the modern state is quintessentially modern by virtue of its racial character. This racial character is, in part, produced through the law which must create ‘likeness’ in order to enact its abstract universalism. If the modern state is ‘rational’ owing to the operation of the rule of law, and law must treat all its subjects as equivalents, it follows the state must be comprised of ‘like’ subjects. This centrality of law, for Goldberg, delimits the transition from a period of racial naturalism to one of racial historicism. As shown in the discussion below, this transition is evident in the operation of correctional practices. Under racial naturalism, the ‘other’ as occupying an underdeveloped position within an evolutionary trajectory – their management relies less on brute force, and more on the power of law and other institutionalized powers, to compel their ‘catch-up’ or assimilation (Goldberg, 2001). In these cases, the law marks out the contours of racial-national belonging. The inassimilable are not so because of biology, but because of an alleged failure to achieve their historical potential.

In Canada, national identity was achieved and reproduced, in part, through the expansion and centralization of carceral apparatus which served to both contain and regulate Indigenous peoples while selectively including, exploiting, or expelling the bodies of racialized labour, including migrants (Bashford, 2004;
Kiiwetinepinesiik Stark, 2016; Lawrence, 2003; Veracini, 2015; Wolfe, 2015). Robyn Maynard demonstrates the critical role systems of policing have played in the ongoing construction and maintenance of racial difference through the demarcation of black ‘criminality’, while Vicki Chartrand shows how the penitentiary has functioned to establish and maintain settler dominion (2019). The contribution I make to these literatures is modest. Applying the concept of penal nationalism to settler Canada adds to existing critical race and settler colonial scholarship by demonstrating how displacement, erasure, and elimination are in fact productive of ‘whiteness’ and the settler nation. As McKittrick argues, “landscaping blackness [along with Indigenous and other people of colour] out of the nation” functions to both conceal the ‘other’ and construct ‘whiteness’ (2006, 96). Penal nationalism allows for the identification of the criminal justice system as a key site through which racial whiteness is produced, reproduced, and communicated. This analysis highlights the often-overlooked social production, and malleability, of racial whiteness. Examining dominant discourses within Canadian criminal justice systems reveals how the content of ‘whiteness’ and the objectives towards which whiteness is mobilized will vary in relation to political-economic and social context (Allen, 2012; Wolfe, 2015). The solipsistic positionality of whiteness within Canadian criminal justice systems has proven malleable and resilient to eradication, despite more than 150 years of ‘reform’.

**Policing and the construction of an imagined community of ‘Northern whiteness’**

Canada’s first national police force, the North West Mounted Police (later the Royal Canadian Mounted Police) was charged both with the policing of so-called domestic issues of law and order as well as with defending, expanding, and policing the frontiers of the territorial state (Barron, 1988; Gavigan, 2012). As a quasi-military force, the NWMP was instrumental in fusing the international task of defining sovereign borders with the domestic task of legitimizing and regulating a range of political subjectivities.

In the practice of defining and articulating the nation vis a vis the ‘international’ the NWMP played several roles. First, the establishment of the NWMP facilitated the westward expansion of settlers into Rupert’s Land extending the frontier of alien sovereignty (Macleod, 1978). Notably the NWMP was tasked with suppressing Metis and Indigenous communities of the Red River Rebellion in the interests of expanding the Canadian Pacific Railway, a cornerstone of Canada’s National Policy (Shantz, 2016). Furthermore, the NWMP was peopled by former military officers, a body of men who considered national defense their primary task. As such, even when called upon to conduct more ‘traditional’ policing roles, these tasks were filtered through a lens of managing and defending national sovereignty. Thus, for example, the establishment and enforcement of the 1870’s Pass System which criminalized Indigenous cultural practices through the regulation of mobility, was routinely cast as preserving the integrity of the nation; bodily,
economically, politically, and socially. By prohibiting unregulated movement, it was hoped Indigenous peoples would be forced to abandon their traditions and compelled to adopt practices central to the settler nation – chiefly an ethic of self-reliance and ‘hard work’, defined by agricultural development and personal accumulation (Barron, 1988).

