INDIVISIBLE

Indigenous Human Rights

Edited by Joyce Green

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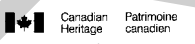

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My teaching career has been enriched by many brilliant, thoughtful, committed students, for whom scholarship is a vocation and to whom colonialism, racism, sexism, capitalism and other forms of oppressive power relations have been serious subjects for scholarly consideration. Many have gone on to be engaged citizens and agents of change. This book is also dedicated to all my former students, who are too numerous to name. I do want to single out those who have been particularly steadfast in the scholarship and politics of justice: Nick Bonokoski, Mike Burton, Diedre Desmarais, Simon Enoch, Veldon Coburn, Nicole Leach, Alyssa Melnyk, Michael Boldt Radmacher, Jennifer Ruddy and Gina Starblanket. The academy and the country are better for your work.

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This book rests between covers graced with the work of Métis artist Christi Belcourt. The title of the piece is *Bird Song*, 30" x 40", acrylic on canvas, private collection. Readers wanting to see more of Belcourt's work may visit <christibelcourt.com>.

Author Biographies

Christi Belcourt is a Michif visual artist and author whose ancestry originates from the historic Métis community of Lac Ste. Anne, Alberta. Like generations of Aboriginal artists before her, she celebrates the beauty of natural world while exploring nature's symbolic properties. Her work can be found within the public collections of the National Gallery of Canada, the Gabriel Dumont Institute, the Indian and Inuit Art Collection, the Art Gallery of Ontario, the Canadian Museum of Civilization and the Thunder Bay Art Gallery. Belcourt was recently named the 2014 Ontario Aboriginal Arts Laureate by the Ontario Arts Council. Follow Christi on Twitter, @christibelcourt, or visit her website, <christibelcourt.com>.

Craig Benjamin works for Amnesty International Canada as a coordinator of the human rights organizations' campaigns in solidarity with Indigenous peoples in Canada. He also represented Amnesty International at the United Nations during the finalization and adoption of the *U.N. Declaration on the Rights of Indigenous Peoples* in Canada. Before joining Amnesty International in 1998, Benjamin worked with a wide range of Indigenous peoples' organizations in North America, Latin America, Southeast Asia and the Pacific to support their advocacy on the international stage.

Gwen Brodsky practises law in Vancouver, teaches law at UBC and has taught in the Akitsiraq Law Program in Iqaluit. She is Director of the Poverty and Human Rights Centre in Vancouver. She is a leading expert on equality rights and the *Canadian Charter of Rights and Freedoms*. Recently, she was counsel to Sharon McIvor in a constitutional challenge to sex discrimination in the status provisions of the *Indian Act*, and she represented the Native Women's Association of Canada on the murders and disappearances of Aboriginal women and girls at the Inter-American Commission on Human Rights. Currently, she is a Distinguished Visiting Scholar at the University of British Columbia Faculty of Law.

Elizabeth Comack is Professor of Sociology at the University of Manitoba, where she teaches sociology of law and feminist criminology. She is also a member of the Manitoba Research Alliance, a broad coalition of academics and community partners engaged in research on Aboriginal and inner-city racialized poverty and inequality. Her recent publications include *"Indians Wear Red": Colonialism, Resistance, and Aboriginal Street Gangs* (co-authored with Lawrence Deane, Larry Morrissette and Jim Silver, 2013), *Racialized Policing: Aboriginal People's Encounters with the Police* (2012) and *Out There/In Here: Masculinity, Violence, and Prisoning* (2008).

Mary Eberts helped develop the equality provisions enshrined in the *Canadian Charter of Rights and Freedoms* and has argued some of Canada's touchstone equal-

ity cases before the Supreme Court. She is a co-founder of the Women's Legal Education and Action Fund, an organization devoted to litigation and education on women's equality rights, and was litigation counsel to the Native Women's Association of Canada. Eberts is author of numerous books, articles and book chapters. Recognition for her work includes the Governor General's Award in Honour of the Persons' Case, the Law Society of Upper Canada Medal, the YWCA Woman of Distinction Award, the Distinguished Service Award of the Canadian Bar Association-Ontario, the Women's Law Association of Ontario President's Award and several honorary doctorates.

Joyce Green is Professor of Political Science at the University of Regina, currently on long-term disability leave. Her research includes issues of decolonization and of democracy in Canada. Her published work to date has primarily dealt with Indigenous-state relations, Indigenous feminism, citizenship, identity and racism in Canada's political culture. She is the editor of *Making Space for Indigenous Feminism* (2007). She is English, Ktunaxa and Cree-Scottish Métis, and her family's experiences have provoked much of her scholarly and political work.

