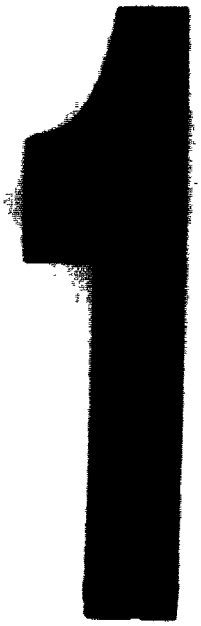


Talkin' About a Revolution*:

Discourse, Aboriginal Justice and the Possibility of Empowerment

by

Ruby Porter, B. Soc. Sc. (Honors)

A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfilment of the requirements for the degree of

Master of Arts

Department of Law

Carleton University
Ottawa, Ontario
August 16, 1996

*The "Revolution", Beatles, White Album, 1968

ISBN 0-612-19449-3

Canada

Name Ruby Potter

Dissertation Abstracts International is arranged by broad, general subject categories. Please select the one subject which most nearly describes the content of your dissertation. Enter the corresponding four-digit code in the spaces provided.

Social Work and Criminology

SUBJECT TERM

SUBJECT CODE

UMI

Subject Categories

THE HUMANITIES AND SOCIAL SCIENCES

COMMUNICATIONS AND THE ARTS

Architecture	0729
Art History	0377
Cinema	0900
Dance	0378
Fine Arts	0357
Information Science	0723
Journalism	0391
Library Science	0399
Mass Communications	0708
Music	0413
Speech Communication	0459
Theater	0465

EDUCATION

General	0515
Administration	0514
Adult and Continuing	0516
Agricultural	0517
Art	0273
Bilingual and Multicultural	0282
Business	0688
Community College	0275
Curriculum and Instruction	0727
Early Childhood	0518
Elementary	0524
Finance	0277
Guidance and Counseling	0519
Health	0680
Higher	0745
History of	0520
Home Economics	0278
Industrial	0521
Language and Literature	0279
Mathematics	0280
Music	0522
Philosophy of	0998
Physical	0523
Psychology	0525
Reading	0535
Religious	0527
Sciences	0714
Secondary	0533
Social Sciences	0534
Sociology of	0340
Special	0529
Teacher Training	0530
Technology	0710
Tests and Measurements	0288
Vocational	0747

LANGUAGE, LITERATURE AND LINGUISTICS

Language	
General	0679
Ancient	0289
Linguistics	0290
Modern	0291
Literature	
General	0401
Classical	0294
Comparative	0295
Medieval	0297
Modern	0298
African	0316
American	0591
Asian	0305
Canadian (English)	0352
Canadian (French)	0355
English	0593
Germanic	0311
Latin American	0312
Middle Eastern	0315
Romance	0313
Slavic and East European	0314

PHILOSOPHY, RELIGION AND THEOLOGY

Philosophy	0422
Religion	
General	0318
Biblical Studies	0321
Clergy	0319
History of	0320
Philosophy of	0322
Theology	0469

SOCIAL SCIENCES

American Studies	0323
Anthropology	
Archaeology	0324
Cultural	0326
Physical	0327
Business Administration	
General	0310
Accounting	0272
Banking	0770
Management	0454
Marketing	0338
Canadian Studies	0385
Economics	
General	0501
Agricultural	0503
Commerce Business	0505
Finance	0508
History	0509
Labor	0510
Theory	0511
Folklore	0358
Geography	0366
Gerontology	0351
History	
General	0578
Ancient	0579
Medieval	0581
Modern	0582
Black	0328
African	0331
Asia, Australia and Oceania	0332
Canadian	0334
European	0335
Latin American	0336
Middle Eastern	0333
United States	0337
History of Science	0585
Law	0398
Political Science	
General	0615
International Law and Relations	0616
Public Administration	0617
Recreation	0814
Social Work	0452
Sociology	
General	0626
Criminology and Penology	0627
Demography	0938
Ethnic and Racial Studies	0631
Individual and Family Studies	0628
Industrial and Labor Relations	0629
Public and Social Welfare	0630
Social Structure and Development	0700
Theory and Methods	0344
Transportation	0709
Urban and Regional Planning	0999
Women's Studies	0453

THE SCIENCES AND ENGINEERING

BIOLOGICAL SCIENCES

Agriculture	
General	0473
Agronomy	0285
Animal Culture and Nutrition	0475
Animal Pathology	0476
Food Science and Technology	0359
Forestry and Wildlife	0478
Plant Culture	0479
Plant Pathology	0480
Plant Physiology	0817
Range Management	0777
Wood Technology	0746
Biology	
General	0306
Anatomy	0287
Biostatistics	0308
Botany	0309
Cell	0379
Ecology	0329
Entomology	0353
Genetics	0369
Limnology	0793
Microbiology	0410
Molecular	0307
Neuroscience	0317
Oceanography	0416
Physiology	0433
Radiation	0821
Veterinary Science	0778
Zoology	0472
Biophysics	
General	0786
Medical	0760

EARTH SCIENCES

Biogeochemistry	0425
Geochemistry	0996
Geodesy	0370
Geology	0372
Geophysics	0373
Hydrology	0388
Mineralogy	0411
Paleobotany	0345
Paleoecology	0426
Paleontology	0418
Paleozoology	0985
Palynology	0427
Physical Geography	0368
Physical Oceanography	0415

HEALTH AND ENVIRONMENTAL SCIENCES

Environmental Sciences	0768
Health Sciences	
General	0566
Audiology	0300
Chemotherapy	0992
Dentistry	0567
Education	0350
Hospital Management	0769
Human Development	0758
Immunology	0982
Medicine and Surgery	0564
Mental Health	0347
Nursing	0569
Nutrition	0570
Obstetrics and Gynecology	0380
Occupational Health and Therapy	0354
Ophthalmology	0381
Pathology	0571
Pharmacology	0419
Pharmacy	0572
Physical Therapy	0382
Public Health	0573
Radiology	0574
Recreation	0575
Speech Pathology	0460
Toxicology	0383
Home Economics	0386

PHYSICAL SCIENCES

Pure Sciences

Chemistry	
General	0485
Agricultural	0749
Analytical	0486
Biochemistry	0487
Inorganic	0488
Nuclear	0738
Organic	0490
Pharmaceutical	0491
Physical	0494
Polymer	0495
Radiation	0754
Mathematics	0405
Physics	
General	0605
Acoustics	0986
Astronomy and Astrophysics	0606
Atmospheric Science	0608
Atomic	0748
Electronics and Electricity	0607
Elementary Particles and High Energy	0798
Fluid and Plasma	0759
Molecular	0609
Nuclear	0610
Optics	0752
Radiation	0756
Solid State	0611
Statistics	0463

Applied Sciences

Applied Mechanics	0346
Computer Science	0984
Engineering	
General	0537
Aerospace	0538
Agricultural	0539
Automotive	0540
Biomedical	0541
Chemical	0542
Civil	0543
Electronics and Electrical	0544
Heat and Thermodynamics	0348
Hydraulic	0545
Industrial	0546
Marine	0547
Materials Science	0794
Mechanical	0548
Metallurgy	0743
Mining	0551
Nuclear	0552
Packaging	0549
Petroleum	0765
Sanitary and Municipal	0554
System Science	0790
Geotechnology	0428
Operations Research	0796
Plastics Technology	0795
Textile Technology	0994

PSYCHOLOGY

General	0621
Behavioral	0384
Clinical	0622
Developmental	0620
Experimental	0623
Industrial	0624
Personality	0625
Physiological	0989
Psychobiology	0349
Psychometrics	0632
Social	0451

Thesis Acceptance Form

M.A. CANDIDATE

The undersigned recommend to the Faculty of Graduate Studies

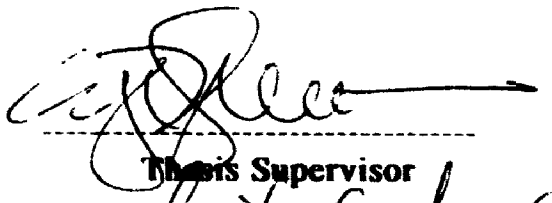
and Research acceptance of the thesis

Talkin' About a Revolution: Discourse, Aboriginal Justice, and the Possibility of Empowerment

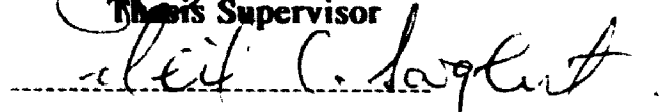
submitted by **Ruby Porter, B. Soc. Sc**

in partial fulfilment of the requirements for

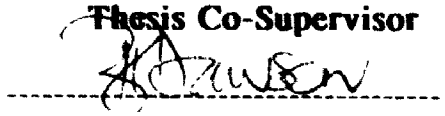
the degree of Master of Arts



Thesis Supervisor



Thesis Co-Supervisor



Chair, Department of Law

Carleton University
August 29, 1996

Abstract

Argument is made as to the emergence of two competing discourses within Aboriginal justice literature, i.e., state-sponsored and First Nations discourse. Both have a tendency to rely on assumptions of cultural determinism and invoke implicit evaluations of Aboriginal justice initiatives in terms of an assimilation/revolution binary. Reconceptualization of the debates using postmodern legal pluralist theory allows one to view the community rather than culture as a better way to evaluate how empowering justice initiatives will be. Two interrelated emphases of criminal justice reform are highlighted as part of the developmental process of self-determination for First Nations: one, the involvement of traditional concepts of law within criminal justice processes and structures and two, those strategies which are primarily based on gaining a measure of control over criminal justice administration. A temporal and context-specific focus is argued as useful in evaluating how Aboriginal justice initiatives can be potentially empowering for First Nations.

Acknowledgements

There are many people whom I would like to thank who have contributed to the realization of this thesis. I would like to first thank the time and effort provided by my thesis supervisors, Jane Dickson-Gilmore and Neil Sargent. Their respective expertise and feedback were invaluable to me most specifically at the beginning when I was formulating my arguments and once the work was finally there. I am grateful for their faith in me and my work. I would also like to extend my gratitude to my external, Scott Clark, who generously gave his time to participate in the defense process.

Many thanks to my colleague and friend, Deanna Sitter who always gives sound advice and provides me with a view of things from a different perspective. As well, Colleen Atkins who encouraged me to stay on track and get the work done.

I would like to acknowledge my family who have always been, and continue to be, a constant source of love and unconditional support for any endeavour I undertake. Particularly, Terra, who is always there for me when I need her the most.

Finally, and most significantly, I would like to thank my partner, Scott Giroux, whose encouragement, support and understanding was instrumental in the completion of this work. Truly, now, we can have 'a life'.

Table of Contents

Table of Contents, continued

List of Tables

Chapter 1
Introduction

In the broadest sense, the following project is a discussion of law, justice and social transformation Inquiry is focused on examining these concepts in the context of the development, implementation and operation of Aboriginal[1] justice and Aboriginal legal orders[2] in Canada The goal is to reexamine current debates within legal studies as a way to conceptualize Aboriginal justice as a means for a transformative political project [3]

Aboriginal justice has assumed a high public profile due in large part to the seeming failure of the current criminal justice system to provide 'justice' for First Nations [4] It is not a new

---

[1] I use the term Aboriginal, Aboriginal peoples and First Nations interchangeably to refer to the variety of Nations (Mohawk, Nis'ga, Mikisew Cree, etc.), Inuit and Metis peoples. I would like to incorporate in this definition Bradford Morse's idea that these terms are meant to "encompass all people who trace to time immemorial their ancestry in this territory now called Canada" and also includes the ambivalent distinction between registered and non-registered Indians. Bradford W. Morse, "Chapter 4: Aboriginal Peoples, the Law, and Justice," in R. Silverman and M. Nielsen (eds.), Aboriginal Peoples and Canadian Criminal Justice, Markham: Butterworths Canada Ltd., 1992, p. 45.
It is necessary to note that throughout this thesis I have not differentiated between the widely held conceptions of 'Metis' people found in the literature and not typically defined when used by authors. There are three competing definitions of Metis people given by Donald Purich: one, Metis is used to describe all Aboriginal peoples who are not registered Indians and are not Inuit; two, Metis describes the people considered mixed-blood persons, in other words, those persons who descended from unions between a First Nation person and a non-First Nation person; and three, Metis are the descendants of the Metis Nation who lived on the Red River Settlement (in the territory now considered Manitoba) in the early 1800s. See Donald Purich, The Metis, Toronto: James Lorimer and Company, 1988, pp. 9-11.
[2] This does not assume that there are not legal orders operating within some First Nations communities presently. Assuming that the legal order(s) are considered valid within their own respective nations, the reference is made to the right to have a legal order considered legitimate by those outside the specific nation. This assumption of legitimacy is rather contentious and raises many more questions than it answers. A discussion of its implications is, in fact, one focus of this thesis and considered in Chapter 6.
[3] Legal reform is one strategy in the promotion of social justice for all people in Canada. Yet due to the particular grave injustices of the historical and continuing overrepresentation of First Nations peoples in the Canadian justice system, the need for the development and implementation of criminal justice and law reform initiatives becomes more salient. At the outset, it must be recognized that criminal justice reform is not the panacea for social justice and must not be considered in isolation from other projects designed towards substantial social transformation.
[4] This is based on the reality that First Nations people are disproportionately represented in the criminal justice system.

issue, it has been discussed and well documented since the 1960's [5] Unfortunately, there has been a serious lack of action to date towards substantially addressing the current realities and participation rate of First Nations in conflict with the law Undoubtedly, initiatives have been partially impeded because of the abundant disagreement as to whether the criminal justice system itself has, in fact, failed First Nations, and, if it has failed, the reasons for this failure and the discovery of appropriate solutions to address the problem While the reality of First Nations overrepresentation is undisputed, its recognition as a failure of the criminal justice system is contested Whether the overrepresentation is indicative of the failure of the criminal justice system is a matter of debate between and within state-sponsored and First Nation discourse [6]

The competing discourses identified here originate within the criminal justice literature, either as (1) state-sponsored documents, inquiries and commissions and (2) those works written from, and in support of, First Nations perspectives of proposed criminal justice policy and/or reform.[7] These two positions are utilized because they have historically been construed as ideologically dichotomous due in part to their autonomous and competing ways of viewing the relationship between First Nations and the criminal justice system and criminal justice reform. However, over the last ten years there has been some ideological overlap within these competing discourses on criminal justice reform One aim of this thesis is to examine this distinction in order to illustrate the recent similarities and differences. In the end, while there still may be historical significance to these categories, it could be suggested that they no longer serve as a basis for distinction and points of

---

[5] The awareness of the striking relationship between the criminal justice system and First Nations began in 1967, with the Canadian Corrections Report, Indians and the Law. Since that time over thirty government sponsored inquires have reviewed the over-representation problem.

[6] For the purposes of this thesis, discourse means the published written works, papers, articles and documents that exist in reference to the relationship between First Nations people and the criminal justice system. I have identified two primary views within the literature, those which have emanated from the state and/or state-sponsored initiatives (i.e., criminal justice documents and policy proposals) and those which have originated from First Nations people and their supporters.

[7] The potential limitation of identifying these discourses may be the sole reliance on published works and the potential ability of some people to dominate that literature. Nevertheless, there is utility in addressing the fact that such views exist and persist in these ways. The strength of grouping the debates as competing discourses allows one to examine how the arguments have been constructed and identify their underlying assumptions.

definition between them While their similarity may prove to be advantageous in the fight for recognition or 'space' for parallel systems of justice, it will be suggested that without political will from the government such shared views of criminal justice reform have little basis for their eventual development, implementation and realization

A review of the literature within state-sponsored discourse illustrates that the overrepresentation of First Nations people in the criminal justice system has been framed in three differing ways (1) as a problem of inadequate due process and procedural justice for First Nations, (2) as a problem of the social context and realities faced by First Nations and, therefore, inequities in the accessibility and benefit of law, and (3) as a problem of the cultural inappropriateness of the system and, therefore, a problem of access to social justice This framework has supported a dichotomy of reform strategies within the state-sponsored literature which can be summarized as the difference between access to law and access to justice Access to law literature refers to those micro-reforms, which essentially tinker with the criminal justice system in order to better accommodate First Nations within it, in other words, reform here aims to provide First Nations with better access to law and legal process. Access to justice literature stresses macro-reforms which address the pursuit of social justice or self-determination for First Nations people. This has been translated into criminal justice reform as the development and implementation of parallel legal orders[8] for First Nations. Unfortunately within state-sponsored discourse parallel legal orders have remained either largely undefined, being a function of each particular First Nation community, or narrowly defined as tribal courts Notwithstanding this tendency, the paramount emphasis within the social justice/access to justice paradigm has

[8] I refer to the concept of justice 'orders' for two reasons. One, I believe that due to the vast differences in terms of culture, history, and social and economic conditions across the First Nations within Canada there could not exist one universal model of justice which would be equally appropriate for all nations. Two, a 'justice order' in contrast to the concept of 'justice system', does not imply the familiar conception of justice indicative of the state system which consists of separate and autonomous-like components which together make up a whole system; using the term order, then, does not invoke implicit comparisons through terminology. As well this allows the terminology to be consistent with later discussions on a conceptualization of justice systems as equivalent to that of other normative or regulatory orders. While generally provided here, this last point will be argued later in the thesis.

been First Nations' autonomy over criminal justice matters and the incorporation of First Nations culture in their parallel legal orders

A review of the literature within First Nation discourse and justice initiatives illustrates that the overrepresentation of First Nations people in the criminal justice system has been conceived primarily in terms of cultural conflict For First Nations, overrepresentation is a problem which may be linked directly to the subjugation of inherent rights and historic colonial oppression and social relations The pursuit of social justice here is paramount and is viewed as the realization of self-determination The ethnocentric bias of the criminal justice system is perceived as the underlying cause of the overrepresentation of First Nations people in the system and, in response, solutions are aimed at developing and implementing cultural values and traditional concepts of justice in order to obtain culturally relevant and appropriate criminal justice processes and/or orders for First Nations. While there are a range of justice initiatives offered from tribal or 'traditional' courts to sentencing circles, the ideal solution is framed in term of differing and parallel justice orders for First Nations There has been an acknowledgment that immediate reforms to the existing system are necessary, however this would only be in conjunction with the appropriate and notable reform identified parallel orders of justice for First Nations.

There has been a tendency within First Nation discourse to suggest that the amount of culture or tradition evidenced within justice initiatives or orders will determine whether that initiative/order is 'assimilationist' or 'revolutionary' If a justice initiative relies largely on First Nation culture and tradition, it is considered as macro-reformist or revolutionary in nature, if it has little or no Aboriginal culture or tradition, and incorporates many mainstream justice processes, structure or logic, then it is considered micro-reformist or 'assimilationist' in nature What is considered the ideal is a new justice

order that is largely informed by First Nations tradition and values and resists or rejects significant incorporation of the mainstream systems structures or logic.[9]

Two levels of criminal justice reform emerge within both of these competing discourses: (1) support for the development of parallel systems of justice for First Nations people, and (2) support for changes within the existing criminal justice system to better accommodate First Nations. Those solutions that are focused on parallel orders of justice for First Nations also support immediate changes within the existing system.

There are significant differences in the state-sponsored and First Nation discourse regarding criminal justice reform, including most significantly, the historical tendency for state-sponsored initiatives of criminal justice reform to deny the ethnocentricity of the criminal justice system and rely upon micro- procedural and processual reforms, rather than reforms which are fundamentally geared toward social justice. However, in recent years this has changed and there has been a convergence within the state-sponsored proposals of reform, such that the cultural conflict of the mainstream system is highlighted as the key focus of reform. So, in fact, the longstanding dichotomy between state-sponsored and First Nation discourse is not entirely accurate any longer; there are some key similarities in conceptualizing the overrepresentation problem as one of social justice and the necessity to support justice reform measures as part of the self-determination

---

[9]This view is widely held within the First Nations discourse on criminal justice reform. It is meant to suggest that a separate legal order would allow First Nations to pursue justice within a more appropriate and meaningful context than the mainstream criminal justice system. Much of the argument surrounding criminal justice reform has in fact polarized debate to force one to commit to the either/or dichotomy about Aboriginal justice: whether an entirely separate First Nation legal order or adaptation of the existing criminal justice system is required. Most discussion within the First Nations literature has rejected the adaptation of the system and supported separate justice orders under the assumption that relationships between legal orders or adaptation of the current system usually implies an extension of the mainstream system or continued cultural oppression. This view to resist mainstream justice structures or logic is explicitly and implicitly argued and supported in the literature. Perhaps the strongest advocate of resistance to mainstream justice structures and logic is Patricia Monture-Okanee, e.g., "Thinking About Aboriginal Justice: Myths and Revolution," in R. Gosse, et al., Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice, Saskatoon: Purich Publishing, 1994, pp. 222-234, and her article with M.E. Turpel, "Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice, University of British Columbia Law Review, Annual, 1992, 26, SPEISS, pp. 239-279. Generally, see: Gosse et al.'s collection above.

process. This does not deny, however, that those state-sponsored initiatives rooted in access to law will continue to persist and challenge the assumptions of the necessity of social justice for First Nations within criminal justice reform

As well, there have been important conceptual similarities within the respective state-sponsored and First Nation discourses, i.e., the reliance upon and evaluation of criminal justice reform within a false dichotomy. Within both discourses, there is a tendency to view criminal justice reform as either pro-assimilationist or pro-revolutionary. This false dichotomy emerges within state-sponsored initiatives in terms of an assimilationist/revolutionary model which articulates the differences between criminal justice reforms as distinctions between access to law/access to justice. First Nations discourse similarly incorporates this binary within its analyses as a function of the amount or level of tradition that is incorporated within their justice initiatives. In perspective, this binary has essentially amounted to the same types of assumptions within both discourses, where (1) assimilationist strategies are evaluated as comparable to micro-reform or tinkering with the system, and (2) revolutionary justice initiatives are equated with macro-reform or the pursuit of self-determination.

This false dichotomy does little but create a situation where evaluation of any initiative is seen in terms of assimilation or revolution; analysis has been limited to "either-or" conclusions which dictate that an initiative which is not considered pro-assimilationist is, by implication, considered pro-revolutionary. The result is an implicit assumption that if an initiative incorporates many characteristics of the mainstream criminal justice system, then it is assimilationist (micro-reformist) or bad and, on the other hand, if the initiative is rooted in First Nation culture and tradition it is revolutionary (macro-reformist) or good. The danger of such binary analyses is that they do not allow that an initiative could incorporate aspects of the mainstream system with good or liberating consequences, nor is there an allowance made for the possibility that a revolutionary initiative could have harmful or oppressive results.

Similarly, within the discourse-level of analysis provided here there has been a tendency for both state-sponsored and First Nation perspectives to rely on a particular romanticized conception of First Nation culture and tradition within criminal justice reform initiatives. Romanticized views of tradition and culture include such notions as community harmony and restitution as unique aims of 'traditional Aboriginal justice'-- cultural values which could, in fact, be applicable to other non-Aboriginal cultures and communities, thereby relegating these goals for First Nations justice strategies as inadequate. The generalizations put forward stressing the cultural inappropriateness of the system may be just as applicable to the experiences of at least some 'others' in Canadian society, and while this does not undermine the First Nations perspective, it does question the overall goals as being somewhat uniquely 'First Nation'. As well, such utopian generalizations serve to undermine the practical realities that must be circumvented to overcome such implementation, e.g., factionalism in communities, centralized and hierarchical governance structures (as imposed through the Indian Act), loss of traditional lifestyles, the difference in current conditions within First Nations communities, and so on.

The reliance on cultural romanticism by First Nations in their quest for justice may be understood as a product of the necessity of illustrating how different their justice alternatives would be in relation to the mainstream criminal justice system. With the high degree of public profile accorded such initiatives, it may be that there would be less public support for more similar methods of justice or if the practical obstacles were made obvious. This may undermine the legitimacy of the claims and perhaps undermine the confidence supporters may have in such views and options. For state-sponsored discourse one might interject that such romanticized views of culture may be incorporated due to the inclusion of First Nations as members within the state-sponsored initiatives. In such cases, the state may be perceived as more responsive to First Nations claims and therefore, legitimate at least on the more superficial, proposed policy level. This does not suggest that such state-policies will in fact be implemented, however the state may look more responsive and committed to real change.

While pursuing traditional First Nation concepts of culture and tradition in reform initiatives as a means of addressing the ethnocentricity of the criminal justice system, the tendency to rely on romanticized views of culture and tradition, as well as the inevitability of culture within communities, as the fundamental assumption of reform is problematic Culture is not static or universal, nor will all First Nations experience culture similarly within or across their communities, rather culture is dynamic and context-specific Reliance on romanticized views of culture inhibits proper evaluations of criminal justice reform, glossing over issues of feasibility and practical implementation in particular First Nations communities. Resistance to the view of cultural determinism is necessary in order to properly develop and evaluate justice reform initiatives in terms of their suitability and relevance to the community.

There is support for the view which recognizes the dynamism of tradition and avoids static constructions of culture.[10] The rejection of cultural determinism is necessary in order to get at the realities of implementing criminal justice reform based on First Nations concepts of justice, and to explain why there will be competing views of justice and variations of traditional concepts of justice within differing First Nation communities. The realities of what structures may be implemented may not just be a question of internal community politics but essential differences in what is considered traditional within the community A reliance on cultural determinism may not be adequate to explain why communities will be able to implement certain justice initiatives or explain why differing levels of culture in justice initiatives are sought in the first place.

The reliance of both the state-sponsored and First Nation discourse on false dichotomies and romanticized views of First Nation culture and tradition begs the location of alternate ways of envisaging Aboriginal justice initiatives. One of the consequences of viewing justice initiatives within an 'either-or' relationship is the tendency to centralize the role of

---

[10]For example, see: Adam Kuper, The Invention of Primitive Society: Transformations of an Illusion, London: Routledge, 1988; E.J. Dickson-Gilmore, "Finding the Ways of the Ancestors: Cultural Change and the Invention of Tradition in the Development of Separate Legal Systems," Canadian Journal of Criminology, 1992, 34, 3-4, pp. 479-502.

the state Consequently, if an Aboriginal justice initiative has similar characteristics or functions to those of the mainstream legal system, then it is considered an extension of that system. Conversely, if an initiative is viewed as having characteristics of traditional First Nation concepts of law it is considered in terms of its distance from the state system and consistent with that that distance, as macro-reformist or revolutionary. In both cases, analysis of the similarity and difference of the initiative to state law is considered appropriate and paramount; defining the initiative's essential nature within these binary terms reinforces this implicitly one-sided view of power in society, where the state has the power to define and control the justice system and First Nations are powerless in their attempt to effect real social change. Such views imply that Aboriginal justice could only be considered liberating or empowering for First Nations within very narrow, implicitly state-defined terms.

To assume the liberating quality of the Aboriginal justice initiatives in these restrictive terms does not address the reality that even a separate and parallel First Nation justice order will have a relationship with the state criminal justice system on some level until such a time that such the Constitution is amended.[11] Until such a time, First Nations will continue to be under the reality of the Indian Act or under the scope of the federal government within a negotiated self-government settlement. In perspective, then, it would seem necessary to find explanations which may be able to account for a state-First Nation relationship while at the same time not polarizing power relations within an 'all-or-nothing' view. Such an assertion begs one to provide an alternate means of explaining how Aboriginal justice can be liberating or empowering for First Nations while avoiding romantic or unrealistic views of the culture incorporated within a given justice initiative.

---

[11]Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.) 1982, c.II. I acknowledge the reality that First Nations, as all persons in Canada, are subject to federal legislation and therefore, are subject to its jurisdiction and limitations. First Nations justice orders will therefore be legislated under this legislation and subject to the jurisdictional limits it prescribes until such a time that there is recognition of inherent Aboriginal rights and sovereignty.

Research Question

This thesis aims to examine the potential emancipatory value of Aboriginal justice orders without relying on these binary analytical categories which render such initiatives as either assimilationist or revolutionary projects and, thereby, as either inherently bad or good. The impetus of such an undertaking is to explore the extent to which Aboriginal justice orders may be seen as fulfilling the social justice mandate of self-determination. Therefore, the intention of this project is to answer the following research question. viewed within a larger paradigm of social justice, to what degree can the achievement of Aboriginal legal orders be defined as empowering, and what is the relationship between the varying incorporation of traditional concepts of law in those orders and their potential capacity for liberation and thereby, positive social transformation for First Nations?

At present there is a dearth of published information on the operation or interaction of Aboriginal legal orders and the Canadian criminal justice system which permit the evaluation of the emancipatory potential these could have for First Nations. This may in part be due to the lack of information on Aboriginal justice orders generally and/or a function of the comprehensive nature such a research study would require. Given this, the project at hand relies on theoretical insights to suggest an answer to the question posed above.

Theoretical Affinities

The main operating assumption of this thesis is that the dualist notion of assimilation/revolution is not an adequate analytical tool in which to explore social transformative projects such as Aboriginal justice. As suggested earlier, within such a dichotomy, analysis is reduced and confined to the following premises: (1) that the state and its structure dominates society; (2) power and influence in society are determined by the state and are uni-directional, and; (3) only revolutionary projects can overthrow the power of the state. What is required is a different way to envisage power and social

relations that does not rely on meta-power conceptions[12] or centralize the role of the state; what is needed is a theoretical window that is able to account for individual agency and provides a way to see social interaction as not predetermined and one-sided.

Legal pluralism is well suited to the task of exploring the relationship between legal orders in First Nations communities and the mainstream criminal justice system. Traditionally, legal pluralism as a body of work has examined the relationship between state and customary law, however it has tended to rely on similar dichotomous assumptions and views of meta-power that the analysis here attempts to avoid. More recent insights in legal pluralism have emerged which tend to have characteristics which are indicative of postmodern work. As such, more fluid conceptions of power are recognized as well as non-legal forms of ordering. The advantage of utilizing legal pluralism are its insights and assumptions regarding the heterogeneous quality of law and the relationships between distinct legal orders. Most significantly, it provides a way to explain how legal orders are dynamic, acting in competitive and mutually influencing ways. This is of particular relevance here, where a significant element of the research is challenging the idea that the mainstream criminal justice system is able to monopolize power, rather than compete for it in a given context, and relegate First Nations people to inevitably powerless positions.

Key to the legal pluralist theory utilized here is its reliance on a conception of power that is rooted in both the micro- and macro- contexts. In a micro-sense, the individual person is viewed within their matrix of social interaction and is considered competent to decide between competing regulatory and normative orders as to what particular behaviour and action they will choose and follow. In this way, people act and behave in independent ways and are therefore able to be viewed as actively negotiating power by deciding which regulatory orders they will follow. In the macro-sense, the power to define and regulate the social body does not reside in one unitary body or person. Rather normative orders,

[12] Reference is made here to macro analyses of power such that is found in Marxist and Feminist literature where power emanates from one broad source and is wide-spread, dominating and inevitable. In such models of power, those who have power and those who are powerless are structured within society and are unable to transcend those particular power relations.

or regulatory orders, expand into society as a method of social regulation; control or social regulation is seen as the process through which a person internalizes the norms and standards of a particular normative order. In this way, normative orders are seen as potentially organizing social behaviour. Key to this macro-view is that regulatory orders in society act as a normalizing force, with value-laden concepts thereby normalizing behaviour. Both micro- and macro- power are not inevitable but are flexible and dynamic. The utility of these views of power is that they allow one to explore the mutually influencing relationship between regulatory orders and permit one to see how an individual may resist or negotiate power. For a discussion of Aboriginal justice, legal pluralism illustrates how First Nations can negotiate power in social relations Power as a site of struggle and individuals as agents of power, illustrate how context specificity is necessary to evaluate the potential liberation or oppressive nature of power

Similarly, legal pluralist theory is also useful in debunking the idea of cultural determinism. As is the case with analyses of power, culture is not structurally determined but negotiated within social relations. The community rather than culture, as a site of negotiated social relations, is a better way to conceptualize First Nation justice initiatives. Culture is a regulatory order that may or may not normalize social behaviour; the normalizing force of culture will play out within the specific community that will develop or implement a justice initiative. The success or failure of that initiative will not necessarily be a function of the culture in the community but the negotiated social relations within it This is a far better analysis than simply assuming that culture alone will account for the existence and persistence of a justice initiative.

Legal pluralism is also useful in that it illustrates how First Nations justice initiatives may be constructed as authoritative and legitimate within and outside of their particular First Nation communities; central to this are the following insights:

1 There are a plurality of legal orders in society, not simply one law or legality.
2 To understand how law operates in society one must study both the official and non-official legal orders
3 Regulatory orders are based on norms which regulate social behaviour, so the official legal order does not have exclusive law-making ability
4 Regulatory orders are in constant and variable interaction which is not predetermined.
5 Legal orders are mutually influencing and dynamic.

These insights acknowledge the plurality of regulatory orders in society and postulate that the legitimacy and authority of rules of behaviour are a function of the context and social relations within the social milieu There is room within the legal landscape to assume that First Nations legal orders could be recognized and considered legitimate As well, the interaction between First Nations legal orders and the state legal order can be shown to be a site of struggle, rather than a static context in which one legal order has an inherent and pre-determined power over another This will assist in developing a basis upon which to postulate that, in fact, there is room for optimism for the empowering potential of Aboriginal legal orders

Legal pluralist theory illustrates how, in theoretical terms, First Nations' justice initiatives could be realized in practical terms. It also provides a better evaluative tool to discern the success and failure of proposed justice initiatives. In the end, I argue that through a temporal and context-specific evaluation of Aboriginal justice orders, there may be room to consider their liberating potential as independent of the level or degree to which traditional concepts of justice are incorporated. This conclusion is not based on a rejection of the importance of culture or a view that a justice initiative could in fact be assimilationist, but is instead rooted in a developmental view of Aboriginal justice. Here Aboriginal justice is deemed to be properly considered as a process of development toward self-determination and social justice, wherein the strategies of social justice are realized in two primary ways: (1) the involvement of traditional processes and law within the criminal justice processes and structures and/or (2) an incremental assumption of control over criminal justice processes and administration. As such, at any one time one of these aims may seem more influential than the other but this should not subject the

evaluation to a binary conclusion of good/bad based on assimilationist/revolutionary standards

Overview of the Document

This work aims to provide two interrelated elements, i e , deconstructive as well as constructive components, within a discussion of Aboriginal justice First, review is offered of the state-sponsored and First Nation discourses that have emerged within the Aboriginal justice literature. Here, the aim is to critically analyze both discourses as a way to deconstruct the implicit dichotomous thought that has historically emerged between and within these two views. Particular attention is given to the construction of the assimilationist/revolutionary debate and the romanticism of culture implicitly assumed in both discourses. Second, this thesis utilizes legal pluralism as a way to reconceptualize the debates found within these two discourses. Through theoretical argument I offer a way to reconstruct the potential for the empowerment of First Nations out of the assumed win or lose view of justice initiatives and the realization of self-determination. In the end, there is a rejection of the assimilationist/revolutionary binary and an embracing of a developmental approach to social change which injects a more grounded and practical view of social transformation in contemporary society

In this pursuit, discussion first turns to an overview of the state-sponsored strategies and proposals made to address the overrepresentation of First Nations people within the criminal justice system. Chapter two discusses the three general views that emerge within the state-sponsored perspective as a way to combat the problem of overrepresentation In essence, a dichotomy emerges within state-sponsored discourse between criminal justice reform based on access to law and access to justice Implicit within chapter two is a starting point from which to view the support for Aboriginal legal orders outside of First Nations communities. This chapter also provides a starting point from which to contrast the potential differences in views that emerge between state-sponsored and First Nation perspectives in order to inform the general degree of support (i e , financial and

organizational) and recognition Aboriginal legal orders may find within the Canadian legal landscape

To provide a basis for understanding the differences in philosophy behind First Nation and state-sponsored strategies of criminal justice reform, an overview of the fundamental cultural differences in world-view between Euro-Canadian[13] and First Nation people is provided. A presentation of the universal values of First Nations culture and concepts of justice are provided as they appear within and are indicative of First Nation discourse. The fundamental purpose of this chapter is examine the claim that the Canadian criminal justice system is structured on concepts of justice that are alien to First Nations people. Examples of this cultural conflict which emerge in the criminal justice system are provided, with particular emphasis on both the discourse (i e., professional language and legal doctrine) and practices of the criminal justice system. Despite the fact that such cultural explanations and norms are offered within First Nation discourse, caution is offered as to their usefulness and generalizability. Chapter three argues for a critical view of culture and less reliance on romanticized versions of culture for informing Aboriginal legal orders.

