ABSTRACT

This paper will introduce the key issues as well as the recent historiographical literature that are being used to frame a study of how Indigenous peoples were subjugated through instruments of legal authority in Britain’s colonies over the nineteenth century after the 1830s. As a means of siting these themes through a specific analysis of colonial legal policies and processes, the paper outlines why western Canada and interior/west Australia in particular deserve attention alongside each other as a means of illuminating the similarities and divergences across British white settler colonies. The paper addresses the question of how the systems of law contributed to Indigenous subjugation, as well as aided in the resistance of Indigenous peoples to colonial imposition. A key related question examined is how British colonies that held clear divergences in their points of foundation (such as land cession treaties in western Canada and the absence of treaties in Australia) reached convergences in the forms of legal subjugation experienced by Indigenous peoples. The paper also establishes the relevance of interdisciplinary transnational research for understanding contemporary Indigenous political concerns, and reconciliation efforts occurring in white-settler societies today.

INTRODUCTION

In his 2005 book on Colonialism in Question, Fredrick 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”.1 Cooper points to postcolonial studies, developed primarily in literature and anthropology, as the critical “interdisciplinary scholarship” of the last two decades that has done most to reinvigorate the fields of colonial and imperial history. At the same time, however, he points out that “a significant part of this body of work has”, problematically, moved in the direction of “treating colonialism abstractly, [and] generically, as something juxtaposed with an equally flat version of European ‘modernity’”, and that it is thus important 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.”2 In essence, Cooper argues that “[t]he revival of interest in the colonial world” since the 1980s “reflects the influence of literature and

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2 Cooper, 4-5.
anthropology and, most importantly, wider intellectual currents that threw into question the most basic narratives and the most basic ways in which knowledge is configured”, and one consequence of this is that historians are now having to fundamentally reconstruct “what we mean by Europe, Africa, Asia [and other world geographical settings], and how they shaped each other over time.”3

In addition to giving Cooper’s (2005) work the additional attention it deserves, in the following paper attention is given to the contributions of other historians and critical interdisciplinary scholars who are now helping us to fundamentally rethink the nature of settler colonialism and its legacies.4 This analysis is in turn used to introduce the key issues, as well as related colonial historical-legal literature, that we are now using to frame a study of how Indigenous peoples were brought under subjugation, primarily through instruments of legal authority, across various British settler colonies starting roughly in the 1830s and extending into the twentieth century. Although for a number of years we have individually and collectively devoted a good part of our research time to the study of the history of English law and its imposition on Indigenous peoples across different British settler colonies,5 we continue to be inspired by the critical insights of leading scholars in the field, including, especially, those found in the recent work of Lauren Benton.6 In her recent book Benton reinforces the importance of studying attempts made to exercise legal authority over Indigenous peoples across the myriad geographical settings, or “legal spaces of empire”, where they occurred.7 Specifically, she points out that throughout the vast but

3 Cooper, 13. One notable leading scholar who has followed up on this argument is Lauren Benton in her recent book, A Search for Sovereignty: Law and Geography in European Empire, 1400-1900 (Cambridge: Cambridge University Press, 2010), in which she acknowledges Cooper for pointing out “the continued creation of spaces of uneven sovereignty”, or “the inherent lumpiness” of European imperial formations, well into the nineteenth century (pp. 7-8).

4 This paper is part of an ongoing interdisciplinary and comparative research effort involving Australian and Canadian scholars representing the disciplines of English literature, history, and sociology. In addition to myself (the lone sociologist in the group), they include Amanda Nettelbeck (English) and Rob Foster (History) of the University of Adelaide, and Louis Knafla (History) of the University of Calgary. This research is funded in part through a 2010-2012 Australian Research Council Discovery Grant, on “The Rule of Law in History and Memory: Australian and Canadian settler frontiers”. As part of this project, we are currently working on a book manuscript, under the working title: “Fragile Settlements: Indigenous Peoples, Law and Resistance in Australia and Western Canada, 1830-1914.” The aim of the current paper is to share and get feedback on the primary themes and arguments we are developing in our current manuscript in progress.


6 Benton, A Search for Sovereignty.

7 Benton, 9.
uneven “European empires” spawned by colonial projects from the fifteenth to the nineteenth centuries, “[l]aw represented a particularly important factor in the social construction of this variegated colonial world”, and that “[t]he administration of empire depended, meanwhile, on the exercise of delegated legal authority”; including the delegated legal authority extended over “indigenous or conquered peoples.”

In addition to further surveying the lines of “post” and “post-post” colonial inquiry pointed to in Cooper’s analysis of the broad interdisciplinary field of colonial studies, it is therefore instructive, as a starting point for rethinking the nature of settler colonialism and its legacies, to also re-chart the trajectories that have been taken in recent studies like Lauren Benton’s to examine the importance of law and its relation to assertions of authority and sovereignty (particularly over Indigenous peoples) at different times and in different (spatial or geographical) settings.

As a way of situating the themes we derive from this theoretically-relevant literature in a specific analysis of colonial legal policies and processes affecting Indigenous peoples, we turn in this paper to considering and offering initial comparisons of the experience of two contrasting British white settler colonies in the nineteenth century, western Canada and interior/west Australia. In doing so, we show why western Canada and interior/west Australia in particular deserve attention alongside each other as a means of illuminating the similarities and divergences in how legal authority and sovereignty were asserted over Indigenous peoples in various British white settler colonies. Using these two colonies as points of comparison, we begin to address the question of how the varied systems of law put in place in British white settler colonies contributed to Indigenous subjugation, as well as aided in the resistance of indigenous peoples to colonial rule. A key related question we begin to address in this paper is how British colonies that had clear divergences in their points of foundation (such as land cession treaties in western Canada and the absence of treaties in Australia) reached convergences in the forms of legal subjugation experienced by Indigenous peoples. Through our efforts at beginning to pursue these lines of theoretically-informed transnational historical inquiry, we also set out to establish the relevance of multi-disciplinary comparative research for understanding contemporary indigenous political concerns, and reconciliation efforts occurring in settler societies today. However, it is important to begin this effort by developing a sharper conceptual and theoretical lens for framing research that takes into account the range of critical interdisciplinary scholarship on settler colonialism and law.

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8 Benton, 3.

9 An initial effort in this direction was undertaken by Smandych in “Mapping Imperial Legal Connections”, and parts of the discussion in the current paper build on this earlier effort.
PART I: COLONIALISM AND SETTLER COLONIALISM IN WORLD HISTORY

Postcolonialism and World History

Cooper credits interdisciplinary colonial and postcolonial studies of the 1980s for introducing “a large transcontinental public to the place of colonialism in world history.” By this Cooper does not mean that historians did not study colonialism as part of world history before the 1980s, but rather that the field was immensely reinvigorated and given a much more critical edge in the work of postcolonial writers of this decade; many of whom of course followed up on the previous path-breaking work of writers like Franz Fanon and Edward Said. Since then, postcolonialism has of course moved from the radical fringes of various humanities and social science disciplines, to become much more mainstream, and, as Cooper highlights, the subject of criticism from many directions. It is not the purpose of our work here to revisit these criticisms or argue for a new “post”-“post” colonialism perspective relevant to the study of colonial law and Indigenous peoples; as important as it is to take these criticisms into account. Rather, it is more productive here to highlight the positive influences this critical interdisciplinary scholarship has had on the more recent study of colonialism and settler colonialism.

A notable effect of the influence of postcolonialism in history has been the shift toward considering colonialism generally, and the advent of white settler colonialism more specifically, as part of more sweeping transnational developments embedded in “global” or “world” history. A leading example of this is the work of Chris Bayly, who, through his book on The Birth of the Modern World, 1780-1914: Global Connections and Comparisons, established himself as a leading proponent of what has been referred to as global “world history”. In his well-received book, Bayly encourages colonial and imperial historians to look beyond the British Empire to examine broader transnational and global connections apparently tied, especially in the nineteenth century, to the development of “many hybrid polities, mixed ideologies, and complex forms of global economic activity”; arguing that “all local, national, or regional histories must, in important ways... be [considered] global histories.” According to Bayly, “the long 19th century” (which he dates from around 1780 to 1914) witnessed Western ideas and practices associated with modernization spread throughout the rest of the world. Through his study of widespread – arguably global – developments of this period, Bayly attempts to show “how historical trends and sequences of events, which have been treated separately in regional or national histories, can be brought together.” Moreover, he argues that making these global connections and comparisons is fundamentally important for rethinking modern world history, in that it helps to reveal “the interconnectedness and interdependence of political and social changes across the world well before

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10 Cooper, 13.


the supposed onset of the contemporary phase of ‘globalization’ after 1945.” At the heart of Bayly’s thesis is the view that as “world events became more interconnected and interdependent” in the nineteenth century, “so forms of human action adjusted to each other and came to resemble each other across the world”, and he pursues this line of inquiry through drawing comparisons and tracing connections across a variety of states and jurisdictions ranging from China to India to Islamic states to the countries of Western Europe and their far-flung colonies. In particular, he “traces the rise of global uniformities in the state, religion, political ideologies, and economic life as they developed through the nineteenth century.” Bayly’s study of rising global uniformities encompasses the entirety of what we can refer to collectively as the modern political state and civil society. More specifically, he argues that the growth of uniformity in the nineteenth century “was visible not only in great institutions such as churches, royal courts, or systems of justice”, but also even in “bodily practices”; or “the ways in which people dressed, spoke, ate, and managed relations within families.”

Bayly makes two other related important points. The first is that the movement toward increasing global “modernity” in the nineteenth century was by no means a “progressive” one-way historical progress that was uniformly embraced and participated in by everyone, and, in fact, for those, such as native or Indigenous peoples who refused to abandon their traditional cultural and socio-political and economic ways of life, the push toward modernization was catastrophic and genocidal. Here Bayly argues that “[t]he deluge came between 1830 and 1890 when the massive expansion of settler populations from Siberia, through Australasia and southern Africa to the Americas expropriated native peoples’ lands and forests to a large extent.” Rather than embracing Western modernity, he concludes that after 1870 the “remaining populations” of the world’s Indigenous peoples began to be “visited by the agents of the state and or moral improvement” and were “increasingly forced to adopt the dress, life-styles, and religion of the dominant populations, or they were corralled off into reservations and special homelands to be exploited as pools of labor for capitalist farms and mines.” While Bayly does not deal directly with the role that law and the exercise of legal authority played as instruments for facilitating (or coercing Indigenous peoples into) the type of Western modernity that he writes about, it is not hard to see how a legal historian might be able to extrapolate this from his work, and it is indeed one of the

14 Bayly, 1.

15 Ibid.

16 Ibid. Emphasis in the original.

17 Ibid. Bayly’s argument regarding the world-wide impact of the spread of Western modernity can be even better appreciated when one takes into account the rapid growth of the British Empire over the 18th and 19th centuries. As Maya Jasanoff points out in her book on the Edge of Empire: Lives, Culture, and Conquest in the East, 1750-1850 (New York: Knopf, 2005), 5-6, “[t]he century from 1750 to 1850 was a formative one for Britain and the British Empire.” While in 1750 “Britain was an island in a sea of empires” and “Britain’s colonial empire was comparatively modest”, by 1850 “Britain had become the world’s first and largest industrialized nation, with a population almost three times larger than in 1750” and the British Empire “encompassed a quarter of the globe, stretching from Ottawa to Auckland, Capetown to Calcutta, Singapore to Spanish Town.” An estimated one in five people across the world were the subjects of Queen Victoria in 1850, with millions more living “in states bankrolled and indirectly steered by Britain.”

18 Bayly, 437.

19 Bayly, Ibid. 2-3, alludes to legal institutions, noting that in the course of the expropriation of vast areas of land from Indigenous peoples, “[p]hysical domination [by settlers] was accompanied by different degrees of ideological dependence.
key insights offered by Bayly that we employ in our current collective transnational research on the colonial settler/Indigenous experiences of western Canada and interior/west Australia.

Secondly, Bayly importantly responds to the criticisms of postmodern and postcolonial historians who have argued that the articulation of historical “meta narratives”, or macro-level causal explanations of historical change, silence the voices of those from less powerful subordinated groups (such as women and native peoples), and therefore (that is, the meta narratives) are arguably “complicit with the very processes of imperialism and capitalism which they seek to describe.” Bayly responds to this type of criticism arguing that, while they often make these claims, “postmodernist and postcolonial historians [ironically also] make constant reference to the state, religion, and colonialism, [which are] all broad phenomena” and that, as such, postmodern and postcolonial histories, like other histories “are implicitly universal histories” that attempt to produce broader generalizations. We concur with Bayly on this point and further show in our work that colonial legal historians can also benefit collectively from being more open to accepting the value of transnational research that attempts to produce similar broader generalizations about the development and use of law and legal authority in European white settler colonies.