Brenda L. Gunn is Assistant Professor in the Faculty of Law, University of Manitoba, where she teaches constitutional law and the rights of Indigenous peoples in international law. She has worked on the U.N. Expert Seminar on Implementation of National Legislation and Jurisprudence Concerning Indigenous Peoples' Rights, and the U.N. Expert Mechanism on the Rights of Indigenous Peoples. Her research focuses on international and domestic protection of Indigenous peoples' rights. She produced a handbook entitled *Understanding and Implementing the U.N. Declaration on the Rights of Indigenous Peoples.* She remains actively involved in the international Indigenous peoples' movement. Brenda Gunn is a member of the Métis Nation.

Paul Joffe is a member of the Québec and Ontario bars. He specializes in human rights and other issues concerning Indigenous peoples at the international and domestic levels. For over two decades, he has been actively involved in international standard-setting processes including those relating to the *United Nations Declaration on the Rights of Indigenous Peoples*; the draft *American Declaration on the Rights of Indigenous Peoples* at the Organization of American States; and the *Indigenous and Tribal Peoples Convention, 1989*. He is co-editor and contributor to *Realizing the U.N. Declaration on the Rights of Indigenous Peoples: Triumph, Hope, and Action* (2010).

Rauna Kuokkanen is Sámi from Ohcejohka (Utsjoki), Northern Finland. She is Associate Professor of Political Science and Aboriginal Studies at the University of Toronto, where she teaches Indigenous politics and rights. Her current research examines indigenous self-determination and the gendered processes of self-government in Canada, Greenland and the Nordic countries among the Sámi. She is the author of *Reshaping the University: Responsibility, Indigenous Epistemes and the*

Logic of the Gift (2007) and *Boaris dego eana: Eamiálbmogiid diehtu, filosofiijat ja dutkan* (As Old as the Earth: Indigenous Knowledge, Philosophies and Research; ČálliidLágádus Sámi Academica Series, 2009). She has translated a Sámi children's book into English (*The White Stone*, 2011, Davvi Girji), edited the anthology on contemporary Sámi literature *Juoga mii geasuha* (2001) and published numerous articles on Indigenous research paradigms, education and critical theory, Indigenous literatures, comparative Indigenous politics, globalization and Indigenous women. She was the founding chair of the Sámi Youth Organization in Finland and has served as the Vice-President of the Sámi Council.

Andrea Smith is co-founder of the Boarding School Healing Coalition. She is currently Associate Professor of Media and Cultural Studies at University of California, Riverside. She is author of *Native Americans and the Christian Right* (2008) and *Conquest: Sexual Violence and American Indian Genocide* (2005), which received the Gustavus Myers Outstanding Book Award, and co-editor of *Theorizing Native Studies* (2014). She is of Cherokee descent.

Maggie Walter is Professor of Sociology in the School of Social Sciences at the University of Tasmania. She has served as the Policy and Law member on the Australian Institute of Aboriginal and Torres Strait Islander Studies Research Advisory Council, on the steering committee of the national Longitudinal Study of Indigenous Children and as Secretary of the Native American and Indigenous Studies Association. She has published articles and book chapters about citizenship, globalization and Indigenous resistance. She is co-author with Chris Andersen of *Indigenous Statistics: A Quantitative Methodology* (2013). Maggie Walter is a descendant of the trawlwoolway people from northeastern Tasmania.

Honoured in Their Absence

Indigenous Human Rights

Joyce Green

Human rights have become a hallmark of international law and are often claimed as an attribute of democratic political orders. Indeed, Canada's current federal government links human rights with democracy in its critique of other states, such as Russia in connection with its annexation of Crimea, and as a justification for Canada's military role in Afghanistan and for its support of Israel. Since 1948 human rights have been formally acknowledged within the international political and legal order, most significantly with the *Universal Declaration of Human Rights* and its covenants on both civil and political, and social, economic and cultural rights. Richard Falk (2000: 133) suggests that these instruments are the "normative foundation" for Indigenous rights claims and particularly for the claim of self-determination of peoples, which the Conventions endorse in their identical Article 1. In 2010 the *United Nations Declaration on the Rights of Indigenous Peoples* (referred to as the Declaration or the UNDRIP subsequently and throughout this book) replicated that recognition of the right of self-determination and enumerated other Indigenous rights. Indigenous self-determination "has become a major international human rights movement" (Russell 2005: 335; see also Anaya 1996: 129–33).

In international law, fundamental human rights have been enumerated and protected since the adoption of the *Universal Declaration of Human Rights* in 1948 and are now considered a customary part of international law. Human rights are understood to be universal. Indigenous rights inure only to Indigenous peoples. And yet the authors in this book frame Indigenous rights as human rights. Somewhere between the universality of our humanity and the particularity of our social, political, cultural, gendered and historical experiences, the lives of human beings are lived in specific, often inequitable and unjust contexts that benefit from human rights protection. Indigenous peoples need the full panoply of human rights and, additionally, Indigenous rights "to be." The most fundamental human right is the right to exist, both as an individual and in one's community. That right is followed by the rights to the conditions that make life meaningful and equitable in social and political contexts.