The policing of Indigenous communities by the NWMP was instrumental in nation-building at another, perhaps deeper level. As Heidi Kiiwetinepinesiik-Stark argues the use of the NWMP to immobilize Indigenous resistance through the language and laws of criminality enabled Canada “to reduce Indigenous political authority, domesticating Indigenous nations within the settler state, while producing the settler nation-state and its accompanying legitimate juridical narratives” (2016). Straddling the lines of military and domestic policing, the NWMP cast Indigenous peoples as ‘foreign’ in order to bolster the settler identity as one of a ‘sovereign’ engaging in diplomatic relations and negotiations. However, once the contours of sovereignty were established through territorial expansion, the NWMP turned to the use of criminal law against Indigenous peoples in order to violently deny Indigenous nationhood by “subsume(ing) Indigenous sovereignty within the bounds of the state” (Kiiwetinepinesiik Stark, 2016)

More broadly, the penal system in Canada grew out of the need to prescribe and discipline the ‘values’ of a new nation – one which viewed itself as distinctive in its purported humanism and work ethic within a burgeoning capitalist economy (Dominion of Canada, 1868). The Canada First Movement were among the first to politically articulate Canadian ‘nationality’ which can be encapsulated by R.G. Haliburton’s comments in his 1869 address:

We are spring from a dominant race... as the British people are themselves but a fusion of many northern elements which are here again meeting and mingling, and blending together to form a new nationality... will comprise at once the Celtic, the Teutonic, and the Scandinavian elements, and embrace the Celt, the Norman French, the Saxon and the Swede... (Haliburton, 1869)

Haliburton then went on to argue the ‘key’ to this new nationality – what would bind settlers together despite different origins – was the so-called climatic-racial advantage of Northern ‘whiteness’:

If climate has not had the effect of moulding races, how is it that southern nations have almost invariably been inferior to and subjugated by the men of the north? Why should a strange chance have planted the dominant families of mankind in northern latitudes? (Haliburton, 1869)

Consequently, a particular ‘rationality’ and morality was attributed to the idea of a ‘Canadian’ form of racial whiteness, tied to a liberal conception of property and labour (Mackey, 1999). Crime, then, became that which threatened the ‘moral and social fabric of society’; notably crimes of ‘vagrancy’ and ‘immorality’ (Beattie, 1977).
The Indian Act of 1888 created explicit space within which the violation of settler morality could be deemed criminal. Under the Act, Indian Agents were made justices of the peace in order to address offences stemming from the Act, while in 1895, they were given power to hear offences under the Criminal Code. Agents were allowed to hear purported criminal offences against morality, and those of vagrancy (Canada, 1892; Gavigan, 2012). Thus, the *criminal* legal system was drawn upon in order to uphold an *administrative* policy (the Indian Act) aimed at securing the sovereignty of settler nationality. As Gavigan documents, the punishments meted out under this structure were frequently sentences in local gaols and/or sentences of hard labour. In the words of one Indian Agent, it was hoped such sentences would “...make a better Indian of him...” (cited in Gavigan, 2012: 138).

While federal penitentiaries erected in the early years of nation-building were viewed as a humane alternative to prior forms of punishment, black, Indigenous and other persons racialized as non-white were largely excluded from such spaces. Nominally tasked with moral regulation, the penitentiary was viewed as ineffectual for non-white persons whose intellectual, cultural, and physiological constitution were deemed too ‘weak’. Anxiety over the alleged contamination of white prisoners’ moral reform by Indigenous prisoners and prisoners of colour necessitated their exclusion from these spaces (Chartrand, 2019). Instead, localized gaols, fines, and corporal punishment were mobilized to regulate those for whom, even incarceration, was thought too civilized. In this sense, the penitentiary contributed to ideas of national whiteness, paradoxically, by positing ‘successful’ incarceration as exclusive to the robust, rational and hard-working white man.