Implicitly, chapter four completes the comparison with the state-sponsored discourse initiated in chapter two, by offering a summary of the corresponding criminal justice reform initiatives operating and offered within First Nation discourse. In contrast to the state-sponsored, 'access to law' reform models, First Nations appear to root justice initiatives within the larger context of social justice generally, most notably within the broader political struggle for self-determination. The points of convergence and divergence between the state-sponsored and First Nations' views of Aboriginal legal orders is provided, with particular focus on social justice issues. Also, emergence of the assimilation/revolution debate amongst First Nations justice reformers is highlighted and provides a basis from which to offer conjecture about the similarity in discourses. The

[13]The term 'Euro-Canadian society' is used in order to highlight the dominant cultural basis of Canadian society. The generic term 'Canadian society' is avoided because I believe it obscures the dominant ethnicity of society.

inability to reduce state and First Nations perspectives into entirely separate categories offers a way to begin reconceptualizing the inevitability of state power and dominance

Chapter five reviews legal pluralism literature in order to distinguish between the dominant streams of legal pluralism theory In contrast to the doctrinal and social scientific approaches, argument is made regarding the suitability of postmodern legal pluralism as a way to move beyond dualist analyses and their narrow views of power What is offered here are the strengths of legal pluralism in terms of its ability to overcome dichotomous thought, conceptualize a plurality of legal orders, de-center the state, acknowledge the dynamic interaction between and within regulatory orders and indicate the basis for the legitimacy of regulatory orders. The strengths of this analysis to account for individual agency and the production of power within the micro and macro levels form the basis for the conjecture that Aboriginal legal orders may be socially transformative projects The tendency to assume cultural determinism is highlighted.

Chapter six applies the insights from legal pluralism to the Canadian context The relationship between the legal system and Aboriginal legal orders is discussed in terms of the likelihood that Aboriginal legal orders can be recognized and legitimated in society Discussion of the potential extent of the relationship between some Aboriginal legal orders is offered, as are cautions of the necessity to evaluate the effectiveness of current Aboriginal legal orders for their ability to realize social justice aspirations. A better way of conceiving that potential is offered by suggesting the need for temporal and context-specific analysis, thereby allowing for a developmental view of the achievement of social justice. In this way, the assimilationist/revolutionary debate is circumvented and social justice considered in terms of two relative projects. (1) the amount of real change in the current system as determined by the use of community-relative needs and aspirations, and (2) control over criminal justice processing. Once cultural determinism is rejected, reconceptualization of culture as the basis of Aboriginal legal orders must be addressed, what is offered here to replace "culture" is the concept of community-based justice orders In addition to historical, linguistic, cultural, social and economic differences within First

Nations, community mobilization and identity are offered as the key factors in determining the success of Aboriginal legal orders Examination of alternative disputes resolution literature allows specific points of potential empowerment to be noted. This is followed by a brief concluding chapter

Chapter 2
A Question of Over-Representation

In recent years there has been much attention given into the problems and conditions of the criminal justice system and its components generally, however more notorious has become the consistent rate of participation in the criminal justice system by First Nations There are alarming statistics that illustrate the extent to which First Nations are disproportionately represented at virtually every aspect of the criminal justice system [14] However, despite acknowledgment of this longstanding problem there remains a perception that very little has been done to address it, a perception which it would appear is not entirely accurate Since the 1960's, there have been a significant number of state-sponsored commissions, studies, inquiries, and reports that have examined the problem of, and posed solutions for, First Nations' over-representation within the criminal justice system. With such volumes of work and attention generated to address the problem it is prudent to examine why the problem continues to persist.

To begin, what underlies this problem is not simply the magnitude of evidence that continues to suggest First Nations are over-represented in the criminal justice system, but that it has become the benchmark of how the system functions generally Over-representation has been endowed as political rhetoric, and has become defined as the sole

---

[14]This problem has been well documented by many researchers, academics and governments. The disproportion refers to the percentage of First Nations involved at particular points (i.e., arrest, detention, incarceration) in the criminal justice system as compared to their percentage in the general Canadian population. For example, while First Nations account for approximately 1.5-2 % of the Canadian population, they make up about 8-10% of the federal correctional population. Carol LaPrairie, "The Role of Sentencing in the Over-Representation of Aboriginal People in Correctional Institutions," Canadian Journal of Criminology, 1990, 32, 3, p. 429. The Report of the Aboriginal Justice Inquiry of Manitoba, Vol. 1: The Justice System and Aboriginal People, Winnipeg: Province of Manitoba, 1991, (hereinafter "AJI Report, Vol. 1"), p. 2, has figures that show Aboriginal people consisting of 11.8% of the total Manitoba population, yet accounting for more than 50% of Manitoba's prison population. Similar to this, A. Cawsey, Justice on Trial, Report of the Task Force on the Criminal Justice System and Its Impact on the Indian and Metis People of Alberta, Volume 1, Edmonton: Government of Alberta, 1991, (hereinafter "Alberta Justice on Trial, Vol. 1") found that "in 1989, 29.5% of persons admitted to provincial and federal correctional facilities were Aboriginal (p. 6-7). "For women the figure was 44.6%"(p. 8-18).

The impact of this second view on addressing the over-representation of First Nations in the justice system is revealed within strategies directed at programming within the system that better accommodates the social and economic realities of First Nation people Reform is aimed at an examination of why Aboriginal people have a propensity to become involved in crime and how to make them more comfortable within that system. It is similar to a liberal response in that the problem remains focused on the individual or individual circumstance and extracts the argument away from the fundamental tenets underlying the justice system itself (i.e , the question of its overall capacity to render justice is not addressed). That is to say, reform considers the social context of the individual First Nation person but remains rooted in bettering the system in light of the special needs or nature of that individual. Some changes to the system are incorporated but only within the terms and logic of the system.

The Final Report on the Task Force on Aboriginal People in Federal Corrections provides a good example of the rationale offered for Aboriginal-specific programs within this perspective. One reason why the system should enhance First Nations access to justice is because they have protection under the Charter, particularly S.15.[40] Providing for the equality of all persons before and under the law allows for the removal or provision of alternative programming if seemingly neutral laws, policies, or programs have adverse effects on different segments of the population, in this case First Nations. The Charter also provides the authority for special programming to exist without being challenged as discriminatory as it would have the potential to exclude participation by non-First Nation people. The underlying rationale for Aboriginal-specific programming resides within the documented reality that "[t]he socio-economic conditions of Aboriginal peoples, as compared to other Canadians, are discouraging" and therefore Aboriginal people require special treatment.[41] Specific areas identified which require Aboriginal-specific programs

---

[40] Solicitor General of Canada, Task Force on Aboriginal People in Federal Corrections, Ottawa: Minister of Supply and Services Canada, 1988, p. 10-11.

[41] It is well documented that First Nations in Canada are subject to frightening socio-economic realties not necessarily experienced by other Canadians. This does not preclude the possibility of other people in Canada suffering socio-economic problems, however it is more poignant in the context of the colonization of Canada and the historical relationship of First Nations and the Canadian government.

State-Sponsored Criminal Justice Initiatives

The awareness of the striking relationship between the criminal justice system and First Nations began in 1967, with the Canadian Corrections Report, Indians and the Law.[18] Since that time over thirty government sponsored inquires have reviewed the over-representation problem. Some of the most recent reports completed include: the Nova Scotia[19] and Manitoba[20] inquiries, the Creating Choices report[21], the Rolf[22] and Cawsey[23] reports in Alberta, the Law Reform Commission Report[24], and the two Linn[25] studies in Saskatchewan.

Three general avenues of reform to address the relationship between First Nations and criminal justice emerge within these studies and inquiries. The first strategy centers on improving or fine-tuning the criminal justice system as it currently operates. This strategy identifies proper legal process and procedures as well as better access to justice for First Nations as the necessary foci for change. The second strategy of reform concerns itself with addressing the social context and realities of First Nations in Canada and the subsequent impact that has on First Nations and the justice system. Reform is directed at programming that better accommodates the different needs and circumstances of First Nations people within the system. The last strategy of reform is rooted in the belief that to address the problems of the criminal justice system for First Nations, the broader social, political, and ideological context must be considered. Here, then, reform is aimed at

---

[18] Marianne O. Nielsen, "Introduction," in Robert A. Silverman and Marianne O. Nielsen, eds., Aboriginal Peoples and the Canadian Criminal Justice, Toronto and Vancouver: Butterworths, 1992, p. 3.

[19] Royal Commission on the Donald Marshall, Jr., Prosecution, Volume 1, Halifax: Province of Nova Scotia, 1989, (hereinafter "Marshall Commission, Vol. 1").

[20] AJI Report, Vol. 1, supra note 14.

[21] Creating Choices: The Report of the Task Force on Federally Sentenced Women, Ottawa, Correctional Service of Canada, 1990, (hereinafter "Creating Choices").

[22] C.H. Rolf, Policing in Relation to the Blood Tribe, Report of a Public Inquiry, Edmonton: Government of Alberta, 1991.

[23] Alberta Justice on Trial, Vol. 1, supra note 14.

[24] Report on Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice, Ottawa: Law Reform Commission of Canada, Report No 34, 1991, (hereinafter "Law Reform Report").

[25] P. Linn, et al., Report of the Saskatchewan Justice Review Committee, Regina: Government of Saskatchewan, 1992, and Report of the Saskatchewan Metis Justice Review Committee, Regina: Government of Saskatchewan, 1992.

changing the nature of the criminal justice system in a post-colonial society by providing First Nations with some autonomy over criminal justice processes and administration in their communities.

A. Legal Process Focus

Framing overrepresentation as a matter of improving the system for First Nations by improving access to legal procedure and processes obviously limits solutions to those simply ensuring due process of law. This view emanates from a particular definition of 'justice' and how law acts to achieve it. Here, justice is defined in liberal terms as equivalent to formal law; justice can be found in the actual processes and operations of law. In other words, for liberals, justice is ensured by following the rules of the legal system (laws) and the enactment of the neutral, objective, and fair adjudicative due process. As long as all people have access to the courts and competent legal professionals they will, from this point of view, be able to access justice.

The limitations of the legal process view of the problem are exemplified in the Royal Commission on the Donald Marshall, Jr. Prosecution.[26] The report was initiated in response to the wrongful conviction for murder of Donald Marshall, Jr., a Mi'kmaq who served eleven years in prison for a crime he did not commit before being exonerated and released. The mandate of the Commission was restricted to an examination of how the system treated this individual and the suggestion of changes to the system based on what went wrong in that individual case.[27] The investigation revealed that because Donald

---

[26] Marshall Commission, Vol. 1, supra note 19.

[27] The Royal Commission, itself, was established due to public pressure over the handling of the case. Significantly, the government focused its inquiry on the problems legal process in the case. This particular focus is reiterated in the restrictive mandate of the Commission:

> [The Royal Commission was established] with power to inquire into, report your findings, and make recommendations to the Governor in Council respecting the investigation of the death of Sanford William Seale on the 28th-29th day of May, AD, 1971; the charging and prosecution of Donald Marshall Jr., with that death; the subsequent conviction and sentencing of Donald Marshall Jr., for the non-capital murder of Sanford William Seale for which he subsequently found to be not guilty; and such related matters which the Commissioners consider relevant to the Inquiry. (Terms of Reference of the Order in Council appointing the Royal Commission, Government of Nova Scotia, October 28, 1986.)

Marshall was Mi'kmaq he was singled out as the prime suspect in the murder investigation[28] and did not receive adequate legal representation.[29] As well, the Commission focused on the numerous other procedural errors at all stages of the investigation, prosecution, and conviction.[30] For the Commission, Donald Marshall was treated with less than adequate due process in part due to his being Mi'kmaq and the actions of specific criminal justice personnel.[31] The sole issue of wrongful conviction was framed in terms of case mismanagement.

In the end the Commission did little other than suggest that the mistreatment of Marshall occurred because a two-tiered system of justice exists in Nova Scotia -- the system responds depending on the wealth, status, and race of the person investigated [32] Recommendations were aimed at alleviating the problems Mi'kmaq people face in the criminal justice system. Not surprisingly, included in the solutions proposed was the recruitment of Mi'kmaq people into the system, the improvement of services for First Nations, and the provision of cross-cultural training for non-Native justice employees. The mandate and inquiry of the Commission allowed for the possibility of addressing the broader cultural and historical factors contributing to this case, however there was no analysis or link to systemic discrimination and racism in the criminal justice system The

---

The emphasis was focused on the miscarriage of justice of Donald Marshall, Jr., specifically why it occurred so to prevent this 'exceptional problem' from happening again in the future.

[28] Marshall Commission, Vol. 1, supra note 19, p.41.

[29] Ibid., p. 73.

[30] For example, police officers lied about talking and influencing witnesses, the trial judge incorrectly interpreted the doctrines of evidence law, the crown attorney did not provide timely revelation of contradictory statements, and defense counsel did not argue all the errors of law at the appeal.

[31] The Commission concluded that:

> The criminal justice system failed Donald Marshall, Jr. at virtually every turn from his arrest and wrongful conviction for murder in 1971 up to, and even beyond, his acquittal by the court of Appeal in 1983. The tragedy of the failure is compounded by evidence that this miscarriage of justice could -- and should -- have been prevented, or at least corrected quickly, if those involved in the system had carried out their duties in a professional and/or competent manner. That they did not is due, in part at least, to the fact that Donald Marshall, Jr. is a Native.

Royal Commission on the Donald Marshall, Jr., Prosecution, Digest of Findings, Halifax: Province of Nova Scotia, 1989, p. 1.

[32] Marshall Commission, Vol. 1, supra note 19, p. 220.

Commission preferred to examine only the 'differential treatment' Donald Marshall received.[33]

It seems that those with vested interests[34] in the system are well suited to examine the procedures of the system but not to question the underlying bureaucratic and institutional logic that permeates it.[35] The noticeably absent analysis of systemic discrimination and racism in the criminal justice system here can be linked to the overall avoidance of questioning the integrity and impartiality of the system.[36] The ease with which solutions can be implemented that deal with access to justice or procedural changes, lend to their enactment, leading one to make reforms without examining the depth and nature of that reform or its reality.

---

[33] In Mary Ellen Turpel, "Further Travails of Canada's Human Rights Record: The Marshall Case," International Journal of Canadian Studies, 1991, 3, pp. 27-48, she describes the Commission's avoidance of racism and historical roots to colonialism as follows:

> The Report steps into the messy matter of racism by hinting at different treatment and by requesting a special study on Mi'kmaq and the criminal justice which included a Mi'kmaq perspective. However, the background study, and specifically the submission by Mi'kmaqs appended to that document [Volume 3], did not work their way into the Commission recommendations. (pp. 41-42)

and later says:

> Identifying racism in the manner of the Royal Commission Report is a classic instance of superficiality. The identification of racism in the criminal justice system, apart from the greater context, is a case of not seeing the forest for the trees. This is the historical process of colonization, supported by a repressive, liberal ideology (enforced by the state) which is the forest. (p. 43)

[34] The link between the limited mandate of the Commission, the defense of the overall system, and the specific avoidance of a discussion on how racism or broader social forces play out in the day-to-day dealings in the criminal justice system cannot be overlooked. The evaluation of the system cannot be considered neutral or impartial if those with the authority to analyze and control the critical procedure have been trained within, and continue to be experienced participants of, that system. The legitimacy of the system is what was trying to be restored and maintained. Bob Wall provides similar argument as the impetus to name "three distinguished judges from outside the province" because it could "[afford] an aura of legitimacy for whatever recommendations the Commission might make." Bob Wall, "Analyzing the Marshall Commission: Why It Was Established and How It Functioned," in Joy Mannette (ed.), Elusive Justice: Beyond the Marshall Inquiry, Halifax: Fernwood Publishing, 1992.

[35] The political, cultural and ideological limits of the Marshall Commission is documented well in the collection of articles in Joy Mannette (ed.), Elusive Justice: Beyond the Marshall Inquiry, Halifax: Fernwood Publishing, 1992.

[36] The Commission focused on racism in the sense of how it is practiced in Donald Marshall's case, enabling it to seem professional incompetence or negligence but provided no overall definition or account of racism in context to overall Canadian history and society.

Examining procedure to indicate whether a person received fair treatment essentially limits the analysis to the process and formal nature of the institution(s) under review. An assumption remains that if the process was flawed, then an injustice occurred. For those focused on process, reform is relatively easy -- remove the flaw(s) and thereby restore the dependability and accuracy of law and justice. Consistent with this logic is the idea that, if there is overrepresentation of First Nations, there is something about these particular individuals in conflict with the law that predisposes their involvement with the system.[37]

Assuming proper procedure and process exists in most cases of law, then why are First Nations still over-represented? As indicated in the Marshall Commission, Donald Marshall Jr. was not treated fairly by many of the justice system components in part because he was Mi'kmaq. If this is the case, and the problem stems only from one person or a limited aspect of the system, it is necessary to address why it is a pervasive problem. In fact, it questions the accuracy of the liberal assumptions that the neutrality and objectivity of procedural justice can ensure justice is rendered. Reform strategies focused on procedural changes do not account for this and provide evidence of why the recommendations similar to those found in the Marshall Commission are limited.

B. Social Context Focus

The second outlook on reform, which aims to overcome the high incidence of First Nation people in the criminal justice system, has arguably dominated the other two strategies. The social context view is regularly included in reports I have included in the other two stances outlined here, but they differ as to the degree they address individual Aboriginal-specific initiatives.[38]

---

[37] Or alternatively, from a critical perspective, one could ask the question, what is it about the system that predisposes First Nations from receiving justice in the system? This will be addressed later in the chapter.

[38] I refer to these differing views as part of a continuum of reform strategies. I do not believe any report is exclusively one view; each of the ways to frame the problem seem to overlap in the report and studies. I have included examples of reports in each of the three views because it I believe it predominantly addresses one of the three perspectives I have identified here. For example, the Marshall Commission mainly focuses on legal processes however, it recommends providing programs to address some of difficulties First Nations encounter in the criminal justice system, i.e., establishing a Native Criminal Court with limited jurisdiction.

In contrast to the procedurally focused reform strategies, which hold that the formal structure of the justice system guarantees equal treatment and due process for each individual in society, this second strategy believes that the formal justice system may not, in fact, be impartial and questions a universal standard of justice. Here, two interrelated avenues of reform emerge: (1) where strategies are aimed at alleviating institutional barriers to the justice system for people (i.e., legal language, complex workings of the system, long waiting periods for court, etc.) and (2) where reform is aimed at challenging the neutrality of the system because those individuals who do not fit the 'typical citizen' stereotype do not get the benefit of equal justice (i.e., one who is not male, white, Anglo-Saxon and middle-class).

Significantly, these reform strategies emerge from a concept of justice different from that of the procedurally-focused liberal perspective. While the liberal notion of justice being equivalent to fair and just legal process is still retained, there is recognition that underlying social inequities (e.g., differing class, race, gender, age) create inequities of access to, and benefit of, the law. The justice system is structured in such a way that not all people can use, access, and benefit from law. Justice here is not solely considered to be an issue of procedure but includes the policies and practices of the institutions and processes. This conception of justice is pessimistic regarding the neutrality of the application of law and process, questions the context of law, and seeks to enhance criminal justice services to accommodate the traditional barriers to justice within the system. Differential treatment to meet the 'special needs' of those individuals traditionally unable to access justice or subject to 'injustices' is considered necessary. Within this concept of justice, strategies strive towards the equality of opportunity and equality of results (as defined by the system) for justice. [39]

[39] Aboriginal-specific approaches in the criminal justice system are likened to affirmative action programs where not only is the equality of opportunity important for those involved to be involved in the criminal justice system in the future, but it is necessary to remove the effects of past injustices by providing remedial measures, for instance, policies that give Aboriginal people preferred treatment but may be seen as discriminatory are supported for the short-term. For example, recruiting based on equal qualifications but prioritizes race to increase proportions of First Nations within the criminal justice workforce.

The impact of this second view on addressing the over-representation of First Nations in the justice system is revealed within strategies directed at programming within the system that better accommodates the social and economic realities of First Nation people Reform is aimed at an examination of why Aboriginal people have a propensity to become involved in crime and how to make them more comfortable within that system. It is similar to a liberal response in that the problem remains focused on the individual or individual circumstance and extracts the argument away from the fundamental tenets underlying the justice system itself (i e., the question of its overall capacity to render justice is not addressed). That is to say, reform considers the social context of the individual First Nation person but remains rooted in bettering the system in light of the special needs or nature of that individual. Some changes to the system are incorporated but only within the terms and logic of the system

The Final Report on the Task Force on Aboriginal People in Federal Corrections provides a good example of the rationale offered for Aboriginal-specific programs within this perspective. One reason why the system should enhance First Nations access to justice is because they have protection under the Charter, particularly S 15 [40] Providing for the equality of all persons before and under the law allows for the removal or provision of alternative programming if seemingly neutral laws, policies, or programs have adverse effects on different segments of the population, in this case First Nations. The Charter also provides the authority for special programming to exist without being challenged as discriminatory as it would have the potential to exclude participation by non-First Nation people. The underlying rationale for Aboriginal-specific programming resides within the documented reality that "[t]he socio-economic conditions of Aboriginal peoples, as compared to other Canadians, are discouraging" and therefore Aboriginal people require special treatment.[41] Specific areas identified which require Aboriginal-specific programs

---

[40] Solicitor General of Canada, Task Force on Aboriginal People in Federal Corrections, Ottawa: Minister of Supply and Services Canada, 1988, p. 10-11.

[41] It is well documented that First Nations in Canada are subject to frightening socio-economic realities not necessarily experienced by other Canadians. This does not preclude the possibility of other people in Canada suffering socio-economic problems, however it is more poignant in the context of the colonization of Canada and the historical relationship of First Nations and the Canadian government.

are those incorporating culture and spirituality.[42] An important point of the Task Force, indicative of social context oriented reform strategies was its statement that the achievement of equity for Aboriginal people in the correctional system is dependent on enhanced Aboriginal participation and increased Aboriginal control over programs and services.

The desire and effects of differential treatment is examined in the Report of the Task Force on the Criminal Justice System and Its Impact on the Indian and Metis People of Alberta. Specifically, this Task Force.

> included an examination of the criminal justice system as it affects Aboriginal people according to their demographics for the purpose of identifying the areas in and the extent to which Aboriginal people are treated differently from non-Aboriginal people, and to assess whether that different treatment is desirable or detrimental. Further to that, the Task Force attempted to identify areas where, and to what extent, Aboriginal people *should* be treated differently from non-Aboriginal within the system.[43]

The objective of the report was to identify, within the scope of the current criminal justice system, the problems and solutions for Alberta First Nations in order to ensure they receive fair treatment within the criminal justice system.[44] In the end, the report was consistent with many others in remaining supportive of the history, culture, and spirituality of First Nations and the need to provide differential treatment on the basis that there is unfairness in applying the majority's justice system to the Aboriginal minority.[45] The appropriateness of the system is questioned, but the implicit assumption remains that

---

For a list of general comparisons in education, employment, life expectancy, family life, etc. however, without the link to colonialism see the Task Force on Aboriginal People in Federal Corrections (Ibid., p. 12).

[42] "The socio-economic circumstances demanding special treatment for Aboriginal offenders include their cultural and spiritual background. Programs that are appropriate for non-Aboriginal offenders may not work for Aboriginal people because of those social characteristics." Ibid., p. 13.

[43] A. Cawsey, Justice on Trial, Report of the Task Force on the Criminal Justice System and Its Impact on the Indian and Metis People of Alberta, Summary Report, Edmonton: Government of Alberta, 1991, (hereinafter "Alberta Justice on Trial, Summary Report"), p. 1.

[44] Alberta Justice on Trial, Vol. 1, supra note 14, p. 1-1.

[45] Ibid., p. 1-2.

inequities can be overcome through Aboriginal participation and involvement in better policy development, program planning and service delivery Alternatives are limited to those which can fit into the existing criminal justice system, questions emerge regarding the application of the dominant culture's standard in services but not its underlying appropriateness.[46] The recommendations assume a propriety in the application of the justice system to First Nations and that an increased Aboriginal involvement is necessary, but only in terms of accommodating existing institutions.[47]

Generally, the culturally-relevant programs that have been designed for First Nations and incorporated into the criminal justice system have been targeted at each of its components police, courts, and corrections. For example, Aboriginal recruitment programs[48] and on-reserve police services[49] have been initiated at the policing level [50] In terms of courts, programs such as circle sentencing[51] and native court workers[52] exist Within correctional

---

[46] The report marginally addresses alternative justice structures but only to acknowledge Aboriginal communities intention to seek development of them and conveniently ignores the possibility by suggesting it is something that would have to be negotiated in a different medium:

> whether an Aboriginal Justice system should exist and its scope and intent, is a matter for negotiation between the Indian and Metis people and the Governments of Canada and Alberta. (Ibid., p. 43)

[47] In fairness, this report did make some admirable recommendations such as placing all minimum security prisoners in their home community to serve their sentence and appointing Aboriginal people to operate an Aboriginal Provincial Court to replace existing circuit courts and also be established in urban areas. (Ibid., pp. 17 and 27)

[48] In 1973, a Special Constable Program was designed in conjunction with the Department of Indian Affairs in order to place Native Special Constables on reserves and adjacent areas, with a particular emphasis on crime prevention and community relations. Considerable criticism was leveled at this program, for a succinct review of the major difficulties see: C.T. Griffiths and J.C. Yerbury, "Natives and Criminal Justice Policy: The Case of Native Policing," Canadian Journal of Criminology, 1984, 26, pp. 147-160. The program was eventually eliminated in 1990, and replaced by an Aboriginal Constable Development Program which allowed previous Native Special Constables to take more training and become full members of the RCMP. For discussion see: AJI Report, Vol. 1, supra note 14, pp. 612-615.

[49] In 1991, an on-reserve First Nations Policing Policy was enacted in order to improve policing services for First Nation communities. The impetus of this program is to allow for more community-based and community managed police services on reserves. A description of the program can be found in: Solicitor General of Canada, First Nations Policing Policy, Ottawa: Minister of Supply and Services Canada, 1992.

[50] There are presently operating locally controlled First Nations police services, for example, the Dakota Ojibway Tribal Council Police Force. For a description see: AJI Report, Vol. 1, supra note 14, pp. 615-616. This was also the recommendation in Rolf, supra note 22.

[51] Circle sentencing involves a change in the procedure of the courtroom. Generally, it involves a gathering of people (in a circle) from the community, the police, the victim, the family of the accused,

institutions initiatives such as native recruitment programs, native spirituality programs, native substance abuse programs, native community supervision programs, and elders participation/visitation programs are in operation [53]

Similarly, efforts have focused on educating criminal justice personnel to the individual realities of Aboriginal people in contact with the justice system, i.e., cross-cultural awareness training.[54] At the same time processes have been implemented which aim to recruit more First Nations as employees to work within the system.[55] Much emphasis has been placed on careers in policing and corrections with more recent attention given to reducing the traditional barriers for Aboriginal people in law schools

This reaction to bettering the criminal justice system generally in order to accommodate First Nations has the effect of tinkering with criminal justice institutions and the

---

the accused, the judge, Crown and defense attorneys to arrive at a mutually accepted decision. While there is a more informal nature to the proceedings, it basically functions in the same way as a typical sentencing hearing. See for example: Tim Quigley, "Some Issues in Sentencing of Aboriginal Offenders," in R. Gosse et al., Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice, Saskatoon: Purich Publishing, 1994, pp. 269-300, and Hugh Benevides, R. v. Moses and Sentencing Circles: A Case Comment," Dalhousie Journal of Legal Studies, Annual, 1994, 3, pp. 241-250.

[52] There are many native court worker programs in operation today. The court workers mandate is to provide legal and social services to the accused. Notably though, the Task Force on the Criminal Justice System and Its Impact on the Indian and Metis People of Alberta, found that the court worker program in Alberta was perceived by Alberta Aboriginal communities as failing them and simply a extension of the system rather than a responsive body to the communities. A. Cawsey, Justice on Trial, Report of the Task Force on the Criminal Justice System and Its Impact on the Indian and Metis People of Alberta, Volume 3: Working Papers and Bibliography, Edmonton: Government of Alberta, 1991, (hereinafter "Alberta Justice on Trial, Vol. 3"), pp. 7-1, 7-2.

[53] The necessity of these programs was identified and recommended in the Task Force on Aboriginal Peoples in Federal Corrections, supra note 40.

[54] This has become a standard recommendation for the numerous studies and reports that address Aboriginal people and criminal justice. The basis is to provide non-Aboriginal people who work within the criminal justice system with a better understanding of the multicultural Canada, in particular the culture, history, racism, and realities of and faced by First Nations in today's society. This may have practical value, however it lends to the idea that a short-term (usually one to three days of training) education will in fact enable the system to be sensitive to First Nations and is obviously rooted in the assumption that solely combating individual discrimination will alleviate the problem of overrepresentation.

[55] Again, this has become a standard recommendation throughout the gambit of studies, inquiries, commissions, and reports. It assumes that be incorporating more First Nations as workers in the system will allow for better treatment of First Nations while they are there and again stems from the premise that discrimination is the problem.

administration of justice. Analysis is limited due to the partial examination of the social context of individual First Nations and the criminal justice system and fails to locate more meaningful/rooted explanation(s)[56] to why and how the system consistently fails First Nations. Many of the governmental studies and reports to date have criticized the logic of this limited social context yet ironically the awareness has little effect on the types of recommendations proposed at the end of the day. Similar to the procedural-focused reforms, at the end of the day, the victim is blamed and the workings of the criminal justice system defended.

One particular governmental initiative that has used the socio-economic context and realities of First Nations as impetus for change and justification for individual-specific programming has been the Creating Choices: The Report of the Task Force on Federally Sentenced Women.[57] Despite its general characteristics, which make it suitable for discussion here, this report presents an example of correctional reform that is unique. In particular, it addresses the traditional barriers for justice, not only in terms of the overall access to relevant and Aboriginal-specific programming but in terms of the additional barriers women have suffered within the correctional system. Creating Choices challenges the applicability and neutrality of correctional programming and policies that were developed for men and questions their appropriateness and relevance for women [58]

While the mandate of Creating Choices was to examine all federally sentenced women, the high indices of Aboriginal women in the institution offered an avenue to additionally

---

[56] For example, the historical, political, economic, cultural, ideological, and social realities that may contribute or provide further insight to the lack of 'justice' for First Nations generally within the criminal justice system. It is not sufficient to examine simply the administration or procedures of criminal justice without linking it to the overall social milieu of Canadian society.

[57] Creating Choices, supra note 21.

[58] This concept is not particularly new as there have been studies and reports criticizing the treatment and facilities of female offenders since 1934. However, this report is significantly different in that it outlines specific and detailed strategies to change the unacceptable conditions experienced by federally sentenced women. The report is also different in that it sought extensive consultation and participation on the Task Force of interest groups, academics, and researchers outside the government.

accommodate the system to fit their individual needs [59] Due to the small numbers of women overall, there has been a lack of women-centered services, programs and options for federally sentenced women [60] The Task Force recommended the closure of Prison for Women in Kingston, Ontario, the only federal correctional institution for women, and construction of four smaller regional facilities and one Aboriginal 'Healing Lodge' Programming will accommodate the particular social realities that federally sentenced women face, including long histories and incidences of abuse, substance abuse problems, low self-esteem, and high incidences of self-injurious behaviour In addition, two-thirds of the women are mothers The Aboriginal Healing Lodge was proposed as an option for Aboriginal women to serve their sentence in a more culturally-relevant place that is operated according to Native traditions and staffed by Aboriginal people The new facilities and Aboriginal Healing Lodge proposed will improve the living conditions and bring substantial change to the traditional male-oriented correctional environment, but it will still operate on correctional principles and philosophy [61] In the end, while the appearance may have changed, the correctional practice, albeit more accommodating to the special needs of the women, will remain the same.[62] This report provides an excellent example of how culture, language, and ideas can be appropriated to fit correctional mandate, organization, and logic [63] This criticism does not discount the actual positive

---

[59] Aboriginal women made up 23% (46 of 203 women) of those women servicing federal sentences in 1991. Margaret Shaw, Paying the Price: Federally Sentenced Women in Context, 1991, Ottawa: Correctional Service Canada, p. 59. The Canadian Human Rights Commission, Annual Report, 1988, states that Aboriginal woman are more likely to go to prison than to university.

[60] The report states that the women are geographically dislocated, over-classified, in inadequate facilities, and have access to few programs. It recommends that the new facilities approach women's corrections from a holistic and woman-centered perspective. Creating Choices, supra note 21.

[61] The Aboriginal Healing Lodge will be premised on Aboriginal culture and traditions but will still have to accommodate the principles of Correctional Service Canada as they will be funding and managing it. In reference to the attempt to implement a non-hierarchical structure of administration for the Healing Lodge, the report states that "[t]here will be a co-ordinator who will have certain responsibilities to other Correctional Service of Canada officials." (Ibid., p. 125)

[62] For example, the mandate of the Task Force (Ibid., p. 72) was to seek alternatives for federally sentenced women in the confines of the existing correctional philosophy:

> The mandate of the Task Force on Federally Sentenced Women required members to examine the correctional management of federally sentenced women from the commencement of sentence to the date of warrant expiry, and to develop a policy and a plan which would guide and direct this process in a manner that is responsive to the unique and special needs of this group.

[63] Much feminist research theory and literature in used in the report and many people who represented 'watch-dog' organizations to corrections were invited to participate on the Task Force and were consulted

changes and progress that its implementation will bring, however as part of the correctional system, it is still bound to the ideology permeating it [64]

While there is much to be said for improving the criminal justice system as it currently operates, the tendency has been to rely on this as the strategy for First Nations in the criminal justice system Simultaneously, there has been an embracement of the idea that overrepresentation is a problem rooted in a lack of cultural specific programming and the special needs of Aboriginal people that have not adequately been accommodated within the system. Supporting reform solely aimed at strategies to assimilate First Nations within the justice system lends to the idea that the system as it currently operates is, in fact, good, it just needs to be tinkered with to be better or "perfect" Improving the criminal justice system in this way simply re-establishes the legitimacy of the system, provides a way to allow superficial treatment of the problem and leaves the difficult questions of the fundamental problem of ethnocentric bias unexplored [65] To admit any less of the system would entail questioning the overall adequacy and applicability of the system for all Canadians and the generally held assumption of equality before the law

Reforms incorporating social context permit better analysis of the problem than a simple, narrow focus on the procedures and process of the criminal justice system However, it is limited as well because ' reasons that First Nations involvement in the system is due to the underlying social condition' they face and limits strategies to no more than better --

---

at the initial stages of its implementation. Some of the language and perspective traditionally associated with these groups were included in the report. It is reasonable to assume that use of this language and perspective provided the Task Force with more legitimacy despite its fundamental link and consistency with standard correctional policy. It is significant that the alternative offered was to build new prisons, providing them with equal treatment in corrections, rather than consider entirely different options for women. A relevant argument is made by Meda Chesney-Lind, "Putting the Brakes on the Building Binge," Corrections Today, August 1992, pp. 30-34, in her critique of the trend in the U.S. to construct more women's prisons.

[64] This point is similar to the argument in Kelly (Hannah) Moffat, "Creating Choices or Repeating History: Canadian Female Offenders and Correctional Reform," Social Justice, 1991,18, 3, pp. 184-203.