Indigenous rights, which are a response to the profound violence of colonialism, are anti-genocidal. Genocide is defined by Article 2 of the *Convention on the Crime and Punishment of Genocide* (U.N. 1948) as:

> any of the following acts committed with the intent to destroy, in whole

> or in part, a national, racial, religious or ethnic group, such as: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on members of the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; and (e) Forcibly transferring children of the group to another group.

The historical record of settler states shows that all of these acts have been committed by the states or their agents against Indigenous peoples (see, for example, Russell 2005; Smith 2005; Comack 2012: 66–88; Savage 2012; Daschuk 2013). Justice Murray Sinclair, Chair of Canada's Truth and Reconciliation Commission, has called Canada's residential school policy genocidal (Comack 2013: 8; see also Woo 2011: 21–22). Canada and, generally speaking, all of the Anglo settler states with similar histories of colonialism are continuing these practices, now sanctified by law, framing historical state actions that can only be seen as genocidal for Indigenous peoples.

Colonialism is generally understood to be a phase of imperialism. The latter involves the expansion of political, territorial and economic hegemony by states that, in the process, subsume or obliterate the populations heretofore occupying a territory and exercising political, territorial and economic jurisdiction upon it, often differently than the imperial invaders. The former involved the creation of institutional and administrative apparatuses to serve imperial needs, import the legal and cultural orders of the imperium and create permanent populations of settlers from the imperium on the "new" territories so occupied (Woo 2011: 88). These processes include imperialism as ideology, a key component of which was the uncivilized and uncivilizeable nature of the "savages" being displaced, which persists still in the colonial imagination (Brantlinger 1995: 44, 55; Brownlie 2012; Savage 2012) and is encoded in systemic racism sustaining settler privilege and Indigenous subordination (Green 2005; Gordon 2011: 66-133). Western imperialism, the form that affected Indigenous peoples in today's settler states, is unique, according to Jan Nederveen Pieterse and Bhikhu Parekh (1995:1), because "it involved a different mode of production (capitalism) and technology (industrialism) and took on a virtually global scope."

Indigenous peoples share experiences of colonization, racism, loss of territory and resources and political and legal subordination. In this sense, Indigeniety is relational, as its political relevance emerges only in conditions of colonization. "It is in the unequal imposed relationship of colonialism that Aboriginality [or Indigeniety] emerges as a political distinction from others. [Aboriginal rights] are rights claimed against the colonial state, by virtue of political and cultural precedence to the colonial state, without which there would be no need for the concept [of Aboriginality]" (Green 2005: 231). Russell writes that, in Australia,

"The sense of aboriginal identity ... had evolved largely through the condition of being colonized" (2005: 135).[1] All Indigenous peoples struggle for a range of fundamental rights, in particular rights to land and self-determination. Thus, Indigenous human rights are framed by the reality of Indigenous lives, which are in turn framed by the realities of colonialism, its citizen and institutional beneficiaries, and its ideological justifications.

Colonialism and Decolonization

These realities of colonialism have been shaped by state-specific policies, practices and political and economic structures. Now there is an international effort through the United Nations "to establish worldwide standards on the rights of Aboriginal peoples which are acceptable to those peoples" (Russell 2005: 33) and offer a measure of self-determination for those who have been racialized and oppressed through state colonialism. Indigenous human rights are claims against that oppression and for liberation.

Indigenous human rights are now explicitly recognized in the *U.N. Declaration on the Rights of Indigenous Peoples* and, arguably, in the Canadian *Constitution Act 1982*, section 35, which "recognize[s] and affirm[s]" the "existing aboriginal and treaty rights" of Indigenous peoples in Canada. These include "Indians, Inuit and Métis" peoples. Moreover, Indigenous peoples in settler states are also (not uncontroversially, given our colonial experiences) within the citizen community of the settler state and are entitled to all of the human rights protections afforded by state laws, such as Canada's *Charter of Rights and Freedoms* and the *Canadian Human Rights Act*, and, of course, to all rights protections in international law.

Subsequent to the passage of the *Universal Declaration of Human Rights* and attached covenants, international law has recognized the need for rights specificity, tailored to categories of life experiences, which have been recognized by the *Convention on the Elimination of Discrimination Against Women* (CEDAW) (U.N. 1979); the *Convention on the Rights of the Child* (U.N. 1989); the *Convention on the Rights of Persons with Disabilities* (U.N. 2006); and the *Declaration on the Rights of Indigenous Peoples* (U.N. 2010). James Anaya has argued that international human rights law imposes a duty on states, which is effectively a responsibility for the political executive to guarantee enjoyment of human rights and to provide remedies for their violation. This includes securing Indigenous peoples' rights requiring "contemporary treaty and customary norms grounded in the principle of self-determination" (Anaya 1996: 130; see also 129–33). For both Indigenous peoples and settler states, animation of the right of self-determination has the potential to create durable and just relationships with some degree of mutuality. As Russell writes, "It is, after all, the principle of self determination of peoples that finally provides the normative basis for Indigenous decolonization" (2005: 136–37). Thus Indigenous human rights, which include the right to self-determination, will be foundational in obtaining decolonization.