**Post-war liberal humanitarianism, pluralism, and the ‘rehabilitative’ model of corrections**

The post-war period saw a number of beliefs and conditions which had legitimized and stabilized settler conceptions of nationhood in Canada lose sway. On a global scale, formally sanctioned racial superiority was no longer legitimate or palatable, marking a general historical shift from regimes of racial naturalism and toward racial historicism (Goldberg, 2001; Mackey, 1999). Furthermore, the passage of the Canadian Citizenship Act in 1947 rekindled interest in national identity and the need to balance ostensible commitments to humanitarian liberal democracy, with the extant ‘superiority’ of the white settler ruling classes (Bohaker and Iacovetta, 2009; Mackey, 1999). At the same time, endogenous processes such as the movement for Quebecois separatism, the resettlement of wartime refugees, Indigenous population growth, and Indigenous sovereignty movements also stoked fear that marginal and foreign groups might threaten existing power bases (Bohaker and Iacovetta, 2009). National identity would shift away from an exclusive focus on whiteness and colonial intolerance. Instead, the new ‘Canada’ would be predicated on an identity of ‘tolerant’ and ‘humane’ pluralism (Bannerji, 2000; Mackey, 1999; Thobani, 2007). Central to this project was the development of a
range of cultural and educational programs which would ensure a level of moral regulation and contain such challenges by allowing ‘others’ to integrate their worlds and identities within the mainstream of Canadian society (Bohaker and Iacovetta, 2009; Mackey, 1999; Thobani, 2007).

This national narrative posited a common commitment to civic values, making possible the peaceful tolerance for a plurality of cultural communities (Mackey, 1999). Yet, these ‘civic values’ were not culturally neutral – these were values which emerged from and bolstered bourgeois colonial whiteness such that the ‘plural’ nation was less about genuine inclusion and more about liberal ‘recognition’ (Coulthard, 2014). Things like the fetishization of individualism and private property, the valorization of electoral politics, etc. were all products of the colonial architecture which managed and maintained the supremacy and power of white settlers (Bohaker and Iacovetta, 2009). Despite the official language of pluralism, the project was one of ongoing assimilation, as registered by the consolidation of the Departments of Indian Affairs and Canadian Citizenship into the newly formed Department of Citizenship and Immigration (1947). This new Department, according to Liberal Prime Minister Louis St. Laurent, was intended “to make Canadian citizens of those come here as immigrants and to make Canadian citizens of as many as possible of the descendants of the original inhabitants of this country” (quoted in Bohaker and Iacovetta, 2009: 430).

At the same time these ‘neutral’ civic values came to dominate national identity, the language of law shifted to embrace similar concepts of ‘rationality’ or the ‘reasonable man standard’ which Goldberg has shown was code for the civilized citizen epitomized by the white, middle-class suburban, property-owning, Western, man (2001: 150). Admonishing prior retributive approaches to crime and punishment rooted in neo-Darwinian and Lamarckian racial naturalism (Goldberg, 2001), Justice Archambault’s 1938 Report foreshadowed the eventual shift in penal practices, calling the present system “practically valueless in so far as it concerns those who have been before, or who are now, confined in prisons and penitentiaries” (1938: 9). Archambault’s recommendations, only adopted after the War in 1947, were that “A system should be evolved, and put into force, which would prevent the repetition of crime, bring about the reformation and rehabilitation of those who have committed crimes, and take care of those who have been released from prisons” (1938: 8). Such recommendations were all the more palatable in the aftermath of the World Wars, and considered “...a humanitarian piece of legislation...” (Dominion of Canada, 1945: 2160).

By 1949, the concept of prisoner reform had become central to debates on corrections. The Annual Report of the Commissioner of Penitentiaries, for example, stated:

There is an increasing realization that the true purpose of the prison is not only to keep in safe custody those committed to its care but to train, uplift, and educate its inmate for better and future citizenship5 (1949: 7).
In 1956 Justice Fauteux, further, argued prisons should be tasked with the training and treatment of people whose criminal violations were a symptom of social ‘sickness’ (Fauteux, 1956). Rather than view issues of criminality as biological, the state took a view to criminality as a social problem. The goal was less to protect the nation through expulsion and isolation and instead became a matter of training those deemed ‘unfit’ for public life to become ‘productive’ members of society. In a national context in which it was no longer politically possible to expel the ‘outsider’, the prison became tasked with reshaping them to become nominal ‘insiders’.