Mapping Imperial Connections and Lines of Communication

Another influential trend in the study of nineteenth century British colonial and broader “world history” has been the burgeoning literature aimed at exploring “imperial connections” and “networks of personal communication” between both the “metropole” and colonies, as well as between various slave and white-settler colonies themselves. In her recent study of the many “anomalous legal spaces of empire”, Lauren Benton points to “recent histories of European empires as webs or networks”, and the manner in which these histories have helped shape her interest in the study of the variegated metropolitan and colonial sensibilities tied to “the processes of imagining and constructing sovereignty”; as well as noting related studies that have reinforced the importance of examining the “legal tensions between centers and peripheries” surrounding attempts to extend legal authority over colonists and Indigenous peoples in white-settler societies. Since Benton is only one of the latest colonial legal historians to acknowledge the significance of more nuanced analyzes of the nature of interpersonal connections and networks of communication across empires, is it important to elaborate on these types of studies,

Social concepts, institutions, and procedures honed in the fierce conflicts and competition between European nations became controllers and exemplars for non-European peoples.”

Ibid., 8-9.

Benton, 2-3.

Benton, 8-9.

For a most recent example, see: John McLaren, Dewigged, Bothered, & Bewildered: British Colonial Judges on Trial, 1800-1900 (Toronto: Osgoode Society, 2011). McLaren’s work and other relevant literature on imperial legal connections across the British Empire is discussed in more detail in the second part of this paper.
alongside other foundational interdisciplinary scholarship relevant to the transnational study of settler colonialism, law, and Indigenous peoples.

The influential work of the leading postcolonial feminist historian, Catherine Hall, and especially her book on *Civilising Subjects: Colony and Metropole in the English Imagination, 1830-1867*, has been an important source of inspiration for a number of historians who have now taken up the study of imperial connections across the British Empire. In *Civilising Subjects*, Hall meticulously reconstructs connections linking the British “metropole” and the colonial experiences of Australasia and the West Indies in the mid-nineteenth century. Pursuing themes developed in her earlier work, she explores British colonialism and its effects on both the “colonized”, or primarily Indigenous peoples who came to be subjected to British rule, and on various colonizers, who themselves came to be transformed in many ways by their involvement in the colonizing process. In her attempt to reconstruct how colonialism was imagined and experienced across the metropole and in the colonies of Australasia and the West Indies, Hall pursues a number of lines of inquiry. In the first part of her book, she traces the colonial career of Edward John Eyre, the British governor of Jamaica in the 1860s, who had previously served as the lieutenant-governor of New Zealand (from 1847-1853), and before that, had already became well-known for his exploits as an adventurer and explorer who in 1840-41 travelled overland across the “Great Blight” from South Australia to Western Australia. Also in the first part of her book, Hall exhaustively documents the local efforts undertaken by Baptist missionaries in Jamaica to convert Black slaves and free coloured people to Christianity. In the second part of her book, Hall reconstructs perspectives from the metropole, examining the unfolding of Jamaican history from the 1830 to 1867 as it was likely perceived by the supporters of Baptist missionaries in England, and particularly in Birmingham, where they had their strongest roots. In doing so she in turn creates a vivid and revealing

24 Who we are honoured to have attending this conference as a special keynote speaker.


26 Hall, above n 25.

picture of how personalities and events in England, Australasia and the West Indies melded together to influence developments that preceded and led to the Morant Bay Rebellion of 1865, which was crushed under the leadership of Governor Edward John Eyre (after he declared martial law), at the cost of 439 lives, the flogging of over 600 men and women, and the burning of over 1000 homes.\(^{28}\) It is significant, although not taken up as an explicit theme in Hall’s work, that Edward John Eyre’s “careering across the Empire”, along with his personal shift from an attitude to liberal-humanitarianism to coercive-authoritarianism, followed a pattern that was similar to other colonial administrators who careered across the British Empire in the early to mid-nineteenth century.\(^{29}\)

The influence of Hall’s work can been seen in other recent significant studies of “imperial careering” across the British Empire. These include Elizabeth Elbourne and Alan Lester’s respective studies of *Blood Ground* and *Imperial Networks* between South Africa and Britain, Zoë Laidlaw’s analysis of *Colonial Connections* across the three sites of Britain, the Cape Colony and New South Wales, and David Lambert and Alan Lester’s collection of essays on *Imperial Careering in the Long Nineteenth Century*.\(^{30}\) In all of these works, we find historians raising new and important questions about the nature of imperial connections and their affect on colonial governance (including legal governance) across the British Empire, particularly in the first half of the nineteenth century.\(^{31}\) In addition, these types of studies can be seen to complement the work of other British and European colonial historians who in recent years have made significant contributions to the study of “transnational”, “global” and “world” history.\(^{32}\)

While Hall’s study of *Civilising Subjects* exemplifies the value of adopting a postcolonial approach that tries to help us imagine how imperialism and colonialism were experienced and perceived both from the centre of the empire – the metropole – and its margins – or local contexts, it does not focus as much as some other recent studies have on the eventually massive movement of British and other European

\(^{28}\) Both Hall in *Civilising Subjects* and Julie Evans in her book on *Edward Eyre* examine Eyre’s changing sensibilities about race and colonial governance over the course of his career, from his open-minded and sympathetic sensibility about Australian Aborigines as recorded in his correspondence and journals of the 1830s and 1840s to his much more reactionary and openly racist views displayed while he was governor of Jamaica in the 1860s.

\(^{29}\) This theme is also pursued, in the Australian context, in a recent article by Anne O’Brien, “Humanitarianism and Reparation in Colonial Australia” *Journal of Colonialism and Colonial History* (2011) 12(2): online. For a more detailed discussion of the initial influence, but later growing disillusionment, surrounding liberal-humanitarian thinking across different nineteenth century British white-settler colonies, see Smandyach, “Mapping Imperial Legal Connections”, 194-203. The significance of this shift in thinking for how Indigenous peoples were treated in nineteenth century settler colonies is discussed in more detail in the second part of this paper.


\(^{31}\) For a more detailed discussion of this literature, see Smandyach, “Mapping Imperial Legal Connections”, 203-213. For an important more recent contribution to the literature on this theme, see: Gary Magee and Andrew Thompson, *Empire and Globalisation: Networks of People, Goods and Capital in the British World, 1850-1914* (Cambridge: Cambridge University Press, 2010).

\(^{32}\) We return to a discussion of these useful but much debated terms later in this paper.
settlers to outreaches of the empire, and the manner in which they quickly came to occupy the land of colonial “others”. However, there are now a number of important studies published on this topic, some of which focus particularly on Anglo-colonial settler societies, and others that focus more specifically on the role that law and legal institutions played in dispossessing Indigenous peoples of their lands.

We will touch on the first of these here, and return to the latter in the next section of this paper.

**Explaining the Anglo-Settler Revolution of the Long Nineteenth Century**

The most significant of recent studies of the Anglo-colonial settler experience is the recent book by James Belich. Belich’s book on *Replenishing the Earth: The Settler Revolution and the Rise of the Anglo-World, 1783-1939*, undertakes the ambitious task of attempting to reshape our understanding of the settlement of North America and Australasia in the long nineteenth century. He does this in an impressive and meticulous manner, with his book extending over 500 pages and covering in intimate detail the far-flung, but arguably intimately connected Anglo-settler experiences of the period. His recent book, like his many earlier award winning studies of the New Zealand frontier experience, was greatly anticipated, and certainly meets and arguably exceeds the high standards readers of his work have come to expect. The essential themes and crux of Belich’s argument in *Replenishing the Earth* were first articulated in a chapter he published in 2005, where he set up his central question as “Where… do we look for a coherent explanation for the dramatic nineteenth-century growth of the Anglophones, without resorting to Anglo-American triumphalism?” Belich argued that one way to start is to “reshuffle the Angloworld”, by imagining “a malleable map of the world, like those used by

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paleogeologists to illustrate the continental drifts of a hundred million years ago.” Specifically, Belich asks us to imagine that we:

Pick up Australia and New Zealand and place them in the Mid-Atlantic, and push Canada and the British Isles a little closer to them and each other. This is intended to suggest the actual close relationship between old and new Britains in the nineteenth century – so close that it transcended geographic distance: Canada and Australasia were the two flanks of a non-contiguous ‘British West’.”

In order to include the rest of North America in this remapping of the Anglo-settler world, Belich suggested that we also split eastern North America (north and south) from Florida to the Great Lakes, and imagine the territory to the east of the Appalachians being the metropolitan base of the “Atlantic American” colonizer, and the territory to the west being the “new America” or the “American West, where the colonizing actually took place.” According to Belich, by the nineteenth century, “the old Atlantic America had joined old Britain as an Anglo ‘oldland’, while the Midwest and West became America’s “dominions”, and the rest of North America and Australasia became the “British West”.

In his presaging chapter, and later in his book, Belich argues that the “settler revolution” of the Anglo-nineteenth century World was characterized by recurrent and overlapping periods of “explosive colonization” and “recolonization”; the first reflected in the massive growth in white-settler populations, and 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”). As in his earlier work on the frontier experience of New Zealand, Belich also recognizes that the settler revolution of the broader Anglo-World took place against the resistance of Indigenous peoples. And significantly, again in his presaging chapter, he reflects the essence of his interpretation of the outcome of this resistance, noting that:

The fresh land, or course, came from indigenous peoples and was usually taken by force. What is interesting here is that the relevant tribal peoples were very often a match for normal colonization; it was explosive colonization that was too much for them. Climatic, formidable, and often pan-tribal resistance correlated with Anglobooms in Tasmania around 1830, Queensland and New Zealand in the 1860s, the American Midwest in the 1870s, and Manitoba in the 1880s. Prior to this, the relevant Aboriginal, Maori, Indian, and Métis groups had resisted and co-operated quite successfully for decades. Recognizing the human tsunami of explosive colonization, therefore, recontextualizes indigenous resistance in Anglo settler societies. Eventual subjugation was due not to the weaknesses of the defence but to the strength of the attack.

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38 Ibid., 40.

39 Ibid., 40. In Replenishing the Earth, 70, Belich states that he would “with some hesitation” also include South Africa as part of this imagined “British West”.

40 Belich, “The Rise of the Angloworld”, 41; Replenishing the Earth, 9.

The key question Belich sets out to answer is that of explaining the “Anglo divergence” in “settling societies”. Belich explains that over centuries European expansion took three forms: “networks, the establishment of ongoing systems of long-range interaction, usually for trade; empire, the control of other peoples, usually through conquest; and settlement, the reproduction of one’s own society through long-range migration.” 42 Although acknowledging that “Europeans were not the only creators of settler societies in the period 1500-1800”, 43 he notes that over this period other European powers in addition to Britain – including the Dutch, Spanish, French, and Portuguese – vied for the control of overseas territories and attempted with more or less success to establish settler colonies through migration. In addition, other European and non-European powers – like the Russians and Chinese – were involved in similar efforts at out-migration colonization; only these were more often overland than overseas, 44 and “the Han Chinese were not keen on permanent long-range migration”. 45 Belich argues, however, that after 1800 there was a clear divergence in the relative success that the primary competing European powers had in creating and sustaining settler societies, with the British (or more generally, the “Anglos”), showing they were unmistakably the winners of the “settler races”. 46

Belich’s attempt to answer the question of how this occurred takes up most of his book and requires a close reading to appreciate all of its subtleties and significance. A key turning point he recognizes is 1783, “when Britain recognized the independence of its rebellious offspring, the United States.” 47 After 1783, “Anglophones were never again to share a single state”, but instead became members of a far-flung “politically-divided and sub-global, yet transnational, intercontinental, and... interconnected mélange of partners and subjects”; a broader “Anglo-world” where changes, including the transfer of “things, thoughts, and people,” flowed more easily within the system “than from without.” 48

While this was one of the central preconditions pointed to by Belich to help explain the Anglo settler revolution of the long nineteenth century, he in turn weighs the relative importance of numerous other factors that came into play, including: the comparative levels of industrialization, agricultural transition, and demographic shifts; the enduring and in many respects strengthened relationship between Britain and the United States after 1789; and “the emergence of a cultural ethos of migration” shared by broadly-defined “Anglos” in both “old Britain” and “old Atlantic America.” 49 A related important

42 Belich, Replenishing the Earth, 21.

43 Ibid., 26.

44 For example, Siberia and the Western Region of China [Xinjiang]. Ibid., 36-38.

45 Ibid., 38.

46 Belich intentionally and ironically conflates the two meanings of “race”; to compete in a race, and to be of a race.

47 Ibid., 49.

48 Ibid., 49.

49 Belich, Replenishing the Earth, 58, states that in its “broadest, default, usage, ‘Anglo’ is simply shorthand for Anglophone or English-speaking, whatever the ethnicity”. Thus, in the context of “old Britain”, he includes as part of the “Anglo culture group”,
distinguishing trait of the “Anglo-world”, therefore, was its remarkable degree of hybridity. According to Belich, after 1783 the Anglo-world was “a hybrid of British and American”, and when one adds “the role of German settlers, the Anglos begin to seem as remarkable for their hybridity as for their unity. There was no melting pot, but there was a thorough mixing of a few strong flavours, and this may have contributed to Anglo success in settlement during the long nineteenth century.”50 In any case, he claims that the “great [Anglo] divergence dates to about 1800 and not before”, 51 and that it can be explained largely separate from the colonial settler experiences associated with other contemporary European and non-European powers.