Both the theoretical consideration and the legal protection of human rights have become more nuanced: while we are all human, we are contextualized by our social, cultural, historical and other situations, and our rights must be similarly contextualized. Despite this recognition, however, there is still an impulse evident in political discussions, and in some theoretical work, to set Indigenous rights apart from the human rights framework. Peter Kulchyski (2013) has argued that Indigenous rights are not human rights, but rather are collective rights that protect culturally specific practices and are not compatible with human rights theory. Other scholars have made efforts to distinguish Indigenous liberatory struggles from other decolonizing struggles: the "salt water" thesis proposed that real colonialism occurred elsewhere, over there, on lands not contiguous to the occupying state; and "internal colonialism" was of a different order, requiring different analyses and political solutions than classical colonialism. All of this has served to minimize the reality of the violent imposition of colonialism in settler states and to deny its logical political and legal implications. Another strand of critique has suggested that the "Western" origins of the notion of human rights makes the "imposition" of those rights on non-Western communities another act of imperialism. However, John-Andrew McNeish and Robyn Eversole's work suggests that different cultural and national communities make the concept of human rights authentically their own in the process of analyzing their conditions and making their claims (Eversole, McNeish and Cimadamore 2005: 99). In this view, then, human rights theory is Indigenized as Indigenous scholars, activists and communities claim Indigenous rights against states, corporate actions and institutional behaviours.

Indigenous rights have been opposed as a concept and as a claim by settler states. Indeed, it took decades of work and much political diplomacy on the part of Indigenous scholars, politicians and activists and their allies to bring the international community to a virtual consensus on the necessity of adopting the *Declaration on the Rights of Indigenous Peoples*.

In Canada it took decades of struggle by Indigenous activists, including international lobbying, to obtain a consensus among non-Indigenous political elites that Indigenous rights should be recognized in the Canadian Constitution. Despite this, there is a cadre of political and corporate actors and academics hostile to Indigenous rights who argue for assimilative goals and for an ahistorical "equality" that ensures erasure or minimization of the historical record of state oppression of Indigenous peoples (see for example Flanagan 2002; M. Smith 1996). Consequently, Indigenous peoples are perpetually in political and legal struggles with settler state and corporate entities, seeking recognition, implementation and protection of Indigenous human rights. The relationship is adversarial and every right won is through struggle on the hostile terrain of settler state courts and legislatures. And, in the process, many cases are lost, also setting legal precedent that constrains future challenges.

In Australia, decades of legal and political struggle led to the precedential deci-

sion of that country's High Court in Mabo (for Eddie Koiki Mabo, who initiated the case) that included the observation that Australia was not and never had been *terra nullius* ("empty land" — thus belonging to no one) and therefore Aboriginal people must be recognized in and potentially compensated for historical acts of dispossession. However, the Court diminished the positive effect of its decision by upholding "the extinguishment of native title by valid acts of imperial, Colonial state, Territory or Commonwealth Governments [and] affirmed terra nullius by introducing a new form of extinguishment into the common law" (Moreton-Robinson 2014; see also Moreton-Robinson 2001: 164–65).

In Aotearoa New Zealand, Maori political struggle has produced a partial accommodation by the state of Maori rights under the Treaty of Waitangi, including (fairly minimal) accommodations within the country's Parliament and recognition of Maori land rights that has *de facto* failed to protect Maori lands.

The U.S. experience is shaped by a history of military force by the state, and the minimalist formula of the "domestic dependent nations" doctrine introduced by the Marshall legal trilogy (after then-Chief Justice John Marshall). Invoked ever since, this doctrine has effectively subordinated Indigenous nations in the U.S. to its political regime.

Sami have gained a measure of political recognition in their territories outside of Russia and in Scandinavia, including the Sami Parliament, but still struggle for political autonomy and land rights. Norway, Sweden and Finland have limited their recognition of Indigenous rights to cultural aspects only, with little to no acknowledgement of Indigenous land rights. In spite of the establishment of the Sami Parliaments in each of these countries, they exercise very limited formal authority or decision-making power (Kuokkanen 2009). In 2005, the draft Nordic Sami Convention was submitted to the Nordic ministers in charge of Sami affairs and the presidents of the three Sami Parliaments for their approval, with the objective of strengthening the Sami rights to language, culture and livelihoods. The negotiations on ratifying the Convention, however, have been delayed.

All Indigenous peoples still struggle against the legal, political and economic impositions of the settler states that have appropriated their territories and sovereignties, and that have, in the process, violated Indigenous human rights. All Indigenous peoples seek to secure a measure of their traditional territories and economic and political autonomy within those territories. And all Indigenous peoples find that the settler states, the colonizers and their political, economic and legal apparatuses set the possibilities and parameters for Indigenous liberation so as to minimize the effect on the states (Gordon 2010: 101).