This assimilative function of criminal justice systems was most evident in the increased arrest and incarceration of Indigenous women. While datasets for this period are scarce, scholars have been able to compile statistics from specific correctional institutions which all point to the post-war period as the beginning of the long trend in overincarcerating Indigenous women (Inwood and Roberts, 2020; Roberts and Reid, 2017; Sangster, 1999). Across the board, the primary charges laid against these women were public order and morality offences including those related to liquor, sex, and vagrancy. These ‘offences’ were interwoven in the minds of police and magistrates, as illustrated by the comments of one magistrate in a 1940's case involving two Indigenous women drinking: “there is no evidence of sex but the proximity of the sexes with intoxicants can have fueled undesirable results” (quoted in Sangster, 1999: 43). Criminal law, in these instances, served two key functions for the national project. On the one hand, as Sangster argues, “Criminal charges provided one means for (Indian) agents to enforce moral standards” (Sangster, 1999: 49). At the same time, the targeting of women had a eugenic effect. It prohibited Indigenous women from biological reproduction (during incarceration), as well as cultural reproduction through child removals. The residential schooling system and the 60’s Scoop, were violent (often deadly) forms of child removal tasked with assimilative practices through ‘re-education’ programmes (McGuire and Murdoch, 2021). These ‘schools’ and ‘care’ systems, themselves, were modelled as prisons with markers of carcerality such as compulsory labour, separation of the sexes, segregation, isolation, and punishment. Underwriting these carceral spaces, as in formal prisons, was the notion of ‘reform’ as an assimilation to whiteness.

Despite ostensible ‘reform’ in the criminal justice system, there was no fundamental alteration of their underlying function as the shaper and gate-keeper of settler colonial white nationalism. Changes in the penal system mirrored changes in the national narrative in so much as a formal shift to tolerant and inclusive humanitarian nationalism were matched by assimilative policies in the criminal justice system. In practice, then, the era of liberal humanitarianism continued to other, marginalize and exclude Indigenous peoples and persons of colour. Both the nationalist and corrections rhetoric at this time purported to offer supports to anyone desiring access to the full benefits and responsibilities of citizenship, while in practice, such offers of support were conditioned in such a way as to exclude communities with different cultural values, social, and material resources. Those who ‘failed’ to achieve full citizenship, then, were posited as
underserving – unable or unwilling to take advantage of the ‘opportunities’ provided by the state’s benevolence.

**Neoliberalism, recession and the depoliticization of the ‘other’**

From the late 1970’s onward, official ‘tolerance’ both in the realm of nationalism and in corrections, underwent substantive transformation despite formal continuity with the language of pluralism and multiculturalism. In both conceptions of nationalism and theories of corrections, a growing call to ‘depoliticize’ what were assumed to be matter-of-fact, apolitical phenomenon emerged. Importantly, this meant shifting the onus for national inclusion and participation away from society and onto the individual. These changes fell in line with overarching ideological and political-economic transformation of the period which saw a shift from Keynesianism to Neoliberalism (Alexander, 2012; Gilmore, 2007; Golash-Boza, 2015; Maynard, 2017). In the wake of significant deindustrialization and the retrenchment of social services and welfare, the veneer of a ‘nation’ predicated on multicultural equality was eroded, while old and new divisions emerged with potential to destabilize the security and legitimacy of settler authority (Mackey, 1999).

By the 1990’s, the legitimacy of Canadian nationhood was facing a protracted crisis through organized political contestation and movements for secession. The Oka Crisis, the failed Meech Lake Accord, and a looming economic crisis all coalesced to bring the issue of Canadian national identity to the fore (Mackey, 1999). Debates at this time began to ask what the limits to national tolerance should be. These limits, it was argued, should not be ‘artificially’ determined by political interests, and inclusion should not be predicated on the supports of the state. Rather, the ‘authentic’ nation would emerge on the basis of the natural qualities and values of so-called Canadians (Mackey, 1999; Thobani, 2007). This turn in the national narrative fell in line with broader trends towards populism under neoliberalism, wherein ‘political’ interests and expert opinion were challenged and the ‘common sense’ of the ‘everyman’ vaunted (Pratt, 2007). Citizenship and national belonging were recast in terms of how well one could reproduce oneself without state supports. Given the colonial history of racially entrenched inequality, those with the material and institutional capacity to achieve self-sufficiency were disproportionately white settlers (Maynard, 2017). This shift to a form of populist nationalism, was mirrored by a transition to penal populism.