Given Belich’s provocative and insightful redrawing of the map of the Anglo-settler world, it is important that these, along with other relevant aspects of his study, be taken into account and followed up on in any research one may want to undertake on how settler colonialism affected Indigenous peoples and the role played by law and legal institutions in their subjugation.52 However, it is also important to try to push Belich’s analysis further. While Belich’s research is comparative, and to an extent transnational, in that it focuses on settler booms and busts across the Anglo-World, it is self-admittedly not global in scope. In addition, although recognized as a valuable addition to the growing body of work on settler-colonial societies, Belich’s book has also been criticized for not engaging more directly with current scholarship in the wider field of settler colonial studies.53 Consequently, in order to adequately assess his interpretive perspective and its usefulness for informing research on the treatment of Indigenous peoples in settler-colonial societies, it is necessary to both engage in more detail with the work of global historians and critical interdisciplinary scholars, and to interrogate the variety of concepts and theories

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50 Ibid., 70. According to Belich, 65, “Native-born Americans moving west were the fourth great component of the Anglo diaspora, along with Briton, Irish, and Germans.”

51 Ibid., 14.

52 Although Belich also gives attention to Indigenous peoples, this is not his primary focus. For example, in his chapter on “The Rise of the Anglo-world”, 50, Belich states that “while I am deeply interested in the impact of the Anglo explosion on indigenous peoples, my focus here [and later in his book] is unashamedly on white Anglo-Saxon Protestants. I am trying to explain how WASPS swarmed.” In the attention Belich does give in the conclusion of his book to reflecting on “the decisive difference settlement booms made to indigenous peoples”, he argues against a “victim ideology” that portrays “the indigenous encounter with Europe as one long undifferentiated tragedy inflicted on innocent – and passive – victims” and provides examples of “the success of indigenous resistance, and coexistence”, which suggest that in the context of the Anglo-settler revolution of the long nineteenth century Indigenous peoples were less victims than “riders of the whirlwind” (Replenishing the Earth, 551-554).

53 Saree Makdisi, review in Victorian Studies, 109. Indeed, while Belich does go to great lengths to explain the divergence of the Anglo-settler experience from that of other European and non-European powers, curiously he does not engage in any direct discussion of the nature and usefulness of the concept of “settler colonialism” as a more general analytical category for helping to compare colonial societies or to explain the effects of settler revolutions on Indigenous peoples. As we will observe shortly, the work of historians and critical interdisciplinary scholars who have employed this concept leads in quite different directions from that of Belich. For example, see: Patrick Wolfe, “Settler Colonialism and the Elimination of the Native” Journal of Genocide Research (2006) 8(4): 387-409; Patrick Wolfe, “After the Frontier: Separation and Absorption in US Indian Policy” Settler Colonial Studies (2011) 1: 13-51; Scott Lauria Morgensen, “The Biopolitics of Settler Colonialism: Right Here, Right Now” Settler Colonial Studies (2011) 1: 52-76.
that have been employed to investigate and deconstruct the meaning and outcomes of settler colonialism.

**Concepts and Theories for the Study of Settler Colonialism**

In recent years critical interdisciplinary scholars have popularized a variety of different but overlapping concepts for approaching the study of historical developments that appear to transcend the traditionally conceived nation state and reflect broader transnational processes of social change and development. One of these is the notion of “global history” which Bayly, among many other historians, have begun to employ more frequently in recent years, alongside the notions of “globalization”, and “cross border” and “transfer” history. Another is the very concept of “settler colonialism” itself, which has its own genealogy and usage which requires critical scrutiny. Other concepts that deserve similar attention are the terms “frontier” and “borderlands” history. And finally, it is particularly worthwhile, for the purposes of our current study of settlers and Indigenous peoples in the “fragile settlements” of western Canada and interior/west Australia, to discuss the potential insights, if any, that can be gained from drawing on Lauren Benton’s recently articulated notions of “fragmented geographies and spaces of empire.”

**Global history and globalization**

In an insightful discussion of the genealogy of global or world history in the context of twentieth century European historiography, Michael G. Müller and Cornelius Torp note how pioneering efforts at “comparative” and “cross-border” history emerged in the 1970s as critiques of the dominant “national paradigm” in historiography. While those who began to pursue “comparative European history” undertook empirical studies aimed at comparing “the trajectories of different national societies,”


55 Cooper, Colonialism in Question, Chapter 4.


57 In A Search for Sovereignty.

58 Müller and Torp, “Conceptualising Transnational Spaces in History.” This article was published as the lead article in a special issue of the European Review of History on “Transnational Spaces in History”.

59 And therefore did not really challenge the dominant nation-state paradigm.
European historians who pioneered the study of “cross-border” history began to more closely explore “relationships that influenced the trajectories of national histories, such as migration, the flow of capital, goods and ideas, shared experiences or economic change, social crises or wars, and international politics.”¹⁶⁰ The latter of these two approaches (which also came to be referred to as “the history of transnational relations”) was subsequently developed under the labels of “transfer history” and (methodologically as) “histoire croisée”, clearly challenged the “‘container space’ of the nation state”, and, with its “new focus on movements and relationships across borders clearly marked a step toward the exploration of uncharted spaces, thus transcending the deeply rooted territorial approach.”¹⁶¹

Müller and Torp point out that while search for alternatives to national history in the European context of the 1970s and 1980s was fuelled by contemporary political debates on European integration and détente in East-West relations, today, debates on “history beyond the nation-state” are overshadowed largely “by more recent, and still ongoing, discussions on transnational and world history” that have “been triggered primarily by [the] two different but related pulses” of postcolonialism and globalization. The authors capture the essence of the contribution of a postcolonial perspective in much the same way as it is described and exemplified in the writings of authors like Cooper and Hall,¹⁶² noting how it “exposed the deeply embedded Eurocentrism of prevailing historical narratives” and “turned historians’ attention to colonial discourse with its binary oppositions and concepts of the ‘other’”, while in turn emphasizing the interactions between the colonizers and colonial subjects and “the resulting hybrid nature of colonial identities.”¹⁶³ With respect to the power of the “pulse” of globalization, Müller and Torp argue that global or world historians, like Chris Bayly in his Birth of the Modern World whom they cite, operate with two assumptions; the first that globalization is not a new phenomenon, and, the second, that “history beyond the nation-state is ‘global’ by definition.” Or, as they describe more fully, from the perspective of global historians (or historians of globalization):

Whatever happened or happens outside the framework of the history of the nation-state appears to be part of global transformation processes, and therefore follows the logics of global interaction. Historians of globalization thus tend to confront the territorially limited space of the nation-state with the unlimited space of global flows. This, of course, is not to suggest that they naively take the existence of a ‘global space’ for granted. Rather they are primarily interested in something else completely: how processes of change and interaction on a global scale have affected ‘national spaces’ (nation-states, including colonial regimes, and national societies) and how national actors have reacted to such challenges and – in some instances – become involved in processes of transnational or even global transformation. In this context the question of

¹⁶⁰ Müller and Torp, “Conceptualising Transnational Spaces in History”, 609.
¹⁶¹ Ibid., 609.
¹⁶² Cooper, Colonialism in Question; Hall, Civilising Subjects.
¹⁶³ Müller and Torp, “Conceptualising Transnational Spaces in History”, 610.
how to map global flows – and how to conceptualise ‘global space’ generally – has been of only secondary importance.\textsuperscript{64}

According to Müller and Torp, while global historians who have contributed to re-thinking the spatial dimension of history commonly “abandon the idea of writing history in a national perspective” or at least attempt in their work “to thoroughly deconstruct national narratives of history”, they have not entirely escaped the problem of creating “new essentialisms” that may be as constraining as the traditional “container concept” of the nation state. Indeed, they acknowledge the counter argument that “[s]tudying ‘global history’, in turn, involves the danger of neglecting space as a dimension of history altogether”, noting that “while we might be able to identify and describe the effects global flows of people, capital, commodities or ideas have on individual local, regional or national societies, it is extremely difficult to analyse and, in particular, to ‘map’ such global flows themselves.”\textsuperscript{65} As such, Müller and Torp prescribe to historians interested in transnational research: “[r]ather than working towards a universally applicable ‘theory of transnational history’, our primary preoccupation is to learn – and accept – that all historical phenomenon have to be studied within their own geographical frameworks”; that is, they maintain that “[a]ll histories, whether European, global, or otherwise, should thus be understood as encompassing ‘multiple geographies’”. Müller and Torp favour using the terms \textit{transnational history} and \textit{transnational spaces} as concepts for guiding the empirical study of social changes and processes that occur over time across multiple geographies. Although acknowledging complexities inherent in attempting to conceptualize \textit{transnational spaces} and carry out empirical studies from a \textit{transnational}-historical perspective, Müller and Torp argue that such a perspective is essential, since, historically (and even of course also today), “people always acted in multiple geographical realms, and experienced and perceived space accordingly.” In essence, the authors conclude that understanding “transnational spaces” is simply “a way of keying into historical realities and perceptions of space that, in geographical terms, did not necessarily coincide with the territorial demarcations of given political entities”, that “the concept of ‘multiple geographies’ needs to be more seriously considered”, and that “the space between the nation-state (or sub-national regions) and the global sphere needs to be more greatly incorporated into empirical research.”\textsuperscript{66}

\textsuperscript{64} Ibid., 610. The authors cite Chris Bayly’s \textit{Birth of the Modern World} as “one of the most outstanding scholarly syntheses of modern world history”, especially for the example it provides of taking the “global scope” of history for granted as a starting point for any historical narratives (611).

\textsuperscript{65} Müller and Torp, “Conceptualising Transnational Spaces in History”, 611.

\textsuperscript{66} Ibid., 612-613. Moreover, they add that “[t]ransnational history is not only about reconstructing the diverse geographies created through economical, social, intellectual and political interactions and connections. It is also about both analysing the relationship among such historical spaces and understanding the tensions and dynamics which result from the relationship between transnational spaces and politically bounded territories.” They also note that “all territorial orders are man-made – and thus represent ‘transient’ spaces” and that as such we need “to treat such phenomena of interaction in space on equal terms with the nation-state or other more traditional spaces of academic inquiry, irrespective of how firmly, and in what way, the respective transnational spaces were institutionalised and how long they might have been relevant for the individual or groups which operated within them.” (613-614). For an interesting parallel discussion of the adoption of the concept of transnational history within US historiography from the early 1990s, see Ian Tyrrell, “Reflections on the Transnational Turn in United States History: Theory and Practice” \textit{Journal of Global History} (2009) 4: 453-474. Tyrrell offers a similar argument to Müller and Torp regarding the value of conceiving of “transnational spaces” broadly to include “mental” as well as “physical” (or material) spaces, for example diasporas and transnational social movements, that “put ‘the nation’ to the periphery of
In a more recent and arguably even more insightful overview of the development and state of global history, Dominic Sachsenmaier adopts a sociology of knowledge perspective for understanding “the growing significance of transnational and global historical approaches” among historians working in academic settings across the United States, Europe, and Asia. Working from this perspective, he undertakes the task of trying to help historians who are engaged in advancing these approaches to become more self-reflexive about theories and concepts they have chosen to employ, and the reasons why there has been a growing use “of the term ‘global history’... across many different world regions and languages.” Sachsenmaier, who is himself a specialist in Chinese history, points out that contrary to what many Western historians might believe, “it is far too simplistic to treat the Anglo-American academic world or any other part of ‘the West’ as the main originator of the current wave of transnational scholarship”, and it is probably more accurate that “the main forces behind the growing weight of translocal historical thinking did not emanate from a clearly recognizable epicenter.” In addition, he notes that “the research commonly subsumed under ‘global history’ is so diverse that it cannot possibly be pinned down through exact definitions and precise categorizations”, and that “[i]t is also not feasible to properly separate ‘global history’ from several other terminological options such as ‘world history’ or ‘transnational history’.” For these reasons, Sachsenmaier mainly uses “terms such as ‘global’ history as shorthand for many types of research reaching beyond those concepts of space that have long dominated many, academic and other, ways of conceptualizing the past.” Although in his book Sachsenmaier reflects in detail on the nature of the global historical trend in specific academic-cultural settings in different parts of the world, his work has salience for all self-described “global” or “transnational” historians and interdisciplinary scholars. Specifically, he prescribes that:

As scholars experimenting with hitherto unusual spatial paradigms, historians involved in the global history trend need to become critically aware of the mental, institutional, local, and global spaces within which they operate. Actually, for theories of global history it is important to ask the same sets of questions that historians apply to the study of academic movements and professional networks of the past. If global historians fail to consider their own sociologies of knowledge, as well as the multifarious social, political, and cultural contexts framing their activities, the conceptual debates in the field will only be a pale reflection of what they potentially could be. In other words, the skills of global historians need to include an exceptionally high degree of professional


Sachsenmaier, Global Perspectives on Global History, 1-3.