[65] It becomes a question of ethnocentric bias because reform is based on the accommodation of Aboriginal people into the existing institutions and programs of justice designed for the white majority. There is the implicit assumption that alternatives must be made through reference to and in the form of those found for the dominant culture, it becomes a measuring-stick to which programs must aspire and be measured.

accommodating them within the system -- their mitigating circumstances allow for special treatment. This becomes a paternalistic argument and limits reform to the manifestations of the problem, not solutions to it. In fact, addressing the fundamental problem is not considered except in passing reference to the need for more appropriate justice for First Nations. This problem remains at the level of justice, and one's conception of it. By aspiring to justice based on equal access to legal structures, reform remains focused on the narrow parameters of process. Consideration of social factors may allow for better opportunities to access law and justice, but only on a procedural level -- more substance is given to opportunity and treatment, but the issue is still framed as a question of opportunity.[66] There is one last type of state-sponsored response that evaluates the relationship between First Nations and the criminal justice system from a different consideration of justice, that is social justice. Here, definitions of social justice reside within the basic rights of all people to health, well-being, and social harmony. There is a concern with the content of justice, and its result at the end of the day, focusing on the end goal (substantial justice) rather than the means to get there (procedural justice). In this way, there have been some links to the overall working of the criminal justice system and its root in a particular culture and view of the world.

C. Social Justice Focus

What differentiates the social justice strategy of reform from the two presented earlier is that it attempts to link the broader overall conditions of Canadian society with the analysis of the relationship of First Nations and the criminal justice system. It attempts to avoid reform strategies which tend to blame the victim because of individual and/or group characteristics and the subsequent reliance on changes to the micro-level of service delivery system or programs. For those focused on social justice, these micro-level integrationist or assimilationist strategies inevitably ignore the actual nature, function, and ideology of the criminal justice system in their attempt to improve it. In contrast, the cultural, historical, and political nature of Canadian society is considered here and

---

[66] The logic here is that treating different people differently will enable the law to work better and level the playing field for those typically at a disadvantage in comparison to the dominant majority.

provides a broader framework to evaluate the workings of the criminal justice system. In this macro-context, the laws and justice system are framed in the reality of colonization and the related cultural assimilation of Aboriginal peoples.

In this view, emphasis is placed on substantive justice and attempts to overcome the liberal assumptions that dominated the governmental responses until the 1980s. Ensuring substantive justice for First Nations indicates a commitment to examine the effects of law as a way to determine its responsiveness to people and communities, it is not simply a matter of improving law and institutions but questioning the unspoken ideology of the system. The over-representation problem is framed as an indication of the overall cultural inappropriateness of the criminal justice system and, as such, reform is aimed at providing more autonomy for First Nations in terms of justice initiatives and alternatives to the current system, i.e., separate justice systems.[67]

Significantly, there have been a number of reports that have indicated that there is overt and systemic racism in the criminal justice system and that its existence points to the need to examine the broader political and cultural assumptions of Canadian society. However, other than suggesting the link, there has been little done to advance these arguments The Alberta Task Force on the Criminal Justice System and Its Impact on Indian and Metis People of Alberta provides a succinct description of the themes that have emerged in the recommendations from the major reports, commission, studies, and inquiries.[68] The Alberta Task Force identified the following as the top ten trends from 1967 to 1990: cross-cultural training for non-Native staff; employment of more Native staff; more community-based programs in corrections; more community-based alternatives in sentencing; more special assistance to Native offenders; more Native community involvement in planning, decision-making, and service delivery; more Native advisory

---

[67] This is a general recommendation and it conjures up many competing visions as to what separate systems of justice for First Nations entails and looks like. Further discussion follows.

[68] "A Review and Compilation of the Recommendations of Twenty-Two Major Reports From 1967 to 1990 on Aboriginal People and the Criminal Justice System" in Alberta Justice on Trial, Vol. 3, supra note 52, pp. 4-1, 4-7.

groups at all levels; more recognition of Native culture and law in criminal justice system service delivery; emphasize crime prevention programs; and self-determination must be considered in planning and operation of the criminal justice system.[69] This last trend to consider self-determination is the only avenue in which a broader analysis has been considered in a meaningful way. Unfortunately, because of the depth and controversial nature of the issue, macro-reform solutions have been quite limited in comparison to others focused on tinkering with the system (as suggested by nine of the ten factors focusing on assimilationist solutions). In fact, recommendations addressing the wider cultural and political factors that have contributed to the over-involvement of First Nations have not provided meaningful criminal justice alternatives other than simply suggesting that First Nations should have more autonomy over justice services or that further work needs to address this specific area.

Notably, in one study before 1990 completed by Jackson[70] the permeation of discrimination and racism in the federal correctional system was identified. He specifically located the process of colonization as underlying First Nations treatment and experiences in the criminal justice system[71] and recommended the development of alternative Native justice systems. It is interesting how the 'ground-breaking' analysis in this report failed to significantly influence other government reform strategies until a few years later.[72]

---

[69] Ibid.

[70] Michael Jackson, "Locking up Natives in Canada," University of British Columbia Law Review, 1989, 23, pp. 215-300.

[71] Jackson's link of native criminality to colonization is made explicitly clear in the following passage:

> What links...views of native criminality as caused by poverty or alcohol is the historical process which native people have experienced in Canada, along with indigenous people in other parts of the world -- the process of colonization. In the Canadian context, that process, with the advance first of the agricultural and then the industrial frontier, has left native people in most parts of the country dispossessed of all but the remnants of what was once their homelands; that process, superintended by missionaries and Indian agents armed with power of the law, took such extreme forms as criminalizing central Indian institutions such as the potlatch and sun dance, and systematically undermined the foundations of many native communities. The native people of Canada have, over the course of the last two centuries, been moved to the margins of their own territories and of our "just" society... (Ibid., p. 216)

[72] For example, the Marshall Commission, supra note 19, was published in 1989, a year after the Jackson report yet it contains nothing like the depth of the analysis found there.

It was not until after 1990 that significant progress was made to change the superficial treatment of the overall ideological constitution of the criminal justice system and broad-based strategies were proposed. The report that substantially challenged the underlying tenets of the criminal justice system is the Report of the Aboriginal Justice Inquiry of Manitoba.[73] This report signaled a major shift in the governmental response to reform to/in the criminal justice system in its challenge to the assumption that First Nations can receive fair treatment and justice within the existing system.

The Report of the Aboriginal Justice Inquiry provides a significant shift in state-sponsored response because it proposes criminal justice reform based on self-government, whereby First Nations would achieve autonomy over justice in their communities and be empowered to create their own justice systems.

The Inquiry was established to inquire into the events surrounding the murders of Helen Betty Osborne and J.J. Harper.[74] The mandate was to "...investigate, report and make recommendations to the Minister of Justice on the relationship between the administration of justice and Aboriginal peoples of Manitoba..."[75] Significantly the scope of the inquiry was quite broad and included an examination of the possibility of systemic discrimination in the system.[76]

---

[73] AJI Report, Vol. 1, supra note 14.

[74] Ibid., p.3. In these two separate circumstances there were allegations of discrimination on the part of the justice system. It sparked question as to the ability of the justice system to provide justice for First Nations. The inquiry was established to specifically report on these incidents and included opportunity to examine the criminal justice system generally.
Consequently, it was found that the police in both cases had racist policing practices which contributed to both of their deaths. The details of the cases and deaths of Helen Osborne and J.J. Harper can be reviewed in Volume 2. This discussion centers on Volume 1 of the report focused at the criminal justice system generally.

[75] Ibid., p. 3.

[76] The scope is summarized to include:

> ...all components of the justice system, that is, policing, courts, and correctional services. The commission is to consider whether and the extent to which Aboriginal and non-Aboriginal persons are treated differently by the justice system and whether there are specific adverse effects, including the possible systemic discrimination against Aboriginal people, in the justice system. The commission is to consider the manner in which the justice system now operates and whether there are alternative methods of dealing with Aboriginal persons involved with the law. (Ibid., p.3)

The Inquiry frames cultural bias as one of greatest contributing factors to the over-representation of Aboriginal people in the criminal justice system.[77] The report asserts that the principles and procedures of the criminal justice system are incompatible with Aboriginal culture and law.[78] It argues that the criminal justice system is structured on alien concepts of justice and therefore, systemically discriminates against First Nations.[79] This is intrinsically connected to their historical treatment and oppression in Canada and is fundamentally rooted to their experiences of colonization. The report states that:

> Historically the justice system has discriminated against Aboriginal people by providing legal sanction for their oppression. This oppression of previous generations forced Aboriginal people into their current state of social and economic distress. Now, a seemingly neutral justice system discriminates against current generations of Aboriginal people by applying laws which have an adverse impact on people of lower socio-economic status. There is no less racial discrimination; it is merely "laundered" racial discrimination.[80]

The inapplicability of the criminal justice system, and its consistent failure to account for cultural differences, provides impetus for the development of Aboriginal justice systems. The report recommends that First Nations develop culturally appropriate rules and processes and that governments empower First Nations to control their own justice systems.

There are two reform strategies offered in the Manitoba Justice Inquiry: reform that is focused on changes within the system and those that are rooted in autonomy for First Nations, i.e., self-government. The changes proposed within the system focused on the traditional components of the system: police, courts, and corrections.[81] The recommendations were specific and some go a little further than the solutions typically

---

[77] Ibid., p. 265.
[78] Luke McNamara, "The Aboriginal Justice Inquiry of Manitoba: A Fresh Approach to the 'Problem' of Over-Representation in the Criminal Justice System," Manitoba Law Journal, 1992, 21, 1, p. 59.
[79] AJI Report, Vol. 1, supra note 14, p. 253
[80] Ibid., p. 109.
[81] Other reforms were directed at youth, women, and child welfare.

offered to date.[82] For example, the creation of Aboriginal controlled police forces.[83] In terms of court reform; changes include proposals for the establishment of Aboriginal peacemakers[84], or conducting a 'blitz' to rid courts of backlog;[85]the provision of proper court facilities in Aboriginal communities is encouraged,[86] as is the drawing of jurors from the community in which a trial is held.[87] Sentencing reform options include using incarceration as the last option, and encouraging more innovative sentencing by the judiciary so that Aboriginal persons do not have to leave their communities.[88] Changes to corrections include proposals for finding alternatives to custody for Aboriginal offenders in facilities now, and the creation of new a correctional policy that allows communities to take responsibility for antisocial behaviour.[89] The report proposed reforms to the existing system in order to alleviate some of the present problems for First Nations and all people, to provide better services until First Nations implement their own systems, and as a recognition that not all First Nations will live in a community that has established its own justice system[90] The underlying point here is that these reforms are adjuncts to the other and more important reform strategy, which is the establishment of an Aboriginal justice system.[91]

---

[82] Some of the same themes have been suggested in previous reports and include more cross-cultural training, recruitment of more Aboriginal people to the system, for those serving sentences provide more community-based and culturally relevant facilities, culturally-appropriate programs in correctional institutions, providing for the special needs of women and youth, etc.

[83] AJI Report, Vol. 1, supra note 14, p. 645.

[84] This is rooted in the idea of using more traditional dispute resolution techniques for reconciliation between the victim and offender. The Aboriginal peacemaker would become an officer of the court and divert cases away from the formal system in order to use this alternative form of conflict resolution. Ibid., pp. 373-375.

[85] Ibid., p. 350.

[86] Ibid., p. 346.

[87] Ibid., pp. 386-387.

[88] Ibid., p. 647.

[89] Ibid., p. 434.

[90] Ibid., pp. 339-340.

[91] To be focused solely in terms of reform within the system would perpetuate historical injustices and not provide adequate solutions because the justice system is culturally based. "Simply providing additional court services in Aboriginal communities or otherwise improving what is a inherently flawed to justice is not, in our view, the answer." (Ibid., p. 252)

The establishment of an Aboriginal justice system is rooted in First Nations' aspirations of self-government [92] In recommending Aboriginal justice systems, the report states:

> Aboriginal justice systems should be established in Aboriginal communities, beginning with the establishment of Aboriginal courts. We recommend that Aboriginal communities consider doing so on a regional basis, patterned on such systems as the Northwest Intertribal Court System in the State of Washington.
>
> We suggest that Aboriginal courts assume jurisdiction on a gradual basis, starting with summary conviction criminal cases, small claims, and child welfare matters. Ultimately, there is no reason why Aboriginal courts and their justice systems cannot assume full jurisdiction over all matters at their own pace.
>
> The law to be applied in such systems would ultimately be the criminal and civil codes of each Aboriginal community, and such part of federal and provincial law as each community selects.[93]

The proposed new Aboriginal justice systems will be eventually able to incorporate all aspects of the criminal justice system including policing, legal aid system, probation services, mediation services, correctional system, parole system and a court system (youth, family, criminal, civil, and appellate courts).[94] The key to Aboriginal justice systems is that the structure of the system is to reflect more culturally-relevant values as well as be controlled entirely by First Nations. In this way, the Inquiry has undertaken a commitment to support what many First Nations want[95] and taken a large step towards practically addressing overall social justice for First Nations.

---

[92] The Inquiry defined self-government as "the rights of Aboriginal communities to run their own affairs within their own territories." (Ibid., p. 641) The inquiry takes the position that self-government is an Aboriginal and treaty right which is protected in the Sec. 35 of the Constitution the right to govern their own affairs was never extinguished. (Ibid., p. 260)

[93] Ibid., p. 642.

[94] The extent to which each community will assume these responsibilities of justice is dependent on the community itself, however the Inquiry felt that First Nations would be able to pursue the administration of justice to full capacity. (Ibid., p. 266)

[95] In the section on Aboriginal justice systems in the report it states that there was much support for the establishment of separate, Aboriginal controlled justice system. The Inquiry held open community hearings throughout Manitoba and invited submissions from those interested in the content of the report, many First Nations people participated in the process.

The Manitoba Justice Inquiry presents significant progress towards addressing the over-involvement of First Nations in the criminal justice system by providing a sound rationale and recommendations for First Nations to develop their own justice systems It does not claim to provide a panacea, but a more modest goal of making significant contribution to a solution. Unfortunately, there remains some pessimism as to the ability of the court structure to incorporate traditional First Nation(s) cultures and concepts of justice. Despite the fact that the proposed Aboriginal justice systems would be controlled by individual First Nations, it seems likely that the importing of parts of the dominant criminal justice structure will incorporate some of its underlying logic as well This is not to suggest that an Aboriginal justice system must be based solely on traditional or customary justice systems from days of old, but this should remain a factor when considering whether this reform strategy goes far enough in terms of the best alternative to the ideology and principles of the current Canadian justice system for First Nations [96] Even with this caution, the Manitoba Justice Inquiry does remain at present the first most substantial attempt by the government, due to its consideration of the redistribution of power, to address the relationship between First Nations and the criminal justice system

The Report on Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice [97] provides similar reform strategies as the Manitoba Justice Inquiry, focusing on reforms to the existing system and the establishment of Aboriginal justice systems While the Law Reform Commission report does not root Aboriginal justice systems in the political agenda of self-government, it remains committed to First Nations control over justice in their own communities.[98] Significantly, the report recommends that the federal

---

[96] Applying Aboriginal concepts of justice to an existing court structure does leave one with the impression that it is simply another form of 'indigenizing' the system. While it is a difficult task to provide proactive recommendations for problem-solving and considering the breadth of the work provided by the commission the point still remains that the Inquiry may have been able to provide the suggestion or incorporation of other types of alternatives for First Nations rather than simply endorsing one model, the tribal court. One may suggest that the limits of the analysis identified here may be in part because those conducting the work are part of the system they are critiquing and therefore only able to see within the context of that system.

[97] Law Reform Report, supra note 24.

[98] The Law Reform Report states:

and provincial government should transfer authority for justice to Aboriginal communities.[99]

Similar to the Manitoba Justice Inquiry in that it stressed that the community would define what aspects of justice they would want to provide, the Law Reform Commission report suggested that the community should be able to decide the scope and content of their justice system However, it offered the following outline of the types of initiatives open to First Nation communities:

> (a) relying on customary law;
> (b) traditional dispute resolution procedures with dispositional alternatives stressing mediation, arbitration and reconciliation;
> (c) the involvement of Elders and Elders' Councils;
> (d) the use of Peacemakers;
> (e) tribal courts having Aboriginal judges and Aboriginal personnel in other mainstream justice roles,
> (f) autonomous Aboriginal police forces with police commissions and other accountability mechanisms,
> (g) community-based and controlled correctional facilities, probation and after care services, and
> (h) an Aboriginal Justice Institute [100]

What is particularly interesting about this report is its recommendations for separate justice systems despite its quite limited mandate, which was to examine the extent to which criminal laws ensure First Nations are given "equal access to justice and treated equitably and with respect."[101] It provides no analysis of broad social factors but relies solely on the idea of human justice and equality. It offers an approach that would be likened to that of the liberal perspective of the problem, however it remains rooted in the goal of social justice.

> We recognize that the call for completely separate justice systems is part of a political agenda primarily concerned with self-government. We need not enter that debate. Aboriginal-controlled justice systems have merits quite apart form political considerations. (Ibid., p. 14)

[99] Ibid., p. 16.

[100] Ibid., pp. 22-23. The Aboriginal Justice Institute was considered to provide research into customary law and also provide accountability for the implementation of the reports recommendations.

[101] ibid., p. 1.

Both of the reports reviewed here have considered issues of equality for First Nations as those which are rooted in substantive justice However, it seems that despite these aspirations, they still only fundamentally offer reform based on changes to the system Aboriginal justice is considered to be based on Aboriginal concepts of justice however, the opportunity for alternative systems has been conceptualized in institutional-like terms, i e , tribal courts or incorporation of Aboriginal laws into the existing system The Manitoba Justice Inquiry's commitment to self-government and critique of colonialism does much to provide understanding of the problem, however its reforms do not go far enough in light of that analysis. Commitment to autonomy-based solutions is commendable, but does not extend much farther than alternatives to the system such as traditional community justice initiatives premised on alternative dispute resolution or diversion programs In this respect, the state-sponsored response has improved but, still remains quite liberal in its strategies of reform.

The Royal Commission on Aboriginal Peoples however extends the preceding analysis and view of what social justice entails in their report, Bridging the Cultural Divide. A Report on Aboriginal People and Criminal Justice in Canada [102] This report provides similar arguments as reviewed here in terms of the failure of the criminal justice system for Aboriginal people as rooted in the historical processes of dispossession and cultural oppression. That being said, what distinguishes this state-sponsored strategy of reform from others is its advocation and conceptual development of comprehensive strategies of justice reform, i.e., separate justice orders for Aboriginal people. While there is acknowledgment of the necessity to effect changes within the current criminal justice system, much of the report is focused on developing a framework in which to actually, actively establish parallel First Nation justice orders [103] Significantly, this report goes farther than other state-sponsored initiatives in that it provides a framework for

[102]Royal Commission on Aboriginal Peoples, Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada, Ottawa: Minister of Supply and Services Canada, 1996.
[103]Ibid., p. 177.

development of a comprehensive First Nation justice order, and provides convincing arguments for jurisdiction and the creation and administration of law [104]

The report fundamentally relies on Aboriginal rights to self-government as the basis of the development and implementation of such justice orders.[105] At issue for the Royal Commission is the construction of a new relationship of power-sharing in criminal justice administration between Aboriginal and non-Aboriginal people in Canada. Within the scope of the analysis, there is an implicit assumption that the realization of such initiatives is dependent on the political will for a fundamental respect for cultural difference. While this report provides the conceptual room within the legal landscape to realize Aboriginal justice orders, it also highlights two corresponding requirements for its realization. (1) provision of the necessary financial resources and (2) formal and substantial recognition of Aboriginal rights under Sec 35(1) of the Constitution Act 1982 [106]

Summary

While each of these three views and/or goals of reform (procedural, socially contextualized, and substantive justice) are distinct in their focus of the problem, they are somewhat related in that they all rely on liberal assumptions as to how solutions must be implemented. The only notable exception has been the report of the Royal Commission on Aboriginal Peoples. Otherwise, to frame each of the reform strategies as necessary within the context of the existing structures and institutions of the present system excludes any 'revolutionary' ways of administering justice. It enables the influence, discourse, and nature of the dominant legal system to remain rather stable, with reforms not significantly challenging the ethnocentric nature of the system itself. It is undeniable that the state-sponsored discourse provides for some positive changes and that there are significant limits to real substantial legal transformation. It remains to be seen whether the types of

---

[104] Ibid.

[105] Ibid.

[106] It seems reasonable to believe that the historical lack of political will for the implementation of separate First Nation justice orders will likely make these two conditions of implementation insurmountable in its eventual implementation.

analysis and strategies of reform offered by the Royal Commission will, in fact, come to fruition

It is necessary to examine what types of reform strategies have emanated from First Nation communities in order to provide further insights into the discourse of solutions to the troubled relationship between First Nations and the criminal justice system in the future. It may also provide an indication of the similarities and differences proposed between these two discourses generally, state-sponsored and First Nation, who have vested interests in challenging the current system and may well indicate the avenues to defining their future relationship within criminal justice administration

Chapter 3
First Nations and the Criminal Justice System: A Problem of Cultural Conflict

Cultural bias and ethnocentricity are considered by First Nations people to be root causes for the overrepresentation of their people in the criminal justice system. As such, First Nations people advocate addressing the cultural inappropriateness of the system when considering and implementing criminal justice reform.

In order to provide a basis for understanding the strategies and assumptions offered within First Nations discourse for criminal justice reform, this chapter examines the claim that the Canadian criminal justice system is structured on concepts of justice alien to First Nations people As will become apparent, justice is a moral-laden concept and is integrally bound to a group's customs, religion, values and language; evidence is provided of the cultural conflict that occurs between First Nation and Euro-Canadian society within the criminal justice system.

Specifically, discussion will address the holistic world-view as well as the common social values and rules of behaviour held by North American First Nations. As well, specific examples of the cultural conflicts that emerge for First Nations people in the criminal justice system will be provided, and the types of cultural ideology which permeate legal discourse will be explored. Finally, Aboriginal concepts of justice are provided which operate and inform much First Nation discourse. Wherever necessary the contrasting principles of Euro-Canadian society are provided in order to help illustrate the differences between the contrasting notions of law, social order and justice.

Despite the fact that such cultural explanations and norms are prevalent within First Nation discourse, caution is offered here as to the usefulness and generalizability of such claims. While the basic cultural conflict evidence found in the First Nations discourse are

not disputed, the analysis here argues for a critical review and avoidance of the reliance on romanticized or universal versions of First Nation culture as a way to inform or think about Aboriginal legal orders.

As will be discussed later in this chapter, the claims explicit in First Nations discourse about the fundamental differences in world-view between First Nations and Euro-Canadian society, and the corresponding impact these have for First Nations people in the criminal justice system have also been utilized within some of the state-sponsored discourse. Significantly, however, there has been a tendency within both discourses to rely on universal and general notions of First Nation culture and world-view While there is some utility in elucidating the broad differences in cultural orientation as a way to understand the problems First Nations people may encounter within the criminal justice system, there has been a tendency to embrace these generalizations as appropriate tools by which to support and fashion criminal justice reform. In this way, the applicability of such concepts to individual First Nations and Euro-Canadian society is assumed and uncontested. Unfortunately, this not only undermines the original cultural claim by assuming its universality and homogeneity (in both First Nation and Euro-Canadian terms) and but also ignores the similarities or commonly-held values that may exist across cultures.

Understandably, First Nations have been required to illustrate and describe their particular cultures as different from Euro-Canadian culture in order to emphasize their cultural distinctiveness and document their rationale for criminal justice reform However, such claims must be considered in this context and as a point of analytical departure for reform strategies, not as specific tenets of each First Nation in Canada. There has been no attempt to critically analyze the usefulness of such broad generalizations and the perceived inevitability of First Nations culture within First Nations communities The value and authenticity of the cultural conflict outlined here is not at issue, however the continual use of culture in universal and deterministic ways is rejected as this encourages romanticized

views of First Nations culture and lends to utopian views of reform, which are both unrealistic and unfeasible.

This caution duly noted, this chapter reviews those general and universal claims of First Nation culture described and offered within First Nations discourse. The importance of addressing these views resides in part due to: (1) the reliance on these universal cultural notions within the First Nation literature and therefore, the need to critically review them and (2) the necessity to illustrate why such analysis has led to cultural deterministic analysis and thereby limiting proper evaluation of First Nations justice initiatives.

First Nations Philosophies

Before examining the differing views and initiatives of First Nations toward justice reform, it is necessary to examine the contention found within First Nation discourse of the fundamental differences in world-view these nations hold in contrast to non-First Nations. The fundamental claim is that this is the basis of the cultural differences between First Nations and the dominant majority. Such a review will also provide a relevant context in which to analyze the overall justice reform strategies advocated by First Nations because, as will become apparent, their claims are that their world-view informs their assumptions of law, justice, and justice orders/systems and impacts the substantially different solutions they propose.[107]

---

[107] Within the First Nation discourse there is a recognition that each First Nation in Canada will not have the same assumptions, beliefs, morals, or philosophy, as this will change depending on the unique nature, history, environment, and culture of each First Nation. As well, the discourse also allows for the fact that within First Nations, there will be both dissenting and non-conformist groups or individuals. However, despite the variations it is maintained that there are some commonly-held values found among Canadian First Nations. For example, this common philosophy or traditional value system is provided by Rosalee Tizya of the United Native Nations, Vancouver, in this way:

> In spite of the fact numerous "Indian" Nations exist, there is a philosophy that is generally shared by all. This is not a "democratic," "socialist," "capitalist," or "communist" philosophy in nature, but can be regarded as an "Indian" philosophy since every Indian Nations share[s] these basic values, not the least of which are the Indian Nations in what is now called Canada.

See: Rosalee Tizya, "Self-Government," in Curt T. Griffiths (ed.), Self-Sufficiency in Northern Justice Issues, Simon Fraser University for The Northern Justice Society, Winnipeg: Kromar Printing Ltd., 1992, p. 38.

The basic world-view considered common to First Nations in Canada is expressed in the 1980 First Nations Declaration of the Assembly of First Nations

> **Declaration of the First Nations**
>
> We the original people of this land know the Creator put us here.
>
> The Creator gave us laws that govern our relationships to live in harmony with nature and mankind.
>
> The laws of the Creator defined our rights and responsibilities.
>
> The Creator gave us our spiritual beliefs, our languages, our culture, and a place on Mother Earth which provided us with all our needs. We have maintained our freedom, our languages, and our traditions from time immemorial
>
> We continue to exercise the rights and fulfill the responsibilities given to us by the Creator for the lands upon which we were placed.
>
> The Creator has given us the right to govern ourselves and the right to self-determination.
>
> The rights and responsibilities given to us by the Creator cannot be altered or taken away by any other nation [108]

A fundamental connection between the Creator and First Nations people that defines their relationship to the world has been made. This spiritual connection is at the core of Aboriginal life and understanding. Rosalee Tizya elaborates on this interrelatedness of spirituality and understanding by describing the cyclical nature of the relationship between the Creator and the four main elements basic to First Nation philosophy (land, people, laws and spirituality):

> From the Creator, the land that is now called North America was called the "Great Island." The people are Nations and/or tribes who were placed in their territories to care for and control the land. In return, the land would provide for all our needs. This relationship between the land, people, and our Creator is inseparable Our responsibility to care for and control the land is seen as an obligation to our Creator and each generation must consider seven generations into the future The land belongs to the Creator we belong to the land. This relationship is the basis of our position of sovereignty and "aboriginal title" today. Since we view this obligation as our responsibility to the Creator, it is our belief that no man-made government or laws can give our land away, take it, extinguish it, barter, or change that which is bestowed by our Creator.

---

[108] Declaration of the First Nations, December 1980, Ottawa: The Assembly of First Nations.

> To fulfill our obligations, the Creator gave us laws and spiritual beliefs for our protection. These laws are seen as rights and responsibilities that govern all our relations to protect and maintain our distinct identities. Spiritual beliefs among our Nations are reflected through our culture, language, and traditions to live in harmony with nature and all mankind, and are maintained by our elders whose work is to teach the young. Our laws formed from our traditions which developed in close communication with nature and molded our societies. Our laws and spiritual beliefs are meant to protect and not to restrict or oppress us.[109]

The interconnectedness of the creation, life, and spirit is provided in First Nation discourse as one of the most significant tenets of Aboriginal philosophy. First Nations people view life holistically or as a totality, where all things are interrelated and cyclical. Time is considered in cosmological cycles and not in terms of time units or segments, it is much more functional and relative than specific.[110] One must strive for harmony in all things because of the interconnection of all things, as each interpersonal relation is considered both spiritual and reciprocal.[111] Underlying this vision of the cyclical nature of life is respect: "respect for creation, respect for knowledge and wisdom, respect for the dignity and freedom of others, respect for the quality of life and spirit in all things, respect for the mysterious."[112]

---

[109] Tizya, supra note 107, p. 40. One of the problems of utilizing Tizya's analysis is her assumption of the universality of some concepts provided within this text. Two specific examples here are: (1) the Iroquois do not refer to North America as the 'Great Island' but as 'Turtle Island', and (2) the view of considering seven generations into the future is not a universal concept but an Iroquois concept not shared by all First Nations. Similarly, the view in the last line of Tizya's view is that "our laws and spiritual beliefs are meant to protect and not to restrict or oppress us" however, this is a comment that could be common across a range of cultures, not simply a First Nation concept. Barbara Kawenghe Barnes, Traditional Teachings, Akwesasne: North American Indian Traveling College, 1984. See generally: David Blanchard, Seven Generations: A History of the Kanienkehaka, Kahnawake: Kahnawake Survival School, 1980.

[110] Alberta Justice on Trial, Vol. 3, supra note 52, p. 9-3. One often hears the reference to "Indian time" where things are done at their own speed or in good time. Punctuality, or strict concern with time, is not considered an issue as it is believed it is for other people or cultures. Time is considered more relative/flexible, which does not suggest there is no adherence to time in the time-clock sense but that being on 'clock' time is not considered important.

[111] Ibid.

[112] James Dumont, "Justice and Aboriginal People," in Royal Commission on Aboriginal Peoples, Aboriginal Peoples and the Justice System: Report of the National Round Table on Aboriginal Justice Issues, Ottawa: Ministry of Supply and Services Canada, 1993, p. 54. A circle is used by First Nations to describe the total nature of life, it is a concise way to envision how everything is both unique but interconnected.

It has been suggested within First Nation discourse that the difference in philosophy between First Nations' and the dominant Euro-Canadian view of the relationship between the Creator and humankind is what underlies their fundamentally different cultures and societies.[113] Indicative of the First Nations perspective, the Ojibway believe that humans were the least necessary of creation and were not given authority over the rest of creation. In contrast, the Judeo-Christian ethic holds that humans were created to have power and control over all the earth and everything in it. [114] This is suggested as the hallmark of the difference between First Nation and non-First Nation society; it underlies the principle differences in approach to life and the nature of society, its accepted customs, manners and behaviour.[115] This difference translates into how one will approach life and what is considered socially accepted behaviour.

---

[113] AJI Report, Vol.. 1, supra note 14, pp. 21-22.

[114] As quoted in the AJI Report, Vol. 1, the Objiway traditionally believe that:

> Creation came about from the union of the Maker and the Physical World. Out of this union, came the natural children, the Plants, nurtured from the Physical World, Earth, their Mother. To follow were Animalkind, the two-legged, the four-legged, the winged, those who swim, and those who crawl, all dependent on the Plant World and Mother Earth for succour. Finally, last in the order came Humankind, the most dependent and least necessary of all the orders.

Ibid., p. 21, as quoted from Freda Ahenakew, Cecil King, and Catherine I. Littlejohn, "Indigenous Languages in the Delivery of Justice in Manitoba," research paper prepared for the Aboriginal Justice Inquiry, Winnipeg, March 1990, p.23.

The root of the assumption for the authority and power of humankind in the Judeo-Christian ethic is found in the Bible. The relevant passage found in Genesis 1:26-29 is quite explicit in this claim:

> [26]Then God said, "And now we will make human beings; they will be like us and resemble us. They will have power over the fish, the birds, and all animals, domestic and wild, large and small." [27]So God created human beings, making them to be like himself. He created them male and female, [28]blessed them, and said, "Have many children, so that your descendants will live all over the earth and bring it under their control. I am putting you in charge of the fish, the birds, and all the wild animals.

Good News Bible, Toronto: Canadian Bible Society, 1976, p. 2.

[115] I believe that the point here is not to implicitly suggest that all non-First Nation people necessarily adopt Judeo-Christian standards and beliefs. What is more likely the case is that the foundations of Canadian law and tradition are based on the belief in God and other Christian values.

There have been additional explanations for the fundamental differences in world view of First Nations and Euro-Canadian people which include the natural world (science) versus supernatural world philosophy, and hunter-gatherer versus agricultural (post-industrial) philosophy. These are offered to help explain why First Nations see the universe as a complex web of interconnections in contrast to the Euro-Canadian view of cause-and-effect relationships. In all these explanations though, the dominant theme emerges from diametrically opposed positions where one group envisions perceptions of itself, the universe and their position in it differently: one as master of all creation; the other as part of creation. For a general discussion of the different world views and their relation to criminal justice see: Rupert Ross, Dancing With a Ghost: Exploring Indian Reality, Markham: Octopus Publishing Group, 1992.

Social Values of First Nations People

First Nations peoples' belief in the interrelatedness and necessity to respect all things influences their social values. James Dumont provides a summary of the primary values of First Nations people (based on their holistic world-view) as the following:

- Kindness: The capacity for caring and the desire for harmony and well-being in interpersonal relations.
- Honesty: To act with the utmost honesty and integrity in all relationships recognizing the inviolable and inherent autonomy, dignity and freedom of oneself and other.
- Sharing: Recognizing the interdependence and interrelatedness of all life, to relate with one another with an ethic of sharing, generosity, and collective/communal consciousness and co-operation.
- Strength: Conscious of the need for kindness and respecting the integrity of oneself and others, to exercise strength of character, fortitude and self-mastery in order to generate and maintain peace, harmony, and well-being within oneself and in the total collective community.
- Bravery: The exercise of courage and bravery on the part of the individual so that the quality of life and inherent autonomy of oneself and others can be exercised in an atmosphere of security, peace, dignity, and freedom.
- Wisdom: The respect for the quality of knowing and gift of vision in others (striving for the same within oneself) that encompasses the holistic view, possesses spiritual quality, and is expressed in the experiential breadth and depth of life. A person who embodies these qualities and actualizes them in others deserves respect as an elder.
- Humility: The recognition of yourself as a sacred and equal part of the Creation, and the honoring of all of life which is endowed with the same inherent autonomy, dignity, freedom, and equality. This leads to a sensitivity toward others, a posture of non-interference and a desire for good relations and balance with all of life.[116]

Within these values and of particular importance is the commitment of the individual to strive towards the collective good rather than individual advancement or identity. This does not suggest that First Nations people do not pursue their individual potential, rather it is that First Nations will respect the autonomy of the individual to pursue their interests as long as it does not encroach on the freedom of another to pursue their interests.[117]

---

[116] Dumont, supra note 112, p. 57. The danger of suggesting that these social values are specifically First Nation is apparent within the context of these last points, where any of the above social values could be considered applicable to other cultures.

[117] This idea is in fact what is entrenched in the Canadian Constitution.

Significantly, the emphasis is on internal constraints on behaviour rather than rules and laws of behaviour. In contrast, non-First Nation people tend to emphasize the external constraints on behaviour and rely on rules and laws to assist people in adhering to the collective good.[118]

The cultural values highlighted above provide the basis for First Nations discourse to interpersonal communication and socially appropriate behaviour for First Nations. Rules of behaviour such as the ethic of non-interference, non-competitiveness, emotional restraint, and sharing are common cultural imperatives for many First Nations.[119] These particular rules of behaviour may be indicative of some First Nations people and communities however, caution is encouraged regarding assumptions of the universal applicability of such views.