Recognizing Indigenous rights requires recognizing the oppressive history and contemporary practices of settler states. Recognition requires some critical engagement with assumptions about and practices of the economic order of capitalism. It requires an appreciation of the racialization of Indigenous peoples as a state stratagem that legitimates their exploitation and blames contemporary

Indigenous peoples for their suffering consequent to that exploitation. It is a critical scholarly position and, like other critical scholarly work, positions itself against the dominant canon in order to read a different analysis into the historical, legal and political record. In this book, the foundational claim is that Indigenous rights are a species of human rights, not a separate set of rights, which must be recognized and implemented as part of the liberatory struggle against oppression and erasure. The general analytical thread that binds all the authors in this book together is that Indigenous human rights are indivisible, not segregated from each other.

Indigenous peoples have, globally, lived with the depredations of imperialism, colonialism and capitalism, most cataclysmically launched in the Americas in 1492 with the adventures of Cristobal Colon, better known as "Columbus." The subsequent appropriation of Indigenous lands and the oppression of Indigenous peoples have been legitimated by nationalism, by economic ideology, by social science theories (of stages of development and cultural evolution), by Christian theological interpretations (justifying Indigenous cultural annihilation), by racism and by settler state law in the service of colonial and settler sovereignty and interests. Thus, the rights of Indigenous peoples have been sacrificed on altars of non-Indigenous interests in favour of those who profit at Indigenous expense. Settler state oppression of Indigenous peoples has been justified, sanitized and mythologized so thoroughly that discussing it has, in the words of Donald Worme, become a "preposterous taboo" (Comack 2012: 9). And yet, "colonialism is not simply a historical artefact" (Comack 2012: 66). Its consequences shape the lives of contemporary Indigenous and non-Indigenous people, and taint the relationship between them.[2]

Despite their involuntary and forced incorporation into settler states, Indigenous peoples have been denied not only self-determination but also the general rights and benefits of citizenship in the state (Green 2005; Thobani 2007: 67–102). The federal and provincial governments of Canada have often treated Indigenous peoples as outside of the citizenship community for the purposes of rights protection — especially where recognition would have economic consequences for governments, such as in education, health care, community safety such as fire protection, child welfare services and so on. Other settler states have been similarly unwilling to treat Indigenous rights within the human rights paradigm and thus as a reasonable obligation on governments, preferring to conceive of these rights as historical and extinguishable. The reality that Indigenous human rights include a claim to land and against the sovereignty of settler states has framed a political problematic for state recognition: none are willing to confront and remedy Indigenous rights violations as a consequence of state occupation and oppression.

The conceptual fuzziness some attribute to Indigenous human rights has made it easier for settler states to ignore them while claiming to protect human rights. This is especially true where rights claims involve territory, sovereignty, recognition of and reparations or restitution for the injuries suffered under colonialism. For

example, in Canada Indigenous peoples have had to carry land claims to the hostile terrain of settler state courts over many decades to obtain small and circumscribed measures of justice (Gordon 2011: 101); education in First Nation communities continues to be dramatically underfunded by the federal government relative to the funding per student in provincial schools; Indigenous health has a profile characteristic of the extreme impoverishment of the "third world," including higher infant mortality rates; and the settler state persists in a bizarre recognition/denial approach to colonialism (see Comack, Green, this volume). Thus, colonialism is treated as only historical rather than as a continuing process; its perpetrators are seen as temporally and legally separate from contemporary democratic governments and settler populations.

All of the settler states deny Indigenous claims to land and sovereignty and have fought those claims in courts and in their political arenas, as in Canada with the Calder (SCC 1973) and Delgamuukw (SCC 1997) cases and in Australia with the Mabo (HC 1998; HC 1992) and Wik (HC 1996) cases. Where states have acknowledged the violence and consequences of historical policies of colonialism by past governments, the acknowledgement has been in such a compartmentalized fashion that it permits contemporary governments to conceive of colonial events as merely historical and to insulate their present practices that violate Indigenous rights from the analysis of past events. In this way, for example, Canadian recognition of the violence of residential schools has not extended to state remediation of the consequences, neither for education, nor for community and family suffering and disintegration, nor for health care, child welfare and so on. At the time of writing, the Canadian government refuses to strike a royal commission inquiry into over six hundred missing and murdered Indigenous women, despite being urged to do so by U.N. Special Rapporteur on Indigenous Peoples James Anaya (*Star* 2013). It persists in a "law and order" agenda that disproportionately incarcerates Indigenous offenders, for longer and with less chance of parole. Andrea Smith (2005:139) indicates that the U.S. shares this approach: "Native people are per capita the most arrested, most incarcerated, and most victimized by police brutality of any ethnic group in the country."