And also writes and publishes in German.

Ibid., 3-4.

Ibid., 2.
reflexivity. Obviously, the theoretical discussions surrounding historical research on human interactions, shared spaces, and encounter zones can only continue proliferating if the relationship between history and historiography becomes more complex.71

It is interesting to observe the exceptional degree of professional reflexivity contained in Sachsenmair’s reflection on the possibilities and limitations of global history. One of the spaces opened up by his analysis of the field is the potential value of collaborative-interdisciplinary historical scholarship that transcends the “local”/“global” divide. Sachsenmair recognizes that “the pluralistic character of global history and the growing quest for multiperspectivity will hardly allow for a resurgence of monopolizing theories and grand frameworks of explanation, which are supposed to fit all local cases equally and unequivocally.” Rather, he argues that “[i]nstead of developing models that are supposed to be applicable all over the world, it is necessary to reflect upon the challenges and opportunities inherent in the cross-regionally entangled landscapes of global history”; and that, in turn “[t]his may help to advance dialogues and transnational modes of cooperation in a research field which more than any other branch of historiography is based on the notion of shared spaces.”72 As pervasive as the use of the term has become in recent years, Sachsenmair argues that “the buzzword of ‘globalization’” has done more to hide than illuminate the complexities of “reflecting upon global history in a changing world.”73 In offering this critique, his position is consistent with that of other historians and interdisciplinary scholars who are skeptical of grand narratives of globalization as a motif in global or world history.74

Perhaps the most damning of these skeptics is Fredrick Cooper in his chapter on the concept in Colonialism in Question. According to Cooper, although “[b]ehind the globalization fad is an important quest for understanding the interconnections of different parts of the world… [w]hat is missing from discussions of globalization today is the historical depth of interconnections and a focus on just what the structures and limits of connecting mechanisms are.”75 Using terms that resonate with both Müller and Torp’s attempt a conceptualizing “transnational spaces” and Benton’s idea of a “variegated colonial world”, Cooper elaborates that:

It is salutary to get away from whatever tendencies there may have been to analyze social, economic, political, and cultural processes as if they took place in national or continental containers; but to adopt a language that implies that there is no container at all, except the planetary one, risks defining problems in misleading ways. The world has long been – and still is – a space where economic and political relations are very uneven; it is filled with lumps, places where power coalesces surrounded by those where it does

71 Ibid., 3.
72 Ibid., 6.
73 Ibid., 6.
74 For example, see: Bentley, “Theories of World History since the Enlightenment”; Manning, Navigating Global History; Cooper, Colonialism in Question.
75 Cooper, Colonialism in Question, 91.
not, places where social relations become dense amid others that are diffuse. Structures
and networks penetrate certain places and do certain things with great intensity, but
their effects tail off elsewhere.\footnote{Ibid., 91-92.}

Cooper argues that in itself globalization is not a useful analytical category and that simply developing
the theme that “global should be contrasted to local” as some sort of reinforcing dialectical process
“only underscores the inadequacy of current analytical tools to analyze anything in between.”\footnote{Ibid., 93.}
Yet, it may be seen that in closing the door to highly generalized types of nomothetic explanation, Cooper, like
Sachsenmaier, opens the door to other types of transnational historical research that may be able to
deal more adequately with the “lumpiness” of power relationships as well as structures and networks
that have historically connected different parts of metropolitan and colonial worlds.\footnote{Specifically, Cooper prescribes that we can do better if “we seek concepts that are less sweeping, more precise, which
emphasize both the nature of spatial linkages and their limits, which seek to analyze change with historical specificity rather
than terms of a vaguely defined and unattainable endpoint.” (93).}
While rejecting the macro-historical study of globalization, Cooper provides an argument in favour of a more
conceptually nuanced historical study of colonialism. According to Cooper, historically, colonialism not
only led to the conscious articulation of differences between human beings based on race (race
differences per se), but it has also, across different historical and geographical settings, placed emphasis
on “fundamentally unequal” relationships. Indeed, Cooper notes one of the points made by postcolonial
theorists with which he agrees is that “the history of colonialism is important” for the way “it brings out
the profound asymmetry in global interactions.”\footnote{Ibid., 31, and note 65, p. 251.}
In the next part of this paper, we turn to surveying
the manner in which historians and interdisciplinary scholars have undertaken the transnational study of
settler colonialism as distinct from colonialism.\footnote{Although in Colonialism in Question, Cooper alludes to the notion of settler colonialism, he does not engage with literature on
the topic.}

Settler colonialism

The concept of settler colonialism also has a genealogy which requires critical scrutiny. While the
concept of settler colonialism is not new to historians, it has undergone several iterations in the hands
of historians and scholars of other disciplines. In a forthcoming article on the topic, Lorenzo Veracini
follows the development of “settler colonialism” as a concept since the 1930s showing that it has gone
through four broadly interdisciplinary and roughly chronological phases.\footnote{Lorenzo Veracini, “‘Settler Colonialism’: Career of a Concept” Journal of Imperial and Commonwealth History (forthcoming). I
would like to thank the author for providing me with a pre-publication draft of this article. Due to it being a pre-publication
draft, page references to quotations are omitted.}
Veracini traces the history of the use of variations of the concept among historians, anthropologists, economists, and sociologists, beginning with Isaiah Bowman’s article and book on ‘The Pioneer Fringe’ (1928 and 1931), in which he “mapped the pioneering ‘regions’ of the age” including “the Canadian Northwest, Rhodesia, [and] West Australia”, among others, “where white men lead in settlement” and where the “‘pioneer’ was identified as ‘a young man bent upon winning from the wilderness with strong hands and the hope of youth a homestead for himself and an inheritance for his children’”. According to Veracini, this work encapsulated the dominant approach reflected in the historiography that spanned the first half of the twentieth century, of settlers pioneering “virgin lands” with only secondary attention given to the displacement of Indigenous peoples: more euphemistically referred to as “management of indigenous residues in settler areas and settler communities established in non-settler locales”. However, Veracini observes that even during this early phase of the development of the concept, writers began to make a distinction between impermanent colonizers – or “sojourners” – and permanent colonizers – or “settlers” – who were those who intended to stay and reproduce (both themselves and as much as they wanted, the conditions of life in the old country) as best the could. According to Veracini, this phase of the use of the concept was “peculiarly indigenousless” and one in which “[t]he study of settlers was not yet the study of settler colonialism.”

Veracini dates the onset of the second iteration of the concept with “the first wave of post-WWII decolonization movements” and “protracted anticolonial struggles involving settler minorities (especially in Africa)” during which time settler colonialism – as a compound made up of both “settler” and “colonialism” – first came to be used “as a category of analytical inquiry.” However, Veracini observes that in both the historical and revolutionary anticolonial literature that emerged during this period, “‘colonialism’ and ‘settler colonialism’ were often understood as essentially coterminous categories”, arguing that this conflation of “colonial and settler colonial forms” was problematic in that it failed to recognize that settlers were potentially an “independent motive force” that could work separately from, and in opposition to, the “metropolitan interests” of financial imperialism and global capitalism. At the same time however, other writers of the period began to recognize the unique place of settlers and settler colonialism as a third separate element in the anticolonial struggles that were being waged as the “‘people’s struggle against financial imperialism’”. Although during this period it came to be importantly recognized that colonial and settler colonial phenomena were better understood as related but separate categories, the use of the concept of settler colonialism remained problematic. The first main problem is that it was largely restricted to use in area studies focused on Africa and the Third World, while failing to take into account that even in other parts of the world where there was no open anticolonial confrontation, there still existed “accomplished settler colonial forms” in the form of white-settler nations where Indigenous peoples had already been effectively exterminated, assimilated, or otherwise contained.

82 Arghiri Emmanuel, “White-Settler Colonialism and the Myth of Investment Imperialism” New Left Review (1972) 1, no. 73: 40; cited in Veracini, “‘Settler Colonialism’: Career of a Concept”.
According to Veracini, the third iteration of the concept spanned roughly the 1970s and 1980s. During this period, analyses of settler colonialism began to extend beyond Africa and the Third World to incorporate many countries primarily of the southern hemisphere, and particularly to Argentina and Australia, where historians began to reexamine and debate their settler-colonial pasts. In addition to often focusing attention “on the economies of settler polities” and in particular the nature of settler capitalism,83 much of the literature and scholarly debate in the southern hemisphere outside of Australia focused primarily on “settler society” (therefore obscuring “colonialism”) or “colonialism” (therefore neglecting the “settler”), while historians of the “North” (Canada and the US) were even slower “in adopting settler colonialism as a conceptual category” during this period.84

The final iteration highlighted by Veracini is the movement which can be dated roughly from the early 1990s, and which continues today toward the critical transnational and trans-temporal analysis of settler colonialism and the institutionalization of “settler colonial studies” as a field of study that is analytically separate from that of “colonialism”. Emanating largely out of Australia, central to this movement is the foundational work of Patrick Wolfe, and the more recent scholarly and organization contributions of Lorenzo Veracini. The literature on settler colonialism has developed substantially and taken many different directions since the publication of Patrick Wolfe’s influential book Settler Colonialism and the Transformation of Anthropology in 1999, and Wolfe himself has continued to play an important role in this development through his own more recent publications.85 In addition to inspiring the work of other historians and interdisciplinary scholars, Wolfe’s influence can be seen in the recent advent of the journal, Settler Colonial Studies, and the effect it is having on institutionalizing the critical interdisciplinary study of settler colonialism.86 In turn, as both the current editor of this new


84 Although Veracini speculates about reasons for this relatively late adoption, this is a matter that could be given much more detailed attention. In other related recent work we have undertaken as part of our transnational study of law and Indigenous peoples western Canada and the interior/west Australia, we have begun to try to contribute in this vein through contrasting the vocal debate over “The History Wars” in Australia with the relative absence of any debate over Canada’s settler-colonial past. See, for example: Nettelbeck and Smandych, “Policing Indigenous Peoples on Two Colonial Frontiers: Australia’s Mounted Police and Canada’s North West Mounted Police”. This theme is also pursued further in the current paper.


online journal and an insightful scholar of settler colonialism, Veracini has in turn done at great deal to build on the work of Wolfe and other earlier contributors and broaden the scope of the field of settler colonial studies. Here we only have space to touch on the key ideas and arguments that have been advanced by Wolfe and Veracini on why we need to focus more squarely on settler colonialism.

The key themes developed in Wolfe’s book and his later work is that “[s]ettler colonies were (are) premised on the elimination of native societies” and that the “invasion” of “settlers” needs to be conceptualized as “a structure not an event”. Thus, Wolfe suggests that wherever it occurs “the primary logic of settler colonialism can be characterized as one of the elimination.” From this perspective, the concept of settler colonialism is inherently both trans-temporal (or timeless) and transnational or global, and also qualitatively different from colonialism. As Veracini explains using a simple point of contrast, the fundamental analytical difference between “colonizers” and “settler colonizers” is that they want different things; while the “colonizer” comes to the land of the colonized and tells them “you, work for me”, the “settler colonizer” takes over the land of the colonized and tells them “you, go away”. While colonialism has often unfolded historically without permanent settlement, and without disposing of Indigenous peoples, settler colonialism is in its inception intimately connected with colonialism, but does not end, arguably, until either the settler colonists or their descendants are removed en masse, which rarely if ever really happens, or until the original inhabitants of the land (that is, Indigenous peoples or the colonized) are effectively eliminated. As Patrick Wolfe points out, however, “[s]ettler colonialism is inherently eliminatory but not invariably genocidal.” More specifically, Wolfe differentiates settler colonialism from genocide, by pointing out that:


88 Wolfe, Settler Colonialism, 2.


91 Who are typically the ones who are colonized.

92 Wolfe, “Settler Colonialism and the Elimination of the Native”, 387.
The logic of elimination not only refers to the summary liquidation of Indigenous people, though it includes that. In common with genocide as Raphaël Lemkin characterized it, settler colonialism has both negative and positive dimensions. Negatively, it strives for the dissolution of native societies. Positively, it erects a new colonial society on the expropriated land base—as I put it, settler colonizers come to stay: invasion is a structure not an event. In its positive aspect, elimination is an organizing principal of settler-colonial society rather than a one-off (and superseded) occurrence. The positive outcomes of the logic of elimination [for the settler colonizer] 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.93

Conceptualizing settler colonialism, colonialism, and genocide, as separate analytical but potentially historically overlapping categories, opens up a wide array of different forms of critical research and analysis. As well, it potentially opens up new ways of thinking about and engaging in the politics of rights, redemption, and reconciliation in today’s colonial settler societies.94 As Wolfe and Veracini

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93 Ibid., 388, endnotes omitted.

collectively highlight in their recent works, included among these are Australia, Canada, the United States, and Israel, “where the logic of elimination continues into the present.”