The ethic of non-interference is one of the most important cultural imperatives of First Nations people. It is rooted in respect for the autonomy and personal freedom of another by forbidding any interference in the activities and freedom of another person It is considered rude to offer advice, tell someone what to do, or discourage a person from something.[120] Interference in any form is forbidden.[121] One particular example of the extent of this ethic is in child-rearing where traditional rules hold that the parent(s) must allow children to make their own choices about life, i.e., when to go to bed, when to eat, what to eat, if they should go to school, etc. Child-rearing in this way is considered to

---

[118] Dumont, supra note 112, pp. 58-59, 64-65. One of the problems found within this view is that it assumes that culture is the reason why there are external constraints to behaviour rather than considering that it is the heterogeneity of society -- a very important distinction which is obscured by First Nation discourse in this way.

[119] For a more detailed discussion of First Nations' cultural imperatives see: Clare Brant, "Native Ethics and Rules of Behaviour," Canadian Journal of Psychiatry, 1990, 35, pp. 534-39. Dr. Clare Brant is a Mohawk psychiatrist who has written about Aboriginal ethics or rules of behaviour that are present among First Nations. He believes that there are approximately ten distinct Aboriginal ethics and categorizes them. The ethics described here still influence First Nations today and are under his category of conflict suppression (the other two categories are projection of conflict and humiliating superego).

[120] For example, within the First Nations community that I live, there is little evidence that this exists in any real way outside of the home.

[121] Ross, supra note 115, pp. 43-44, documents a particularly poignant example of one woman's commitment to the traditional ethic of non-interference where she, despite witnessing it, did not stop her son from committing suicide.

promote responsibility and self-reliance.[122] The ethic of non-interference encourages social harmony in the community by promoting personal privacy. Related to the ethic of non-interference is the cultural value of non-confrontation, where one is discouraged from direct confrontation with another and encouraged to find other ways to make their ideas known or resolve conflict.[123] It is important to note that the cultural ethic surrounding the acknowledgment of praise and gratitude is also very specific. Instead of commending the person, one is supposed to ask the person to continue providing their contribution. In this way, the person to whom the comment is directed will not feel embarrassed; alternately, this approach avoids demeaning other peoples' contributions [124]

The ethic of non-competitiveness promotes group harmony in First Nation communities. This is done through the discouragement of imposing one's will on a group by promoting cooperative goals and effort. In this way, no person will feel less equal in contributing to the group or in self-worth. Emotional restraint is considered important because it again allows for the cohesiveness of the group. To indulge oneself in an outburst of emotion is considered selfish because it may endanger the interpersonal relationships in the community. Finally, the cultural imperative of sharing puts an obligation on a person to share with others. It is a tool to make sure no one goes without or becomes too rich in the community. Historically, it was necessary to make sure no one starved by sharing with each other what each had.[125]

---

[122] AJI Report, Vol. 1, supra note 14, p. 34. Clare Brant, as summarized by Rupert Ross, emphasizes this point and explains:

> It is Dr. Brant's view that children raised by non-interfering parents become enormously loyal to them and to the entire extended family. They have, after all, enjoyed only pleasurable experiences with them, free of complaint, criticism, advice or coercion. It is unlikely they have found that same freedom in any other context. These children then become, in his words, "layered" onto that extended family. They become integral, as opposed to autonomous, parts of it, and they remain that way for the rest of their lives.

Clare Brant, "Living, Loving, Hating Families in the '80s," address delivered at the Oshweken Community Hall, January 9, 1982, in Ross, supra note 115, p. 19.

[123] AJI Report, Vol. 1, Ibid., p. 30.

[124] Ross, supra note 115, p. 34.

[125] AJI, Vol. 1, supra note 14, pp. 34-35.

Brant states that forms or rules of behaviour were enforced in the community through two particular ways.[126] One is the projection of conflict, where the blame for a transgression was blamed on a monster or villain, something outside the immediate family or clan. Blame in this way allowed the community to discipline people by threat Second, the use of shaming, teasing or ridicule was used to discourage unethical behaviour This was done to promote the harmony in the community by keeping those who could not follow the rules away from the group, promoted peer pressure for proper rule following, and promoted group solidarity by encouraging closeness to the group. While emotions were generally restrained, First Nations people were able to release some of their emotions or feelings of hostility through other means. Their culture provided socially acceptable ways to deal with these subverted tendencies or criticisms through their ceremonies, feasts, and social functions For example, the sweat lodge was used to purify themselves of problems and illness, anger or other subverted feelings, the potlatch, the Sun Dance, etc The historical wrongs in outlawing these social celebrations severely hindered the cohesion, harmony, and stability of First Nation communities

Contrast to Euro-Canadian Values

First Nation discourse holds that rules of behaviour are significantly different for Euro-Canadians and these rules have been, in both the contemporary period and historically, the basis for Canadian institutions and systems. As suggested earlier the ethnocentric nature of the criminal justice system is viewed as the underlying pressure leading to First Nations' over-representation in the system. A brief review is provided here of the values considered appropriate and pervasive in dominant society which contrast sharply with the traditional values of First Nations. At the center of the difference is a fundamental difference in world-view: non-First Nations tend to hold a linear perspective of life rather than one centered on holism.[127]

---

[126] Brant, supra note 119.

[127] Again, reliance is made on commonly-held values within this view, ignoring the variations between people and communities in Canadian society and the beliefs and values that are shared by many First Nation and non-First Nation people.

The linear philosophy[128] contrasts the holistic, or cyclical, view of life in that it does not prioritize the interconnectedness of life, of relationships and time. A straight line is used as a metaphor to explain the assumptions of linear thinking. Here, life progresses along a straight path, there is a beginning and an ending. Movement along the line is considered progressive and can only go in one direction -- future-oriented. Time is consistent with this view and is considered as an inherent part of the line, progressing steadily in particular segments oriented toward the future The single line describes the preoccupation of the individual life rather than the collective. The vision of life is considered singular and focused, where there is a concern with the logical progression of things and events.

Dumont suggests that the dominant trait for Euro-Canadians, in contrast to First Nations traits of holism and respect, is the preoccupation with movement and behaviour.[129] These are considered the underlying tenets of Canadian society Interrelatedness of life surfaces as the "the objectifying, the quantifying, and analyzing of things to determine interconnections that make up the total picture."[130] The vision of life is singular and focused, where one must move from beginning to end in a logical and successful manner. In fact, the pursuit of success is considered to be an underlying motivation for Euro-Canadians and is rooted in the values of assertiveness and competitiveness Private gain and the achievement of success are considered paramount for the individual, and the collective is only considered in relation to the sum of its individuals Dominant society has a tendency to value behaviour that is confrontational, direct, active, and disciplined, where strength is synonymous with the superiority of an individual and is shown in the ability to master or control a situation. In this regard, recognition of those less fortunate or equal is considered an obligation and showing sympathy; sharing is regulated through laws rather

---

[128] The distinction is found in the report, Alberta Justice on Trial, Vol. 1, supra note 14, pp. 9-1 - 9-7; Dumont, supra note 112, p. 63.

[129] Ibid.

[130] Dumont, supra note 112, p. 63. One example of this categorizing of life is the tendency to think in dichotomous terms where characteristics of life and people are conceived through binary terms, e.g., white/black, good/bad. man/woman, etc. Inherent values are associated to each category, where one is accorded positive and desirable qualities and the other associated with negative or undesirable values and connotations. A reference to one automatically accords a value to the other. This type of analysis and thought is well-documented by postmodern theorists.

than motivated by genuine concern and respect Restraint to individual pursuit and the common good is exercised through obedience to a higher authority or law

Explanation of these cultural imperatives has been provided to help illustrate the reasons why First Nation discourse indicates that the criminal justice system is alienating to them The main point in the discourse emerges and assumes that any system or institution that is rooted in culturally specific behaviour will be foreign and ill-suited for those raised with fundamentally different values The rules of behaviour indicative of First Nation culture conflicts with the type(s) of behaviour that is implicit and, therefore, expected in the current criminal justice system Some specific examples of the cultural conflict that occurs within Canadian justice institutions for First Nations people are provided in order to illustrate the level and extent of that conflict

Cultural Conflict in the Criminal Justice System

Illustration of the cultural conflict in the administration of justice will be focused on two levels: (1) micro-levels consisting of individual examples of experiential culturally-specific behaviour, and (2) macro-levels where there is importation of cultural ideology into legal discourse. Both levels, micro and macro, of analysis are identified within First Nation discourse and are necessary for understanding the overall predicament of First Nations people involved in the justice system

Due to cultural conflicts, First Nation peoples are not receiving justice in the Canadian criminal justice system. A succinct indication of the 'injustices' is provided by Murray Sinclair, one of the Co-Commissioners of the Manitoba Justice Inquiry:

- Aboriginal people are often overcharged (that is they are charged with more, and/or more serious, offences than they are ultimately convicted of),
- Aboriginal people are less likely than non-Aboriginal people to plea bargain or to benefit from a negotiated plea;
- Aboriginal people are less likely than non-Aboriginal people to contest their charges;

- Aboriginal people are often unrepresented or under-represented in court. They are largely economically impoverished and cannot afford to hire their own counsel. Aboriginal people are also charged more often with summary conviction offences for which our legal aid plans are, for resource reasons, unwilling or unable to provide, or pay for, legal assistance,
- Even when they do have counsel, Aboriginal people see their lawyers less frequently than non-Aboriginal accused and for shorter periods of time;
- Aboriginal people are more likely than non-Aboriginal people to plead guilty, even when they are not, or do not believe themselves to be, guilty;
- Aboriginal people are more likely than non-Aboriginal people to be incarcerated upon conviction (but compared with non-Aboriginal people, they are likely to receive, on average, shorter sentences);
- Aboriginal people are more likely than non-Aboriginal people to leave the legal process without understanding, and therefore without respecting, what has occurred to them or why [131]

These examples provide an understanding of how consistent application of foreign cultural values within the criminal justice system affects First Nations people.

It is necessary to point out that there are some compatible values within First Nation and non-First Nation world-views, including some of those discussed before such as cooperation, sharing, respect for individual freedom, honesty, and harmony in interpersonal relations. However, despite the similarities, First Nation discourse portrays dominant Canadian society as exempt from these values in certain activities, and one such example is the processes of the criminal justice system.[132] The criminal justice system may well strive to produce resolution of conflict and harmony in interpersonal relationships within society; however, to accomplish this it has relied on adversarial, confrontational, and antagonistic processes and procedures. Theoretically, disputes are resolved by an impartial or neutral person who has been tasked with the responsibility to weigh the biased positions of two parties, determine 'truth' and return a fair decision based upon the determination.[133]

---

[131] Murray Sinclair, "Aboriginal Peoples, Justice and the Law," in Richard Gosse, et al., Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice, Saskatoon: Purich Publishing, 1994, pp. 173-174.

[132] AJI Report, Vol. 1, supra note 14, p. 21.

[133] It is thought that the judge and legal proceedings represent neutral arbitrators, however as will be discussed later, this assumption does not recognize the cultural root of the system and/or the specific

First Nations discourse contends that the reliance on confrontation and the adversarial nature of justice proceedings poses a problem for First Nations, as many value non-confrontation and believe it necessary to avoid public accusation. Many First Nations consider accusation or criticism of another inappropriate social conduct. With the weight of this social more upon them, it is difficult to testify in a court of law generally, whether speaking in support or criticism of another person. Rupert Ross offers this insight

> I began to feel that there might be some validity to my suspicion that for many Native people testifying in court might actually be a *wrong* thing to do. When they repeatedly asked me why they had to tell their story over again in court when they had already told "us" (meaning me and the police), they were not just trying to avoid an unpleasant experience, they were trying to avoid participation in what they considered an immoral one. For many of them, testifying against someone to his or her face in a public courtroom may well have seemed an even greater wrong than what was done to them in the first place (especially when the accused had acted in a drunken state, while the witness, in contrast, was being asked to act with full and sober deliberation).[134]

This is one problem that the justice system poses for First Nations, however one can cite other impacts of the adversarial nature of the proceedings, such as the determination of truth.

In the Canadian criminal justice system, truth is expected to emerge from the contradictory positions the differing parties argue before the court (not limited to simply crown and accused but also to the respective witnesses). This is the legacy of Canadian legal philosophy, and the underlying aim of the judicial decision-making process to arrive at 'truth' or the best possible approximation of 'truth'. However, this conflicts with First Nations' conceptions of truth-finding which are rooted in their respect for each individual and the belief that all people possess wisdom. Imbued with these values, First Nations

---

individual overseeing the proceedings. These things as well as the individual's personal beliefs and attitudes do in fact influence the outcome of the proceedings.

[134] Ross, supra note 115, p. 13. Elsewhere Ross states,

> ...refusal or reluctance to testify, or when testifying, to give anything but the barest and most emotionless recital of events, appears to be the result of deeply rooted cultural behaviour in which giving testimony face to face with the accused is simply wrong...

Rupert Ross, "Leaving Our White Eyes Behind," Canadian Native Law Reporter, 1989, p. 5.

view the best possible 'truth determination' in dispute-resolution as that which allows and respects that all people can contribute and provide input, 'Truth' is best approximated with as many versions of the event or circumstance as possible.[135] The Manitoba Justice Inquiry summarizes First Nations view in this way:

> The "truth" of an incident is arrived at through hearing many descriptions of the event and of related, perhaps extenuating, circumstances. Impossible though it is to arrive at "the whole truth" in any circumstance, as Aboriginal people are aware, they believe that more of the truth can be determined when everyone is free to contribute information, as opposed to a system where only a chosen number are called to testify on subjects carefully chosen by adversarial counsel, where certain topics or information are inadmissible, and where questions can be asked in ways that dictate the answers.[136]

Commitment to finding truth in this manner sets one at odds with the contemporary legal system as it would dictate that one can contradict another's testimony or version of the incident or events. If all people are thought to have valuable input and the potential to make meaningful contribution, there is no question of whether someone's views are right or wrong, as those views constitute other indications/aspects of what went on.[137]

The necessity for a witness to look credible and assert the superiority of their version of events may further illustrate why many First Nations people are reluctant to testify in court. If one is respectful of others and sees truth as relative, and that while all persons may speak to the whole truth, no one person speaks 'the singular truth' of any situation, a First Nation person's acquiescence to the possibility of more than one version of the events may make it seem as if a First Nations person's testimony or account of events may be less

---

[135] AJI Report, Vol. 1, supra note 14, p. 36.

[136] Ibid., p. 36.

[137] Further illustration is provided on this point by Murray Sinclair (supra note 131, p. 180):

> According to the Aboriginal world view, truth is relative and always incomplete. When taken literally, therefore, the standard courtroom oath -- to tell the truth, the whole truth and nothing but the truth -- is illogical and meaningless, not only to Aboriginal persons, but from the Aboriginal perspective, to all people. The Aboriginal viewpoint would require the individual to speak the truth "as you know it" and not to dispute the validity of another viewpoint of the same event or issue. No one can claim to know the whole truth of any situation; every witness or believer will have perceived an event or understood a situation differently. It would be rare for an Aboriginal witness to assert that another witness is lying or has gotten his facts wrong.

credible.[138] If a First Nation person behaves according to their cultural mores and is not assertive in their version of events to those not privy to their cultural behaviour, it may seem that the witnesses are either uncertain about the 'facts' or that their testimony is variable. This undermines the cultural behaviour wherein a the First Nation person allows for the possibility that another version of the event(s) is equally as valid as their own [139]

Additionally, the cultural concept of truth restricts First Nations from fully participating in the criminal justice system, i.e., within the pleading process In the legal system, it is culturally acceptable to plead not guilty without incurring the assumption that one is behaving dishonestly because that plea is considered a vehicle by which the onus is placed upon the crown to prove their case However, many First Nations will plead guilty because it would contradict adherence to the cultural tenet to tell the truth at all times [140] Additionally, to plead not guilty would require troubling the court to prove the charge or require other people to publicly testify, and to put others in this position would be considered immoral.[141]

It has also been documented that First Nations people may plead guilty due to language barriers.[142] Criminal justice proceedings and processes are most often carried out in French or English, the two official Canadian languages. This is a problem in First Nation communities where many people may not speak either official language, and court

---

[138] This is tied to the cultural value of not acting or demonstrating superior knowledge to others which is discussed by Ross (supra note 115, pp. 23-24.):

> Behind this rule against advice-giving, then, appears to be a larger rule requiring that no one ever feel bested by another. In the first place, it would be wrong to act as if you were superior in any fashion and, in the second, it would be wrong to make anyone else feel less than adequate...the maintenance and nourishment of each individual's self-esteem seems a paramount duty. Anything which might cause another person to lose face, to feel inadequate, foolish or stupid, would be a blow to that self-esteem and an impediment to their development as a human being.

[139] Sinclair, supra note 131, p. 180.

[140] Ibid., p. 183; Ross, supra note 115, p. 10; Christie Jefferson, Conquest By Law, Ottawa: Solicitor General Canada, 1994, p. 177.

[141] Ross, supra note 115, p. 14; Sinclair, supra note 131, p. 183.

[142] For example, see: Ross, Ibid.; AJI Report, Vol. 1, supra note 14; Robin Ridington, "Cultures in Conflict: The Problem of Discourse," in W.H. New (ed.), Native Writers and Canadian Writing: Canadian Literature Special Issue, Vancouver: U.B.C. Press, 1990, pp. 273-289.

personnel more often than not are unable to carry out their work in any First Nation language. While interpreters and translators may be able to narrow the language gap, their usefulness is dependent on their competence and availability. At the same time, problems may also occur due to the specialized legal language of the justice system. Legal concepts and ideas may be difficult or impossible to translate into First Nation languages and, if they are able to be translated, they may come to mean something different in form or intent from the original term and this may impede the legal process. The ability to understand legal concepts is a fundamental problem because it affects the likelihood that a First Nation person will be aware of and receive their legal rights and obligations and, in essence, affects the nature and outcome of legal proceedings. Consider the impact of the following example:

> Q I was starting to ask you if you could explain to us the ... meaning of the word "guilty" in Micmac.
>
> Francis There really is no such word as "guilty" in the Micmac language. There is a word for "blame". So an Indian person who's not as knowledgeable let's say in the English language if he were asked if he were guilty or not, he would take that to mean, "Are you being blamed or not?" and that's one of the reasons I found that Native people were pleading guilty is because they suspect that the question was, "Is it true that you're being blamed?" and the Native person would of course say, "Yes." In other words, but the real question being, "Are you guilty or not guilty?" and the answer of course would be "Yes, I plead guilty," thinking that's blame. What they neglected to say was, "Yes, I'm guilty that I'm being blamed but I didn't do it."[143]

First Nations responses like this highlight the extent to which language can limit or subvert the intent of the legal process, inhibiting defendant's access to full rights and equality under the law. The assumption of the neutrality of law and legal language and its universally applicability must be questioned when legal procedures, such as making a plea, are negatively impacting upon First Nations people.

---

[143] This example is from the Royal Commission on the Donald Marshall, Jr., Prosecution as quoted in the AJI Report, Vol. 1, supra note 14, p. 38. The reference provided is Francis, 2 November 1987, presentation quoted in Ahenakew, King and Littlejohn, "Indigenous Languages," p. 30.

Legal language and discourse can pose further problems for First Nations because of the cultural value of the western justice tradition to imbue written records, documents and history with an authoritative quality Historical testimony and knowledge given by First Nations people is often devalued in legal proceedings because of its basis in oral histories and discourse.[144] Historically, First Nations people had no written records and consequently relied on oral stories, voiced through the generations, as the repository of historic knowledge and experience [145] This reliance on oral stories and histories poses problems for the Euro-Canadian legal tradition which relies extensively on written records and documents to define and provide historical 'fact'. Consequently, oral histories are often undermined in legal proceedings and the legitimacy of their content and credibility as a source of 'truth' is relegated as inadmissible or suspect.[146] The laws of evidence (rooted in concepts such as the hearsay rule, best evidence rule, weight of evidence rule and parole

---

[144] Robin Ridington (supra note 142) provides an good background for the understanding of oral traditions for First Nation people in the following passages:

> Hunting and gathering people typically live in kin-based communities where most social relations take place between people who know one another well. Because people share knowledge of one another's lives they code information about their world differently from those of us whose discourse is conditioned by written documents. They know their world as a totality. They know it through the authority of experience. They live within a community of shared knowledge about the resource potential of a shared environment. They communicate knowledge through oral tradition. They organize information through the metaphors of mythic language. They reference experience to mutually understood information. They communicate with considerable subtlety and economy. (p. 277)
>
> Each person's life is an example of the mythic stories that people know to exist in a time out of time. Experience within a closely contexted oral culture is meaningful in relation to a totality that is taken for granted. Storied speech is an example of that totality, not simply a part of it. Storied speech makes subtle and esoteric references to common history, common knowledge, common myth. Each person is, therefore, responsible for acting autonomously and with intelligence in relation to that knowledge of the whole. From within the familiarity of shared, culturally constructed metaphors and assumptions, the essential creative and transactional quality of human communication may not be obvious. It is only when we attempt discourse with people who are unwilling to listen to our words, to understand our experiences, that we find ourselves talking at cross purposes. Attempted discourses between different cultures may create conflict, ambiguity, even oppression. (p. 278)

[145] In addition to oral stories, some First Nation cultures represented historic knowledge in "customary laws sometimes represented by wampum belts, sacred pipes, medicine bundles, and rock paintings." Aki-Kwe/Mary Ellen Turpel, "Aboriginal Peoples and the Canadian Charter of Rights and Freedoms: Contradictions and Challenges, in E. Comack and S. Brickey (eds.), The Social Basis of Law, Toronto: Garamond Press, 1991, p. 229.

[146] For example, see: Clay McLeod, "The Oral Histories of Canada's Northern People, Anglo-Canadian Evidence Law, and Canada's Fiduciary Duty to First Nations: Breaking Down the Barriers of the Past," Alberta Law Review, 1992, 30, 4, pp. 1276-1290; Ridington, supra note 142.

evidence rule) have consistently worked to disregard oral history evidence and testimony as trustworthy sources of information.[147] The ethnocentric bias of literacy and its concomitant devaluation of First Nations' historical knowledge by courts and judges has led some critics such as McLeod to surmise that law is a tool of oppression for First Nations [148]

The devaluation of oral stories and histories is particularly poignant in court cases involving Treaty or Aboriginal rights cases. Ridington provides a provoking example of the extent of cultural biases and conflicting discourses of the court when she tells of the case of the Dunne-za/Cree elders providing oral stories as testimony in court.[149] The case addressed the contention of the Dunne-za/Cree that their land in Northern British Columbia had been surrendered in 1945 without their consent, and challenged the fiduciary obligations of the federal government. For Ridington the outcome of the case was dictated by the ability of the judge to understand conflicting modes of discourse, specifically "[h]e would have to understand Dunne-za/Cree discourse and how it relates to the discourse of his own legal tradition."[150] Her argument highlights the premise that human communication and discourse are rooted in culture and it is culture which creates meaning and comprehension for those interacting and communicating. Her suggestion that outcomes of legal proceedings rest on the ability of the judiciary to understand and bridge differer.. cultural realities and meanings that are rooted in discourse and language,

---

[147] McLeod, Ibid. While McLeod exposes the ethnocentricity and cultural bias of the courts and legal system personnel in devaluing oral history, he remains optimistic that there is room within the law at present to admit oral evidence as credible and reliable. For McLeod, the validity of oral history in courts is dependent on judges awareness of the cultural principles of Anglo-Canadian evidence law and their commitment and use of the parole evidence rule, judicial notice, hearsay exception and expert evidence in a culturally unbiased manner. While McLeod's argument that Canadian courts must begin to understand First Nations discourse is well taken, I would suggest that it remains a more difficult task than to simply allow that consciousness-raising among the judiciary will indeed lead to acceptance of oral history as a source of 'truth' in Anglo-Canadian law. It would seem that a reliance on law that is cultural bound will not necessarily lend itself easily to the reevaluation or reapplication of those same legal principles by attempting to keep their application to a different culture in mind.

[148] For example, McLeod, Ibid.; Also see Chief Justice McEachern's decision in *Delgamuukw* v. *British Columbia* (1991), 79 D.L.R. (4th) 185 (B.C.S.C.) who rejects the legitimacy of oral histories of the Gitksan and Wet'suwet'en because the proof of their content occurred before contact and thus was unable to be substantiated by scientific, anthropological or historical evidence.

[149] Ridington, supra note 142.

[150] Ibid., p. 274.

gives more substance to the claim that Euro-Canadian law and traditions are in fact alienating and foreign for First Nations people.[151]

Ridington offers critical commentary on the court's response to the testimony of the Dunne-za/Cree elders. She states that these problems including language barriers, behavioural expectations, and lack of respect for the elders, who are honored persons of the Dunne-za/Cree community attest to the cultural processes at play over and above its literary bias. For example, the Elders' stories were constantly being interrupted by the judge, lawyers and interpreters in order to make sense of what they were saying. The fact that they were constantly interrupted was considered rude in their culture and, as Ridington states, it had probably never happened to them before [152] Significantly, the elders felt that the interruptions and cross-examinations implied that they were simply dismissed or not taken seriously. As such, they refused to speak any longer Hugh Brody offers this insight:

> Elders from the Dunne-za/Cree bring their case to the Court because they believe there's some direct relationship between knowledge and justice, but the cross-examining procedure, and perhaps the whole court procedure, actually breaks any such simple equation. As you experience it on the stand, you don't feel a relationship between knowledge and justice. What you feel is someone playing a game with you... elders in the Dunne-za/Cree *can't* cope with it They sense that they're being mistrusted, disliked, doubted by the cross-examining lawyer And that will, in fact, cause them to fall silent . [because] if somebody doesn't believe what you're saying, you shut up. That's the dignified thing to do [153]

The nature and impact of court proceedings can significantly affect those not acquainted with Euro-Canadian law and its legal traditions Again, this experience points to the problems that can occur for First Nations people due to language and cultural differences in the criminal justice system

---

[151] The claim that culture determines discourse, meaning, and comprehension and additionally that discourse creates and performs cultural reality is found in much work on narrative and language.
[152] Ridington, supra note 142, p. 284.
[153] Brody cited in Ridington, Ibid., p. 286.

Alongside the problems that language and discourse can pose for First Nations people in legal proceedings are those behavioural expectations dictated by the court system, which will influence legal proceedings and the pursuit of justice. Once again, the problem is one of cultural conflict. For example one such cultural response was noted above when discussing truth, that a First Nation person acknowledges the relative truth in many versions of events or circumstances. A First Nation witness may seem unreliable or less credible if they are seen to be agreeable with other views or hold that other versions of events as reasonable. Without knowing that a First Nation person may simply be acknowledging the validity of another account or view, it may be surmised that they are changing their story

Another aspect of demeanor that may affect the fairness of a legal hearing for many First Nations persons is the tendency to behave in a passive or accepting manner, as is prescribed by the traditional cultural ethic of emotional restraint. Adherence to this ethic requires the person to show little emotion and a lot of restraint which may restrict a First Nation person from challenging, protesting, or questioning what happens to them or within the process. Such behaviour may seem to indicate to those unfamiliar with First Nations cultural mores that First Nation witnesses or accused lack cooperation, empathy, remorse, or the potential for rehabilitation, impressions which may subsequently influence more fundamental perceptions of the person's character and the outcome of the proceedings.[154] This risk is especially acute in other processes that are related to the legal proceedings, such as psychiatric assessments that are required by the court. The cultural rules that require some First Nations people not to criticize or give advice to others may limit First Nations peoples' involvement in court and court related procedures. Ross suggests that speaking about innermost thoughts or feelings requires one to share and

---

[154] Murray Sinclair, supra note 131, pp. 183-184, offers the insight that First Nations are raised knowing their place within creation and dependence on the Creator; they are taught to wait patiently, quietly, and respectfully for the mercy of the Creator. As such, they act with courage to accept those things that must come to them. With this commitment to respect for others and authority, First Nations behaviour may be misread or misinterpreted by others if they make an "effort to honor those pleading [their] case, [by trying] hard to agree to their requests, to give answers that please, and not to argue or appear adversarial."

respond in the communication process, if this burdening of others violates cultural ethics then the process of communication is damaged or hampered [155] If one does not respond as we would expect, assumptions of unresponsiveness, undemonstrativeness, or noncommunication may lead to misdiagnosis and possible mistreatment due to cultural standpoint.[156]

A final example of demeanor that may be misinterpreted because of its cultural specificity is eye contact. Within Euro-Canadian culture it is considered rude not to make eye contact. When someone is speaking with you, eye contact is made to show interest and attentiveness and may influence perceptions of the veracity of the speaker's position. However, in First Nations' culture the opposite is true; it is considered rude to sustain direct eye contact. A sign of respect would be to maintain only passing glances to show attentiveness. This conflicting cultural rule can be misread by those outside of First Nation culture and can thereby negatively affect one's perceptions of a First Nation person. Again Ross provides the example of First Nation witnesses in the courtroom who may be considered untrustworthy or evasive because they did not maintain eye contact, when they were in fact conveying their respect.[157]

Cultural Assumptions as Reflected in Legal Actors and Reasoning

The preceding examples derived from and within First Nation discourse illustrate well their position that legal traditions and concepts within the criminal justice system are in fact not universal or culturally neutral in their application Rather, they have, and continue to, discriminate and perpetuate the inequities experienced by First Nations people in the system. However, equally as important and potentially discriminating for First Nations people is the potential ethnocentric behaviour and/or actions of criminal justice system personnel. Here, cultural bias and/or assumptions may be incorporated within legal

---

[155] Ross, supra note 115, pp. 33-34.
[156] Ibid.
[157] Ibid., p. 4.

discourse and criminal justice institutions in less obvious ways.[158] For instance, ethnocentricity or assumptions of cultural superiority may be subsumed within degrading or discriminatory remarks or views of First Nations people within legal reasoning as well as in the previously discussed operating assumptions operating within the courtroom proper (i.e., within the actions and behaviours of the criminal justice personnel such as judges, lawyers, police officers, etc). While perhaps these cultural assumptions may operate in less visible ways, they would indeed still affect the level and extent of justice a First Nation person may receive from the system.

The assumption of the inferiority of First Nations people and culture can be found in many court decisions, particularly those dealing with Aboriginal and treaty rights. Kline suggests that historical decisions have more often held devalued images of First Nations ways of life avocations,[159] First Nations as 'uncivilized people or savages'[160] and 'undoubtedly at the time of settlement a very primitive people with few of the institutions of civilized society'.[161]

A further example of potential sites of ethnocentric bias have been found in court decisions which have assumed that it is proper for those courts to decide and define what constitutes First Nation culture and traditions, as was the case in the Delgamuukw[162] and Naqitarvik[163] decisions. In the Delgamuukw case the judiciary reinforced historically-specific images of First Nations lifestyles and cultures and defined First Nation culture solely in terms of their pre-contact forms and content. The judiciary here held that the

---

[158] This does not discount that a criminal justice worker, i.e., judge, lawyer, police officer, etc. may be blatantly biased or discriminatory towards a First Nation person. However, my aim is to highlight such less obvious ways that cultural ideology may be operating and present within the mainstream criminal justice system.

[159] This was the reasoning of the Judicial Committee of the Privy Council in *St. Catherines's Milling and Lumber Co.* v. *The Queen* (1888), 14 App Cas. 46 (P.C.) as found in Marlee Kline, "The Colour of Law: Ideological Representations of First Nations in Legal Discourse," Social and Legal Studies, 1993, 3, pp. 458-459.

[160] Quoted from *R.* v. *Syliboy* [1929] 1 D.L.R. 307 (N.S. Co. Ct.) in Kline, Ibid., p. 459.

[161] Quoted from *Calder* v. *Attorney-General of British Columbia* (1970), 8 D.L.R. (3d) 59 (B.C.S.C.) as found in Kline, Ibid., 459.

[162] *Delgamuukw* v. *British Columbia* (1991), 79 D.L.R. (4th) 185 (B.C.S.C.).

[163] *R.* v. *Naqitarvik*, (1986), 26 C.C.C. (3d) 193 (C.A.).

adoption of modern Euro-Canadian society essentially nullified First Nation culture and lifestyle, and therefore provided a basis to justify that the Gitksan and Wet'suwet'en people ceased to hold Aboriginal title to land [164] In the Naqitarvik case, assumptions of cultural superiority were quite blatant and what became deemed the central issue in this case was that First Nation society and structures had to remain as they did in ancient times to be considered truly 'traditional' ways.[165]

Much of this chapter up until now has been concerned with describing the cultural conflict found in the nature and content of the legal system that is discriminatory for First Nations The neutrality of the justice system has been rejected within First Nation discourse and evidence has been provided to postulate that the justice system operates solely on Euro-Canadian assumptions and principles Within this context, it becomes necessary to turn to Aboriginal concepts of justice in order to provide the basis for understanding how First Nations discourse constructs Aboriginal justice, and what rationale informs choices of specific strategies of criminal justice reform

Here, the same problems of generalization and universality found within the first section of this chapter persist However, given that these principles of traditional justice are offered within First Nations discourse and their practical implementation within justice reform is highlighted as a way to circumvent the ethnocentricity of the mainstream criminal justice system, it is necessary to examine their content. As will become apparent within this discussion, these views of justice are very utopian and, while there may be some utility to

---

[164] *Delgamuukw* v. *British Columbia*, supra note 148.

[165] *R.* v. *Naqitarvik*, supra note 163. The accused in this case was charged with sexual assault in Arctic Bay and was given a sentence of ninety days imprisonment, two years probation and one-hundred hours of community work. This sentence was given by Judge Bourassa due to the submissions from the Inumarit (Council of Elders) and community as well as consideration of the community's traditional treatment of offenders. However, the sentence was overturned in the Northwest Territories Court of Appeal and the accused was given eighteen months imprisonment. The rationale for this was to suggest that despite the traditional methods of conflict resolution and rehabilitation in the Inuit community there was evidence of modernization and technology in the community as well as evidence to suggest that the Inumarit had diverged somewhat from the traditional body it was in earlier days. What was deemed at issue here was that First Nation society and structures had to remain as they did in ancient times to be considered truly 'traditional' ways. Again, providing evidence of the stereotypical assumption that traditional practices must remain intact and unchanged.

designate the specific characteristics sought within First Nations justice initiatives, the broad aims of justice cited here could be considered indicative of dispute resolution across a range of cultures In part, some of the problems here are largely those of the works cited (i e , Jefferson), which have attempted to provide an overview of Aboriginal justice for people not at all acquainted with First Nation-specific views of justice. However, this is, in fact, the central problem of such analysis and illustration provided within First Nation discourse -- an overreliance on generalizations and utopian concepts There has been a conscious choice to incorporate these limited views in the discussion of justice, as that is what is indicative of the notions of justice found in this discourse.

Aboriginal Concepts of Justice

To begin it is necessary to point out that First Nation discourse maintains that the concept of 'justice'[166] is abundantly used with little attention to its different meanings and understandings in First Nation societies. First Nations communities do not envision notions of 'justice' in the same sense as Euro-Canadian society For the majority of Euro-Canadians, justice is equated with the highly formal law and legal system which is compartmentalized into diverse areas such as criminal law, civil law, and family law and includes federal legislation and laws such as the Indian Act, Criminal Code, Canadian Constitution and so on In contrast to this, First Nations communities speak of "a general stance towards unacceptable behaviour, integrating religious taboos, hunting regulations, ceremonial procedure, morals, violations against people and property, into one cohesive, unwritten code of behaviour."[167] In contrast to the separate institutions and structures of justice of Euro-Canadian society, justice is an overall feature of the social structure and culture in the First Nations communities.[168]

---

[166] In fact the literature reveals that the word 'justice' did not exist in First Nations communities. While First Nations' notions of justice or concepts of justice are enlisted throughout this work, these are used as primarily as means to differentiate their use, while also suggesting the common understanding of dispute resolution at the roots.

[167] Jefferson, supra note 140, p. iv.