The failure to recognize Indigenous rights as human rights has also contributed to the popular mythologies in settler states that naturalize the political and economic order that has privileged settlers at the expense of Indigenous peoples. These are the bases of structural racism. The artificial and erroneous theoretical divide between Indigenous and other human rights has been useful for propaganda purposes, but is not intellectually defensible. Indigenous rights claims are too often recast by states as interests requiring consultation rather than rights requiring recognition and animation. Consultation is not treated as the UNDRIP's "free, prior and informed consent" but as a conversation with no clear framework for either engagement or resolution (see Benjamin, Joffe, this volume). Indigenous rights are generally not seen to be sufficient to trump economic and political initiatives by

state or corporate actors. For example, in Canada, approval of certain oil and gas pipeline and related export facilities proposals will be granted if the "net benefit" to the state "outweighs" Indigenous rights (and environmental concerns), which will necessarily be trodden on.

Indigenous resistance to rights violations is not infrequently misrepresented by mainstream media and politicians as radical, illogical, anti-progressive and romantic rather than practical (see, for example, Cronlund Anderson and Robertson 2011). The worst of anti-Indigenous rhetoric labels Indigenous resistance as terrorism — the ultimate political epithet in the post-9/11 world. Thus settler state publics are presented with official and media versions of "the natives are restless," rather than getting detailed contextual coverage of the issues animating Indigenous peoples. The lack of comprehension within dominant societies contributes to their impatience with and intolerance for Indigenous rights activism, and to a lack of political pressure on government to resolve these matters honourably.

In sum, the argument in this book is that Indigenous/Aboriginal rights are a species of human rights essential for the realization of human rights of Indigenous people and peoples in the context of settler states. Moreover, settler states are obliged to respect and animate these rights, despite the evident tensions in political and economic interests between elite capitalists, settler citizens and Indigenous peoples.

The contributors to this book are all scholars of and advocates for Indigenous peoples' fundamental human rights. Legal scholars take up law as an instrument of (in)justice. Social scientists take up the theoretical and policy framework that constructs privilege and oppression. Their material has the potential to, via education, create measures of empathy, justice and enlightenment. Activist scholars show how engagement in advocacy for Indigenous human rights generally or specifically can produce transformation.

Theorizing and Contextualizing Indigenous Human Rights

Joyce Green begins with the context that Canada, a settler state created on the territories of and at the expense of Aboriginal peoples, opposed the 2007 United Nations adoption of the *Declaration on the Rights of Indigenous Peoples* and, despite ratifying it in November 2010, has qualified its significance to the point of meaninglessness. She locates the struggle for Indigenous rights in the Canadian constitutional framework and juxtaposes the Harper Government's resistance to the Declaration against the Canadian context for Aboriginal human rights and the implications of the Declaration for Canadian compliance with international law and for domestic policies.

Elizabeth Comack begins her chapter by quoting Canadian Prime Minister Stephen Harper: "We [Canada] also have no history of colonialism," volunteered at a press conference at the G20 (an international forum of the world's twenty largest economies) "Pittsburgh Summit" in September 2009. The difficulties of confront-

ing colonialism in Canada are evident when the prime minister is comfortable making such an astounding assertion. Comack proceeds to document the justice system basis for colonialism in Canada, particularly its manifestation through racialized policing, which disproportionately and negatively affects Indigenous people. Police forces are tasked with creating and re-creating order in society. In the case of settler societies like Canada, that order is imbued with racial oppression. Comack observes: "So long as Canadians are content (and privileged) in their denial of colonialism — and the damage created by that ongoing legacy — the potential for the Canadian state to meet its obligations to the Indigenous peoples and to comply with its international obligations as spelled out in the *U.N. Declaration on the Rights of Indigenous Peoples* will be seriously restricted."

Maggie Walter writes that national suffrage was extended to Australian Aborigines in the 1960s, the last of the so-called Aboriginal protection laws was scrapped in the 1980s and land rights became at least a legal reality in the 1990s. Why then, she asks, are Aborigines still struggling for rights of recognition now? The answer can be found in the "race bind" deployed to justify racially differentiated policies and the everyday normalcy of racialized disrespect. The "race bind," she writes, is "the place where the dominant discourses of individualism, free market capitalism and the embedded stratification of race privilege/disprivilege meet. The result is a toxic discursive paradox that denies the concept of race itself" while blaming Indigenous misery on the individual choices of Indigenous people. This paradox obliterates Indigenous human rights.

Andrea Smith uses the struggle for reparation for American Indian boarding school abuses in the United States to examine the complexity of using human rights frameworks within settler states. Smith notes that while human rights movements can potentially co-opt anti-colonial struggles, human rights campaigns can also be useful organizing strategies leading to more radical emancipatory strategies later. Smith explores how activists can most fruitfully advance the human rights of Indigenous peoples.

Several authors, particularly Gwen Brodsky, Mary Eberts and Rauna Kuokkanen, take up the gendered nature of colonial oppression and of Indigenous human rights. A gendered analysis shows that while colonialism affects all Indigenous peoples, it does not affect women and men identically. Their work supports Andrea Smith's assertion that "Colonial relationships are themselves gendered and sexualized" (Smith 2005: 1) and her observation that "sexual violence has served as a tool of colonialism and white supremacy" (2005:137). Each of these authors reveals a different facet of Indigenous women's human rights, experienced as violations rather than implementations of rights.