The implications of adopting the concept of settler colonialism as a starting point for historical research are sweeping, and potentially paradigm shifting. And this is arguably especially so for colonial legal historians. Colonial legal historians have often tended to adopt atheoretical, or descriptive, and narrow doctrinal approaches that make the study of “colonial law and its effects” the main focus of attention. However, approaching the study of forms of colonial law and legal authority from a settler colonial perspective, requires the radical decentring of “law” and a movement toward including other means by which settler colonists attempted to “eliminate” Indigenous peoples. Although this approach is to a certain extent already implicitly reflected in the recent work of some Foucaudian-inspired historians, employing the concept of settler colonialism more explicitly in the historical analysis of legal mechanisms of Indigenous subjugation (or elimination) adds a more structurally-based, materialist, and transnational analytical framework to guide analysis. As Wolfe and Veracini both point out in their work, settler colonialism is “a structure rather than an event”, since it is both a “complex social formation” and has “continuity through time”. And it is also inescapably transnational and global, in that settler colonialism as a structure, and as an analytical category, is not bound by geography or place.

The concept of settler colonialism also arguably provides a more fruitful way of thinking about complexity and potential outcomes of attempts at native-settler reconciliation. As Patrick 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

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95 Wolfe, “Settler Colonialism and the Elimination of the Native”, 393.

96 Of course, this argument could also be equally applied to contemporary research.

97 In a recent review essay, Ariela Gross makes a similar point regarding legal historians more generally, noting that: “To the extent that comparative legal studies [as taught in law schools] are historical, they take an entirely internal, genealogical approach to the development of legal codes or institutions. Likewise, most socio-legal histories have been rigorously local or regional, and certainly have remained within a nation-state framework.” Ariela Gross, “Race, Law, and Comparative History” Law and History Review (2011) 29(2): 549-565. This criticism could be applied to the substantial comparative, but descriptive, literature on “legal transplants”. Michele Graziadei, “Legal Transplants and the Frontiers of Legal Knowledge” Theoretical Inquiries in Law: Legal Histories of Transplantation (2009) 10(2): 723-743.

98 In the sense articulated above by Wolfe.

99 For example, see: Keith Smith, Liberalism, Surveillance, and Resistance: Indigenous Communities in Western Canada, 1877-1927 (Athabasca: Athabasca University Press, 2009); and also, Nettelbeck and Smandych, “Policing Indigenous Peoples on Two Colonial Frontiers: Australia’s Mounted Police and Canada’s North West Mounted Police”.

100 Wolfe, “Settler Colonialism and the Elimination of the Native”, 390.

101 However, it is important to qualify this point by noting that in the past the work of settler colonial scholars, even in Australia, has not been characteristically transnational or global in focus. For example, in her insightful overview of Australian historiography since the 1930s, Ann Curthoys points out that is only relatively recently that “non-national frameworks” have begun to reconfigure Australian historical work. Ann Curthoys, “We’ve Just Started Making National Histories, and You Want Us to Stop Already?” in Antoinette Burton (ed.), After the Imperial Turn: Thinking with and through the Nation (Durham: Duke University Press, 2003), 85-86.
counter-claim.” In other words, “the logic of elimination [also] marks a return whereby the native repressed continues to structure settler-colonial society.” Both Wolfe and Veracini also 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.” Lorenzo Veracini explores the implications of these insights in detail in his recent work, questioning the ability of Indigenous peoples to ever achieve genuine reconciliation with settlers, given the currently intractable settler colonial “situation”.

In his work Veracini offers an “interdisciplinary reflection on settler colonialism and decolonization” in which he proposes two fundamental traits of the “settler colonial situation”, which he refers to as “isopolitics” and “deep colonizing”. In the most general sense, “an isopolity can be described as a single political community joining separate jurisdictions”, and “isopolitical relationships” can be conceived of as “the way in which people and rights can be transferred across constituent entities of a community of ‘racial identity’”. Veracini uses the experiences of British colonial and settler colonial societies to flesh out these concepts, first, by suggesting that British colonialism gave rise to isopolitical relationships that made it possible for colonizers (cum settlers) to have many of the civil and political rights they possessed as British subjects in the ‘old country’ transferred with them to the colonies. Consequently, since colonizers/settlers were “people who travel[ed] with an inherent capacity to possess real estate and father children endowed with political rights, [the] colonizing metropole and settler locale[s]” were initially “united in an isopolitical relation” in which the first held sway over the second. However, Veracini suggests that with the rise of settler nationalisms across the British Empire and the eventual move toward forms of colonial self-government, these isopolitical relationships shifted to ones reflecting the decline of metropolitan-imperial power, and with it, the enhanced political and legal power of settler colonists to shape their own destiny and that of ‘others’, including Indigenous peoples and migrants who did not enjoy (either on paper or in practice) the same inherited rights as British subjects. 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 ‘Others’” to colonial practices. Veracini defines “this circumstance

\[\text{counter-claim.}\] In other words, “the logic of elimination [also] marks a return whereby the native repressed continues to structure settler-colonial society.” Both Wolfe and Veracini also 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.”

Lorenzo Veracini explores the implications of these insights in detail in his recent work, questioning the ability of Indigenous peoples to ever achieve genuine reconciliation with settlers, given the currently intractable settler colonial “situation”.

In his work Veracini offers an “interdisciplinary reflection on settler colonialism and decolonization” in which he proposes two fundamental traits of the “settler colonial situation”, which he refers to as “isopolitics” and “deep colonizing”. In the most general sense, “an isopolity can be described as a single political community joining separate jurisdictions”, and “isopolitical relationships” can be conceived of as “the way in which people and rights can be transferred across constituent entities of a community of ‘racial identity’”. Veracini uses the experiences of British colonial and settler colonial societies to flesh out these concepts, first, by suggesting that British colonialism gave rise to isopolitical relationships that made it possible for colonizers (cum settlers) to have many of the civil and political rights they possessed as British subjects in the ‘old country’ transferred with them to the colonies. Consequently, since colonizers/settlers were “people who travel[ed] with an inherent capacity to possess real estate and father children endowed with political rights, [the] colonizing metropole and settler locale[s]” were initially “united in an isopolitical relation” in which the first held sway over the second. However, Veracini suggests that with the rise of settler nationalisms across the British Empire and the eventual move toward forms of colonial self-government, these isopolitical relationships shifted to ones reflecting the decline of metropolitan-imperial power, and with it, the enhanced political and legal power of settler colonists to shape their own destiny and that of ‘others’, including Indigenous peoples and migrants who did not enjoy (either on paper or in practice) the same inherited rights as British subjects. 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 ‘Others’” to colonial practices. Veracini defines “this circumstance

102 Ibid., 389.
103 Ibid., 390.
107 Ibid., 173.
as ‘deep colonizing’: a situation in which the very attempt to bring forward the supersession of colonial practices actually entrenches their operation.\textsuperscript{108}

More generally, Veracini offers the crucial prescriptive insight that “[r]ecovering the isopolitical character of settler colonial imaginaries is also important because a focus on the tension between ‘colonial’ subordination and ‘independent’ national sovereignty can make settler colonialism disappear.” Veracini refers to the historiography of Canada and the US to make this point, noting “it is probably no coincidence that settler colonialism as a transnational interpretive category is an Australasian contribution”, given that in “[b]oth Canadian and US historiographies, the focus on the fundamental rupture represented by American independence has contributed to making an appraisal of settler colonial phenomena especially difficult.” More specifically, he notes that in the United States this “resulted in an emphasis on accomplished sovereign national independence” while “in Canada, on the contrary, it produced an emphasis on a sustained relationship and institutional connection with Britain.”

According to Veracini, the “focus on anticolonial struggle against the British occupiers traditionally prevented ‘colonialism’ from entering the analytical field in the United States, while in Canada ‘colonialism’ did not enter the analytical field because it was by definition something done by someone else.” Even with the more recent historiographical revisions introduced in each country beginning in the 1960s, Veracini maintains that “[t]he dialectical opposition between rupture and institutional continuity [in the US and Canada respectively]... prevented an engagement with settler colonialism as an interpretative category”,\textsuperscript{109} which still remains largely the case today.\textsuperscript{110} Another plausible implication of this perspective is that if it is used as a tool to reflect back in a comparative manner on the histories of western Canada and interior/western Australia during the last quarter of the nineteenth century, one may find that the settler colonial experiences of these two jurisdictions were more similar than we have in the past been led to believe.

According to Veracini, “deep colonizing” also permeates contemporary settler societies.\textsuperscript{111} In instances where the “politics of recognition” are being played out in settler societies today it often appears that

\begin{footnotesize}
\begin{enumerate}
\item Veracini gives credit to James Belich for documenting, in \textit{Replenishing the Earth}, how “[t]he global settler ‘revolution’, in fact, entailed a global isopolitical turn”; even though Belich does not explicitly employ the concept (Ibid., 176).
\item Ibid., 178.
\item Veracini acknowledges the Australian-based anthropologist Deborah Bird Rose for introducing the term “deep colonizing” in her contemporary work “dealing with the position of Aboriginal women in the context of recent developments in land claims
\end{enumerate}
\end{footnotesize}
Veracini attempts to explain the seeming current intractableness of settler colonialism ("deep colonizing") and the failure of the politics of recognition (at least for Indigenous peoples), arguing that we must begin by attempting to understand the deep seated “defensive mechanisms” used by both original settler colonists and their descendants to disavow the “founding violence” of settler colonialism. The continuing salience of these defensive mechanisms, which help settler colonists psychically disavow the violence of settler colonialism is reflected in the Australian context, in the "History Wars" and the backlash to efforts at reconciliation surrounding the “Stolen Generations” of Aboriginal children, in publically-made remarks like “‘the children were not stolen’ (denial); ‘it was for their own good’ (rationalisation); [and] ‘those were the times’ (intellectualisation).” This perspective shared by Veracini and other recent scholars of settler colonialism is helpful for further sharpening the analytical lens that can be used for uncovering and explaining the violence of settler colonialism in the past. As well, it is valuable as an additional conceptual tool for understanding and attempting to transcend the politics of denial that clearly characterizes the situation of many settler societies today, including Australia and Canada.

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114 Ibid., 374.


116 In our larger book project of which this paper is a part, we give detailed attention to this theme in our comparative analysis of the national foundational mythologies of Australia and Canada which are both characterized by their silence on the history of Indigenous subjugation and injustice, and the rise of counter movements in the twentieth and early twenty-first century that have contested this silence.
trends in United States and Canadian literature on the westward settlement and the extension of Anglo and American law and legal institutions over Indigenous peoples.

Frontiers and borderlands

Regardless of whether or not Veracini is correct in his assessment of the reasons the concept of settler colonialism has been slow in entering the analytical field of histories of the European settlement of North America, there is clear evidence that such is the case. In contrast to Australia, where settler colonialism has become a pivotal concept for guiding research on Indigenous-settler relations in a range of different historical and contemporary contexts, the work of historians of European settlement in North America has traditionally been largely atheoretical and limited conceptually to making use of the two often interchangeably used concepts of “frontiers” and/or “borderlands”. This is not only the case for North American historians, as other historians have also made use of these concepts and they are still being employed as analytical categories in history and other disciplines today. For our purposes however, it is mainly important to examine the manner in which these concepts have been used in North American historiography, and to assess whether they may still have some utility in the historical study of Indigenous-white settler encounters, particularly involving law and legal institutions, in the nineteenth century.