[168] Marianne O. Nielsen, "Criminal Justice and Native Self-Government," in Robert A. Silverman and Marianne O. Nielsen (eds.), Aboriginal Peoples and Canadian Criminal Justice, Toronto: Butterworths, 1992, p. 245.

Justice, or the maintenance and preservation of peace and order, has been claimed as a function of the "socialization process and the social, religious, economic and organizational functioning"[169] of a First Nation community. Community values and rules of behaviour were well ingrained and operated to encourage self-restraint and preserve order within the community.[170] It was the interests of the community and its collective survival that were paramount in First Nation societies, rather than individual interests. The reality of mutual interdependence underlies the notions of justice as the entire First Nation had a vested interest in enforcing conformity and ensuring the societal equilibrium.[171]

As discussed previously, First Nations cultures are premised on wholeness and holistic living, the realization of the interdependence and interconnectedness of life and commitment to the law of balance and harmony in all things. Aboriginal justice incorporates this comprehensive view of culture which addresses the family, social and community development and well-being. Its aim is to pursue a re-establishment of the equilibrium and harmony across relationships, families and society. As such, traditional justice is respectful of the integrity of all persons, both the wronged and the wrong-doer.[172] Interpersonal disputes, such as witchcraft, blood feuds, murder, that affected the whole community and threatened group survival, were treated very seriously.[173] Other types of wrong-doings such as adultery or assault were considered relatively minor offenses if they did not affect the whole community.[174]

According to First Nations' discourse, rather than punishing the offender, the community would assist the offender in reclaiming their balance. First Nations believed that "[i]f

---

[169] Ibid., p. 245.

[170] Again, there is a problem of the specificity of this statement only in terms of justice in Aboriginal communities. I would suggest that all societies do this to varying degrees.

[171] Nielsen, supra note 168, p. 245.

[172] Dumont, supra note 112, p. 83.

[173] Jefferson, supra note 140, p. vi.

[174] In fact, while this is considered true by Jefferson, this is not the case in highly structured First Nation societies such as the Tlingit. Rather, here if adultery was committed across class lines, the penalty could have been death.

someone within the group was 'out of balance,' that is, not physically, spiritually, emotionally and mentally balanced, they were not conforming to the group's expectation and caused conflict "[175] Responses to the wrong-doing were aimed at changing the offender's behaviour through counseling or teasing in order to assist their reintegration in communal life and thereby restoring peace and harmony in the community

Traditional justice is characterized by informal dispute resolution methods and/or social control mechanisms There are a range of methods geared towards curbing anti-social behaviour and included in those strategies offered in the literature are:

1 regular teaching of community values by elders and other respected persons in the community,
2. warning and counseling of particular offenders by leaders or by councils representing the community as a whole,
3 use of ridicules or ostracism by the community at large to shame offenders and denounce particular wrongs;
4 public banishment of individuals who persisted in threatening peace in the community,
5. mediation and negotiations by elders, community members, or clan leaders, aimed at resolving particularly dangerous private disputes and reconciling offenders with the victims of the misconduct,
6 payment of compensation by offenders (or their clans) to their victims or their victims' kin, even in cases as serious as murder, and
7 in the case of wrongs that posed a grave threat to the community (such as sorcery, murder, and, perhaps, theft or adultery), physical coercion or execution of the offender, either directly by the community (after investigation and deliberation by a council) or by the victim of the wrong, who was recognized by the community as having the right to take such action [176]

For First Nations, the aim when dealing with anti-social behaviour was "the resolution of disputes, the healing of wounds and the restoration of social harmony."[177] When the offense was recognized, it was dealt with immediately by the parties to the offense

---

[175] Nielsen, supra note 168, p. 245.
[176] Michael Coyle, "Traditional Indian Justice in Ontario: A Role for the Present," Osgoode Hall Law Journal, 1986, 24, 3, p. 625.
[177] AJI Report, Vol. 1, supra note 14, p. 27.

(offender and victim) Once atonement was made, the matter was considered finished [178] Again, emphasis was on restitution and reconciliation for the wrong-doing and restoring harmony in the community not punishment

Justice had a dynamic quality in First Nations communities in that it "was flexible, situational and adaptable, meaning that an action which may not have been an 'offence' at one point, may have been at another, depending on the circumstances"[179] and that there was an avoidance of numerous prescribed offenses and sanctions allowing for flexible responses to misconduct.[180] There was also a collective responsibility taken by the nation, community or clan for antisocial behaviour which allowed for more restraint for harsh or unreasonable sanctions or atonement [181] Related to this the collective responsibility for justice is the necessity for community support and consensus in decision-making for the laws and justice of the community [182] The community had considerable influence over the effectiveness and appropriate responses to misconduct because without community support, laws and other rules of behaviour could not be enforced [183]

For First Nation discourse, the point is clear that the concept of justice is perceived rather differently in First Nation and Euro-Canadian traditions In Aboriginal society justice focuses on suppressing anti-social behaviour through more internalized control, by the individual in self-restraint and the community in informal social control On the other hand, the Euro-Canadian justice focuses on the external authority and power of the state (more authoritarian-styled justice) to control deviant behaviour Another significant difference is that deviance and non-conformity in First Nations societies is considered in a non-judgmental manner; any responses to these are focused on restoring the balance and

---

[178] Ibid., p. 27.
[179] Jefferson, supra note 140, p. 245. For example, one may recall the seasonal prohibition against hunting alone in the summer when many Nations were gathered together on the plains to hunt bison.
[180] Coyle, supra note 176, p. 625.
[181] AJI Report, Vol. 1, supra note 14, p. 26.
[182] Jefferson (supra note 140, p. 173) maintains that "in all tribes, the exercise of power by the political and economic leaders was tempered by the frequent and potent expression of public opinion on how a matter was to proceed."
[183] Ibid., p. 245.

harmony of the collective through restorative justice. A summary of the major points of divergence and conflict within the underlying principles of both views of justice as described within First Nation discourse is provided in Table 1

Generally, the contention articulated within First Nation discourse is that the heart of the conflict between traditional Aboriginal justice and Euro-Canadian law reside in the fundamental values and beliefs of each culture -- fundamentally differing world-views [184] The claim is made that difference in world-view cannot be separated from conceptions of 'law' and 'justice'; the imposition of foreign concepts of justice based on cultural beliefs and perspectives has resulted in unfair, unjust and inappropriate treatment of First Nations. Aboriginal people have responded by advocating for the need to restructure or reshape the Canadian criminal justice milieu to recognize Aboriginal cultural principles and community autonomy This strategy of reform is not simply a reaction to the problems experienced by First Nations people in the criminal justice system, but is viewed as resonating within the larger continuing political resistance of First Nations to the Canadian government's disinterest in fulfilling its historical obligations to First Nation societies and the quest for self-determination [185]

The summary of Aborig al justice discourse provided has been important in the sense that it has outlined the general claims being made within First Nation discourse to illustrate the aims and contents of Aboriginal concepts of justice. While informative in the sense that it generally orients those persons not familiar with Aboriginal culture this discourse has

---

[184] When thinking of the difference in world-views of First Nations people and Euro-Canadian, I am reminded of the words of Aki-Kwe/Mary Ellen Turpel, "[a]boriginal cultures are not simply different 'races' -- a difference explained in term of biology (or colour): Aboriginal cultures are the manifestations of a different human (collective) imagination." See Turpel, supra note 145, p. 225.

[185] First Nations' desire for self-determination and Aboriginal control over all aspects of community life, including justice, has been a primary political agenda item for First Nations for some time now. The argument that self-determination strategies for wider political and social change underlies other more focused reforms is echoed by Monture-Okanee and Turpel (supra note 9, p. 263) who state, to frame strategies of criminal justice reform in terms of wider political aspirations should not be

> perceived as [introducing] an ulterior political agenda issue. It is integrally connected to 'justice' for our peoples. The overall political forum [and motivation] recreates itself in microcosm in the context of criminal justice.

tended to rely on generalizations and an assumed universality of First Nations concepts of justice and culture. This poses particular problems (1) it presupposes general concepts of First Nation justice as universal and thereby ignores variations between First Nations, (2) it assumes that concepts of justice are static within First Nation culture, and (3) it assumes a static view of First Nation communities in that these concepts of justice are just as applicable in First Nation communities in contemporary society as they were in the historical context. The consequence of thinking about First Nation culture and justice in utopian terms is that it creates a implicit measure by which to decide whether a First Nation community or justice initiative is 'traditional', if certain cultural rules of behaviour and norms are followed or if the aims and objectives of traditional concepts of justice are incorporated into a justice initiative, then that community is viewed as 'traditional' The implication is to evaluate justice initiatives in relatively utopian terms and implicitly, in culturally determined ways. What is necessary now is a review of First Nations justice initiatives that emanates from the romanticized assumptions of First nation culture and justice provided here.

TABLE 1: Comparison of Traditional First Nation Justice and Euro-Canadian Justice[186]

Traditional First Nation Justice	Euro-Canadian Justice
1. Justice is an integral part of the group's functioning and is understood by all.	1. Justice is a separate institution, completely understood only by specialists.
2. Traditional First Nation spirituality is the foundation of codes of behaviour.	2. Protestant Ethic and Christianity the moral foundation of law.
3. Rules of behaviour are formulated by community tradition and consensus	3. Laws formulated by elected representatives.
4. Enforcers have positions and power through popular consensus.	4. Enforcers are hired and do not depend on popular consensus for actions.
5. 'Laws' tied to the natural environment; only a few universally condemned actions in Aboriginal customary law.	5. Laws tied to man-made economy and therefore complex and numerous.
6. 'Laws' are verbally communicated.	6. Laws are written and codified.
7. Communal basis for society; no legal protection for private property; land held in trust by an individual and protected by the group.	7. Individualistic basis for society, and the use of the law to protect private property.
8. 'Law' usually administered by the offended party, i.e., the family, the clan or the tribe, through a process of mediation or negotiation.	8. Law administered by representatives of the state in the form of officially recognized or operated social institutions.
9. Personal offences seen as transgressions against the victim and his/her family; the community only intervenes in individual disputes if the demands that are made are unresolvable or unreasonable.	9. Personal offences seen as transgressions against the state as represented by the monarch; the system is immediately involved.
10. The relevance of the offence to the welfare of the group determines the seriousness of the punishment.	10. The seriousness of the offence depends on current morals, on the value of property involved, or amount of physical harm to the victim. There are very few 'system' offences - treason, unlawful assembly, obstructing justice, etc.
11. Situational factors are important in considering the 'offence'	11. Sentencing is formalized, legislated and written in various acts and codes. Situational factors are taken into account only as part of the criminal justice system personnel's discretion.
12. Punishment is immediate.	12. The justice process takes time, sometimes over a year, before trial and sentence.
13. Arbitration and ostracism usual peace-keeping methods.	13. Force and punishment used as methods of social control.
14. Punishment benefits both the victim and the group.	14. Punishment seldom benefits the group, and benefits the victim only if restitution is ordered.
15. Conformity is more important than retribution, etc.	15. Conformity is usually irrelevant except as an influence on the criminal justice system personnel's discretion.
16. Positive reinforcement and punishment are both present.	16 Punishments are emphasized.

[186] Sources: Adapted from Christie Jefferson, Conquest By Law, Ottawa: Solicitor General Canada, 1994, p. 174, and Marianne O. Nielsen, "Criminal Justice and Native Self-Government," in Robert A. Silverman and Marianne O. Nielsen (eds.), Aboriginal Peoples and Canadian Criminal Justice, Toronto: Butterworths, 1992, p. 248.

Chapter 4
First Nations and Criminal Justice Reform

The Euro-Canadian cultural bias of the criminal justice system and the problems it poses for First Nations people in conflict with the law was reviewed in the previous chapter, providing the framework from or within which to examine the criminal justice reform strategies advocated by some First Nations. The impetus for First Nations people to initiate and implement criminal justice reform appears to reside most commonly in their desire to address the ethnocentricity of the system and to pursue their inherent right of self-government/self-determination.[187] Criminal justice reform strategies are formulated in terms of these fundamental premises rather than in terms of the basic motivation of governmental reform initiatives, namely: addressing and eliminating over-representation.[188] This is not to suggest that First Nations do not seek to eliminate their over-representation, but that this would be a corollary of their overall reform strategies

This chapter reviews the self-government and inherent rights premises of criminal justice reform within First Nations discourse, and contrasts these conceptions and avenues of social justice from those which we saw emerging within the avenues of state-sponsored

---

[187] Aboriginal peoples' inherent right to be self-governing has been conceptualized in the literature in terms of Aboriginal 'self-government' and Aboriginal 'self-determination'. These two specific terms are commonly interchanged in the literature as if they have one single meaning. However, this is not in fact accurate. Monture-Okanee and Turpel assist in differentiating the concepts: self-government refers to the right of Aboriginal peoples to "choose their form of governance" whereas self-determination "is broader and emphasizes the rights of peoples." "The content of the principle of self-determination is larger than the delegated authority from the federal government implied in the term 'self-government." Monture-Okanee and Turpel, supra note 9. The connection between self-determination and self-government will be clarified later in this chapter.

[188] The claim of cultural bias and the necessity of addressing reform at the macro-levels of society was characteristic of the third avenue of reform, focusing on social justice, that emerged from governmental studies and inquiries (as discussed in Chapter 2). While little differentiates analysis and strategy of reform from the First Nations perspectives reviewed here its starting point was the consequence of highly publicized cases of the differential treatment of First Nations and non-First Nations, overrepresentation and perceived racism in the system. The starting point of criminal justice reform as advocated by First Nations here is the result of political activism on the part of First Nations to deal with outstanding historical issues and consequences of colonization. The difference may seem negligible but does reflect a reluctance of the government to undertake reform until it had to in contrast to the consistent resistance by First Nations of domination and cultural annihilation (i.e., the state is forced to confront reform, First Nations always advocated it).

reform. From here, the analysis turns to the plurality of strategies and emerging justice initiatives found in First Nation communities, and discusses their points of convergence with, and divergence from, governmental initiatives. Finally, the chapter ends with a method, based in informal/formal justice debates and legal pluralism theory, to further examine and extrapolate as to the nature and extent of future relationships between these two paradigms of justice.

Self-Determination as Basis for Criminal Justice Reform

First Nations discourse roots reform strategies that address the ethnocentricity of the Canadian criminal justice system in First Nations peoples' inherent sovereignty as original inhabitants of North America. As in all other matters that affect them, First Nations people believe that criminal justice reform must be grounded in their inherent rights -- to control their own lives, lands and communities. This perspective proposes that all aspects of the Canadian political, economic and social environment (and any future changes to it) must be premised on recognizing and incorporating Aboriginal rights to sovereignty and self-determination.

The standpoint within this discourse is that the problems emanating from the criminal justice system are indicative of the institutionalization of Euro-Canadian political and social structures and values in Canadian society. In addition to acknowledging the ethnocentric bias of the criminal justice system, this perspective incorporates a broad analysis of colonialism and the historical objective of the Canadian state to assimilate First Nations into the dominant system and the dominant society's governmental organizations. First Nations people claim that the imposition of Euro-Canadian social structures and organizational forms which are designed, controlled and managed on a Euro-Canadian world-view, actively eradicate traditional governance and justice practices in Aboriginal communities. As a result, strategies of criminal justice reform must be directed at the structure as well as the content of the system. It becomes a question of a different starting point for strategies of reform. one that is premised on the cultural distinctiveness and inherent sovereignty of Aboriginal peoples in contrast to those premised on Euro-Canadian values and social structures. In order to accomplish this, First Nations discourse advocates that initiatives for criminal justice reform must originate in

First Nations communities and be principled on the right of First Nations to have control over the processes, structure and content of institutions and programs within civil and criminal justice matters. Only through an Aboriginal presence in the administration of their social structures, in this case criminal justice, in their communities will true reform or change be realized. Reform must be conceptualized within the sovereignty of First Nations communities and incorporate ways which allow them to reclaim control over their own affairs, thereby discontinuing the imposition of culturally-irrelevant structures and institutions on their communities and moving them toward self-determination.

Underlying the call for community-based strategies of criminal justice reform is the fact that First Nations peoples consider themselves distinct nations based in their inherent sovereignty[189] and right to self-determination. The claim of sovereignty is premised on the fact that "prior to European contact, Aboriginal peoples were organized politically autonomous structures with sovereign control over their territories"[190] as well as the fact that First Nations entered into treaties with the British Crown as sovereign peoples and nations.[191] Similarly, the right to self-

---

[189] I rely on Kirke Kickingbird's conception of sovereignty:

> ...a good working definition of sovereignty is: *the supreme power from which all specific political powers are derived*. Sovereignty is inherent; it comes from within a people or culture. It cannot be given to one group by another. Some people feel that sovereignty, or the supreme power, comes from spiritual sources. Other people feel that it comes from the people themselves.(p. 46)
>
> Some people fall into the trap of equating sovereignty with nationhood, government, or politics. While sovereignty, nationhood, government, and politics are related, it is important to remember that sovereignty is absolute and comes before nations, governments, and politics. Sovereignty has the most meaning in a practical sense when we look at the sovereign powers exercised by a government. So the most basic power of a sovereign people is the power to select their own form of government.(p.47)

Kirke Kickingbird, "Indian Sovereignty: The American Experience," in Leroy Little Bear, Menno Boldt and J. Anthony Long (eds.), Pathways to Self-Determination: Canadian Indians and the Canadian State, Toronto: University of Toronto Press, 1984, pp. 46-53.

[190] Augie Fleras and Jean Leonard Elliott, The 'Nations Within': Aboriginal-State Relations in Canada, the United States, and New Zealand, Toronto: Oxford University Press, 1992, pp. 23-24.

[191] In support of this view, Aki-Kwe/Mary Ellen Turpel (supra note 145, p. 225) states:

> Of course, there is no compelling reason, according to the doctrines and principles of international law, to view treaties between Aboriginal peoples and the Crown as anything other than treaties between sovereigns, or *international* treaties.

Additionally, James Youngblood Henderson claims:

determination was a pre-existing Aboriginal right that was never extinguished and constitutes their "determin[ation] to exercise control over those political, cultural, economic and social issues of concern to them."[192] Despite colonialism and the historic disregard of the nature and spirit of the treaties, First Nations peoples assert that these inherent rights were never extinguished. First Nation discourse holds that each Aboriginal society is a distinct culture and political community, in other words, a different nation.[193] While they may not be considered as such by dominant society (the colonizers), First Nations claim their nationhood despite their current subjugated status in Canadian society and have claimed the conceptualization of 'nations within' or 'entrapped nations'.[194]

The ultimate political goal for First Nations is self-determination, that is to survive as a distinct society and control those issues of concern to them.[195] However, Fleras and Elliott point out that First Nations people recognize that the preservation of a collective identity within the current political framework of society is difficult given the assimilationist practices and the primacy of individual rights in Euro-Canadian society [196] As a result, First Nations have adopted a political agenda which advances their inherent right to self-government in addition to

---

> The terms of [the] treaties recognized [First Nations] as protected states in the British Kingdom. Under British law, these terms do not transfer the states' inherent sovereignty to the Crown, only their allegiance as autonomous political orders.

James Youngblood Henderson, "Implementing the Treaty Order," in R. Gosse et al., Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice, Saskatoon: Purich Publishing, 1994, p. 54.

[192] Fleras and Elliott, supra note 190, p. 23.

[193] It is rather interesting that within First Nation discourse there has been a overwhelming tendency to rely on generalizations and universalities of First Nation culture in order to provide a seeming homogeneous view of First Nation culture, as discussed in the previous chapter. However, at the same time there is acknowledgment that each First Nation it distinctly different in culture and society from other First Nations. This contradiction lends more credibility to my argument against romanticized and ideal conceptions of First Nation culture and its implicit cultural determinism.

[194] This concept is used by Fleras and Elliott (supra note 190) and refers to the fact that Aboriginal peoples have, and continue, to assert their distinctiveness and resist assimilation in order to reinstate their sovereignty and nationhood. However, their subjugated status keeps them as nations within other nations. Similarly, Aki-Kwe/Mary Ellen Turpel (supra note 145, p. 227) states that while First Nations retain nationhood due to their continued domination, they are in fact 'entrapped nations'.

The important point here is that First Nations define themselves as a sovereign entity within the federal state.

[195] Fleras and Elliott (Ibid., p. 23) elaborate: "Central to this goal of self-determination is the conviction that Aboriginal peoples constitute a social collectivity with an alienable duty as custodians to bequeath land and culture to future generations."

[196] Ibid., p. 23.

Aboriginal and treaty rights as a way to realize self-determination [197] By framing the issue in terms of the inherent right to govern themselves, First Nations can challenge the dominant political structures to redefine the Aboriginal-state relationship As self-governing bodies First Nation communities would constitute a 'new' order of government in Canada. In addition to the federal and provincial governments, First Nations envision a 'treaty order' whereby First Nation communities would be granted the powers and authority over matters and issues of concern to them.[198] Significantly, this new order of government would be entrenched in the Constitution so that it would be viewed in terms of First Nations' inherent rights and not viewed as a 'privilege' of the federal government or 'created' by Canadian law [199] First Nations believe that their authority must emanate from the constitution in order to recognize their role as distinct and founding nations within Canada [200]

---

[197] This argument of inherent rights to self-government is echoed in words of Don Worme:

> Let me say, first and unequivocally, that as First Nations we do have an inherent right of self-government. It's not a right that has been delegated to us by the King or anybody; it's a gift or a right that's been granted to us by our Creator.

Don Worme, "First Nations Perspective on Self-Government," in R. Gosse et al., Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice, Saskatoon: Purich Publishing, 1994, p. 77.

[198] James Youngblood Henderson, supra note 191, p. 55. In this regard he states:

> ...treaty stipulations could be made only with First Nations who were capable of governing themselves and others. The treaty order is an existing Aboriginal government. It continues the traditional order. The treaties did not terminate the governmental or legal authority of the Aboriginal Peoples. These treaty obligations made them full partners in establishing a legal order in western Canada under the imperial Crown. This inherent order was restored in the new Canadian order.

[199] A good summary of this rationale is provided by Gerald Morin:

> Everyone knows we have spent a lot of time over the past couple of years talking about the inherent right of self-government. Last year, the provinces, the federal government and Aboriginal Peoples acknowledged and recognized that Aboriginal People have the inherent right of self-government. That is to say, our rights flow from our Creator, from our history and from our nation. It is not up to governments to grant us those rights, but merely to recognize our pre-existing inherent rights so that in the future they can be clearly entrenched in the Constitution and so that, as a practical matter, we can clearly exercise those rights within Confederation. This is our starting point, the foundation of everything.

Gerald Morin, "Metis Perspectives of Justice and Aboriginal Peoples," in R. Gosse et al., Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice, Saskatoon: Purich Publishing, 1994, p. 37.

[200] First Nations challenge the view that British and French governments were the founding peoples of Canada as they had been on the continent long before European contact, since time immemorial. This fact constitutes their role as the nations upon which Canada was founded.

While the purpose of self-government is clear, to restore Aboriginal authority over their social structures and institutions rather than the imposed authority of state, the overall conception of what self-government entails or hopes to accomplish is sketchy This has been in part due because there is no single conception of self-government. There has been resistance to defining self-government by First Nations because there are approximately six hundred First Nations in Canada each identified by their own specific culture, history, traditions, and language and with specific needs, realities and aspirations.[201] Advocates of self-government claim that the concept of self-government should "be flexible, adaptable and non-dogmatic"[202] as it will come to mean different things for differing nations. The Royal Commission on Aboriginal Peoples describes the complexity and ambiguity of the concept in this way

> Self-government means different things to different Aboriginal groups. For some, it may mean reviving traditional governmental structures or adapting them for modern purposes. For others, it may mean creating entirely new structures or participating more actively in new or existing institutions of public government at the federal, provincial, regional or territorial levels. For certain groups, it may involve developing structures of public government that would include all the residents of a particular region or territory. For still other groups, it may mean greater control over the provision of governmental services such as education and health care. In discussing the implementation of self-government, it is important to remember that there is more than one way for the Aboriginal peoples to achieve the goal of greater autonomy and control over their lives. No single pattern or model can be adequate, given the great variety of aspirations and circumstances among Aboriginal peoples.[203]

Clarifying self-government will be part of the overall political agenda of each specific First Nation in Canada as they begin the process of challenging the authority of the federal and provincial governments and seek to regain control over their own lives, lands and communities. Clearly, the paradigm of self-government is conceptually suited to reflect Aboriginal concerns and effect change in the criminal justice system while sustaining the First Nation political agenda for self-determination.

---

[201] There are 586 First Nations in Canada.

[202] Fleras and Elliott, supra note 190, p. 24.

[203] Royal Commission on Aboriginal Peoples, Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution, Ottawa: Royal Commission on Aboriginal Peoples, 1993, p. 41.

First Nations' approaches to criminal justice reform are firmly established in the larger process of effecting substantial social change by addressing colonial and racial domination in Canadian society. By advocating for control over the administration of justice, First Nations will direct themselves towards the achievement of this larger goal of self-government and self-determination while providing practical ways to deal with the problems that First Nations confront in the legal system. In perspective then, two levels of justice are pursued simultaneously: (1) individual justice, aims to improve and eradicate the injustices First Nations people experience in conflict with the current legal system and (2) social justice, which aims to effect change to the overall inequity and domination of First Nations by Canadian society.

Significantly, both types of justice advocated by First Nations are also being pursued through the state-sponsored reform identified earlier pursuing process, social context and social justice strategies.[204] Substantial differences lie between the state-sponsored and First Nations discourses in terms of those state-sponsored strategies which are aimed at better access to law and procedural justice because these inevitably fail to address the historical context of social relations as part of the problem. There are some profound similarities between those pursuits of social justice identified in the state-sponsored position and First Nations perspective described here; that is, the concern for self-government as a basis for criminal justice reform Both positions hold that reform must be directed towards changing the criminal justice system in terms of the right of First Nations to govern themselves [205] However, when discussing the state-sponsored position, critique was leveled at the types of recommendations proposed because of their seemingly liberal limitations of actual solutions towards the social justice end, namely tribal courts. Criticism was directed toward the embracement of existing criminal justice institutions and frameworks as the way for First Nations to obtain greater control over the administration of criminal justice matters in their communities It seems necessary to examine the types of solutions that First Nations advocate in order to compare their solutions

---

[204] I am referring to those governmental strategies of justice reform for First Nations in the criminal justice system identified in Chapter 2.

[205] In fact, the governmental strategy of reform based on social justice assumptions also endorsed constitutional amendments to recognize that right.

with the state-sponsored approach. If, in fact, First Nations offer similar strategies based on self-government then there would be a good basis upon which to speculate on a future relationship based on strategic similarities and common goals within the criminal justice system, which is typically the fundamental stumbling block to any cooperative action between First Nation-state relations. We will return to this point later

Aboriginal Self-Government and Criminal Justice Initiatives

From within the First Nations discourse then, it would appear that justice and nation-building are integrally tied together The pursuit of self-government to redefine First Nation-Canadian state relations provides the basis to enable First Nations to take over control of criminal justice matters in their communities Once achieved, First Nations are able to provide more culturally-relevant and sensitive alternatives for their people in conflict with the law Much of the political strategy for First Nations has been centered on Constitutional amendments in order to entrench their inherent Aboriginal and self-government rights.[206] At present, there has been much resistance and lack of political will by the federal and provincial governments to entrench Aboriginal and self-governing rights as part of the first principles of the Constitution Accordingly, First Nations have pursued more interim avenues of reform to have control over the matters which affect them, such as negotiating within the scope of existing constitutional arrangements and treaty rights [207]

The pursuit and recognition of self-government by First Nations is essential to a discussion on criminal justice reform. Essentially, without the authority or right to self-government

---

[206] It seems pertinent to make the distinction as to what are potential relationships between Aboriginal peoples and the Canadian state and therefore, Aboriginal rights. There are three views that emerge of Aboriginal rights:

1. Inherent - Aboriginal rights flow from inherent and unextinguished Aboriginal sovereignty
2. Treaty-Based - from existing Aboriginal and treaty rights as those set out in the Constitution,
3. Delegated - from federal and provincial governments.

[207] Much resistance to the Constitutional guarantee of First Nations inherent rights to self-government has to do with one, the reluctance of the federal and provincial governments to cede power to another order of government, thereby affecting their authority and jurisdiction and two, the threat of First Nations secession and therefore perceived survival of Canada's as a unified body and sovereign state. As such, First Nations have been limited to 'negotiating' self-government to obtain municipal-like powers. (Fleras and Elliott, supra note 190, p. 25)

recognized by the Canadian state the options for First Nations to reform the criminal justice system based on their concepts of justice are limited Criminal justice reform proposed by First Nations would be incorporated into the existing system and subject then to the discretion, authority and funding of the federal and provincial governments because criminal justice matters are currently under their purview. Because it is the structure and content of the system that First Nations seek to address, there may be more chance for comprehensive social reform if First Nations have greater control over the design and implementation of structural changes rather than changes through the incorporation of culturally-sensitive programs or projects which tends to be the norm. As well, as sole control and jurisdiction over criminal justice in First Nations communities, a broader level of initiatives and changes may be possible The potential for reform would not be limited to the criteria and limits dictated by the state but primarily to the will and needs of the community [208]

There is considerable optimism that current constitutional arrangements could accommodate First Nations aspirations for control over administration of criminal justice matters within their communities. There is indication that the internal autonomy of communities could be negotiated through treaty guarantees and current sections of the Constitution For example, treaties can serve as a basis for Aboriginal criminal justice systems namely because the internal autonomy and integrity of the nations, First Nations and the British Crown, underlies the relationship between these parties to the treaties; treaties are a negotiation between distinct self-governing nations. Some academics argue that due to the fact that "the text of all of the treaties are silent on the question of criminal justice,"[209] and that the treaties are an alliance

---

[208] There are other factors which would determine what criminal justice initiatives were implemented such as the history and ideology of the people, internal and external economics, and internal and external politics (Kickingbird, supra note 189, p. 47-48). The point is that whatever the community was realistically able and willing to undertake could be implemented.

It is necessary to address that there are First Nation communities which are not able to partake in self-government strategies and therefore would be limited as to what reform initiatives they could take on. This is the case of First Nations with small membership or those without any resources or financial base. For example, Metis and non-status Indians do not have the money or a sustainable resource base of which to implement self-government. (Fleras and Elliott, supra note 190, p. 27.)

[209] Bruce H. Wildsmith, "Treaty Responsibilities: A Co-Relational Model," University of British Columbia Law Review, Annual, 1992, 26, SPEISS, p. 325. Wildsmith notes the exception of the Mi'kmaq Treaty of 1752 which in its text refers to the Courts of Civil Judicature as the place to resolve disputes between colonists and Mi'kmaqs. Significantly, this treaty did not speak to other matters of

between co-equals, and each party to the treaties had before and after internal sovereignty over their own internal affairs, there is room to argue that the federal and provincial governments would have to recognize and grant paramountcy to Aboriginal justice systems in First Nation communities [210]

Similar arguments over the viability of First Nations justice structures and self-government in criminal justice matters has emerged in MacKay[211] and Macklem.[212] Both argue that existing constitutional frameworks allow for First Nations to restructure the criminal justice system consistent with their aspirations for self-determination MacKay is optimistic that the federal-provincial division of powers as outlined in the Constitution can be interpreted as to allow for the establishment of an Aboriginal justice systems.[213] Macklem, on the other hand, maintains that S 35 of the Constitution Act can work to allow criminal justice matters as a practice of self-definition in a First Nation community and thereby qualify as an Aboriginal right.[214] As well he argues that the key to greater control over self-government in criminal justice matters is

---

internal disputes within each differing nation, therefore suggesting the autonomy of each nation to resolve their own conflict through their respective traditional means and questioning the legitimacy of the Euro-Canadian law to apply to treaty Indians. Similar argument is made in Henderson, supra note 191.

Unfortunately, these analyses fail to account for the "promises of separate [justice] institutions made to the Five Iroquois Nations by the Dutch in the 1664 Albany Treaty, and later ratified by the British." (Dickson-Gilmore, p. 262) Within the context of this treaty provisions were made for an institutional and jurisdictional arrangement which allow each nation to keep its own legal system and the right to try an offender within the laws of his/her own culture. This treaty has formed the traditionalist's claim to the right to implement separate justice order, the Longhouse Justice, at Kahnawake. For discussion see, E.J. Dickson-Gilmore, "Resurrecting the Peace: Traditionalist Approaches to Separate Justice in the Kahnawake Mohawk Nation," in Robert A. Silverman and Marianne O. Nielsen (eds.), Aboriginal Peoples and Canadian Criminal Justice, Toronto: Butterworths, 1992, pp. 259-277.

[210] Wildsmith, Ibid.

[211] A. Wayne MacKay, "Federal-Provincial Responsibility in the Area of Criminal Justice and Aboriginal Peoples," University of British Columbia Law Review, Annual, 26, SPEISS, pp. 314-322. MacKay focused solely on the federal-provincial division of powers as set out in the Constitution and deliberately ignored the impact of the Charter of Rights and Freedoms in this discussion.

[212] Patrick Macklem, "Aboriginal Peoples, Criminal Justice Initiatives and the Constitution," University of British Columbia Law Review, Annual, 26, SPEISS, pp. 280-305.

[213] MacKay, supra note 211. However, while optimistic he raises the point that under federal-provincial jurisdiction as it now stands an Aboriginal court would not be able to be the final and binding in its jurisdiction, the Supreme Court of Canada would in fact be the final say. Also important to note MacKay believes that the imposition of current constitutional structures on First Nation should be an interim solution only.

[214] Macklem, supra note 212.

S. 25 of the Charter of Rights and Freedoms, which will provide the basis for legislative guarantees to different forms of justice by Aboriginal people [215]

While there is optimism that current constitutional arrangement may be supportive of the Aboriginal control of criminal justice matters, it is necessary to view these in perspective, as interim approaches to real constitutional change Legislative authority and negotiated self-government can in fact work to allow First Nations to implement criminal justice initiatives based on a different approach to justice, one which aims to provide conflict resolution in line with more traditional concepts and goals of justice The key is community autonomy over the design, implementation and operations of their justice choices and initiatives

Given the focus on community autonomy to implement criminal justice initiatives and the varied cultures and societies of First Nations in Canada, it is not surprising that there is no single approach to justice. Criminal justice reform is proceeding under a wide variety of different administrative arrangements, ranging from initiatives undertaken independently by First Nation communities, to ones that are closely circumscribed by the policies and administrative arrangement of Canadian governments

The next section will address the strategies of reform that has been advocated by First Nations communities. What will become apparent is that there are diverse reform strategies proposed by First Nations peoples despite their consensual concern with addressing the social 'justness' of reform These differences underlie the difficult process of paradigmatic reconciliation (First Nation-Canadian state justice system reconciliation for integrated systems) and/or relationships between concepts of justice that criminal justice reform will have to address in the future.

Aboriginal Justice Initiatives

For First Nations, initiating justice alternatives is a way to provide a 'difference-based approach'[216] to justice based on their cultural distinctiveness and rights as sovereigns

---

[215] Ibid.

There is a wide range of justice initiatives proposed and implemented by First Nations communities in the pursuit of culturally-relative justice alternatives Two distinguishing factors are indicative of all are one, they are rooted in pursuing and realizing the processes of self-government and two, their commitment to culturally appropriate justice solutions whether that means an entire system originating on traditional Aboriginal justice concepts such as rehabilitation and restoration of harmony in interpersonal relationships or the integration of such to existing structures Other than these similarities there is a continuum of justice initiatives proposed ranging from separate justice orders to integrated justice orders [217]

A. Separate Justice Initiatives

One strategy for criminal justice reform is based solely on traditionalist concepts and structures of conflict resolution rather than government sponsored ones Advocates of separate or parallel First Nation justice systems consider it the most appropriate strategy to combat their continued subjugation to imposed and foreign concepts of justice A parallel system of justice would allow First Nations to retain full autonomy over criminal justice administration and matters

A system of justice to deal with conflict resolution in a First Nation community outside the purview of the Canadian state and based on traditional justice and peace-keeping conceptions is an appealing solution because of its primacy as a self-government initiative. The challenge is that there is a dearth of information available to draw on to inform and animate a separate system of justice While there is no separate system operating in Canada, there has been a design proposed by one group of traditional people in the

---

[216] Term used by Turpel, supra note 145, p. 226.