In the realm of criminal justice, the ‘reform’ model had begun to take on a new meaning by the late 1970’s. In the 1977 MacGuigan Report, the Law Reform Commission recommended corrections move away from a treatment model, stating:

“...we do not recommend imprisonment for the purpose of rehabilitation. Even the concept is objectionable... It implies that penal institutions are capable of adjusting an individual as if he were an imperfectly-operating mechanism.... We prefer to
approach the problem with a new term – ‘personal reformation’ - which emphasizes the personal responsibility of prisoners instead” (1977: 37).

In eschewing a recognition of socio-political context, the Report sought to (re) locate responsibility for rehabilitation, and hence criminality itself, in the individual, arguing “only the wrongdoer can bring about reform in himself since he is responsible for his own behaviour....” (MacGuigan, 1977: 38). However, as Moore and Hannah-Moffat argue, this era of corrections entailed important elements of continuity, despite substantive change (2005). Both phases of corrections relied on a formal commitment to rehabilitation, though the welfarism that had informed the prior was replaced with therapeutic intervention focusing on the rehabilitation of individual ‘defects’. Such perceptions of criminality informed and aligned with transformations in the national narrative which, while rhetorically committed to liberal pluralism, facilitated and legitimized a deep-seated suspicion of those who did not or could ‘reform’ and assimilate into the mainstream.

Alongside this shift in the theoretical locus of criminality was a transformation in the focus of criminal law and policing. From the 1980’s onward criminality, now synonymous with personal irresponsibility, was cast as a threat against the nation. Even the costs of incarceration were posited as a hardship to the nation, as then Minister of Justice Jean Chretien commented, “…who is punished more by a sentence of imprisonment – the prisoner, or the taxpayer…” (Chretien, 1982).

More specifically, and following trends in the United States, Canadian criminal policy under neoliberalism was characterized by the War on Drugs and the War on Poverty (Gordon, 2006; Maynard, 2017). Thus, despite a secular decline in the use of marijuana, cocaine and heroin throughout the 1980’s, Prime Minister Brian Mulroney declared the Canadian War on Drugs. The use of drugs, under a neoliberal lens was posited as an irrationality or wasted opportunity. It was cast as an inability to exercise ‘rational’ restraint, to ‘work hard’, and maximize productivity (Gordon, 2006). The use of drugs was also cast as burdensome in a period where an ability to detach oneself from any expectations of the state was the signal of a true ‘Canadian’.

Focusing primarily on simple possession, the War on Drugs targeted racialized and impoverished communities with significant implications for racialized and Indigenous women who used drugs. For these women, not only were they cast as personally irresponsible, but also morally reprehensible as actual or potential mothers. As the potential bearers of future citizens, their criminalization hinged as much (if not more) on their ‘crimes’ against national health through the ostensible violence and victimization they brought upon their children or foetuses (Dell and Kilty, 2012). With the War on Drugs came an even greater growth in the incarceration of racialized and Indigenous women. Thus, “drugs were (posited as) a threat to Canadian society itself” which was “tearing a gaping hole in the fabric of society” and “turning children into thieves” (cited in Maynard, 2017).

Similarly, the ‘War on Poverty’ manifest in a public hysteria over so-called welfare fraudsters (Gavigan and Chunn, 2004; Mosher and Brockman, 2010).
Once again, state dependence was cast as a form of criminality and opened welfare recipients to a wide range of intrusive surveillance techniques. In particular, the War on Poverty targeted recent immigrants, linking so-called race with a criminal threat to national health (Maynard, 2017). The conditions under which one could be charged with welfare fraud, of course, were very easy to meet given extensive historical record-keeping and documentation were required as proof of legitimacy (difficult burdens of proof when we account for refugee status, language barriers, and poverty itself). Coupled with the fact that fraud under five thousand was punishable with a prison sentence, the War on Poverty served to mark as criminal and ‘outsider’ those who did not ‘choose’ to seize upon the ‘opportunities’ of the market and instead relied on state support (Gavigan and Chunn, 2004; Maynard, 2017). Once again, these trends in penal policy contributed to and buttressed growing populist nationalism. Criminal policy was being made in contrast to statistical and expert evidence, instead appealing to the emotions and ‘common sense’ of ‘the people’ – otherwise known as penal populism.