Traditionally North American historians have followed the image of the frontier formalized for the United States by Frederick Jackson Turner as a line which separates “civilized” from unsettled territories, and which moves with the pace of European settlement. In the 1950s, the concept also began to be employed in comparative research carried out by both North American and other historians. A classic

\[117\] For another perspective on why the concept of colonialism is largely absent from United States historiography, see Michael Adas, “From Settler Colony to Global Hegemon: Integrating the Exceptionalist Narrative of the American Experience into World History,” American Historical Review (2001) December: 1692-1720. Ian Tyrrell, “Reflections on the Transnational Turn in United States History,” also discusses the parochial character of US historiography and circumstances that led to its questioning starting in the 1980s.


\[119\] Good examples of this are the Borderlands e-journal, founded at the University of Adelaide in 2002, and the Journal of Borderlands Studies based at New Mexico State University since 1986. Both of these journals are broadly interdisciplinary and eclectic in their content. The multifaceted interdisciplinary use of the concepts of “borders”, “cross-border relationships”, and “border crossing” is also notably reflected in the recent work of Merry E. Wiesner-Hanks, “Crossing Borders in Transnational Gender History” Journal of Global History (2011) 6: 357-379.


\[121\] Veracini, “‘Settler Colonialism’: Career of a Concept”, endnote 11, cites representative examples of this early literature. Examples relevant to Australasia and North America include: H. C. Allen, Bush and Backwoods: A Comparison of the Frontier in Australia and the United States (East Lansing: Michigan State University Press, 1959); A.L. Burt, “If Turner Had Looked at Canada, Australia, and New Zealand When He Wrote about the West” in W. D. Wyman and C. B. Kroeber (eds.) The Frontier in
example of this is Paul Sharp’s comparative study of the relative success of the North West Mounted Police on the Canadian frontier, compared to their counterparts in the United States and Australia, in which he argued that:

In part they [the successes of the NWMP] were due to the decision to treat the Indians with honesty and respect, to maintain a system of incorruptible agents, and to recognize that the aboriginals could not be expected to forget centuries of neolithic customs over night. Even more important, the Canadian West was virtually uninhabited by white men, save for a scattering of traders. Unlike the American or Australian experiences, the law arrived before the rush of settlement, thus giving the Indians time to adjust to the sedentary life before white settlement engulfed them. 122

More recent historiography on the Canadian and American west has begun to draw more critically on both the concept of the frontier as a space “in which geographical and cultural borders were not clearly defined”, and the concept of borderlands as “contested boundaries between colonial domains.” 123 In their essay on “From Borderlands to Borders” published in the American Historical Review in 1999, Jeremy Adelman and Stephen Aron “seek to disentangle frontiers from borderlands” in order “to rescue the virtues of each construct.” 124 Adelman and Aron capture the continuing legacy of Turner’s frontier thesis noting that despite its criticisms “some historians continue to assert the significance of a recast frontier”, and that in doing so “the frontier has gained a new historiographic lease on life.” 125 A problem with this, according to Adelman and Aron, is that this reformulation of the idea of the frontier may be more accurately viewed as a revival of the notion of “borderlands” that was in its inception specifically associated with Turner’s protégé, Herbert Eugene Bolton. While Turner created an image of the American frontier “in which pioneer progress necessarily entailed Indian retreat”, Bolton, a historian “of New Spain’s northern territories”, proposed the concept of borderlands to better appreciate and explain “the extended cohabitation between natives and newcomers that prevailed on the perimeters of European colonial empires.” 126 Adelman and Aron acknowledge the significant contribution to enriching “our understanding of the complexity and contingency of intercultural relations” made by recent

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125 Ibid., 814.
126 Ibid., 815.
historians who “have substituted ‘borderland’ for all of North America’s ‘frontiers’”; and particularly the corrective (to “straightforward conquests”) they provide by emphasizing “the accommodations between invaders and indigenes and the hybrid residuals of these encounters.”

However, according to Adelman and Aron, one, among several, problems with this reformation of the frontier as borderland, is that it buries a key aspect of Bolton’s original formulation of the concept, which took centrally into account the idea that borderlands were also contested imperial frontiers, that, in his research, were “highlighted in the friction between two Old World powers in the New: Spain and England.” Adelman and Aron’s main criticism, therefore, is how this reformulated concept neglects “the power politics of territorial hegemony.” The key problem with overlooking “the essentially competitive nature of European imperialism and the ways in which these rivalries shaped transitions from colonies to nation-states”, is that “[a]bsent the international dimension of borderlands, the cross-cultural relations that defined frontiers take on a too simple face: ‘Europe’ blurs into a single element, and ‘Indians’ merge into a common front.”

Adelman and Aron propose that if appropriately disentangled the concepts of frontiers and borderlands both have a place in historical research. It could also be argued that these disentangled concepts may be seen to be useful in the study of Indigenous-white settler encounters, including those involving law and legal institutions, and should not be replaced entirely by the concept of settler colonialism. Adelman and Aron argue for a reconceptualization of the frontier as “a meeting place of peoples in which geographic and cultural borders were not clearly defined”, and where “intercultural relations produced mixing and accommodation as opposed to unambiguous triumph”. On the other hand, they call for a revival of the key element of Bolton’s conception of borderlands, defining them as “contested boundaries between colonial domains”, where Indigenous peoples were able to exploit differences between competing imperial powers “partly to resist submission but mainly to negotiate intercultural relations on terms more to their liking.” Adelman and Aron develop this argument further, in a manner that interestingly resonates with the work reviewed earlier in this paper on settler colonialism, illustrating through the use of specific historical examples how “borderlands” become “bordered” lands, and the consequences this has for Indigenous peoples. While scholars of settler colonialism distinguish it from colonialism through the move toward settler self-government which gives rise to “deep colonizing”, the idea of “bordered” lands, captures the transition “from inter-imperial struggle to international coexistence” and highlights the manner in which this shift was consequential in “narrowing the scope of political independence” that had previously been available “[t]o the peoples for whom contested borderlands afforded room to

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127 Ibid., 815.
128 Ibid., 815.
129 Ibid., 815. Adelman and Aron also point out other problems with the conceptual shift from frontiers to borderlands, including the way it downplays “profound changes in favor of continuity.” They note that: “In such work, a timeless legacy of cultural continuity shrugs the rise and fall of empires, the struggles between emerging independent nation-states, and the fact of increasingly dependent indigenous and métis/mestizo peoples. By contrast, Turner’s frontier – warts and all – took into account underlying transformations. Problematic as efforts to isolate apertures and closures have been, Turner’s frontier concept as least insisted on temporal boundaries.” (footnotes omitted).

130 Ibid., 816.
maneuver and preserve some element of autonomy.”131 While loosely defined conceptions of the frontier and borderlands have been used in work on Indigenous peoples and colonial law and violence in the past, including research on the settler colonies of Australia,132 it would be worthwhile to take into account Adelman’s and Aron’s reconceptualization. An ideal transnational research context in which to do this is the comparative study of western Canada and interior/west Australia. Arguably, one of the added distinguishing factors that made Indigenous-settler encounters different in western Canada and the interior/west Australia was that until 1846 the border between the United States and what would become western Canada was still being disputed, and for several decades following (until the 49th parallel was surveyed in 1872) Indigenous peoples never knew (and obviously didn’t care less) which side of the border they were on. In addition, “deep colonizing” in western Canada arguably began not with the arrival of settlers who intended to stay, but with the arrival of surveyors and the North West Mounted Police (formed in 1873), who were sent out with the mandate of “saving the Canadian Indians from American whiskey traders”, and also pacifying them so that western settlement could proceed unhindered. As historians of the western Canadian “borderlands” experience have also shown, the policing of Indigenous peoples in the Canadian west by the NWMP after 1873, was undertaken by them with a clear eye on convincing them of how fortunate they were compared to the “American Indians” who belonged south of the 49th parallel;133 even though it would be many decades before the NWMP could effectively police the border.134 These are only a few of the lines of inquiry that are opened up by thinking about frontiers as both “borderlands” and “bordered” lands, in addition to self-claimed “settler societies”. However, it is also useful to think about the extent to which these lands may additionally be conceived of “fragmented geographies and spaces of empire” in the sense employed by Lauren Benton.

Fragmented geographies and spaces of empire

It is also no doubt the case that just as the NWMP were, at least initially, not able to effectively police the 49th parallel, they were not able to police Indigenous peoples with any degree of rigour or consistency because of the manner in which they were spread across vast geographical spaces out from under the eye of the police, and later, missionaries, Indian agents, and criminal courts. The same was

131 Ibid., 816.

132 See references cited in above footnotes 5 and 115.


134 It is also interesting to note in this context that in her recent work on peoples of the Blackfoot Confederacy, who occupied both sides of the Canadian-US border, Blanca Tovías documents how they equally resisted the laws put into place both above and below the 49th parallel that criminalized the Sundance and other traditional religious ceremonies. See, Tovías, “Navigating the Cultural Encounter: Blackfoot Religious Resistance in Canada (c. 1870-1930)”, and Colonialism on the Prairies: Blackfoot Settlement and Cultural Transformation, 1870-1920.
also (if not even more) true of interior/west Australia, where for much of the nineteenth century the policing and prosecution of Aborigines based on the “rule of law” was difficult and sporadic. In previous work Lauren Benton has made use of both concepts of “borderlands” and “legal pluralism” to situate and explain the encounters colonized Indigenous peoples had, or avoided having, with imposed legal systems.\(^{135}\) As noted earlier however, in her most recent work she moves toward studying attempts made to exercise legal authority over Indigenous peoples, and their responses to such attempts, within the broad context of the myriad, often fragmented and ill-defined, jurisdictional and geographical settings in which they occurred across the colonial world from the fifteenth to the nineteenth centuries. According to Benton, throughout this “variegated colonial world... [t]he administration of empire depended... on the exercise of delegated legal authority”; including the delegated legal authority extended over “indigenous or conquered peoples.”\(^{136}\) In pointing this out, Benton’s work reinforces the need to investigate the law and its relation to assertions of authority and sovereignty over Indigenous peoples in different colonial and settler colonial settings, while it also provides a new conceptual vocabulary for doing this. This is illustrated in a number of the incisive concepts and expressions Benton uses to capture the complexities involved in the “search for sovereignty”, including “European empires as webs or networks”, the “anomalous legal spaces of empire”; the “legal tensions between centers and peripheries”, “the processes of imagining and constructing sovereignty”, and “the formation of corridors and enclaves within imperial spheres of influence.”\(^{137}\) According to Benton, it is the latter of these expressions (corridors and enclaves) in particular, that, used in historical analysis, “moves us beyond a reliance on the concept of borderlands to describe spaces in which imperial sovereignty was contested.” Critiquing Adelman and Aron in this regard, she explains:

The term [borderlands] itself implies the clash of imperial powers over territorial control, and describes the spatial pattern that emerged when imperial zones bumped up against one another. But indeterminacy of sovereignty sometimes resulted from conditions other than competing claims, and from politics not centered on territorial mastery. Precisely because effective imperial control was defined by sets of narrow corridors and clusters of enclaves, multiple imperial powers could operate in the same region without producing abutting and conflicting spheres of control. The reach of jurisdiction could follow a snaking pattern of travel and trade routes that might cross or parallel other passages without entanglement... And everywhere [that] imperial agents failed to dictate colonial conditions on their own; locals manoeuvred politically in ways that altered territorial claims and legal institutions.\(^{138}\)


\(^{136}\) Benton, A Search for Sovereignty, 3.

\(^{137}\) Ibid., 2-3, 37.

\(^{138}\) Ibid., 37.
Benton’s work on the complexities of “the search for sovereignty” has rich implications for rethinking how we can conceive of and research law and its attempted imposition on Indigenous peoples in nineteenth century colonial and settler colonial settings. It also suggests that the two quite different, but at the same time in many ways similar colonial “enclaves” of western Canada and interior/west Australia may be ideal settings for potentially original and significant comparative and transnational research. Moreover, moving beyond conceptions of “fragmented geographies” that inform the work of scholars of international law, Benton suggests that “divided sovereignty appears less a temporary concession to particular challenges of administering empire and more as a central premise of rule with an enduring influence on both imperial geographies and global regulation.” In the next section of this paper, we turn to drawing on the work being done by colonial legal historians that can provide a more substantive foundation for this type of transnational research, and sketch out the specific directions of our study of the “fragile (legal) settlements” of western Canada and interior/west Australia.

PART II: COLONIALISM, SETTLER COLONIALISM, AND LAW

The work of historians and critical interdisciplinary scholars we have reviewed so far in this paper captures the broad historical themes and concepts that may be seen to be relevant to the transnational study of forms of law and their imposition on Indigenous peoples across colonial and settler colonial societies in the long nineteenth century. Significantly, as we have seen, in his study of The Birth of the Modern World, Chris Bayly examines broad transnational and global connections apparently tied to the development of different polities, ideologies, institutions, and forms of economic activity, especially in the nineteenth century. More specifically, in regard to Indigenous peoples, he “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 growing uniformity also affected “systems of justice” and the lives of Indigenous peoples who were swept over by “[t]he deluge [that] came between 1830 and 1890 when the massive expansion of settler populations from Siberia, through Australasia and southern Africa to the Americas expropriated native peoples’ lands and forests to a large extent.” Similarly, as we have seen, postcolonial and settler colonial-informed studies of scholars like Catherine Hall and Julie Evans (and especially their work on the colonial career of Edward John Erye), highlight the need to examine the transnational flow of ideologies and their connected practices. Specifically, they provide a striking individualized example the profound initial influence, but later growing disillusionment with liberal-humanitarian thinking regarding Indigenous peoples across nineteenth century white-settler colonies; which suggest the need to further explore the link between permutations of liberalism and

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139 Somewhat along the lines of scholars of settler colonialism.