[217] The continuum would in fact range from a fully separate system of justice for First Nations to the status quo, one solely based on Euro-Canadian concepts. However, because the discussion speaks to justice initiatives, this automatically excludes those justice programs or projects not controlled by First Nations or aimed at the furthering of self-government.

Mohawk Nation at Kahnawake which gives an indication as to what an independent Aboriginal legal order may look like [218]

The proposed Longhouse Justice System of Kahnawake[219] incorporates the traditional concepts of justice and structures of governance into a criminal justice 'process' As indicative of First Nation concepts of justice, this system of dispute resolution focuses on reconciliation and compensation Emphasis in this justice process is first a focus on the peaceful resolution of disputes through informal means In fact, the Longhouse process is not initiated until all informal attempts at resolution and private settlement is exhausted [220] If a dispute could not be resolved at this level, the process would entail convening the clan leaders of the community council at the Longhouse to hear the dispute

The Longhouse is a traditional governance structure of the Iroquois or Six Nations Confederacy and was the basis of their conduct of government [221] While not specifically applicable to criminal justice matters, it has been modified as a way to actualize traditional dispute resolution within a contemporary criminal justice context Within the Longhouse, traditional clan associations and specific physical arrangements are utilized in the decision-

---

[218] The Longhouse Justice System of Kahnawake is currently the only model of separate justice in Canada. As such, discussion rests solely on this model as indication as to what a separate system would look like. See: Dickson-Gilmore, supra note 209.

[219] Dickson-Gilmore (Ibid.) cautions the reader that endorsement of this program for separate justice is divided in the Kahnawake community. Support for the traditional Longhouse is linked to those who align themselves with the Nation Office traditionalists. Other traditionalists in the community support one of two other Longhouses that also exist at Kahnawake While these other two Longhouses challenge the legitimacy of Nation Office Longhouse, they are not regarded with as much support as the Nation Office Longhouse. Additionally, opposition to the Nation Office Longhouse resonates from those who ally themselves with the Band Council/conservative group in the community. This group does not support the traditional Longhouse preferring to endorse justice initiatives currently operating in the community that are based on Euro-Canadian traditions.

For Dickson-Gilmore (Ibid.), it seems likely that the varied support in the community for the traditional justice of the Longhouse will impede any chance at its legitimate implementation and operation there. While this does not change its relevance for review here, the problems associated with implementation in communities will be revisited later.

[220] Ibid., p. 269. This includes the report of the dispute to a respected community member for suggestions on resolution and third-party intervention between disputants and their clan leaders

[221] Ibid., p. 265. The Five Nations who created the Confederacy were the Mohawk, Oneida, Onondaga, Cayuga and Seneca; in 1722, the Tuscaroras joined the Confederacy. Jefferson, supra note 140, p 25 The Iroquois Confederacy was united under the Great Law of Peace which served as the foundation and principles of their peaceful political association.

making processes between the Nations and communities Similarly, the traditionalists at Kahnawake would rely on the differing clans of the Mohawks (Turtle, Wolf, and Bear) to discuss the dispute at hand Dickson-Gilmore describes the traditional process of governance within the Mohawk community [222] In the Longhouse, the Wolf moiety and Bear moiety would face each other on both sides of the Longhouse with a fire between them, the Turtle clan would be the keepers of the fire and act as mediators and directors of the process When an issue was to be raised in the Longhouse, each person involved in the dispute and all other interested parties were free to come before the clan leaders and speak At the conclusion, the clan leaders would deliberate in a very specific manner

> When an important issue arose, it would be brought into deliberations first among the Turtle clan, who would discuss it among themselves and pass their opinion to the Wolf clan for their consideration The Wolves would in turn consider the Turtle clan's recommendation and, if they found fault with them or wished then to alter them in any way, they would return their suggestions for change to the Turtles The Firekeepers would discuss the proposals of the Wolf leaders until they agreed among themselves either to accept the Wolves' changes or to return the issue back across the fire to them for further deliberation This exchange would persist until the Turtle and Wolf clans agreed upon the best possible outcome, which the Turtles would then pass across the fire to the Bear clan, thereby initiating a further set of negotiations When all clans finally reach an accord, the Turtle clan, having ensured that the outcome was consistent with the laws and principles of the Kaianerakowa, would return the council's decision to the people (Barnes 1984) [223]

The differences from this traditional governance of the Mohawks to that of the Longhouse justice system is that deliberations would be directed towards "(1) the facts of the offence; (2) its nature/severity, and (3) possible solutions"[224] and that at the conclusion of the deliberations the disputing parties would be asked if they consent to the decision, if so the matter was finished [225]

---

[222] Dickson-Gilmore, Ibid.
[223] Ibid., p. 266.
[224] Ibid., p. 269.
[225] Ibid., p. 269.

In the Longhouse justice system there were two additional proposed levels of justice, that of the Mohawk Nation Council of Chiefs and the Grand Council of Haudenosaunee At the first gathering at the Longhouse in the community, settlement is based on satisfactory resolution[226] and continued deliberations until a suitable decision is reached When this is impossible the matter is turned over to the Mohawk Nation Council of Chiefs where they could decide to deliberate in the same fashion or not to hear the case at all and return it to the community If a decision was not possible here, this Council was able to "set the matter aside until additional evidence became available"[227] or refer it to the Grand Council of Haudenosaunee At this final and binding level of Longhouse justice, there were three options one, the Grand Council could deliberate to a resolution in the same fashion, two, return the dispute to the community, or, three, in extreme cases "determine and impose the best possible compromise "[228]

What distinguishes this system of justice as separate is that it does not rely in any way on Euro-Canadian justice concepts, traditions or structures Rather this model of justice addresses conflict resolution in a forum consistent with the traditional political organization of the Mohawk community in order to encourage responsibility for misbehaviour While there is some improvision of traditional justice dispute resolution within the traditional governance structure and applied to the contemporary context, the system is fundamentally based and structured on the basic traditional qualities and characteristics of Mohawk culture and society As such, it remains a distinctly Mohawk response to criminal justice reform

Some question remains as to what would constitute an offence, victimization, or dispute within this system Would federal and provincial laws count as disputes or offenses to be pursued in the Longhouse justice system? Would the Mohawk community required a different codified law rather than the federal or provincial laws? If some provincial and

---

[226] Dickson-Gilmore (Ibid., p. 270) states that the "pivotal condition of resolution is the satisfaction of all parties regarding its equity and propriety."
[227] Ibid., p. 270.
[228] Ibid., p. 270.

federal laws were pursued within the confines of this traditional system, would this system still in fact be considered separate? These questions are somewhat irrelevant given the fact that this particular system is not implemented however, it does offer some key points which it would have to address if in fact it does In any case it offers some understanding as to what full autonomy over justice matters outside the content and structures of the current Canadian system may entail

B Integrated Justice Initiatives

In contrast to separate justice systems where, if implemented, a First Nation would have full autonomy over the content, operation and structures of justice, most First Nations in Canada have opted for a more integrated approach to justice initiatives This implies that they have only relative autonomy over criminal justice administration and that their justice initiatives are operating in some form within the scope of the existing criminal justice system framework and institutions Partnerships are forged and negotiated with the federal and provincial governments for control over some programs or institutions of criminal justice administration in the community Negotiations for control over justice have widely been on an individual nation-to-nation basis

At the outset it is necessary to state that there is little literature that is published on integrated criminal justice initiatives in First Nation communities [229] There are however, a number of references to unpublished justice proposals or program descriptions This provides formidable difficulties when attempting a review of what initiatives are in fact 'out there'. Most justice initiatives are referred to as 'programs', 'diversion', or 'alternative conflict resolution,' which speaks to the innovative ways to subsume creative and challenging community projects within the scope of the present-day system What is

---

[229] Harding makes a similar argument in his annotated bibliography: "Our past consultations and initial investigations including literature searches, convinced us that there was very little published information on the emergence of such programs" (p.5) and "...there has simply not been a lot of information created on Aboriginal-controlled justice programs, and what exists is not always or easily accessible." (p.3) See: Jim Harding and Bruce Spence, An Annotated Bibliography of Aboriginal-Controlled Justice Programs in Canada, Regina: Prairie Justice Research, 1991. While this is the most comprehensive annotated collection of justice initiatives by First Nations published to date, its use in providing current (1991) initiatives is limited and disappointing.

provided here is a summary of a number of justice initiatives representative of the initiatives within First Nation communities [230] While it is sufficient for the discussion at hand, it should not be considered a comprehensive review of First Nation justice initiatives in the Canadian legal landscape [231]

Teslin Tlingit Council (Teslin, Yukon)

The Teslin Tlingit Justice Council is a good example of the types of criminal justice initiatives currently implemented in communities Two aspects of the Teslin Tlingit First Nation make this justice council particularly positive (1) that it is under the auspices of a self-government agreement and (2) that it is an explicit example of the phased assumption of criminal justice jurisdiction

In 1993, the Council of Yukon Indians, representing the fourteen Yukon First Nations, signed an umbrella agreement with the federal and territorial governments on self-government [232] This umbrella agreement (Model Self-Government Agreement) allows each of the Yukon's First Nations to negotiate their own self-government framework and

---

[230] I have chosen to focus on community-based initiatives for two reasons. The first being that the community is the basis of my underlying argument that relative autonomy over criminal justice administration and empowerment in First Nations communities are not mutually exclusive, rather there is much within the community-based justice initiatives even if it is subsumed within the mainstream justice system that points to a significant site of power and influence for First Nations political and social aspirations. The second is that the thesis's narrow focus has been generated out of the recognition that there is very little information available on First Nations living in urban areas generally, or the needs and experiences of First Nation offenders in the urban environment. For recent attempts to address this lack of information, see: Therese Lajeunesse and Associates Ltd., Selected Urban Aboriginal Correctional Programs in Canada: A Program Review, Aboriginal Peoples Collection, Ottawa: Ministry of the Solicitor General of Canada, 1994; and Carol LaPrairie, Seen But Not Heard: Native People in the Inner City, Ottawa: Minister of Public Works and Government Services Canada, 1995.

[231] I rely on information that has been published as sources for these initiatives. While a thorough survey and review of First Nation justice initiatives in Canada is not within the scope of this chapter, I have found in my own research and work that the dearth of information out there respecting current justice initiatives is perhaps one of the most important areas of research that must be addressed and compiled in the near future.

[232] Umbrella Final Agreement: Council for Yukon Indians, Ottawa: Supply and Services Canada, 1993. There were no Treaties signed in the Yukon and therefore a land claim process was initiated with the territorial and federal governments there.

agreement with some common elements [233] Within a negotiated self-government agreement, Yukon First Nations are able to enjoy jurisdiction over many different areas of culture and governance such as the administration of justice Jurisdiction for the administration of justice, which can include policing, adjudication and corrections, will not be provided immediately, instead allowing for a ten-year transition period Some restrictions to jurisdiction will be incorporated within Yukon First Nation justice agreements such as limitations on communities' authority to settlement lands As well, First Nations will not have law-making authority over criminal justice matters [234]

Presently, "The Teslin Tlingit Justice Council" is operating in the community of Teslin The conveyance of a five-member justice council is one step in the development of a tribal justice system Three phases of implementation have been developed in the first stage, the justice council operates as a community sentencing panel within the current court system and ensures that the court's disposition is carried out [235] In the second stage, the members of the justice council will assume a justice of the peace role where they will have the jurisdiction over minor offenses such as territorial and local laws "in order to diminish the role of police and judges in the process,"[236] and, in the third stage, the members of the justice council will take over jurisdiction of serious offenses and Criminal Code matters [237] Presently, the justice council has indicated that the tribal justice system will not address those "offenders who did not comply with conditions imposed by clan leaders, or who continued to offend "[238]

---

[233] For instance, there are common elements to approaching oil and gas rights, forest, mineral rights, land use and taxation as well as guarantees of First Nation participation in management of lands, resources, fish and wildlife.

[234] Carol LaPrairie, Exploring the Boundaries of Justice: Aboriginal Justice in the Yukon, Report to Department of Justice; Yukon Territorial Government; First Nations, Yukon Territory; Justice Canada, 1992, p. 22.

[235] At present this is the role of the justice council in Teslin. There role in sentencing stands if one of their community members pleads guilty or has been found guilty. They act is a jury-like fashion where they are directed by the court judge as to the parameters of the sentence and then make recommendations accordingly.

[236] LaPrairie, supra note 234, p. 85.

[237] Ibid., p. 85.

[238] Ibid., p. 85.

The members of the Teslin Tlingit Justice Council are the clan leaders of the five differing clans of the community This is consistent with the communities return to a traditional governance structure where clans provide the basis for structures and community and social relations [239] Clan leaders have lifetime appointments,[240] providing the advantage of the continuity and the continued long-term evolution of the justice process in the community While Teslin has only implemented the first phase of the tribal court system it has been received well in the community [241] While the court-like functions and structures of the current justice system are incorporated into the Teslin justice project, it has much potential in these developmental phases to evolve a form and content unique to the needs and aspirations of the Teslin Tlingit Nation

Gitksan and Wet'suwet'en First Nations (Northwest British Columbia)

The Gitksan and Wet'suwet'en are two socially distinct but integrated peoples who have created a shared society through the historical influences of each to the other [242] They have undertaken a justice project to facilitate and administer traditional justice services in their communities based on their proposal to the provincial government entitled Unlocking Aboriginal Justice Alternative Dispute Resolution for the Gitksan and Wet'suwet'en People [243]

The Gitksan and Wet'suwet'en peoples are pursuing alternative dispute resolution their communities based on the cultural traditions of their societies For these communities, the

---

[239] Ibid., p. 83. To the detriment of LaPrairie's report, it does not elaborate on the specific characteristics of the Teslin clan structure nor relates the proposed tribal justice model to the tradition forms of dispute resolution within the community.

[240] However, clan leaders may be removed in some circumstances or due to misconduct.

[241] LaPrairie (supra note 234, pp. 84-85) points out that a territorial court judge had requested to initiate a sentencing circle within the court process in the community and has created some ill-feelings within the justice council that their power has been upsurped. The fact that this initiative originated outside of the community rather than within it speaks to the issue of imposition of outside structures (despite whether it is culturally-sensitive or traditionally based) and provides a good argument for the Teslin First Nation to retain jurisdiction for conflict resolution.

[242] "Unlocking Aboriginal Justice: Alternative Dispute Resolution for the Gitksan and Wet'suwet'en People," in Curt Griffiths (ed.), Self-Sufficiency in Northern Justice Issues, Simon Fraser University for the Northern Justice Society, Winnipeg: Kromar Printing Ltd., 1992, pp. 213-252.

[243] Ibid. This discussion is centered on a review of this proposal.

most appropriate alternative to the current criminal justice system is an integrated system of justice that respects the integrity of the differing cultural and legal traditions of both the Euro-Canadian and Gitksan and Wet'suwet'en societies In this way, their proposed alternative dispute resolution initiative works within the framework of the existing administration of justice but in such a way as to revive and retain traditional governance structures based on their kinship society These First Nations reject the use of a parallel system of justice for their community which would entail use of Native police, Native courts and Native jails stating that these hierarchical, centralized structures would conflict with their decentralized society For the Gitksan and Wet'suwet'en people, the use of traditional principles and concepts of law must be used in the context in which they were derived (and practiced) in order for them to have meaning [244] This rationale underlies their view that traditional Aboriginal law must operate within traditional cultural and social structures in order to be effective and successful [245]

Because the nature of their system of justice resonates from their traditional governance structures, it is necessary to describe it I rely on the description of their House system in their own words

> For a Gitksan or Wet'suwet'en, there is no such thing as a purely legal transaction or a purely legal institution All events in both day-to-day and formal life have social, political, spiritual, and economic as well as legal aspects The structure the people have evolved to facilitate the family relationships is an all-purpose one
>
> The primary political unit of the system is the House, named for the long house where many of its members lived at one time All House members share a common oral history encapsulated in songs and in crests that are displayed on blankets and poles People's responsibilities to each other and to the natural world are funneled through the chief who is the land-owning entity in Gitksan and Wet'suwet'en societies. There is no higher political authority in the system than a House chief. While the head chief is responsible for the actions of the House and its members, he does not act alone Within the House, there are a number of other chiefs, the wings of the head chief, who must be consulted along with the elders of the House and, on larger matters, the chiefs of other Houses

---

[244] Ibid., p. 227.

[245] In fact, the Gitksan and Wet'suwet'en provide a historical example of the 'Durier' system of justice imposed on the Wet'suwet'en at the turn of the century which aimed to convert and assimilate them but only undermined and humiliated them. (Ibid.)

A person is born into his or her mother's House and succession to chief names comes through the mother's side Those Houses that are closely related and that have shared historical moments remain important to each other The chiefs of those houses most frequently consult each other The broadest grouping of related Houses is the Clan There are four Clans in the Gitksan system and five in the Wet'suwet'en Clan members know they are historically related but may no longer be able to recall the precise blood relationship that binds them Clan identity is important in marriage law in that no one can marry within his or her own Clan Marriage out of the Clan and succession though the mother tends to dissipate enduring male power blocs and diffuse both exceptional and non-exceptional individuals throughout society

Although the societies are matrilineal, the father's side is important, particularly at the beginning and end of a person's life A father is expected to raise his children even though they are not members of his House or Clan As they go through life the children reciprocate and when they die, it is their father's House that arranges their burial

People in the region acknowledge that each Clan in their society has a counterpart in each neighboring society, although the Clan names and some of the crests may vary Many Houses also have early histories in common with Houses which today exist among other peoples Travelers can make contact with distant relatives in villages outside their own society by recognizing the crests shown on poles, blankets, and house fronts In this way an individual's kinship network extends over the whole region, although the fabric is much more tightly woven within his or her own people

The most important economic transactions that travel through the network are the sharing of wealth within the House and the reciprocated payments for services between Houses The reciprocity is reflected in the feasts, the most important of which are concerned with the succession of the name and responsibility of a head chief These occasions give the authority of the community to the chief and to the system as a whole While the daily interaction binds the society together, the formal exchanges at the feast reinforce its kinship structure It is at the feast that a chief may exert political authority over Houses other than his or her own by validating or witnessing the succession of a new head chief, by confirming the host House's description of its territorial boundaries and river fishing sites, and by reaffirming the society's laws But no Gitksan chief or group of chiefs has authority over all the Gitksan, although each has knowledge of the laws, history and protocol of a number of neighboring Houses and of more distant Houses with whom there are frequent marriage ties Similarly, no group of Wet'suwet'en chiefs claim overarching authority over the Wet'suwet'en people Each chief's authority extends over a part of the society, partly overlapping that of the next chief and so

> on until the whole society is covered by a woven mat of authority The weave pattern of this mat reflects that of the kinship net [246]

It is obvious by this description that the basis for Gitksan and Wet'suwet'en culture and society is the family It provides for the structure, institutions and rule of society [247] Focusing kinship structures and collective Clan responsibility allows one to see how the social relations function to structure society and make people more responsible for their actions, as misbehaviour shamed the House as well as the person who committed the anti-social act Incorporating contemporary criminal justice matters within this structural context is the basis of their proposal

This project is part of the pursuit for self-government and based on the reality that the change required by the imposition of government structures to a 'new' system based on traditional concepts must be gradual The first phase of the process would entail addressing four identified priority issues assault, spousal abuse, rape and child sexual assault [248] To address these priorities requires that there be shared responsibility of the provincial government and Gitksan and Wet'suwet'en social systems in terms of diversion, sentencing advisors, parole advisors and alternative dispute resolution These key components would allow this First Nation community to address these problems through their House and kinship systems, placing responsibility on and within the community to deal with them based on principles of social harmony, collective responsibility and compensation of the victim [249] The significant difference in this community in terms of self-government is that the Gitksan and Wet'suwet'en peoples self-government plan, as negotiated through contracts between professionals working within the community and the House chiefs, such arrangements would not undermine traditional governance units and structures but reinforce their traditional jurisdiction

---

[246] Ibid., pp. 221-223.
[247] Ibid., p. 220.
[248] Ibid., p. 231.
[249] Ibid., p. 234.

processes and values in such as way as to provide distinctly native solutions, rather than simply indigenizing the system

Summary and Analysis

As the preceding review made acutely apparent, there is a continuum of criminal justice initiatives that have been proposed and/or implemented to date The range covers what one could term a parallel order of justice outside of the structures and content of the Canadian criminal justice system as exemplified by the Longhouse justice proposed by the Mohawks at Kahnawake to more integrated systems of justice premised on the interaction and blending of western and Aboriginal concepts of dispute resolution.

The differences between the initiatives is attributable in a large part to how the individual community has defined conflicts and disputes in their community, and to what extent they have embraced and implemented a more traditional approach to community harmony and justice needs.

For instance, the root causes of social conflict and anti-social behaviour has been defined differently within these justice initiatives. While all the strategies of reform turn upon the cultural differences between First Nation and Euro-Canadian society and the subsequent erosion of their culture and traditions, what has demanded attention are the realities of a particular problem or root causes linked with overall community health. For example, for the Mohawks the impetus for resurrecting traditional methods of dispute resolution has been the necessity to build "an Indian enclave" in order to secure an autonomous future, the longevity of the community is seen in terms of absolute autonomy from Euro-Canadian structures.[276] Similarly, the Gitksan and Wet'suwet'en peoples have viewed the return to the traditional structures and functioning of their communities as a way to reclaim their collective culture and structures, community health is focused on reclaiming their traditional kinship system of collective responsibility. Contrasting these are the initiatives of Hollow Water First Nation and the Dene who define the necessity of addressing

[276] Dickson-Gilmore, supra note 209, p. 260.

health care workers, schools, churches, etc) come together as a team to assist in the healing once the initial disclosure is made There is a reliance on both professionals and community members[252] to work with those who are touched by the offense through the extensive thirteen step process to healing [253] There is recognition that healing is required not only by the victim and victimizer but also a wide range of people, and that these others also require assistance and help In this way, the CHCH initiative encourages wider community health and social harmony

Once there is disclosure, criminal charges are laid against the victimizer The victimizer must plead guilty and accept full responsibility for the victimization in order to participate in the CHCH initiative, if not, they will be prosecuted through the criminal justice system "Virtually all accused have requested the team's support, with the result that trials are rare."[254] The offender is placed on probation while they undertake the process of healing through the CHCH as stipulated in their 'healing contract' While it may seem that the offenders are not being held responsible for their crime, Ross makes a comment on what healing must accomplish

> The healing process is painful, for it involves stripping away all the excuses, justifications, angers and other defenses of each abuser until, finally, confronted with a victim who has been made strong enough to expose his or her pain in their presence, the abuser actually feels the pain he or she created Only then can the re-building begin, both for the abuser and the abused The word "healing" seems such a soft word, but the process of healing within the Hollow Water program is anything but [255]

---

[252] The idea of using both professional and community members is to promote a shared knowledge and understanding of the helping process. Each professional is paired with a community member so that the community member can learn the skills of the professional and so the professional can learn the process of community healing. (Ibid., p. 244)

[253] The thirteen step treatment is provided in Lajeunesse and includes:

> Step 1 - Disclosure, Step 2 - Protecting the victim/child, Step 3 - Confronting the victimizer, Step 4 - Assisting the Spouse, Step 5 - Assisting the family(ies)/the community, Step 6 - Meeting of the Assessment team/RCMP/Crown, Step 7 - Victimizer must admit and accept responsibility, Step 8 - Preparation of the victimizer, Step 9 - Preparation of the victim, Step 10 - Preparation of all the families, Step 11 - The special gathering, Step 12 - The healing contract implemented, Step 13 - The cleansing ceremony.

Therese Lajeunesse, Community Holistic Circle Healing, Hollow Water First Nation, Ottawa: Solicitor General of Canada, 1993, p. 2-3

[254] Ross, supra note 250, p. 244. Lajeunesse (Ibid., p. 5) makes the point that there are times when charges are not laid therefore limiting what the CHCH can do.

[255] Ross, Ibid., p. 245.

As well, the CHCH initiative would suggest that the abuser is not "getting away with anything," an idea is rooted in conceptions of justice based on retribution and punishment. To accept responsibility and be accountable to the victim and their community is most important and "is not only much more difficult for the victimizer, but also much more likely to heal the victimization, that doing time in jail could ever be "[256]

It is significant that the those involved in the CHCH initiative recommend that incarceration of the offender should not happen under any circumstances. This is rooted in the idea that such an action would undermine the healing processes and breaking the cycle of abuse in the community They state

> The use of judgment and punishment actually works against the healing process. An already unbalanced person is moved further out of balance
>
> What the threat of incarceration does do is keep people from coming forward and taking responsibility for the hurt they are causing. It reinforces the silence, and therefore promotes, rather than breaks, the cycle of violence that exists In reality, rather than making the community a safer place, the threat of jail places the community more at risk
>
> In order to break the cycle, we believe that victimizer accountability must be to, and support must come from, those most affected by the victimization -- the victim, the family/ies, and the community Removal of the victimizer from those who must, and are best able to, hold him/her accountable, and to offer him/her support, adds complexity to already existing dynamics of denial, guilt and shame. The healing process of all parties is therefore at best delayed, and most often actually deterred
>
> The legal system, based on principles of punishment and deterrence, as we see it, simply is not working We cannot understand how the legal system doesn't see it [257]

From this view, that the needs and healing of the community should come before an ideology of punishment, the CHCH initiative was the impetus to use sentencing circles within sexual abuse cases in their court It is a community-based approach for an

---

[256] Excerpt from CHCH 1993 position paper, as quoted in Ibid., p. 247.
[257] Ibid., pp. 246-247.

alternative to traditional criminal justice processing and sentencing. The bottom-line is that a diversion from prison acts to counteract the typical diversion from healing which is so often the case in the dominant justice system.

What is particularly important to note here is that this project grew from community attempts at concrete solutions to specific community problems. It was only after it was developed that the legal system was approached, essentially accommodating the process which they were trying to do. This offers optimism as to the ability of First Nations communities to define and control the justice processes in their communities.

Sandy Lake First Nation Elders Council (Ontario)

Sandy Lake First Nation established an Elders Council as one way to realize greater autonomy in the administration of justice in their community. The objective was to incorporate traditional Aboriginal values within the existing justice system. It is considered a community-based system where, according to its proponents, the aims of customary justice, namely mediation, conciliation and restitution, are amalgamated into the mainstream Canadian justice system.[258]

The Elders Council consists of three individuals who "sit in a 'co-judging capacity with either the provincial court judge or justice of the peace at the time of sentencing."[259] The legal proceedings take on an air of informality with everyone sitting in a circle and everyone given a chance to speak. While the traditional personnel of the court are present, emphasis is placed on the Elders and their role in reconciling the situation with the accused. Within the context of the court proceedings, the Elders Council provides advice as to what a sentence should be, preferring to recommend sentences that are rooted in reconciliation and restitution and likely include treatment programs, community service

---

[258] Jonas Fiddler and Josias Fiddler, "Current Initiatives on the Sandy Lake Reserve, Ontario," in Curt Griffiths (ed.), Self-Sufficiency in Northern Justice Issues, Simon Fraser University for the Northern Justice Society, Winnipeg: Kromar Printing Ltd., 1992, p. 97.

[259] Ross, supra note 250, p. 248.

work, donations to community organizations, etc.[260] While the ultimate sentencing decision rests in the judge, with very few exceptions the court has adopted the Elders advice In such cases,

> when the elders deal with someone who refuses to respond to their assistance and counsel, they advise the court of that fact and then state that they have nothing more to say We have come to see this as a modern form of banishment from the community, with the only difference being that such offenders are banished into the hands of the outside justice system instead of Mother Nature.[261]

What is at the root of this initiative is the incorporation of traditional principles of assisting an individual who has committed an anti-social act rather than punishing them. Individual responsibility for misbehaviour is fostered in the community and "the misbehaver is made to feel needed, and, indeed, everybody involved should feel that they have a part to play and have a stake in the process."[262] The result of this program has been the drop in repeat offenders in the community.[263]

Another program operating in the Sandy Lake First Nation community is the appointment of five community members as peace officers.[264] The peace officer's role is to enforce the community by-laws and generally maintain peace within the community. The program is supported by the local police and is well received by the community. Its aim is to act in a crime prevention role so as to assist people with their problems and to deflect situations that may otherwise led people to court.[265]

Dene Traditional Justice Project (Lac La Martre, N.W.T.)

The Dene Traditional Justice Project[266] is a good example of a First Nation initiative that has started a process towards implementing traditional conceptions of justice and dispute

---

[260] Ibid., p. 248.
[261] Ibid., pp. 248-249.
[262] Fiddler and Fiddler, supra note 258, p. 99
[263] Ibid., p. 99.
[264] Ibid., p. 98.
[265] Ibid., p. 99.
[266] This report deals with Dene people of the Northwest Territories, specifically the Dogrib people of Lac La Martre. It is suggested that the findings and recommendations can be generalized to all those in the

resolution in their community. The mandate of the project was to record the traditional rules of behaviour and conflict resolution in the Dene community of Dogrib Significantly, there was much community support to implement a Dene system of justice that reflected their traditional cultural values and beliefs. However, what is particularly important is that the community recommended tackling alcohol abuse in the community as the starting point to that end. Community healing was identified as the fundamental key to a Dene system of justice. "If the [Dene] people want to take back responsibility for social control, the adults have to start by taking back personal responsibility for themselves."[267] Ambitious goals are at the backdrop of the project which focuses on a gradual implementation of their own justice system and the assumption of full jurisdiction and autonomy over criminal justice matters. There was a need identified to "rebuild Dene values and institutions so balance is restored between the natural, spirit and human worlds once again."[268] One important aspect of this project were the recommendations for extensive community consultations regarding the design and content of their future system.

South Island Tribal Council Justice Program (British Columbia)

In 1985, the South Island Tribal Council developed a tribal justice program in order to address criminal justice problems in their communities.[269] One such justice initiative that emerged is a diversion program for youth offenders which was established under the auspices of the Young Offenders Act.[270]

Participation in the diversion program is limited to those youths who volunteer for diversion and have admitted the guilt for their offense The program is premised on the

---

Dogrib region including the communities of Rae Lakes, Snare Lake, Dettah, NdilQ and Rae-Edzo. Joan Ryan, et al., Final Report: Traditional Dene Justice Project, Lac La Martre, N.W.T., 1993, p. 173.

[267] Ibid., p. 170.

[268] Ibid., p. 258.

[269] Brian Thorne, "Toward a More Sensitive Justice System: Initiatives and Outcomes," in Curt Taylor Griffiths, Preventing and Responding to Northern Crime, Vancouver: Simon Fraser University for the Northern Justice Society, 1990, p. 273. "The South Island Tribal Council represents eleven Band councils covering five different court jurisdictions."

[270] An alternative measures program if approved by the province, can be used instead of justice proceedings to deal with young offenders who have committed an offense.

traditional concepts of law and manners of the South Island First Nations. The key aspect of the diversion process is the involvement of Elders who are considered the traditional law givers and counselors of the communities.[271] The program is premised on the knowledge and wisdom of the Elders who operate the program and their ability to deal with the youth in traditional ways. The objective of the Elders Council is:

> to reestablish the youth's identity, to facilitate reconciliation of the youth with himself or herself. An effort is made to establish Native pride and to further the development of that youth in relation to the community.[272]

The Elders must be approved by the youth's family prior to the proceeding. In addition to the youth "will be represented by a spokesperson who will act in the capacity of a legal advocate, and can also serve as a witness."[273]

Peer Elders, or younger respected members of the community,[274] will also work with the youth. Their main role will be to offer culturally relevant support and counseling for any issues or problems that the youth (and their family) may have.

In addition to this youth diversion program, the South Island Tribal Council is working towards other justice initiatives such as a tribal police force and the establishment of a tribal court. The premise upon which criminal justice initiatives for these First Nations have evolved is the lack of traditional values and culture reflected in the mainstream system, and the necessity to focus on rehabilitation rather than punishment as a goal in justice matters. The two most important prerequisites for justice initiatives for South Island First Nations are the participation of Elders in the development and operation of initiatives, and the necessity to derive initiatives from community needs and aspirations.[275] All initiatives are grounded in the assumption that justice must integrate traditional

---

[271] Brian Thorne, "The South Island Tribal Council Justice Program," in Curt Taylor Griffiths (ed.), Preventing and Responding to Northern Crime, Vancouver: Simon Fraser University for the Northern Justice Society, 1990, p. 90.
[272] Ibid.
[273] Ibid.
[274] Ibid., p. 91.
[275] Thorne, supra note 269, p. 275.

processes and values in such as way as to provide distinctly native solutions, rather than simply indigenizing the system

Summary and Analysis

As the preceding review made acutely apparent, there is a continuum of criminal justice initiatives that have been proposed and/or implemented to date The range covers what one could term a parallel order of justice outside of the structures and content of the Canadian criminal justice system as exemplified by the Longhouse justice proposed by the Mohawks at Kahnawake to more integrated systems of justice premised on the interaction and blending of western and Aboriginal concepts of dispute resolution

The differences between the initiatives is attributable in a large part to how the individual community has defined conflicts and disputes in their community, and to what extent they have embraced and implemented a more traditional approach to community harmony and justice needs.

For instance, the root causes of social conflict and anti-social behaviour has been defined differently within these justice initiatives. While all the strategies of reform turn upon the cultural differences between First Nation and Euro-Canadian society and the subsequent erosion of their culture and traditions, what has demanded attention are the realities of a particular problem or root causes linked with overall community health. For example, for the Mohawks the impetus for resurrecting traditional methods of dispute resolution has been the necessity to build "an Indian enclave" in order to secure an autonomous future, the longevity of the community is seen in terms of absolute autonomy from Euro-Canadian structures.[276] Similarly, the Gitksan and Wet'suwet'en peoples have viewed the return to the traditional structures and functioning of their communities as a way to reclaim their collective culture and structures, community health is focused on reclaiming their traditional kinship system of collective responsibility. Contrasting these are the initiatives of Hollow Water First Nation and the Dene who define the necessity of addressing

---

[276] Dickson-Gilmore, supra note 209, p. 260.

community health in terms of treating widespread sexual abuse and alcoholism, respectively, to heal the community, justice is one means of restoring their collective health In contrast The South Island Tribal Council, Teslin Tlingit Justice Council and Sandy Lake First Nations have viewed the incorporation of traditional concepts of justice within the justice system in order to encourage community health through restoring, teaching and assisting individual people in their life's balance. While these initiatives are not mutually exclusive they do point to different starting point towards reclaiming community health, broad range healing versus narrower focused healing initiatives, and underlies their differing strategies within or towards justice reform.

Significant difference lies also within the degree to which traditional methods of dispute resolution are utilized within their projects. The goals of traditional dispute resolution, reconciliation, restitution and social harmony, are incorporated into each of the differing strategies to varying degrees. For the Mohawks, and the Gitksan and Wet'suwet'en, emphasis is upon reclaiming traditional governance and structures outside the criminal justice system to deal with criminal justice matters. On the other hand, diversion, Elder's councils, and circle sentencing, that are also advocated as strategies of reform are more focused in changing the content and nature of the current system rather than their specific structures per se. The components of the justice system, police, courts and corrections are still utilized but traditional concepts are incorporated within them. This results in the differing amounts of integration and incorporation between the Euro-Canadian system and emerging initiatives. So those initiatives relying on current justice structures will result in modifying the effects of that system and seek a less radical way to attempt fundamental change.