Gwen Brodsky writes about Sharon McIvor's petition to the United Nations Human Rights Committee. The petition proposes that, despite several legislative amendments, the *Indian Act* criteria for Indian status still discriminate against Indian women and their descendants. Furthermore, Canada's legal and govern-

mental institutions have failed repeatedly and deliberately over an excessively long period of time to remedy *Indian Act* sex discrimination. Brodsky argues that the U.N. Human Rights Committee should require Canada to end *Indian Act* sex discrimination once and for all.

Rauna Kuokkanen proposes a human rights framework that connects Indigenous self-determination to the human rights of Indigenous women. Kuokkanen examines these interconnections with a particular focus on the question of violence against women. She contends that for Indigenous self-determination to be successful, it must also address the question of violence against Indigenous women. That is, Indigenous women are entitled to human rights as *Indigenous women* — and Indigenous political orders are obliged to recognize gendered rights and rights violations if these political orders are to be legitimate within the framework of international human rights law.

Mary Eberts argues that the deployment of colonial "Victorian" patriarchy in Canadian culture and particularly through the *Indian Act* creates a cultural and legal architecture characterized by the fusion of racism, misogyny and colonialism. This has constructed Indigenous women as a "population of prey," the proof of which is evident in both standard quality-of-life indices and in the awful and disproportionate phenomenon of missing and murdered Aboriginal women. In Eberts's view Canada is responsible for the *Indian Act* and for refusing to expunge the racist and sexist elements from its Indian status provisions.

Brenda Gunn argues that the rights recognized and affirmed in the U.N. Declaration can be used as a framework for interpreting the scope of protected rights under s. 35(1) of Canada's *Constitution Act, 1982*. Gunn examines the principle, much ignored in Canada, that domestic and international law should be congruent. She concludes that crucial Supreme Court of Canada decisions, and some important strands of dissent in other decisions, point toward a need for a more robust incorporation and application of international rights instruments to Canada.

Craig Benjamin reviews the concept of "free, prior and informed consent" (FPIC) in the evolution of international human rights standards, and argues that meaningful consultation requires the possibility of consent being either granted or withheld. That is, FPIC must be more than mere consultation: it must include the ability to make decisions about land, resources, culture and so on. Benjamin argues that the principle of FPIC is necessary to the reconciliation of Indigenous and non-Indigenous peoples and that adoption of this principle in the regulation of resource development would ultimately benefit both.

Paul Joffe shows that, despite its endorsement of the U.N. Declaration, the Canadian government continues to counter Indigenous peoples' human rights, and to devalue and minimize the Declaration. In Joffe's view, Canada's actions, which include "government actions relating to Indigenous peoples' rights to land and resources; food security, environment and climate change; free trade; essential services; and children's rights" (Joffe, this volume), violate the rule of law and core

Canadian constitutional principles of justice, democracy and non-discrimination. He warns that the consequences of such conduct are likely to perpetuate Indigenous impoverishment and rights abuses.

Lawyers Gwen Brodsky, Paul Joffe, Mary Eberts, Brenda Gunn and Andrea Smith bring legal analyses to bear on the framework of settler state law and of international law as they affect Indigenous human rights. Brodsky, Eberts and Rauna Kuokkanen foreground Indigenous women in their powerful analyses. Elizabeth Comack and Joyce Green take up the historical and contemporary force of colonialism in Canada. Craig Benjamin, Green and Joffe examine the politics and law of the Canadian government's obstruction of the progress of international law and state protection of Indigenous human rights. Maggie Walter shows how race and racism have played, historically and now, to the extreme disadvantage of Aborigines in Australia.

The synthesis of these arguments leads to the inescapable conclusion that Indigenous human rights are indeed indivisible: the human rights of Indigenous peoples must include recognition of their Indigeniety and the specific rights that flow from that profoundly political identity, together with the rights that all human beings are supposed to enjoy. The human rights of Indigenous people are injured when their rights as Indigenous people are violated. To be fully and authentically human, Indigenous peoples must be able to be Indigenous — in cultural, economic, political, ecological and other ways. To be fully human, Indigenous peoples must be as able as any other community to adapt their practices and cultures — the exercise of these rights — to the conditions in which they live: these are not archaic rights frozen at some historical pre-colonial point, but the rights of living, adapting contemporary communities.

Indigenous human rights are remarkably vulnerable to abrogation at the behest of or through the indifference of what are profoundly racist and misogynist settler states. Settler states privilege primarily white settler populations, capitalist economic relations and policy and legal regimes predicated on the erasure of Indigenous sovereignty, humanity, autonomy and equality. Herein lie the main barriers to achieving Indigenous human rights.