140 Ibid., 297.


142 Ibid., 437.
attempts at the more uniform legal subjugation and coercive assimilation of Indigenous peoples. On the other hand, James Belich’s view, to the contrary, that Indigenous peoples in nineteenth century British settler colonies can be more fairly characterized as “riders of the whirlwind” of a settler revolution than passive victims of an “undifferentiated tragedy inflicted on the innocent”, suggests the need for giving more attention to how Indigenous peoples managed to survive and resist settler colonialism and the colonizing institutions and practices it brought with it, including the reach of settler-imposed law. And finally, we have also seen how more critical and interdisciplinary settler-colonial scholars, like Patrick Wolfe and Lorenzo Veracini, have moved beyond Belich to study various forms of settler colonialism and open new ways of thinking about and engaging in the politics of rights, redemption, and reconciliation in today’s colonial settler societies; a topic which arguably also needs to be more directly addressed by British colonial legal historians. In the following part of this paper, we look more closely at how colonial legal historians, including those of a more interdisciplinary ilk, are beginning to take up some of these themes in their work.

Transnational and Global Connections: Legal Careering and Lines of Communication across the Empire

Just as Catherine Hall and others have shown in their work that governors and other colonial bureaucrats spent a good part of their lives careering across the British Empire, colonial judicial officials and legal administrators also often had similar transnational, or at least inter-colonial, careers. While there is an abundance of national-biographical literature on the lives of colonial judges in different nineteenth century British settler colonies, it is only recently however that legal historians like John McLaren have begun to write about the lives of judges who, sometimes voluntarily, and sometimes by necessity, moved from one colony to another over the course of their legal careers.

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143 See, above note 25.


145 With possible occasional returns to Britain.

historians, along with McLaren, are continuing to make important contributions to the study of lines of communication between legal authorities in England and the colonies, and movement of judges and other legal officials\textsuperscript{147} across the British Empire.\textsuperscript{148} Although frequently not their primary aim, studies of this type have significant implications for the transnational study of various forms of law and the effects of their being imposed on Indigenous peoples in colonial and settler colonial societies; as we will see shortly in the context of discussing work on nineteenth century liberalism, colonial policing, and efforts made to apply colonial criminal law to Indigenous peoples.

\textit{Permutations of Liberalism and Legal Uniformities: Exploring the Convergence of Outcomes}

Despotism is a legitimate mode of government in dealing with barbarians, provided the end be their improvement, and the means justified by actually effecting that end.\textsuperscript{149}

The more I learn about the ways of these native people, the less comfortable I feel about what we Heaven-sent whites are doing to their way of life.\textsuperscript{150}

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\textsuperscript{147} Including the movement, or “transposition”, of legal doctrines and practices that informed their thinking. Dorsett and Hunter (eds.), \textit{Law and Politics in British Colonial Thought: Transpositions of Empire}, 1.


\textsuperscript{150} Francis Dickens (Fort Macleod, North West Territories) to Ezra Butts (England), 1 March 1877; in Eric Nicol (ed.), \textit{Dickens of the Mounted: The Astonishing Long-lost Letters of Inspector F. Dickens, NWMP 1874-1886} (Toronto: McClelland and Stewart, 1989), 118.
One of the most prominent themes in current writing on the building of European empires over “the long nineteenth century” is the question, or conundrum, of the role played by the ideology of liberalism as a justification for dispossessing Indigenous peoples of their land and forcing them to adopt “Western” life-styles and institutions, including legal institutions. According to Chris Bayly, the ideology of “Euro-American” liberalism spread increasingly across the world after 1815 along with the international spread of the “Euro-American” ideologies of socialism and science. Despite its association with ideals including representative government, free trade, and legal equality and “universal rights”, Bayly notes that in the colonial context liberalism confronted a perennial internal conflict, which he describes as “the conflict within liberalism between the ideals of universal rights and the idea of ‘moral independence’, which limited [liberalism’s] capacity to effect real political change.” This tension inherent in liberal thinking was arguably reflected in the behaviour of Edward John Eyre and many other colonial administrators who careered across the British Empire in the nineteenth century.

The existence of conflicting yet intimately connected metropole and colonial discourses over the “the struggle between Liberty and Authority” in nineteenth century British slave and settler colonies is also recognized by other British colonial historians. Despite this, however, the role of the ideology of liberalism in the subjugation of Indigenous peoples in the nineteenth century has rarely been explicitly addressed by legal historians. One exception to this is the work of P.G. McHugh. In his monumental book on Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination, 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.” According to McHugh, “Liberalism – like the Enlightenment – was no coherent doctrine or programme so much as a disposition or tendency. As with Christianity, it encompassed a variety of

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152 Ibid., 304.

153 As we saw in earlier discussion of the work of Catherine Hall and Julie Evans. In this context, John McLaren’s advice on future research is also instructive. Specifically, he notes that: “There is room for much more work by legal historians on the Colonial Office and its influence on imperial policy and law”, and that in particular more attention “needs to be directed to the Office’s waning role in the case of settler colonies as local desires and ambitions increasingly took centre stage and imperial officials bought into the reality of self-determination for these territories.” John McLaren, “Afterword: Looking from the Past to the Future” in Hamar Foster, Andrew Buck and Ben Berger (eds.), The Grand Experiment: Law and Legal Culture in British Settler Societies (Vancouver: University of British Columbia Press, 2008), 269.


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heterogeneous positions and developed over a long period of social upheaval and political change.” However, he notes the commonality that, “Above all liberals believed that human nature was intrinsically the same everywhere, and that it could be totally and completely transformed, if not by revelation, as the evangelicals envisaged, then by the workings of law, education, and free trade.” Despite this, however, McHugh remarks that: “If there was one area where liberal values with their emphasis upon 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.”156

Like Bayly, McHugh gives considerable attention to developments that occurred over the course of the long nineteenth century, and, also paralleling Bayly’s analysis, one of his themes is the increasingly uniform manner in which the common law came to be applied to Indigenous peoples across a range of different white-settler societies as the nineteenth century progressed. McHugh highlights the influence of the spread of liberal ideology as a significant contributing factor to this developing legal uniformity. However, like other historians, he recognizes that the influence of the initial humanitarian liberalism of mid-nineteenth century colonial governmental and legal officials was short-lived, and eventually gave way to developments in settler colonies that resulted in Indigenous people’s heightened subjugation and unequal treatment in the legal system compared to their white-counterparts.157

McHugh also highlights substantial differences in the nature of legal developments across jurisdictions, contrasting the experience of the United States and British settler colonies. Specifically, he shows that although, by the 1830s, the Marshall court decisions in the United States had led to an acceptance of “a doctrine of residual tribal sovereignty,” the British rejected this approach “and lurched from episode to episode in the second quarter of the nineteenth century towards a more absolutist and thoroughgoing concept of Crown sovereignty over tribal peoples”; and importantly, he adds that “[t]his process came about mostly through the need to define more precisely the Crown’s criminal jurisdiction over the tribes as British settlement spread in the post-Napoleonic period.”158 McHugh claims that once “tribes” (or Indigenous peoples) were “physically vanquished in the great mid-century wars and disposessions, all jurisdictions set about erecting legal regimes for the dissolution of the tribalism that both impeded the

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157 McHugh, Ibid. 129, develops his concept of “uniformity” from his reading of the work of James Tully, *Strange Multiplicity: Constitutionalism in the Age of Diversity* (1995), and specifically from what Tully referred to as “the Empire of Uniformity” to denote the general “tendency towards a centralizing and absolute model of sovereignty.” According to McHugh, “This ‘Empire’ has a disposition towards homogenizing constitutional history into a ‘monologic’ of a signal-voiced sovereign, ruling over a culturally undifferentiated polity.” He adds significantly that: “This is certainly a good way of describing the misery-ridden experience of aboriginal peoples in the North America and Australasian jurisdictions from the late nineteenth century. Each jurisdiction, highly conscious of its sovereign self and not thinking of its relations with aboriginal peoples in any way other than as an aspect of that sovereignty, imposed its own ‘Empire of Uniformity’”. For a extended review of McHugh’s book which points in more detail to its remarkable depth of research and thoughtful analysis, see Mark Walters, “Histories of Colonialism, Legality, and Aboriginality” *University of Toronto Law Journal* (2007) 57: 819-832.

158 Ibid., 117. Emphasis added.
progress of settler society and challenged its constitutional authority. For tribal peoples the end of the nineteenth century saw the onset of the ‘Empire(s) of Uniformity’.”

McHugh’s analysis has obvious significance for potentially fruitful directions of research in the field of colonial law and Indigenous peoples. One of these is the study of permutations of liberalism and their connection to growing legal uniformities, in all of the legal realms in which Indigenous peoples were made subject to colonial and settler colonial law, both within and beyond the British Empire. More narrowly, but no less importantly, McHugh’s claim that the assertion British “Crown sovereignty over tribal peoples... came about mostly through the need to define more precisely the Crown’s criminal jurisdiction over the tribes as British settlement spread...”, suggests that the study of the application of criminal law to Indigenous peoples may be centrally important to explaining how British colonies that held clear divergences in their points of foundation reached convergences in the forms of legal subjugation experienced by Indigenous peoples.

Surviving and Resisting the Reach of Law: The Relevance of the Experience of Western Canada and Australia

Although British colonizers and settlers also brought with them other forms of imperial and colonial law, including ideas on property law and resource use, and the law of nations and conquest, that enormously affected the well-being of Indigenous peoples, in our current collaborative research we have chosen to focus primarily to how the development of colonial criminal law and attempts made to apply it to Indigenous peoples in western Canada and interior/west Australia unfolded as part of a broader trans-colonial historical process. One reason we do this is that it reflects a practical extension of our previous individual and collaborative research, which has focused, for the most part, on the more violent and coercive end of the continuum of the legal and extra-legal methods used to either eliminate or contain Indigenous peoples in these two respective British white-settler colonies, or fragile settlements of the wider “British West”. We also build on this approach because of what we observe to be the relative lack of attention other colonial legal historians have given to the study of criminal law and its enforcement from a broader imperial and trans-colonial perspective, and our view that this focus can add significantly to our understanding of both the way in which law and legal institutions (including colonial policing) were used in attempts to subjugate Indigenous peoples, and how they at times, or even perhaps often, managed to resist and escape the reach of the law. Colonial policing and attempts at applying colonial

159 Ibid., 118.

criminal law to Indigenous peoples were just two of the myriad ways in which Europeans asserted their sovereignty and rule in colonial and settler colonial societies. At the same time, they are particularly relevant to study, especially for what they may be able to show about the nature and outcome of attempts made to assert sovereignty and legal authority over Indigenous peoples whose civilizations came to be infringed upon by specific “corridors and enclaves” of settler colonialism.

**Colonial Policing**

As in the case of histories of the colonial judiciary, there is a substantial regional and national-historical literature colonial policing in British white-settler societies. However, there is relatively little published research that approaches colonial policing from broader trans-colonial or transnational perspectives. However, the few studies that have been more explicitly comparative and transnational are significant and suggest important lines of research that are worth pursuing further.

One example of work done from a British trans-colonial perspective is Mathieu Deflem’s study of the fundamental characteristics of colonial police organizations and policing activities in the former British colonies Nyasaland (Malawi), the Gold Coast (Ghana), and Kenya. Deflem’s work is significant in pointing to the organization of the colonial police forces and “the way they operated within the wider realm of political and economic colonial rule, as well as their functions and changing nature over time.” In particular, he notes that in each of these colonies colonial policing was initially paramilitary in nature and aimed at subjugating Indigenous people through coercive control and that in each colony early police forces consisted of both “imposed control units” routinely lead by European military-trained officers and “tribal law enforcement forces” who were typically native police officers “who did not serve in their own region of origin or residence.”

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163 Ibid., 48.