The overriding difference between these initiatives is their particular focus of change. The question is whether to direct change toward the prevention of anti-social or criminal behaviour in the community or whether to direct it toward anti-social behaviour once it has occurred, a reactionary response. How the problem is perceived will determine the subsequent responses. Does the initiative intend to respond to community health issues

and therefore is aimed at reducing the effects of the current legal system, or is it an outright rejection and abandonment of the non-Aboriginal justice traditions incorporated within the system? Similarly, the extent to which traditional world-views are incorporated in the system can be focused either at the community level as a way to combat collective community healing or at the individual level (specific offender focus) Pursuing these different means and goals within Aboriginal justice initiatives does not necessarily imply an evaluation of which initiative is better, rather it points to the varied motivations and/or realities at present within First Nations' communities. What determines which communities will implement what depends on many factors such as community cohesion, funding and resources, community aspirations, internal and external politics, size of the community, community problems, etc. The bottom-line is that the community and its particular characteristics will determine the nature and range of justice initiatives and autonomy desired. While all communities have the common goal of self-government, that end can be realized in many differing ways.

The prevalence of integrated initiatives rather than separate system initiatives to date does not detract from the reality that many of these initiatives are part of a development and implementation plan towards parallel systems, e.g., as discussed in the Gitksan and Wet'suwet'en or Teslin Tlingit First Nation justice strategy. However, this does not imply that all First Nation communities aspire to this end. Self-government is conceived in many different ways and a justice system that integrates structures and components of the mainstream criminal justice system and traditional concepts, laws and structures may be what some First Nations desire in their community. This is not to suggest that First Nations should embrace the status-quo. What is at issue is that these communities make those choices in a post-colonial perspective; that is, a perspective that is based on First Nations' world-views and challenges the assumptions on the superiority of imposed Euro-Canadian structures. Utilizing some aspects of mainstream structures in the short term and coordinating justice reform efforts in conjunction with the system or entire rejection

thereof in the long-term should be left to the communities to decide.[277] This may be a more pragmatic issue as to the specific characteristics of the community, dictating the limits and potential of the communities' aspirations and strategies. Some characteristics may be internal and can be controlled to some extent, e.g., mobilization of the community and community cohesion, however others are external and may be more illusive, e.g., retaining funding, size of the community, etc.

There are indications that First Nations people are divided as to what is the most appropriate and ultimate goal First Nations communities to strive for: separate systems or reforming the mainstream system.[278] While First Nation resistance to continuing domination by colonial structures and relations is key, there are differences as to how communities should go about this for substantial criminal justice reform. Communities which have indicated that they are pursuing an integration of traditional concepts of justice within the current system, or within basically similar structures (i.e., tribal courts). are considered to be pursuing, on some level, less substantial solutions. The seeming embracement of mainstream structures is considered enough to discredit their choice of reform for their particular community. Critics such as Monture-Okanee would suggest that anything less than revolutionary initiatives of criminal justice reform, i.e., traditional

---

[277] For instance, Turpel suggests that there may be aspects of the justice system that First Nations may not want to deal with, such as the criminally insane. Mary Ellen Turpel, "Reflections on Thinking Concretely About Criminal Justice Reform," in R. Gosse et al., Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice, Saskatoon: Purich Publishing, 1994, p. 215.

[278] For example,

> Ovide Mercredi, National Chief of the Assembly of First Nations, was asked about the trend to make the legal system more culturally sensitive, he responded, "Every time we try to make changes, we look to white society. Why do we do that? Why do we spend time modifying white institutions to be more sensitive to our people when our people are in pain?"
>
> "Elders who advise a white judge on sentencing are patronized. They are put in an inferior position, needing the white judge to rubber-stamp their recommendations. Diversion programs like those in Toronto and Indian Brook do not bring real changes. We must ask ourselves: What do we want -- amelioration or reform?"
>
> For Mercredi, there is only one answer -- a parallel system of justice

Margot Manson, "Justice That Heals: Native Alternatives," Canadian Lawyer, October 1994, 18, 8, p. 28.

solutions based on traditional laws and structures, are less credible as solutions and therefore flawed[279]; these First Nations are operating within colonial logic if they do not aspire to an entirely separate legal order or codify traditional laws Monture-Okanee takes this position.

> The path that I am advocating is a path on which revolution is possible Existing law is not the solution. Tradition is the solution Recovering our distinct ways of being is the solution. That recognition is merely a philosophical statement, and bringing it down to the daily experience of all people in our communities is a monumental task. We need the space to have the conversation about solutions at the community level rather than having to engage in a lofty discussion at the political level about our legal rights.
>
> ...What we can reclaim is the values that created a system where the abuses did not occur. We can recover our own system of law, law that has at its center the family and our kinship relations. We must be generous with ourselves and kind as well, as we discover how to live again as healthy and disciplined individuals We must know that the dominant system of government will also be kind and generous to us as we heal from five hundred years of oppression. We must be patient with each other as we learn to live in a decolonized way again This means that we, as Aboriginal individuals, must stop accepting the myth of white superiority and begin advocating truly Aboriginal responses. This means looking further than the mere creation of so-called Aboriginal or tribal courts. It means rejecting the *Indian Act* regime and the foreign system of relating to each other that was imposed [280]

This provides an exacting standard for First Nations; one that they may not be able or desire to live up to; they are somehow not fulfilling a self-government or self-determination mandate, but falling short and continuing to work with internalized colonial attitudes. My point is not to reject or undermine support for separate justice systems nor to embrace the status-quo. Rather, I suggest that to embrace such a position as espoused here allows one to fall into the assumption that if you are not doing A, then you are

---

[279] Monture-Okanee, supra note 9, pp. 226-227. I want to be clear here that I am in full support of the project that Monture-Okanee advocates. What is at issue is the assumption that if a First Nation did not pursue justice reform to the same degree that she advocates, that this would be considered continued assimilation and somehow does not qualify as an avenue of self-government. While this point is well taken, my concern is with highlighting the way in which perhaps tribal courts could enable a community to mobilize and gain control over the justice structures in their community. I contest the assumption that the control of the legal processes would be uni-directional in such an instance, resonating in the state and no 'real' control for the community.

[280] Ibid.

pursuing B The debate becomes defined in terms of assimilation/revolution, whereby accepting one automatically excludes claim to the other

Embracing this assimilation/revolution analysis allows one to assume a state-centered view of criminal justice initiatives wherein justice initiatives are always defined in terms of the state If an initiative incorporates many characteristics or qualities that are associated with the mainstream justice system, it is considered to be an example of micro-reforms and assimilationist in nature, if it does not have many aspects similar to the state then it is considered macro-reformist or 'revolutionary'. This conception designates any assimilationist or state-associated initiative as implicitly inferior and totally ignores a possibility that the mere fact that an initiative rejects mainstream concepts, processes or principles may not render it appropriately revolutionary or necessarily good. What this in fact does is obscure any relationship between the two except in dichotomous terms, and resists other explanations of the potential or limitations of either approach.

I propose to reexamine this argument and dichotomous thinking by suggesting that, while it may not be ideal, those First Nations communities who are pursuing community-based reform strategies that integrate traditional concepts and structures and mainstream structures can still be considered to be mobilizing self-government The key is that the strategy of reform is defined, implemented and operated by the community In this way, the community can be a source of power and can realize greater control and autonomy over criminal justice matters. Developing community structures for justice can mobilize the community and empower it.

Comparison of First Nation and State-Sponsored Strategies of Reform

There are more similarities between the governmental strategies of criminal justice reform and discourse reviewed in chapter two and First Nation initiatives and discourse than one might have expected. Specifically, there is convergence on the idea that criminal justice reform must be considered in light of the Canadian history of colonialism and First Nations

right of self-government.[281] Similarly, there is some overlap in the types of strategies that are offered.

For instance, there were many similarities between the state-sponsored social justice position and First Nations discourse. Both discourses endorsed the recommendation to develop unique and relevant justice solutions for First Nations that address their fundamental and differing world-views and conceptions of justice than those subsumed in the Canadian criminal justice system. Both the state-sponsored and First Nations discourse claims that initiatives must be grounded in the commitment for First Nations people and communities to take more control over criminal justice matters, as is their right for self-government. There was also convergence in the discourse on the need to entrench the sovereignty of First Nations within the Constitution as a way to realize self-determination and recognize their inherent rights, notwithstanding the assumption that it may be possible under existing legislative frameworks. As well, there was endorsement within both discourses on the view that First Nations should develop separate systems of justice if that is what they desired to do, in accordance with their own particular cultural goals and traditional conflict resolution practices. Some of the initiatives proposed in both the state-sponsored and First Nation discourses for criminal justice reform were similar as well, for example, diversion, sentencing circles, tribal courts,[282] parallel systems, etc. Similarly, there was agreement that changes had to come from the community in order to be relevant and successful. Finally, there was recognition in both perspectives that immediate changes to the current system were required in addition to the long-term solutions proposed aimed at changing the colonial state-First Nation relationship.

These rather significant points of similarity tend to challenge the notions in the assimilation/revolution debate described above. Due to the similarities within the discourses reviewed and their recommendations, one cannot conclude that all state-

---

[281] This was the view of the state-sponsored strategies premised on social justice.

[282] While there was convergence on the need for community-based and specific solutions, the province wide tribal court system proposed by the Manitoba Justice Inquiry seemed ironically at odds with this.

sponsored strategies are aimed at assimilation while First Nation justice initiatives are aimed at revolution Therefore, conclusions on justice reform initiatives that are evaluated on their point of origin should be avoided, i e , that state-sponsored strategies are entirely inadequate or assimilationist and/or that First Nation strategies are entirely empowering and good However, what can account for these analytical convergences between these seeming competing discourses? I would suggest it is indicative of two things. (1) the recognition that there must be an incorporation of post-colonial analysis to social issues in order to move beyond mainstream approaches which tended to reinforce cultural assumptions and outcomes, and (2) the incorporation of First Nation peoples input and analysis in recent governmental inquiries and commissions, indicating that First Nation discourse was able to influence the definition of the problem and played a role in rationalizing the subsequent solutions [283] It also gives an indication that the state-First Nation relationship is not pre-determined, where the state is all powerful and First Nations people are powerless In such cases where a social issue is defined not simply in terms of what is best for the government, or the status quo, then one is cautioned to avoid arguments which implicitly assume the staticity of government logic or a uncritical view of the state as all-powerful The problem is that such views cannot account for the ability of the government or state institutions to be influenced or dynamic Power does not simply resonate in the state in such cases; a new conception of power is needed to account for this

Theoretical Affiliations

I have argued two points above: (1) that the assimilation/revolution approach to assessing the worth of criminal justice initiatives for First Nations is unsuitable because it obscures the possibility that reform initiatives can be empowering for First Nations, and (2) the related assumption that the state-First Nation relationship is pre-determined, i.e., the state has all the power and First Nations are relegated powerless. The argument made is that

[283] As indicated by the lack of similar conclusions found in governmental studies, commissions and inquiries addressing the relationship between First Nations and the criminal justice system and the negligible role, if any, First Nations people played in those.

justice initiatives that are centered on post-colonial solutions that challenge the authority and structures of the state (criminal justice system) as dominant and incorporate traditional concepts of justice can in fact work to empower First Nations by assisting in their self-government pursuits, enabling them control over justice administration in their communities. This view assumes that a community can be a source of power and an avenue to effect social change. This contention aims to reconceptualize strategies of reform by avoiding simplistic and dialectic arguments in an effort to reassess the value of some criminal justice initiatives proposed for and by First Nations communities [284]

In the remainder of this thesis legal pluralist theory will be explored which provides basis for these arguments. Legal pluralism is well suited to explore the relationship between justice in First Nation communities and the mainstream criminal justice system. As its focus, legal pluralism traditionally examines the relationship between state law and customary law in one geopolitical space and was characterized by its legal centricism, that is its reliance on the state and the system of lawyers, courts, and prison as the only form of legal ordering [285]. However, there have been recent insights in this body of work which have posited a more fluid conception of law that recognizes non-legal forms of ordering.[286] The advantage of utilizing this conception of legal pluralism within this analysis are the insights and assumptions it lends to the heterogeneous quality of law and the relationships between distinct legal orders. Most significantly, it provides a basis for explaining how legal orders are dynamic, acting in competitive and mutually influencing ways. This has particular relevance here when debunking the idea that the mainstream criminal justice system would be able to monopolize power, rather than compete for it in a given context. In this way, the interaction between First Nation traditional law and state law can be shown to be a site of struggle, not pre-determined where one legal order has

---

[284] Again, this argument is not made in order to suggest that micro-reform strategies are preferred over more macro-reforms. Rather the point is made in order to consider that those criminal justice strategies that may be implemented within First Nations communities that are linked with the system can be empowering. This offers hope to the value of some short-term strategies or those initiatives seen as 'developments' along the road to full autonomy for First Nations in the administration of justice.

[285] Sally Engle Merry, "Legal Pluralism," Law and Society Review, 1988, 22, 5, p. 874.

[286] Boaventura de Sousa Santos, "Law: A Map of Misreading. Towards a Postmodern Conception of Law," Journal of Law and Society, 1987, 14, 3, pp. 279-302.

inherent power over the other This creates more basis for the argument that First Nation reform strategies that may be linked with the mainstream system do not necessarily become a mere extension to it, incorporating its internal logic

It will also be generally argued that the formal/informal justice debates also provide relevant analysis here as alternative dispute resolution (ADR) has been an underlying theme in justice initiatives for First Nations. Similar to the arguments made within legal pluralism literature, there are indications that the community can be an appropriate focus for discussions of the relationship between the law of the state and law in the community I reject traditional accounts of alternative dispute resolution which have left the relationship uni-directional, wherein the formal system is the benchmark by which to gauge informalism However, reconceptualizing the formal/informal law relationship provides a basis for arguments as to the potential of ADR in promoting the use of traditional law in First Nations communities Advantages of ADR for First Nations communities include (1) a movement towards self-government aspirations because they have the ability to define and develop justice in relation to the views and traditions of the individual community, (2) the ability to implement a range of justice, and (3) a reconceptualization of the role and legitimacy of justice orders outside the official justice system Most importantly, ADR can illustrate how power does resonate within community initiatives.

Interpreting justice reform strategies more liberally and recognizing the usefulness of incorporating traditional justice concepts within modified mainstream justice structures, may allow one to see how justice reform can become a motivation for community mobilization toward more larger goals. Reconceptualizing the state-First Nation relationship allows one to resist shortsighted all or nothing analyses which ignore the centrality of the community in the success or failure of traditional justice projects, notwithstanding the nature of their interaction with the state. The following chapter examines this first assumption of the pre-determined nature of the relationship between

First Nation and state-sponsored justice initiative within analyses of the legal pluralism literature

Chapter 5
The Suitability of Legal Pluralism as an Analytical Framework

Throughout the previous chapters there has been an unstated but underlying premise that has emerged -- that is, Aboriginal justice is an area of political struggle. Discussion of the relationship of First Nations peoples and the criminal justice system has emanated as to the differences and similarities of the issue between and within First Nations and state-sponsored discourses.[287] The contested terrain addresses: (1) the identification and definition of the problem framed in terms of what constitutes justice for First Nations people, i.e., access to law and due process or substantive social justice; and (2) the strategies of reform that are necessary to achieve justice for First Nations, i.e., whether it is a question of improving the system to accommodate their access to law or submersing the issue in terms of colonial structures and social relations in society and therefore, pursuit of First Nation self-determination.[288]

Culminating within these contrasting conceptions of justice are ideological differences. Examination has shown that the ethnocentricity of the criminal justice system underlies the discriminatory treatment of First Nations within it. The cultural bias has been shown to be implicit not only in the overt practices of the system, such as the nature and content of the legal proceedings, but within the less overt practices of the system such as judicial reasoning and judgment as well. The criminal justice system, based on Euro-Canadian legal concepts and traditions and rooted in adversarial and individualized justice, is clearly at odds with the concepts of justice and dispute resolution in First Nation culture, based on community harmony and healing.

---

[287] That these are not exclusive categories as discussed in Chapter 4 rather speaks to where the perspective originates rather than exclusive authorship or paradigm. As indicated there are diverging and converging views within these two camps as much as there is between them.

[288] The adoption of Weber's formal and substantive rationality seems to be at play here.

In terms of framing and locating solutions to the problem, it has typically been assumed that the difference lies between the First Nation and state perspectives because each discourse is considered to be unequivocally rooted in its particular world-view and rationale. Within the literature, the corresponding logic to this view has framed any debate of strategies of change to criminal justice within a paradigm of assimilation/revolution. In this way, any state-sponsored initiative is perceived to be assimilationist or micro-reformist in nature, primarily aimed at the status quo within the legal system; conversely, any First Nations-sponsored initiative is perceived in more revolutionary or macro-reformist terms, essentially challenging the ethnocentricity of the criminal justice system in substantial ways. It follows that if any First Nation initiative is not rooted in traditional structures and concepts of justice, or incorporates many characteristics of the mainstream justice system then it is by default an assimilationist initiative and those espousing it are coopted through colonial social relations and functioning solely within that capacity.[289] However, argument is offered here surmising that this assimilation/revolution analytical model is too simplistic to properly evaluate the similarities of criminal justice initiatives proposed by both the First Nations and state-sponsored discourses.

Contrasting these assumptions of the assimilation/revolution model, review of First Nation and state perspectives has illustrated that there are similar strategies of reform generated within these seemingly dichotomous views, particularly in terms of the similar endorsement of justice initiatives focused on First Nations self-government. One is not able to categorically say that state-sponsored initiatives are rooted in colonialist assumptions and beliefs based on Euro-Canadian views and traditions and those initiatives originating from First Nations academics and communities provides an indication as to the exclusive form and voice to speak for all First Nations communities and reform initiatives

[289] This logic takes on the qualities of a false consciousness. In this way, those First Nations espousing reform initiatives within or in cooperation with the criminal justice system are considered as operating under a false consciousness of a real understanding of the problem. They are essentially seen as agents (or puppets) of the dominant system and therefore their initiatives and logic are rendered suspect and counter to 'real' change.

Instead, there seems to be considerable variation and overlap in the types of solutions proposed within and between initiatives proposed by these two perspectives. One, then, should be careful not to conceptualize these positions as distinct and separate categories solely by virtue of where they originate (as if this would be easy to ascertain, in any event). State initiatives should be evaluated in terms of their responsiveness to the issues and solutions as defined and deemed necessary by the particular First Nations communities they affect. At the same time, First Nations proposals should be evaluated solely in terms of the particular community aspirations and wishes they resonate from, not be evaluated through a measuring-stick imposed outside that particular community. One fundamental point of intersection between First Nation and state discourse is that the specific community is the authoritative voice and will determine what reform strategies are authoritative and legitimate within their community.[290]

Limits of the Assimilation/Revolution Analysis

The assimilation/revolution analytical framework is rather essentialist because reform initiatives are considered assimilationist or micro-reformist if they incorporate mainstream criminal justice culture or structures, and revolutionary or macro-reformist if they incorporate traditional First Nations culture or concepts of justice. The binary assumes that in cultural conflict, the inevitable hierarchical power arrangements in society relegates First Nations to a subordinate position and allows for no possibility to realize self-

---

[290] The view that self-government strategies and criminal justice reform must be directed by each specific First Nation community due to the variances in economic, historical, cultural and linguistic aspects of the community has been espoused by all those who view these reform strategies as necessary for First Nations self-determination. What is ironic is that those persons who contend that revolutionary change is necessary for First Nations otherwise they are coopted into assimilationist strategies also rely on this argument that each First Nation community must decide for themselves what strategies of change are appropriate. Clearly, if a community chose to initiate criminal justice reform that worked within the framework or in cooperation with the mainstream justice system as one way of fulfilling their self-government aspirations it seems contradictory to consider such an attempt simply assimilationist and therefore, not directed toward self-government. Such a view is imposed on others as a measuring stick of appropriate strategy of change and undermines the basic premise that each First Nation must decide for themselves the appropriate strategies of change. What becomes implicit is a hierarchy of authentic self-government strategies between First Nations, where each is judged by the other, again relegating the original argument of respect for community difference meaningless.

government in contemporary society (because of monolithic views and dominant power of the state). This is a conspiratorial view of the state and social relations.

One of the problems with conceptualizing change within the criminal justice system as an oppositional 'either-or' relationship has been the tendency to centralize the role of state law. The legal system, or state law, is highlighted as the norm whereby all initiatives are viewed in relation to it. Consequently, if an Aboriginal justice initiative has similar characteristics or functions to those of the mainstream legal system, then it is considered an extension of that system.[291] On the other hand, if an initiative is viewed as having characteristics of traditional law, the initiative is considered revolutionary. In both cases, analysis of the similarity and difference of the initiative to state law is considered appropriate and paramount, defining the initiative's essential nature within these binary terms.

As discussed in the previous chapter, what distinguishes First Nations initiatives of justice reform is the desire to root reform in Aboriginal concepts of justice and world-view. Justice reform strategies are based on developing and implementing traditional ways and views of dispute resolution and therefore emphasizing collective responsibility, community balance and harmony. Whether a structurally separate justice order is developed or whether modified mainstream criminal justice system structures are utilized,[292] First Nations discourse fundamentally roots justice initiatives in differing cultural values and norms or an 'ethno-ideology.'[293] In this way, they are distinct from state law in that the

---

[291] The argument of widening the net of social controls commonplace in legal pluralism criticisms and is rooted in the assumption of the dominance of state law and inferiority or passivity of other 'law', e.g., customary law or any other similarly functioning normative order. One may rely on any number of references to this view, see: Richard Abel (ed.), The Politics of Informal Justice, Vol. 1, New York: Academic Press, 1982.

[292] I am drawing a parallel between both separate and integrated justice initiatives to indicate that this difference is not relevant to the fact that both types would constitutes a different legal practice or legal order. What is important is the difference in ideology underlying the initiative not what the initiative looks like, per se.

[293] This term is provided by Nicholson:

> 'Ethno-ideology' is that set of interpretive categories and symbols developed over time by an ethnic group. An ethnic group, in turn, is an interactive entity whose members have in common a shared sense of history, beliefs and values (De Vos 1982:9). Such an entity functions as a

norms underlying the legal practice are not Euro-Canadian and therefore do not operate with similar goals, e.g , punishment vs. healing respectively. The different content and nature within First Nations initiatives is the basis of how they constitute differing legal practices or orders. To the extent that they include traditional law and authentic legal structures is not of primary importance;[294] it is relevant that the particular legal practice is designed along distinct culturally appropriate behaviour and values. Assuming that a contrasting ethno-ideology is operating to inform legal practices and norms, it becomes difficult to assume a conspiratorial view of the state and legal system.[295]

Assuming that an ethno-ideology is operating in First Nation justice initiatives, one can no longer assume that justice initiatives of First Nation communities which include aspects of the dominant criminal justice system or its structures are necessarily assimilationist. Incorporation of aspects of the mainstream system does not necessarily imply

---

"reference group invoked by people who share a common historical style based on overt features and values" (Royce 1982:18). An ethno-ideology forms part of an ethnic group's "continuity of common identity" that persists over time, despite variations in a group's membership and/or its specific mechanisms of prescription (Spicer 1980: xvii).

The concept's usefulness is its ability to highlight the competing cultural ideology and associated functioning in contrast to the contemporary legal ideology of the legal system. Ethno-ideology serves to challenge the dominant legal ideology in specific First Nations communities and therefore initiatives informed by this view should be seen as in competition with the dominant ideology not simply consumed or subsumed under it. M. E. R. Nicholson, "Ethno-Ideology's Role in Legal Behaviour: Another Dimension of Ideological Pluralism," Legal Studies Forum, 1987, 11, 2, p. 147.

[294] There is debate within the literature as to what constitutes authentic traditional law and dispute resolution. Critics of the move by First Nations communities to utilize traditional concepts of justice within their justice initiatives point out that the traditional concepts have been adapted to the modern context and therefore render them invented and inauthentic. The point being made is that if the practice is not operating as it was in pre-contact days then it is somehow not a traditional value or norm and is therefore falsely portraying First Nations traditions. Such an argument assumes a static view of First Nations as discussed in Chapter 3. There is not sufficient weight to assume this argument nullifies the resurrection of tradition or renders it any less legitimate because it has changed or been adapted to modern contexts. For discussion of the use of traditions in the modern context see: Dickson-Gilmore, supra note 10; and Roger F. McDonnell, "Contextualizing the Investigation of Customary Law in Contemporary Native Communities, Canadian Journal of Criminology, 1992, 34, 3-4, pp. 299-315.

[295] Conspiratorial in the sense that the legal system can identify and therefore in deliberate and manipulative ways operate to combat all potential threats to its operation and authority and thereby eliminating all potential laws or legal rivals. Argument such as this assumes a simplistic view of power in that the state law is dominant and correspondingly, all other legal norms or orders are passive.

incorporation of the logic and ideology of that system.[296] The tendency to centralize the state and hierarchicalize its ideology and norms assumes that state law is dominant and has an unchallenged power to integrate and control law and legal processes. If plural legal orders or practices are acknowledged, they become viewed as subordinate entities of pre-determined top-down power relations. This can be an enticing argument, allowing one to dismiss everything in rather simplistic terms, but ultimately leads to the conclusion that state law is static, unchanging and monolithic. Structuring law and the legal system in this way cannot account for change in, or the adaptability of, law. What is required is development of an analytical framework that can account for the uneven nature of law, plural legal systems and complexity and variations between legal systems with predictive value.[297]

Choosing to reject any depiction of the state-sponsored and First Nation perspectives as a question of embracing either an assimilation or revolution strategy of criminal justice reform, respectively, begs one to locate an alternative way to frame the issue of criminal justice reform which avoids static and circular arguments [298] A more comprehensive view of law is necessary, one which resists the tendency to equate all law with state law (as homogenous) and is able to view the interaction between differing legal orders as dynamic, not pre-determined. Legal pluralism is well suited to this task and allows for the development of the idea that First Nation justice initiatives can be empowering and promote social change. By articulating separate and integrated justice initiatives in terms of legal pluralist theory, one will be able to view the legal system as a site of struggle and dynamism, rather than a predetermined entity of hierarchical dominance.

---

[296] It is significant that state law is considered dominant and that if any domination of ideology occurs that it would necessarily be that of the state rather than the other way around. This point is discussed further later.

[297] Nicholson, supra note 293, p. 157.

[298] Circular in the sense that if a strategy is considered reform-oriented then it cannot be revolutionary and vice versa.

Legal Pluralism Insights

The central assumptions discussed above in terms of centralization of state law and the assumed relationship of its dominance with other plural legal orders are indicative of the debates within legal pluralism literature. Earlier legal pluralist work has many parallels with these assumptions and have also highlighted the cultural basis of dispute resolution.[299] In discussing the tenets of legal pluralism, there has been a tendency to focus on distinct categories, i.e., classic legal pluralism and new legal pluralism.[300] The most common advocate of this latter position is Merry.[301] She develops this conceptual distinction by assuming that 'modern' scholars maintain that social and cultural pluralism exists in every society and thereby rejects the 'dated' view that tends to define legal pluralism as situated in a specific societal period where the relations of domination between the colonized and colonizer are transforming the social sphere. For Merry, while there are some differences between the centralist and diffusive views, this divergence depends on how the term 'legal system' is defined. The centralist view is grounded in a narrow conception of law as a particular form (i.e., customary law, European law, etc.) while the diffusive view takes a broader position and includes all forms of social regulation.

This distinction, of classic and new legal pluralism, obscures the breadth and range of debate within this field and again sets up a dichotomous categorization of the literature. Debate is not focused on the accuracy of these differing views of legal pluralism, but more aptly aimed at the artificiality of claiming there are two camps of legal pluralism. Critics state that it is not a matter of separate conceptions but "early and late discover[ies] of plural normative orders."[302] In order to circumvent this evolutionary depiction and situate

---

[299] This assumption will be reviewed further later; suffice to say that culture provides a good avenue in which to discuss differing legal orders for First Nations, culture itself cannot be seen as determinate and therefore a tentative category for a difference-based approach to justice initiatives. Utilizing the most recent innovations in legal pluralism literature, namely that associated with postmodern tendencies, will provide a way of conceptualizing the indeterminate nature of culture as ideology yet retaining its larger use as an ethno-ideology.

[300] For criticism see: Franz von Benda-Beckmann, "Comment on Merry," Law and Society Review, 1988, 22, 5, p. 900; and John Griffiths, "What is Legal Pluralism?" Journal of Legal Pluralism and Unofficial Law, 1988, 24, pp. 1-55.

[301] Sally Engle Merry, supra note 285, pp. 869-896.

[302] Benda-Beckmann, supra note 300, p. 900.

the most appropriate insights within this literature for the thesis at hand, a brief overview of the debates within legal pluralism literature is offered

Despite its recent reemergence in current legal discourse, legal pluralism can be traced back to the work of anthropologists and sociologists in the 1920s [303] While there may not have been reference to the term legal pluralism per se, some of the themes and debates that emerged in past historical, analytical and philosophical accounts of law and legal order(s) are being reengaged by theorists and practitioners of legal pluralism today. These themes and debates within legal pluralism can be viewed as located in various disciplinary paradigms. Discussion is organized on the thematic trends found across three general schools of thought -- the doctrinal, social scientific and postmodern perspectives -- which have influenced theories of legal pluralism.

This review separates the literature into three major analytical perspectives the doctrinal, social scientific and postmodern views. Due to the extensive amount of legal pluralism literature, the theoretical classification proved best for thematic organization and as method of evaluation. The theoretical focus provided here was not intended to marginalize the empirical work in the field but to point out the similarities between theory and practice. It has often been claimed that much of the early doctrinal and sociological work was void of social or legal theory. However, this is clearly a poor interpretation of what is operating because even explicit denial or rejection of theory does not preclude its presence in scholarly inquiry and research. One cannot escape the assumptions, concepts, classifications and hypotheses that are associated with a particular body of theory [304]

Historical Antecedents of Different Legal Pluralism Approaches

Among the scholarly claims to knowledge of law and legal orders there have been longstanding debates as to the appropriate foci of study and the proper method of inquiry

---

[303] For example, see: Bronislaw Malinowski, Crime and Custom in Savage Society, Totowa, New Jersey: Littlefield, Adams and Co, 1969.

[304] Alan Hunt, "Dichotomy and Contradiction in the Sociology of Law," British Journal of Law and Society, 1981, 8, 1, p. 52.

Arguably, the perceived validity of any work on legal pluralism relies in part on the compatibility of the values held by the disciplinary literature and its readership. In addition, the discipline one is most closely aligned with will determine one's attitude to a stance on legal pluralism or any particular concept.[305] This suggests why there does not, or potentially cannot, exist one coherent, unitary theory or commonly held definition of legal pluralism.

For the most part, the earlier literature in this area has relied on the contrasting views of lawyers and anthropologists.[306] Where lawyers have tended to focus on a formal inquiry of the 'law' as exemplified by legal rules, legislation and legal agencies, anthropologists have been more apt to examine 'law' as a distinguishable category of social control viewed in the everyday life and disputes of a particular social group.[307] The most noted exception has been Llewellyn and Hoebel's 1941 work, The Cheyenne Way,[308] a collaborative effort by a lawyer and an anthropologist, which has been heralded as evidence that these two perspectives can operate in conjunction with each other. Later research, in the 1960s and 70s, incorporated more insights of sociologists and legal theorists and emphasized a more contextual position, incorporating the social, economic and political nature of the social world into the study of law. Most recently, since the mid-1980s, legal pluralism has been associated with the critical legal studies movement and is viewed in relation to postmodern theory,[309] which challenges traditional disciplinary claims to knowledge of law and legal process.[310]

---

[305] Cotterrell argues that validation of the claims to knowledge for any discipline lies within itself as each differing field determines its own object of inquiry; in other words, each discipline is self-validating. See: Roger Cotterrell, "Law and Sociology: Notes on the Constitution and Confrontations of Disciplines," Journal of Law and Society, 1986, 13, p. 9.

[306] For more detailed discussion of the differences in the work of lawyers and anthropologists in this field see: Simon Roberts, "Introduction," in Simon Roberts (ed.), Law and the Family in Africa, The Hague, Paris: Mouton Publishers, 1977, pp. 1-14; Klaus-Friedrich Koch, "Law and Anthropology: Notes on Interdisciplinary Research," Law and Society Review, 1969, 4, 11, pp. 11-27; Laura Nader, "The Anthropological Study of Law," American Anthropologist, 1965, 67, 6, 2, pp. 3-32; I.D. Willock, "Getting on with Sociologists," British Journal of Law and Society, 1974, 1, pp. 3-12.

[307] Roberts, Ibid., p. 2.

[308] K.N. Llewellyn and E. Adamson Hoebel, The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence, Norman: University of Oklahoma Press, 1941. See: Nader, supra note 306, p. 3.

[309] Although not all new critical legal scholars utilize postmodern theory, it has an identifiable influence within this movement. For discussion see: Alan Hunt, "The Big Fear: Law Confronts

The differences between disciplines fundamentally affects the theoretical orientation and methodologies utilized when describing (whether theoretically or empirically) the law, legal order(s) and legal phenomena.[311] Although there are common assumptions operating overall, differences can also be distinguished among authors within each discipline. The common ground within each disciplinary perspective includes a particular stance towards the law-society relationship and the appropriate foci of study for the examination of the society, culture, or country. Broad disciplines operate ideologically in determining the types of research questions to be addressed and influencing the ways in which the 'data' on social phenomena is analyzed/interpreted.

Disciplinary Influences and Legal Pluralist Thought

As indicated previously, legal pluralism has been influenced by a variety of academic disciplines. In order to distinguish the main themes in the literature it is necessary to expound the major principles involved. Theoretical orientation, as identified by doctrinal, social scientific and postmodern camps, presents itself as the best way to describe these competing tenets. What becomes evident is that the differences among these general orientations provide a way in which to view how each fundamentally challenges the axiomatic assumptions underlying the other. Critique and debate within these categories are assumed, but it becomes a matter of ideological difference when the particular paradigm postulates are challenged.

Postmodernism," McGill Law Journal, 1990, 35, p. 507; Neil Sargent, "The Possibilities and Perils of Legal Studies," Canadian Journal of Law and Society, 1991, 6, pp. 1-25.

[310] While this review seems to show evidence of a linear, evolutionary process in the development of conceptual frameworks (implicit or explicit) toward the study of law, it may simply be a function of the nature and scope of the literature offered here. This 'line of' argument would seem a plausible project for future study because, as Koch states, "history is divided into periods marked by events which we assume changed the course and manner of thought about nature and culture"(supra note 306, p. 13). However, this paper represents an introductory examination for the reader and, as such, a definitive argument is not warranted or provided. However, this limitation does not detract from the analytical framework offered here, as it does well to provide clear indication of the historic trends discernible with little reference to a comprehensive, historical review of legal theorists.

[311] This term is used loosely as it assumes that there is something 'out there' which can be labeled 'legal phenomena'. When investigating situations of legal pluralism, the fields of study reviewed here approach definitions of law, legal order and social order differently or sometimes reject their definition entirely.

A. The Doctrinal Approach

Doctrinal legal scholars approach research on law and legal order(s) as rooted in an investigation of legal rules and principles derived from the courts and legal documents. The assumption is that law is the unification and classification of what can be found in legal texts. No attempt is made to study legal institutions, legal actors or other legal phenomena outside of law documents because it is assumed that each role and function is addressed in the authoritative texts, therefore displacing the need for empirical investigation of how 'law works in the real world' (i.e., law in practice in the social world).[312] In the doctrinal tradition, law consists of norms and rules that are knowable and independent of human interaction Thus, law is conceived as a normative, coherent system unto itself and an autonomous field of study outside of society.[313] Methodologically, doctrinal legal scholars tend to rely on a detailed analysis of recorded cases. Early fieldwork by lawyers, in indigenous societies, if done at all,[314] had operated within this perspective. It typically consisted of "rule-centered questioning of informants," the results of which were then reorganized into the legal concepts and categories of western law.[315] For example, Roberts describes research by lawyers on legal pluralism in Africa and points to the emphasis placed on classifying rules in order to determine which system of law was applicable to ethnic groups when more than one legal system existed in the same geopolitical space.[316]

---

[312] Sargent, supra note 309, p. 4.