Indigenous Human Rights and Decolonization

While Indigenous human rights have been overwhelmingly honoured in their absence by settler states, it is not politically or legally impossible for these states to now commit to the constitutional, economic and political protection and implementation of these rights. States have come some distance since imperialism and colonialism were seen as unproblematic by their historical practitioners. Most settler states now have a sense of shame about their oppression of Indigenous peoples, evident in the propaganda that is used to minimize this history and also in the efforts made to distance contemporary political and social orders from the events of recent and historical oppression. It would be cathartic, as well as just, to

move to a robust defence of the rights that have been so violated. Moreover, such state action would serve to move Indigenous and settler peoples past our shared oppositional past and create the conditions for more amicable future relationships. Finally, such state action would bring settler states into compliance with the international (and in at least Canada's case, domestic constitutional) obligations to protect Indigenous human rights. While remedies will not be universal or quickly achieved, political will is an essential first ingredient in a path to reconciliation and decolonization. Importantly, no reconciliation or decolonization can occur unless the state recognizes and ceases current acts of colonialism: this is not solely an historic matter.

Legal action is only one measure in a decolonization toolkit and is generally only undertaken when political measures have not been fruitful. Organized public dissent, similarly, is a tactic deployed when virtually all other measures have failed. The iconic social movement Idle No More emerged in 2012 in response to Canada's political intransigence on crucial matters vital to Indigenous human rights: failure to provide adequate housing, education, health care and implementation of treaty provisions, among others. Canada could have welcomed the political engagement of Idle No More activists. Yet, it has instead retreated to suspicion, spying and monitoring the movement for information for "detecting, preventing or suppressing subversive or hostile activities" (Ling 2014). It seems there is no acceptable way for Indigenous peoples to speak to the state about the conditions in their lives or about their unhappiness with Canada's historical and continuing mistreatment and its indifference to Indigenous suffering.

And ultimately, Indigenous peoples have signalled that assimilation into the settler state, or marginalization from its economic and political benefits, will not be accepted, especially by Indigenous youth. Like the international Occupy Movement, Idle No More represents the voice of the voiceless, the power of the marginalized and the aspirations of many people and communities. While it has been less evident in recent months than at its most prominent at the time of Chief Teresa Spence's fast to protest Canada's disregard of the needs in her community, it is a movement that could re-emerge. It is comprised of community members in cities, on reserves and in the hinterlands. It is an organization with many voices, a fairly flat structure and multiple strategists. It provides space for political debate and opportunities for leadership and activist development. It provides an important focus for settler media, thus helping to educate settler Canadians about the difficult political, social and economic realities in what is called Indian Country. It has led to solidarities with non-Indigenous activists, including through the Silent No More initiative, which speaks up about settler state violation of Indigenous human rights. Canada has not heard the last from Idle No More and its allies.

The international Indigenous movement is preparing for the United Nations World Conference on Indigenous Peoples in New York, on September 22–23, 2014. So, too, should settler states. The U.S.-based Indian Law Resource Center calls the

conference "an historic opportunity to secure positive action in the U.N. to improve the lives of indigenous peoples around the world … [and] to share perspectives and best practices on the realization of the rights of indigenous peoples and to pursue the objectives of the U.N. Declaration on the Rights of Indigenous Peoples" (ILRC Press Release 2014; http://indianlaw.org/worldconference).

Indigenous human rights are liberatory. Colonialism lies at the base of Indigenous dehumanization and oppression. The settler state citizen populations and its elites are the beneficiaries of these processes of racialization, oppression and denial by these now democratic (if also amnesiac) states. These states' policies have profoundly abused Indigenous peoples' human rights through forced relocations — an historical ethnic cleansing — and the forced family disintegration caused by residential schools, adoption and foster care of Indigenous children, Christian dogmas imposed by government policies and health catastrophes (Daschuk 2013). Other practices have included starvation as a means of domination, the destruction of Indigenous economies and imprisonment on meagre plots of land, enforced and monitored by the coercive force of the state. Settler states have used armed force, colonial bureaucratic institutions and racialized policing to dominate Indigenous peoples. States continue to subject Indigenous organizations and movements to constant surveillance and infiltration of police, security personnel and spy agencies of governments.

Indigenous human rights exist in law and in principle. They have achieved legitimacy at the United Nations, and the entire international community is now aware of the need to secure these rights on a state-by-state basis. It is time for these rights to be recognized, supported and implemented by the settler states. Only this can lead to the possibility of reconciliation with Indigenous peoples and to decolonization — the mutual imagining of a future that accommodates us all on terms we freely choose.

Notes

1 Both terms "Indigenous" and "Aboriginal" are used here. Indigenous is the accepted term in international law, as expressed in the *U.N. Declaration on the Rights of Indigenous Peoples*. The term "Aboriginal" is the accepted term in Canadian constitutional law and in the *Constitution Act, 1982*, s.35, which refers to "Indians, Inuit and Métis" and which recognizes and affirms the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada.

2 A good examination of this history and its contemporary consequences may be read in Candace Savage's 2012 award-winning book *A Geography of Blood*.

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