164 Ibid., 57.
Other work has pointed to the antecedents of later British colonial policing, and in particular the paramilitary model used in Ireland. For example, in his critical analysis of “The Birth of Modern Policing and Colonial Capitalism”, Randall Williams explores conditions in Ireland that served as the basis upon which new conceptions of modern policing, repression, and exclusion began to spread throughout the British Empire, arguing that coercive paramilitary police forces have always been a primary method by which Indigenous structures of law and justice have been actively undermined in British colonies.\(^{165}\) In a similar vein, Greg Marquis recognizes that formative influence of the colonial policing of Ireland and the Royal Irish Constabulary (RIC) as a model for other colonial police forces, including the Canadian North West Mounted Police (NWMP).\(^{166}\) He argues that like the RIC, the NWMP was an armed paramilitary force created to assert sovereignty and impose central-government control over a potentially troublesome “Imperial frontier.” He shows, however, that while the two forces often shared similarities “in terms of recruitment, training, promotion, conditions of service, and relations with the public”, they also reflected “fundamental contrasts” in the nature of colonial policing across different Imperial frontiers. Marquis argues that the main contrast between the two forces was that while the imperial policing mandate of the NWMP was “mostly depoliticized and therefore successful in the long run”, the mandate of the RIC was “overtly political” and perceived on all sides to be partisan.\(^{167}\)

In his study of histories of policing in Australia, Mark Finnane also examines the influence of the Irish experience on the development of colonial policing in nineteenth century Australian settler colonies, as well as pointing to contrasts between colonial policing in Australian colonies and western Canada.\(^{168}\) Finnane argues that “the foundation of the north-west mounted police provided a striking contrast to Australian examples”, being a “national force of a kind that was never contemplated in the quite different conditions of Australian settlement.” Despite this important difference, however, Finnane maintains that the NWMP “was forged in circumstances somewhat similar to those affecting the Australian and New Zealand police. That is, the issue of the colonial and imperial response to the status of the indigenous peoples of these colonies was central.”\(^{169}\) Similarly, although not his central focus, in a more recent study of the policing of the north and south “Great Plains” of western Canada and Texas, Andrew Graybill points to commonalities in the role played by the NWMP and the Texas Rangers in

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169 Ibid., 23.
“subjugating indigenous groups,” and “dispossessing peoples of mixed ancestry”, alongside the role they played in “defending the cattlemans empire”, and “policing the industrial frontier.”

Another recent study that has perhaps the most direct implications for trans-colonial research on British colonial policing is Jonathan Richard’s study of the history of native police in Queensland. Richards’ study builds on earlier Australian regional and national studies of colonial policing that have highlighted the important role played by native police forces, while at the same time that he argues the need for more attention to the trans-colonial dimensions of native policing across the British Empire. Richards shows that Queensland’s Native Police force, which consisted of constables who were mainly recruited from outside Queensland and who usually operated under orders from non-native senior officers, “was clearly modeled on other formations of Indigenous armed forces”, and was similar to native police forces raised Ceylon, India, the Cape Colony, and elsewhere in the West Indies, Africa and North America. Moreover, he shows that “[i]n other parts of Australia, in other British colonies and in other European empires, armed Indigenous forces performed similar functions to the Native Police of Queensland, using almost identical tactics.” Richards also notes the trans-colonial backgrounds of non-native officers, showing that “a number of officers in the Native Police were former members of British armed forces, and fought in other parts of the Empire,” while others “were the sons of army officers.” As Amanda Nettelbeck and Robert Foster have similarly documented in studying native policing in South Australia, Richards argues that under the tutelage European officers, the native police of Queensland participated in a campaign of “racial violence” that was “largely accepted and widely practised on the Queensland frontier.” However, Richards also generalizes more broadly that while “colonialism washed across Australia, [and] racial violence took place all along the frontier... Violence and terror against Indigenous people” were also “central components of European imperialism everywhere.”

This raises the outwardly anomalous case of the NWMP in western Canada, which Marquis has described as “mostly depoliticized and therefore successful in the long run.” Although in the end the NWMP were not constituted as a native police force, as Marquis and other Canadian police historians have pointed out, prior to the resistance led by the Métis to the Canadian government’s assertion of

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171 Jonathan Richards, The Secret War.

172 Ibid., 184.

173 Ibid., 9.

174 Ibid., 8.

175 Nettelbeck and Foster, In the Name of the Law.

176 Richards, The Secret War, 208.

177 Richards, The Secret War, 15.

178 Marquis, “Policing Two Imperial Frontiers”, 205.
sovereignty over western Canada in 1869-1870, the NWMP was “envisioned as a Native force” and initially “Prime Minister Macdonald had thought of the Mounted Police as largely Môôîts or mixed-blood, following the British practice of India, the West Indies, and Africa, where security forces were officered by Europeans but recruited from the local population.” However, it is significant that while they were not formally incorporated into the rank-and-file of the NWMP, “native scouts” and native-language interpreters played an indispensable role in the policing of the Canadian west, which suggest that this aspect of the western Canadian experience with colonial policing needs to be explored more fully from a British trans-colonial, or even more broadly-based transnational perspective. It is primarily for this reason that in our ongoing collaborative research we have begun to address this theme in detail drawing on a range of primary historical data sources obtained from Canadian-based archives and libraries. Another theme related to our goal of developing a British trans-colonial perspective on the policing of Indigenous peoples in western Canada and the interior/west Australia, is the work we are undertaking aimed at learning more about the demographic and prior policing and military backgrounds of European police officers who served on these forces, as well also trying to learn more about where they went after their policing careers in either of these two “fragile settlements” of the “British West”. This type of

179 Ibid., 188.

180 See, for example: Hugh Dempsey, Charcoal’s World: The True Story of a Canadian Indian’s Last Stand (Calgary: Fifth House, 1998), and Rodger Touchie, Bear Child: The Life and Times of Jerry Potts (Victoria: Heritage House, 2005).

181 One rare example of work being carried out from an even broader transnational perspective crossing several European empires is the current research by Richard Hill, of the Stout Research Centre at the Victoria University of Wellington, New Zealand, on policing indigenous peoples across British, French, Spanish, Portuguese, and German empires in the nineteenth and twentieth century, which he is now starting to publish. See, Richard Hill, “State Power, Policing and Human Rights in Colonies”, at: http://www.victoria.ac.nz/law/centres/nzcpl/publications/human-rights-research-journal/publications/vol-4/Hill.pdf.

182 For a preliminary discussion of some of these sources, see: Nettelbeck and Smandyach, “Policing Indigenous Peoples on Two Colonial Frontiers”.

183 Partly inspired by Jonathan Richards’ suggestive research.

184 The primary data sources available to do this for NWMP officers are extensive, including all of the archived personnel records of officers who served from 1873 to 1904, which are available on line through Library and Archives Canada, at: http://www.collectionscanada.gc.ca/databases/nwmp-pcno/index-e.html. Glimpses of the inter-colonial careers of some NWMP officers can also be found books and other publications written by and about former officers. Examples include senior officers like Francis Dickens, Arthur French, and Sam Steele. Francis Dickens, the son of Charles Dickens, served as an officer with the Bengal Mounted Police from 1863-1870 and as a Sub-Inspector with the NWMP from 1874-1886; Arthur French, the Irish-born first Commissioner of the NWMP (1873-1876), later became a Colonel in the Queensland Defence Force (1886-1891), a Brigadier General in the Royal Artillery in Bombay (1894-1895), a Major General in the New South Wales Military Forces (1896-1900), and the president of the Federal military committee appointed in 1901 to draft the first Defence Act of the Commonwealth of Australia. Sam Steele, who also had a military background, was appointed Sargeant-Major in the NWMP in 1873, and served as a senior officer in the force until the onset of the Boer War, when he volunteered to command Lord Strathcona’s Horse cavalry in the war, which attracted many volunteers from the NWMP to join him. He stayed on in Africa to help organize the newly formed South Africa Constabulary, and later served as a Major-General in the WW1. See: Eric Nicol, Dickens of the Mounted: The Astonishing Long-lost Letters of Inspector F. Dickens, NWMP 1874-1886 (Toronto: McClelland and Stewart, 1989); R. Sutton, “French, Sir George Arthur (1841-1921)” Australian Dictionary of Biography (1981) 8; S.B. Steele, Forty Years in Canada (Toronto: McClelland, Goodchild and Stewart, 1915). In 2008, the University of Alberta and Glenbow Museum in Calgary purchased Steele’s unpublished personal papers and other related correspondence, previously held by relations in England, for $1.8 million. See: The Sir Samuel Steele Collection, at: http://steele.library.ualberta.ca/index.html.
biographical research is crucial if we hope to shed more light on the trans-colonial and transnational dimensions of colonial policing across the British Empire and in specific settler colonies.

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*The Application of Colonial Criminal Law to Indigenous Peoples*

Over the years numerous British colonial legal historians have examined the development of criminal law jurisdiction over Indigenous peoples separately in different nineteenth century “Anglo-British” white-settler colonies. However, as in the case of research on colonial judges and policing, few of these studies have been explicitly comparative in nature. One exception to this is the important study by Lisa Ford, which offers a detailed comparative analysis of the early criminal jurisprudence of New South Wales and Georgia, and the way in which it was applied to Indigenous peoples. According to Ford, the story of the fashioning of settler sovereignty in these territories was part of a much broader “global story” because it happened throughout the Anglophone colonial world and elsewhere over roughly the same period, and because it had the similar effect everywhere of pitting “settler sovereignty against the rights of indigenous peoples.” Like McHugh, Ford argues that one key area in which this was played out was in the attempts made to assert criminal law jurisdiction over Indigenous peoples. She maintains that drawing Indigenous peoples into criminal courts as both offenders and victims of crime was at the core of redefining “sovereignty and its relationship to territory and jurisdiction.”

Focusing on New South Wales and Georgia as two settler polities that together exemplified this “moment of settler sovereignty”, Ford argues that such “settler polities extended jurisdiction in the 1820s and 1830s because they 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 “plural legal practices” increasing “came under

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187 Ibid., 2, 4.

188 Ibid., 2.
pressure”, 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.”

Arguably, what is most important about Ford’s analysis is the model it provides of how one might fruitfully approach attempting to understand convergences in the outcomes of the legal treatment of Indigenous peoples across settler polities that appear to have quite different origins and histories. Crucially, it also reminds us that although the “global story” is important, “explanatory power… rests at the local level”, and that “[t]he story of settler sovereignty can only be told by sifting out the changing legal means attached by participants to the daily struggles of indigenous peoples for resources, for dignity, and for survival.”

Although less sweeping in scope, there are a number of other transnational and local studies that are also foundational to developing a more complete story of how settler colonists have attempted to assert criminal jurisdiction over Indigenous peoples, and the challenges they have faced over time in pursuit of this goal. One of the most recent, and perhaps most important of these is Mark Finnane’s investigation of “the limits of jurisdiction” in colonized Australia. Finnane’s critical reflection is written in light of the significant colonial legal histories produced in recent years by authors like McHugh and Ford, contrasted with the controversial and highly symbolic decision made 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 convicted persons in criminal sentencing decisions. Finnane asserts that this clearly “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

189 Ibid., 4-5. Ford draws here on Lauren Benton’s ideas on the plural legal practices and regimes developed in Law and Colonial Cultures.


192 This amendment repealed an earlier 1994 amendment to the Act that allowed for this practice, and directed that: “a court must not take into account any form of customary law or cultural practice as a reason for: (a) excusing, justifying, authorizing, requiring or lessening the seriousness of the criminal behaviour to which the offence relates; or (b) aggravating the seriousness of the criminal behaviour to which the offence relates”. Cited in Finnane, “The Limits of Jurisdiction”, 149.
traces of indigenous authority and even assertion of jurisdiction have survived.” In other words, he raises the issue of how is it that settler colonists have not yet been able to truly succeed in “eliminating” peoples through law. The failure of settler colonial states, like Canada and Australia, even today, to assert “a comprehensive and untrammeled jurisdiction” in face of “the reality of persisting Aboriginal difference in customs, norms, and perspectives”, opens up additional possibilities for understanding the “aspiration” toward “jurisdictional uniformity” that has characterized colonized Australia and other British settler societies since the 1830s, and it may also help us toward developing more realistic ways of thinking about and engaging in the politics of reconciliation in settler colonial societies.

CONCLUSIONS

In general, the studies reviewed here suggest that attempts made to win settler sovereignty through asserting criminal jurisdiction have perennially encountered Indigenous resistance and “tenacious pluralities” that have been difficult if not impossible to destroy. In this paper, we have tried to show that one way to understand this outcome more fully is from a transnational historical perspective that takes into account the wide sweep of recent scholarship produced by historians and interdisciplinary scholars of colonialism and settler colonialism. In addition, we have attempted, at least in a preliminary way, to show how the study of western Canada and interior/west Australia, approached from this type of transnational perspective, may help to further illuminate similarities and divergences in how legal authority and sovereignty have been asserted over Indigenous peoples across different British settler colonies, and the repercussions of this today. One of the lessons we have learned from our several years of (still ongoing) collaborative and interdisciplinary research, is the indispensable added knowledge and insight into British colonial legal histories that can be gained from this approach. As we have also tried to show in this paper, this type of trans-colonial research can also serve as a foundation for even more broadly based studies of “the search for sovereignty” and the legal subjugation of Indigenous peoples across other European and non-European “legal spaces of empire.” Ironically, in the end, if one agrees with the logic of settler colonial scholars, the best measure of success of these research efforts may be their critique and replacement with histories that are written in collaboration with, or solely by, the survivors of settler colonialism.

193 Ibid.
194 To use the term popularized by Patrick Wolfe.
195 Finnane, “The Limits of Jurisdiction”, 150.
196 Ibid., 159.
197 Ford, Settler Sovereignty, 4-5.
198 Benton, A Search for Sovereignty, 9.