These trends reached their zenith under the government of Stephen Harper and his populist ‘Tough on Crime’ mandate, which exploded following the Global Financial Recession of 2007–2008. Following his re-election in 2011, Stephen Harper’s Conservatives passed the omnibus Bill C-10 (the so-called Safe Streets and Communities Act) which served to expand Canada’s incarcerated population, even while crime rates had hit an all-time low (Blaze Carlson, 2011; Bronskill, 2011). The Act imposed mandatory minimum sentencing for a range of street-level crimes, eliminating the sentencing discretion of judges. The Act also eliminated conditional sentences, pardons in certain cases, and ‘double credit’ for time served, while imposing more serious forms of punishment on youth offenders. All of this functioned to hyper-criminalize low-level crimes of poverty, disproportionately targeting racialized communities (Maynard, 2017). A report from the Collaborative Centre for Justice and Safety argued it was imperative in the post-recession period to invest in ‘hot spot’ policing – largely to manage those rendered vulnerable, precarious, and therefore, potentially troublesome, by the contraction of labour market opportunities and social welfare programs. Just as with notions of national belonging, ideas and decisions around criminality, criminal policy and policing were informed by ideas of economic value – an ostensibly apolitical measure intelligible as mere ‘common sense’ (Ruddell and Jones, 2014).

**Conclusion**

I have argued that an analysis of Canadian criminal justice reform through the lens of penal nationalism reveals the enduring and adaptive relationship between criminal justice systems and nationhood. Specifically, I have shown how penal practices in the settler context are existentially – rather than contingently – bound into racial nation-building. In the settler colony, criminal justice systems have always performed dual functions of erasure and creation. The criminal justice system not only erases, displaces, and objectifies BIPOC communities, it also actively constructs
ideas of racial whiteness. Analyzing this constructive angle of criminal justice systems reveals continuity amidst successive periods of reform, and an enduring objective to consolidate and measure ‘responsible’ citizenship through the cultural norms and structural privileges of whiteness.

As such, the present historical conjecture of reckoning cannot be contained to this moment alone. The construction of white settler identities is structurally tied to the penal system’s erasure, categorization, regulation, and displacement of non-white persons, communities and cultures. To reckon with this requires something far greater than reform – it necessitates a complete transformation in how justice, legality, criminality and citizenship are conceptualized in the first place.

In Canada, these are not the discussions being had amongst political representatives and policy makers. Rather than redirecting funding for incarceration to diversionary community programs and supports, what we have seen is further investment in and expansion of Canadian carceral infrastructure. Indeed, the most recent federal budget has earmarked $2.86 billion for police and $2.81 billion for prisons which includes projects intended to expand ‘beds’ in the system (Canada, 2021). Much like the conciliatory nationalist rhetoric of Liberal Prime Minister Justin Trudeau, correctional investment has sought to ‘reform’ criminal justice practices to be more ‘inclusive’, justifying carceral spending with an expansion in sweat lodges, culturally appropriate programming and meal services, and new institutions that will be located closer to the very communities torn apart by incarceration (Montford and Moore, 2018; Piché, 2017; Piché and Walby, 2017). Of course, none of these measures challenge the underlying premise of the criminal justice system, nor its relationship to settler identity. Instead, such moves continue to normalize the presumed ‘deviance’ and ‘criminality’ of BIPOC communities, while alleviating settler anxieties around charges of racial exclusion.

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Notes

1. To be elaborated in the next section.
2. As I discuss elsewhere, whiteness in early Canada was a politically strategic means through which Anglo-French tensions were reduced under the banner of a unifying settler identity (Evans, 2018). However, the content of whiteness and the objectives towards which whiteness is mobilized are mutable in relation to political-economic
and social context (Allen, 2012; Wolfe, 2015). Thus, in the post-war period, whiteness came to embrace select previously excluded groups such as the Ukrainians, the Jewish, and the Italians (Mackey, 1999).

3. Italicization my own.

4. According to Bohaker and Iacovetta (2009), the belief in an inevitable Indigenous disappearance which had characterized the pre-war myth of nation building was, by the 1930’s no longer tenable, owing to an 18% population growth rate. By the end of the war period Indigenous peoples were the fastest growing population in Canada.

5. Italicization my own.

6. Until 1961, any Indigenous person completing post-secondary education would become ‘enfranchised’ thereby losing their status (Bohaker and Iacovetta, 2009: 445).

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