[313] See: Lawrence M. Friedman, "The Law and Society Movement," Stanford Law Review, 1986, 38, pp. 763-780; Sargent, supra note 309; Susan S. Silbey and Austin Sarat, "Critical Traditions in Law and Society Research," Law and Society Review, 1987, 21, 1, pp. 165-174.

[314] Some legal theorists such as Maine have relied on information of other societies from second-hand accounts. For ancient societies this may be warranted but there has been documentation to suggest that not all legal theorists, when able to, have chosen this route. Sir Henry Sumner Maine, Ancient Law: Its Connection With the Early History of Society and Its Relation to Modern Ideas, Ninth Edition, London: John Murray, 1883.

[315] Roberts, supra note 306, p. 2.

[316] Ibid., p. 3. The term 'geopolitical space' is taken from Boaventura De Sousa Santos and means the social and political 'field' of people that exists in a particular geographical location. See Boaventura De Sousa Santos, "The Postmodern Transition: Law and Politics," in Austin Sarat and Thomas R. Kearns (eds.), The Fate of Law, Ann Arbor: The University of Michigan Press, 1991, pp. 79-118.

Franz von Benda-Beckmann refers to the legal doctrinal orientation as primarily an internal perspective, in which these scholars "evaluat[e] events, court judgments and jurisprudential ideas in [order to obtain] a 'better', 'more correct law'"[317] Doctrinal legal scholarship is associated with liberal legal theory or positivism [318] This assumes that the law is an appropriate focus of inquiry because it can discern an objective 'reality' in the real world, is universally valid due to its autonomous nature outside of social context, and lacks a claim to any values and/or interests. Accordingly, much of the work done in this tradition has been Euro-centric and focused on the continual application of western laws and institutions as the ideal or 'normal' legal order.

While this view is traditionally associated with lawyers and legal administrators, early anthropologists can be seen as having this focus also [319] The distinguishing factor in this doctrinal perspective is the widely held functionalist view of law that, it is essentially a way

---

[317] The internal perspective is depicted in opposition to an external perspective which "treat[s] problems of normative and institutional pluralism from a social scientific (anthropological/sociological) point of view." Franz von Benda-Beckmann, "Theme III - Legal Pluralism in the Third World After Decolonization: Introduction and Overview," in Proceedings of the VIth International Symposium, Commission on Folk Law and Legal Pluralism, Volume Two, Ottawa, Ontario, August 14-18, 1991, pp. 556-557. While implicit in Benda-Beckmann's discussion, both of these perspectives are viewed as inadequate and constitute artificial ways of viewing legal phenomena. Benda-Beckmann's own work integrates the internal/external binary into an actor-perspective where:

> relevant actors [are] not just villagers, tribal people, or peasants, or that within these categories one must differentiate according to age, economic and political status and gender...equally [there is] necessity to look at law makers, judges, and other local or state functionaries as actors as well. (Ibid., pp. 556-557)

The contrasting internal/external perspectives and postmodern alternate proposed by Benda-Beckmann in critique of the doctrinal paradigm are also discussed by some feminists, for example see: Martha Minow, "Partial Justice: Law and Minorities," in Austin Sarat and Thomas R. Kearns (eds.), The Fate of Law, Ann Arbor, Michigan: The University of Michigan Press, 1991, pp. 15-77.

[318] Roberts claims that:

> [m]uch of modern English legal theory [is] predominantly imperative and positivistic in character...laying strong emphasis on institutional features such as a rule-making body, the judiciary and enforcement agencies. Almost without exception, the question 'What is law?' has been answered in terms which take for granted some centralized state organization and isolate as essential attributes the presence of rules, courts or sanctions.

Simon Roberts, Order and Dispute: An Introduction to Legal Anthropology, Oxford: Martin Robertson and Company Ltd., 1979, p. 23.

[319] Snyder also makes reference to the use of case studies by anthropologists and offers an explanation that anthropological work in cases differs from lawyers. For a concise discussion and further references see: Francis G. Snyder, "Antiropology, Dispute Process and Law: A Critical Introduction," British Journal of Law and Society, 1981, 8, 2, pp. 141-144 and 170 (endnote 54).

of mediating between plural competing interests in a society based on consensual values With few exceptions law is considered as "a framework rather than as a process."[320]

B. The Social Scientific Approach

In contrast to the doctrinal view of 'law and society' where each remains an autonomous field of inquiry, anthropologists and sociologists take a social scientific view of law, examining 'law in society'.[321] Emphasizing the historical, social, economic, and political specificity of social and legal phenomena, the social-scientific tradition views law and society as interconnected Significantly, the terrain of law is not viewed in terms of 'law on the books'[322] but in terms of the conditions of 'law in action', this acknowledges the impact that social practices have on the knowledge of 'law' Rejecting 'law' or jurisprudence as the focus of study, it examines broader issues of order in society.[323]

In the early development of the social scientific view, the choice of definition to describe a type of law, whether that is colonial law, western law, imposed law, etc., was seen as indicative of its relationship to society [324] However, in the 1960s and 1970s attention was

---

[320] Ibid., p. 144. This position is taken by Snyder and in doing so he names only the work by Malinowski and Gulliver as exceptions. In addition, it seems necessary to highlight Llewellyn and Hoebel and their work in The Cheyenne Way as one of the first to place law in society and view society from a conflict perspective, i.e. society as made up of groups with competing interests. Malinowski, supra note 303.; P.H. Gulliver, Social Control in An African Society, A Study of the Arusha: Agricultural Masai of Northern Tanganyika, London: Routledge and Kegan Paul Ltd., 1963.; K.N. Llewellyn and E. Adamson Hoebel, supra note 308.

[321] Anthropology is considered a branch of the social sciences and as such has similar ideological perspectives. However, both areas have tended to focus on differing aspects of law in society: anthropologists in terms of culture and sociologists in terms of interaction (behavioural jurisprudence). See Koch, supra note 306, p. 11

[322] 'Law on the books' is of the doctrinal perspective and is used here metaphorically. Research done within societies which do not have codified laws are still able to be viewed in this way as long as the focus remains on examining legal rules and legal processes.

[323] Roberts, supra note 318, p. 184; M.B. Hooker, Legal Pluralism: An Introduction to Colonial and Neo-colonial Laws, Oxford: Clarendon Press, 1975, p. 8.

[324] Ibid., p. 8. For discussion of the differing definitions of law see: June Starr and Jane F. Collier, "Introduction: Dialogues in Legal Anthropology," in June Starr and Jane F. Collier (eds.), History and Power in the Study of Law: New Directions in Legal Anthropology, London: Cornell University Press, 1989, pp. 1-28.

shifted from defining law to a focus on the analysis of procedures and processes of dispute.[325]

While an improvement over the doctrinal perspective, the study of process similarly relies on universal assumptions. "The dispute case, unlike any particular form of adjudication or class of disputes or functions, is present in every society "[326] In this way, the social scientific perspective as focused on disputes returns to a one-dimensional view of law, where it is described in terms of situational and social significance This focus on procedural law, in direct contrast to the substantive view taken by the doctrinal approach, is still seen from the postmodern perspective as insufficient What is left wanting is an examination of law or legal orders that does not alienate the social context, yet is not so broad as to exclude factors that may potentially affect individual behaviour, i e , age, sex, occupation, race, class, or ethnicity [327]

The social scientific view is traditionally associated with an interactionist or legal realist perspective where the "focus [is] on individuals and groups who use laws and legal processes for pursuing their own ends."[328] Interactional research has been mainly empirical methodologically and aims to examine the gap between legal rules and the actual behaviour those rules address, in other words, legal effectiveness [329] The underlying operating assumption is that the law is not objective but serves certain purposes or interests. This threatens the doctrinal perspective that holds law as legitimate (not

---

[325] Hooker, supra note 323, p. 10. The distinction developed between doctrinal and earlier social scientific accounts has not accounted for the overlap of legal anthropologists in both groups. Emphasis is made here to emphasize the potential artificiality of this classification and indicate that a level of continuity exists.

[326] Nader, supra note 306, p. 24.

[327] For discussion see: Franz von Benda-Beckmann, "Changing Legal Pluralisms in Indonesia," in Proceedings of the VIth International Symposium, Commission on Folk Law and Legal Pluralism, Ottawa, Ontario, August 14-18, 1990, Vol. 2 , pp. 608-629; Daisy Hilse Dwyer, "Substance and Process: Reappraising the Premises of the Anthropology of Law," Dialectical Anthropology, 4, 4, 1979, pp. 309-320.

[328] June Starr and Jane F. Collier, supra note 324, p. 21.

[329] Austin Sarat, "Legal Effectiveness and Social Studies of Law: On the Unfortunate Persistence of a Research Tradition," Legal Studies Forum, 1985, 9, 1, pp. 23-31.

impartial, political or ideological) and espouses norms that guide effective social relations.[330]

More recent work within this social scientific perspective has tended to adopt a critical legal theory that focuses on a structural or institutional perspective.[331] What distinguishes this perspective is a view of law as an ideological site. Similar to the realist orientation, law is considered non-neutral and is viewed as inherently political, not instrumental. Starr and Collier define the institutional approach as:

> as a focus on economic and political processes, treating individuals as representatives of particular economic interests or social groups, and laws as representing particular ideological positions.[332]

Perhaps the best examples of critical theory are Marxist and feminist approaches.[333] The focus is an examination of the unstated assumptions underlying the elements of a legal order: the rules, practices and institutions. Methodologically, this critical view is focused on applied research with a desire for fundamental legal and social change.

Methodologically, debate rages within the social scientific paradigm over the position taken by a researcher to the study of law. One position in this discipline denies the assumption of the doctrinal approach, or liberal legal theory, which holds that researchers and theorists should and can maintain an objective stance with respect to the 'object' under study. Alternatively, the social scientific tradition is riddled with remnants of this tension where some authors have maintained that there can be no pure objectivity in research but the researcher must acknowledge that:

---

[330] Ibid., p. 25.
[331] Starr and Collier, supra note 324, p. 21
[332] Ibid., pp. 21-22.
[333] There are many references that could be cited on how these two theoretical strands view law, for example, see: Carol Smart, Feminism and the Power of Law, London: Routledge, 1989; Alan Hunt, "Rights and Social Movements: Counter-Hegemonic Strategies," Journal of Law and Society, 1990, 17, pp. 309-328. For a Marxist perspective to legal pluralism, see: Peter Fitzpatrick, "Marxism and Legal Pluralism," Australian Journal of Law and Society, 1983, 1, pp. 45-60, and "The Political Economy of Dispute Settlement in Papua New Guinea," in Colin Sumner (ed.), Crime, Justice and Underdevelopment, London: Heinemann Educational Books Ltd., 1982, pp. 228-247.

> The observer is prone to fit the material under investigation, consciously or unconsciously, into a conceptual and institutional framework of his own, distorting the material as he does so.[334]

Two well-known opponents of competing conceptions to whether there is an objective reality 'out there' are Bohannan and Gluckman.[335] Bohannan maintains that the anthropologist's values will inevitably distort what is being described in the society being investigated. In order to control some of these preconceptions, Bohannan advocated that any study should provide an account of how the people in the society understand their behaviour, in other words, analysis should be in terms of indigenous concepts rather than western notions. For Bohannan, comparative studies must be done through neutral frameworks so not to depict one society in terms of another.[336] Alternatively, Gluckman holds that western concepts of law are universally valid and are appropriate tools for analyzing any society.

C. The Postmodern Approach

The postmodern view differs quite substantially from both the doctrinal and social scientific perspectives of legal pluralism discussed. In this orientation there is no absolute definition of law, instead law is constituted by the multiple networks of legal orders (normative orders) in society. For this reason, the term legal pluralism is used to describe the plurality and multiplicity of legal orders[337] that exist in constant interaction, which are mutually interacting in varied and unpredictable ways, and equally influencing systemic norms.[338] Merry provides a good indication of this when she claims this view rejects the idea of a single system and instead emphasizes broad conceptions of legal orders to

---

[334] Roberts, supra note 318, p. 17.
[335] See: Max Gluckman, The Judicial Process Among the Barotse of Northern Rhodesia, Manchester: The University Press, 1967; Max Gluckman, "Concepts in the Comparative Study of Tribal Law," in Laura Nader (ed.), Law in Culture and Society, Chicago: Aldine Publishing Co., 1969, pp. 349-373; Paul Bohannan, Justice and Judgment Among the Tiv, London: Oxford University Press, 1957.
[336] Paul Bohannan, "Ethnography and Comparison in Legal Anthropology," in Laura Nader (ed.), Law in Culture and Society, Chicago: Aldine Publishing Co., 1969, pp. 401-418.
[337] Legal orders here refers to all norms regulating social conduct.
[338] Boaventura de Sousa Santos, supra note 286, pp. 297-298.

include non-legal forms of normative ordering. Key to this view is an emphasis on normative orders that act as informal legal systems:

> ...in which the processes of establishing rules, serving compliance to these rules, and punishing rulebreakers seem natural and taken for granted, as occurs within families, work groups and collectives. [339]

While state law is acknowledged as one form of legal ordering, primary concern is with social regulation that adopts characteristics of law but does not take pl .ce in an 'official' legal system. Santos provides clarification of legal pluralism in the postmodern sense:

> Legal pluralism is the key concept in a postmodern view of law. Not legal pluralism of traditional legal anthropology in which the different legal orders are conceived as separate entities coexisting in the same political space, but the conception of different legal spaces superimposed, interpenetrated, and mixed in our minds as much as in our actions, in occasions of qualitative leaps or sweeping crises in our life trajectories as well as in the dull routine of eventless everyday life.

In essence, a postmodern view of law rejects the 'law *and* society'/'law *in* society' dichotomy constructed by the doctrinal and sociological orientations. This is an attempt to circumvent an essentialist view of 'law' and 'legal order' through a total reconceptualization of the social world.

A common contention within postmodern literature is that work on most doctrinal and sociological work on legal pluralism has relied on definitions of legal pluralism that are rooted in the state, whether implicitly or explicitly.[340] Griffiths explains that this contention is rooted in the tendency to see the law as made by some official agency of the state. Normative orderings other than the legal order are considered "hierarchically

---

[339] Merry, supra note 285, p.871.

[340] Most of the work in legal pluralism has (until recently) assumed that the state is the sole source of legitimate law ('official law'). For elaboration of this theme, see: John Griffiths, supra note 300; Sally Engle Merry, supra note 285. The postmodern view upsets this assumption and presupposes the need to examine both the 'official' and 'unofficial' law in a social field, see: Boaventura de Sousa Santos, "On Modes of Production of Law and Social Power," in International Journal of the Sociology of Law, 1985,13, pp. 299; Susan S. Silbey and Austin Sarat, supra note 313, pp. 165-174.

subordinate to the law and institutions of the state," and that the state acts from a position of "moral authority because of [its] position in the hierarchy."[341] Postmodern legal pluralists reject the centrality of the state as the measurement of legal normativity.[342] This limits its analytical usefulness as it does not acknowledge the context of any behavioural norm and so cannot provide an adequate account of legal pluralism. The postmodern tradition focuses on context-specificity and rejects a meta-theory approach in investigating the social world.

Methodologically, this orientation examines the micro-level of society and highlights the everyday social relationships and practices that make up the complex social world in which we live. In doing so, this perspective embraces the idea that the power to define and regulate the social body does not rely on one unitary body (doctrinal approach) or interest group (instrumental or critical perspective). This view rejects the centrality of the state in the study of social phenomena, as in both the doctrinal and sociological positions, and offers a more sophisticated analysis of how ideological concepts become constituted through a plurality of decision-making institutions, distributive criteria, and cultural traditions, all of which interact in complex ways.[343] The operating assumption is that legal orders constantly interact in mutually influencing ways but not in any predictable or static ways, interaction is unpredictable. By studying the multiplicity of power relations, a postmodern analysis becomes an ally for legal pluralists who reject a conception of state as the agency of social cohesion and normality, serving to assume the conditions of existence and survival of the community.

The unquestioned legitimacy of formal, western law in theory and methodology is challenged. The 'official' legal order must compete with other normative orders to be seen

---

[341] Griffiths, Ibid., p. 3.

[342] Legal norms and regulations are in competition with each other throughout society and therefore legal pluralists in this perspective do not give more legitimacy to legal norms within the formal institutions of the legal system. The judicial system competes with other social fields within human interaction and sets of social relations.

[343] Boaventura de Sousa Santos, supra note 286, p. 299.

as supreme -- there is no permanent hierarchy of normative order in any individual's life.[344] This allows the legal pluralists who rely on the insights of postmodern theory to circumvent the redundant rhetoric of the previous disciplines.

The postmodern perspective allows for a focus on middle-range explanatory variables. This is an improvement from the doctrinal and social scientific approaches, wherein examination of law or legal orders was either alienated from the social context, or was too broad, excluding factors that affect individual behaviour, i.e., age, sex, occupation, race, class, or ethnicity.[345]

Presentation of these three differing analytical groups informing legal pluralism is not meant to ascribe any exclusivity to particular disciplines as there is overlap and influences between them and their theoretical perspectives. It was necessary to introduce the reader to the theoretical and methodological themes explicitly and implicitly raised in the legal pluralism literature. Each of the three analytical categories provides a useful blueprint in which to frame the broad assumptions underlying work about the law, legal and social orders. The necessity of demystifying these premises is essential when confronting the diversity of work in the field of legal pluralism. In this way, the tendency among scholars to provide ahistorical accounts or unsituated debates of social phenomena is overcome.[346]

Suitability of Legal Pluralism Informed by Postmodernism

With the debates in legal pluralism reviewed, discussion now turns to the specific contributions that postmodern legal pluralism offers for the development of a conceptual framework to analyze Aboriginal justice initiatives. Argument is offered as to the

---

[344] Criticism is leveled at this point later in the Chapter because de-centralizing the state has inevitably led to the inability to conceive of law as an important organizing force in society. This stance does not simply reengage in the centrality of the state as the appropriate focus of study but instead suggests that incorporating a view of how state law and other regulatory orders interact overcomes the tendency to accord no significance of the political and legal nature of the state or the inability to account for the predominance of particular discourses.

[345] Dwyer, supra note 327, p. 313.

[346] Again, there has been a tendency for later work to engage in debates described in earlier work. This provides ample justification for a review of many of the debates espoused by earlier legal theorists and researchers despite their seemingly unconnectedness.

suitability of postmodern legal pluralism because of its: (1) rejection of binary views of the law in/and society relation and state/non-state centered thought, (2) acknowledgment of the plurality of legal orders in society; (3) conceptualization of power as dynamic and rooted in the individual as well as regulatory orders; (4) view of the legitimacy of legal orders as rooted in the dynamic interaction with other orders; and (5) opportunity to conceive legal pluralism as empowering or a socially transformative project Argument is offered to overcome some of the difficulties in legal pluralist literature by extending analysis to include a view of the state within that analysis.

Advantages of Debunking Dichotomous Thought

There are many parallels between the debates in the doctrinal and social scientific legal pluralist work and the criticisms offered earlier of conceptualizing Aboriginal justice initiatives within an assimilationist/revolution framework. There exists a similar tendency to rely on dualistic analyses of legal phenomena. Specifically, within the doctrinal and sociological perspectives, the social world is often constructed as a binary reality, constituting a series of mutually exclusive categories. This has an either-or effect[347] wherein the adoption or rejection of one of the binary elements automatically constitutes and defines the other. Within binaries, one is usually accorded with positive and good characteristics while the other is seen as its opposite and equated with negative or bad values. The conceptions of legal pluralism in doctrinal and social scientific work tends to utilize three particular binaries including: the consensus/conflict ordering of society, the law *and* society/law *in* society relation and the state law/non-state law While this does point to the suitability of the postmodern view as alternative to escape this tendency, one must first analyze this dichotomous thought to see how it has limited some of the theoretical positions in legal pluralism.

Hunt examines a connection between a linear model of law based on consent/coercion and the corresponding views of society as based on consensus/conflict [348] In this way, a

---

[347] Hunt, supra note 304.
[348] Ibid., pp. 51-57.

consensual or ordered view of society relies on law as a way to maintain the universal norms and values In other words, law is viewed as inherently good and based on the consent of the members in society to uphold this common good. On the other hand, a society based on conflict describes society as constantly in the process of change, and groups and individuals are always in conflict because they are attempting to realize their own interests; law, here, is viewed as a coercive force to mitigate between these competing interests.[349] The consequences of this binary is that scholars exclusively rely on these preconceived categories to situate and contextualize their work. In doing so, they implicitly assume that there are no alternate ways of viewing society and thereby, they reinforce continued use of the dichotomy Law exists in society in only one of these two functions

The second binary of the law-society relation associated with the doctrinal and social scientific perspectives has created a longstanding competition between the two fields. Lawyers and anthropologists/sociologists have remained relatively steadfast in their respective traditions and their views of where the law corresponds in society, whether as an autonomous field of inquiry or rooted in the social. Discussion within this law *and* society/law *in* society dichotomy presupposes an inability to reconceptualize the 'law' or a 'legal order' as this would entail arguing a position not derivative of one of these two opposing positions.

While many other binaries could be offered[350] as indicative of these two modern legal pluralist positions, the most poignant binary has been state law/non-state law. As pointed out by legal pluralists informed by a postmodern perspective, this has been one of the reasons why inadequate accounts of legal pluralism prevail. Primacy is given to a conception of the law as fundamentally linked to the state. In this way, previous legal

---

[349] John Horton, "Order and Conflict Theories of Social Problems as Competing Ideologies," The American Journal of Sociology, 1966, 71, pp. 6-24.

[350] Other dichotomies in the literature includes specific/universal concepts of law, law on the books/law in action, simple/modern, dominant law/servient law, more law/less law, undifferentiated/ differentiated society, formal/substantive justice, state/civil society, ideological/repressive domination, and private/state law, strong/weak legal pluralism, etc.

pluralist scholars have tended to ignore or marginalize informal regulatory orders and concentrate on formalized, 'legitimate' law and its processes Analysis of other normative orderings not considered official law requires reengagement with the fundamental tenets underlying the binary and the way it has been studied. In contrast, adopting a more fluid and dynamic view of legal orders allows one to escape the tendency to focus on state law and traditional law, or official and unofficial law as dichotomous and autonomous Here, both state law and traditional law co-exist but do not interact, or if there is account of their interaction it is done strictly in terms of the state reshaping that 'informal' legal order Analysis indicative of this rationale serves to equate traditional law to ahistorical, pre-colonial or static characteristics and in turn equates state law with colonial supremacy, where the one view of law, e.g., Euro-Canadian law, is considered transhistorical and universal. Engagement of legal pluralism research on these terms provides an inadequate basis to view law in multicultural and polyethnic societies such as Canada.

The Plurality of Legal Orders: De-Centering State Law

Rejecting monolithic views of the state and envisioning plural interacting legal orders enables one to forgo those types of dualistic analyses discussed above Instead, there is recognition of the variety of regulatory orders in society that influence, and are influenced by, individual action and behaviour. In this way a complex matrix of social relations are discerned and more complex and dynamic ways of envisioning legal interaction emerges

In reconceptualizing anthropological and sociological accounts of legal pluralism,[351] Vanderlinden points to two important assumptions which simultaneously direct us to two elements distinguishing legal pluralism based on postmodernism (1) legal pluralism is the existence of more than one single legal order meeting at the level of the 'sujet de droits'[352]

---

[351] Jacques Vanderlinden, "Return to Legal Pluralism: Twenty Years Later," Journal of Legal Pluralism and Unofficial Law, 1989, 28, pp. 149-157.

[352] For Vanderlinden, "the words 'sujet de droit' convey not only the idea that an individual is the holder of rights and duties, but also that he is subjected to a legal system." (Ibid., p. 152)

and, (2) pluralism is an individual condition in which each person is subject to a network of social orders.[353]

Vanderlinden summarizes basic postulates of postmodern legal pluralism: human societies have at least a minimum of regulation within the social networks that constitute them; the individual is the important focus of study, as he/she is the converging point for the multiple regulatory orders (cultural, economic, familial, etc.); there are a multiple and diverse number of regulatory orders in every society; "regulatory orders, among them legal orders, are always in a dynamic competitive relationship to each other, although this is often latent and not immediately apparent to the outside observer."[354]

He clarifies a definition of legal pluralism as the dialectical process of regulatory orders and individuals asserting power Rejecting the doctrinal and social scientific view of state law as the sole regulatory order (a distinct, identifiable 'legal order'), Vanderlinden describes the concept of 'relative pluralism' This describes a situation where one regulatory system is defined solely by its relationship to another social network or order Alternatively, he offers the term 'regulatory pluralism', as a better way of conceiving the plurality of regulatory orders that exist and in doing so disconnects from a conception of legal pluralism in the traditional state-centered sense.[355] Vanderlinden, by using the concept 'regulatory pluralism', denies the existence of one separate regulatory order labeled a 'legal order'. Vanderlinden states:

---

[353] In Vanderlinden's words:

> ...pluralism is essentially a condition, thus a way of being, of existing. It is the condition of the person who, in his daily life, is confronted in his behaviour with various, possibly conflicting, regulatory orders, be they legal or non-legal, emanating from the various social networks of which he is voluntarily or not, a member. (Ibid., p. 154)

[354] Ibid., p. 151

[355] Ibid., p. 154.

> 'Legal pluralism' is pluralism limited to the legal regulatory orders with which the 'sujet de droits' can be confronted Use of the term assumes that there exists in the social networks to which the individual is subjected one or many regulatory orders that can be identified as 'legal' (the law of the "State' and/or unofficial law) In that sense, legal pluralism is but a specific case of regulatory pluralism. And I am willing to admit that for one who denies there is a distinct, identifiable sort or order which can be qualified as 'legal', this entails that there cannot be a distinct state legal pluralism, only states of regulatory pluralism.[356]

Vanderlinden is an excellent example of the postmodern perspective in that his focus situates the individual as the site of social phenomena or studying 'bottom-up' [357] The attention to terminology shows the complexity of the paradigm offered and the necessity to redefine societal orders for a better analytical understanding of legal pluralism which is not rooted in the state.

Conceiving plural regulatory orders in society also allows one to escape the tendency of doctrinal and social scientific legal pluralist research to base the essential differences of state/non-state law in terms of culture Much of that literature has addressed the differences in state and customary law. In this way legal orders were seen along racial or cultural differences, and considered inevitable and pre-determined While culture can be the basis of regulatory orders, as in the discussion at hand on First Nations strategies of implementing their own regulatory orders as alternatives to the criminal justice system, culture is by no means structurally determined.

In other words, culture assumes a prescribed set of shared values and behaviours within a particular group and, in this sense, regulatory orders may be operating or existing [358] Here rule-making and regulation are embedded in culture [359] However, by conceiving an

---

[356] Ibid., p. 154. The advantage of viewing legal pluralism as regulatory pluralism is highlighted. Vanderlinden seems to assert that regulatory orders assert power over an individual and this view is contested within postmodern legal pluralism views. Most view power as emanating in individuals as well as regulatory order, further discussion follows.

[357] Griffiths, supra note 300, p. 3.

[358] Lauren Benton, "Beyond Legal Pluralism: Towards a New Approach to Law in the Informal Sector," Social and Legal Studies, 1994, 3, pp. 223-242.

[359] Ibid.

individual as able to negotiate between the competing normative orders and practices they interact with, culture cannot be seen to be so determined. As such, one must reexamine how culture may operate to pattern social relations and interaction but not structure it as inevitable, otherwise static assumptions of social interaction and culture are assumed. The advantage of viewing the potential conflict of values within culture provides insight as to how regulatory orders must compete not only with other regulatory orders for legitimacy but also within their own regulatory sphere for continued existence; significantly, it is the acknowledgment that cultural rules and regulations are in competition within the group as well as outside it.

Recognition of the diversity and interpenetration within and between regulatory orders, can allow for a reevaluation of the legal orders emerging within First Nations communities. Two possible views are available: (1) the legal orders are a product of the patterns of interaction which reflect shared values and are derived from shared experience in that community, or (2) the legal order arises as a negotiated agreement for participants to act as if they had shared experiences and values.[360] In this latter case, there is an assumption of particular sets of social relationships and outcome, not an assumption of the congruity of culture. Debunking social order as either a question of the consensus or conflict of values allows for evaluation of the potential and/or limitations of justice initiatives in communities. This provides a useful point of departure within the central tenets of this thesis on First Nation justice initiatives. The legitimacy and authority an initiative may have in the community will be determined by its ability to pattern relationships in the community, failure in this regard will lead to the persistence of other regulatory orders as guides to regulate or normalize individual behaviour.

Vanderlinden's views on the individual as the key to legal pluralism allows one to see how bottom-up power operates as sites of struggle and control over social processes. If not supported in the community, there would not be a legal order. The complex matrix of

---

[360] Ibid.

social relations will determine how an initiative will be developed, implemented and authoritative in the community.

Dynamic Interaction Within and Between Regulatory Orders

As opposed to static and structural conceptions, regulatory orders in postmodern legal pluralism literature are seen in terms of their ability to undergo dynamic change and innovation within their own contexts as well as in terms of their interaction with other legal orders. In this way one legal or regulatory order cannot not be seen as simply reduced to the other through their interaction, rather there are points of convergence and divergence between these orders.[361] Conceptualizing plural orders with this autonomous characteristic acknowledges the differing ideology incorporated into, and underlying, differing regulatory orders and their corresponding incompatibility (in ideological terms).

What is key to understanding the interaction of plural regulatory orders is postmodern analyses of power which are incorporated in the legal pluralist view Foucault's analysis of power provides the rationale for the rejection of a unitary, state normativity of social phenomena (e.g., legal regime).[362] This is in part because he focuses on the micro-level of society and highlights the everyday social relationships and practices which make up the complex social world in which we live. In doing so, Foucault embraces the idea that the power to define and regulate the social body does not rely on one unitary body or person This view rejects the centrality of the state in the study of social phenomena and offers a more sophisticated analysis of how ideological concepts become constituted through a plurality of decision-making institutions, distributive criteria, and cultural traditions, all of which interact in complex ways. In fact, by studying the multiplicity of power relations, a Foucaultian analysis becomes an ally for legal pluralists who reject a conception of the

---

[361] Peter Fitzpatrick, "Law, Plurality and Underdevelopment," in D. Sugarman (ed.), Legality, Ideology and the State, London: Academic Press, 1983, pp. 159 and 168.

[362] The insight of Michel Foucault within postmodern work is undisputed and reliance on his views to inform legal pluralism abounds in the literature. Legal pluralists have tended to rely on some of his analytical work, which overcomes monolithic views of power and instead describes the multiplicity of power relations in society on the micro level. Power is a site of struggle over knowledge and the production of truth.

state as the agency of social cohesion and normality serving to assume the conditions of existence and survival of the community

For postmodern theorists, power is conceptualized not as a fixed quantity; it is not possessed by one person at another's expense and so is not conceived in repressive terms. Power comes from everything because it is everywhere; rather than identified with a single institution, power or group, it is a force circulated throughout the entire social body. It is exercised from the bottom-up (from the micro-level of society) and utilizes opposing forces as vehicles of its own exercise:

> individuals...are always in the position of simultaneously undergoing and exercising this power. They are not only its inert or consenting target; they are always also the elements of its articulation In other words, individuals are the vehicles of power, not its points of application.[363]

Power, then, is an exercise not a possession, functioning productively and in fragments. Foucault

> does not deny the reality of domination or subordination but attempts to develop an approach to power which sees it as a series of conflicting methods, techniques and practices which is not unidimensional or certain in its effects and which is not entirely dependent on coercion or consent for its operation.[364]

This relational and fluid understanding of power initiates a way for one to conceptualize how sites of legal regulation compete with each other for legitimacy and power.

If legal pluralists rely on the postmodern insight that individuals are the sites of power, how do they account for the existence of organized regulatory orders which act in law-like ways to influence social behaviour? There has been a reliance on Foucault's analysis of the relationship between knowledge and power in society for insight. For Foucault,

---

[363] Michel Foucault, Power/Knowledge: Selected Interviews and Other Writings 1972-1977, New York: Pantheon Books, 1977, p. 98.

[364] Roger Matthews, "Reassessing Informal Justice," in Roger Matthews (ed.), Informal Justice?, London: Sage Publications, 1988, p. 18.

> power produces knowledge. power and knowledge directly imply one another; there is no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations.[365]

This is one of the main tenets of Foucault's own work and is, in fact, the basis for his analysis of the emergence of disciplinary power in modernity To Foucault, disciplines are counter-law and through their discourse they have expanded into society as a method of social regulation, giving rise to normalization and control of individuals and displacing law and punishment (the basis of juridical power). Foucault develops the way in which disciplines control people (social regulation) by illustrating the process of normalization Normalization describes the way in which a subject of a discipline internalizes the norms or standards of that discipline What Foucault offers for legal pluralism, in this account of normalization and the way in which disciplines operate on norms in law-like ways, is a way of conceiving how local legal regimes operate with their own 'logic' (values and assumptions).[366] It could allow a legal pluralist to see how legal regimes are able to develop coherent structures and forms of social regulation by virtue of the integral links between knowledge and power,[367] as well as elaborate on the way social behaviour is not entirely fragmented and unrelated, but can be organized

There are critiques of the Foucaultian conception of juridical (or state) power and disciplinary power as distinct and incompatible, where juridical power is based on the law of a sovereign and top-down and disciplinary power is fragmented throughout society and is exercised from the bottom-up Foucault maintains that juridical power has become the

---

[365] Michel Foucault, supra note 363.

[366] This view is similar to the concept of constellations of legal pluralism advocated by Franz von Benda-Beckman who asserts that a constellation refers to "symbolic universes of meaning: the rules, regulations, institutions, procedures that are regarded as being part of the unified whole." He claims that these normative universes have specific histories, theories, realities, etc. and are self-validating within themselves. Universes, for Benda-Beckmann becomes an effective tool to describe the coexistence of the differing orders in the social world. See: Benda-Beckmann, supra note 327, p. 611.

[367] What is particularly useful here as well is the fact that Foucault emphasizes that social regulation is able to take differing forms, and therefore is not solely restricted to law. This insight contributes to an understanding of legal pluralism in that it reinforces the view that there can be systems or instances of social regulation outside official bodies. In diffusive legal pluralist terms, it allows for the possibility of viewing the existence of legal regimes outside the official legal system.

most pervasive in society. Embracing his conception of disciplinary power which conceives of power in terms of productively forming norms and shaping individual behaviour to adhere to these norms in contrast to a conception of power that is essentially prohibited and repressive. While Foucault's analysis seems to draw on a dualist notion of power similar to that of official/unofficial law and regulatory order, it does point to the need to articulate a way of seeing the juridical and disciplinary powers in society as interacting and not exclusive. While drawing on Foucault does allow for insight into the multiplicity of regulatory orders in society, and their incorporation of law-like structures or functions in society, his analysis is limited due to the inability to see how state law does exist and operate alongside disciplinary powers in society. Foucault tends to neglect an analysis of how some disciplinary powers in society become dominant. Postmodern legal pluralists recognize this limitation and acknowledge the need to view the role of state law in the context of other regulatory orders and make visible the ways in which non-state regulatory orders draw on the symbols of formal state law while competing with it.

Legal pluralism not only concerns itself with a plurality of legal orders; it also focuses, as stated previously, on normativity. An examination of the organization, function and operation of regulatory orders with emphasis on the role of normalization allows for a contrasting view of the dominance of legal normativity in the institutions of the state. For legal pluralists this expansion of a conception of legal orders (even though it is extrapolated to norms rather than law) provides a better way to think of the role and nature of regulatory orders in society as a pattern of social relations acting as a normalizing force and imbued with value-laden concepts. Viewing regulatory orders, such as the household, workplace, bureaucratic organizations and cultural communities, etc. as sources of law and legal normativity in society provides a way to see how social fields compete with each other. There is no primacy given to state institutions as the only vehicles of normativity. It also describes how the differing regulatory orders can be asymmetrical and non-egalitarian depending on the discourse. This connection between laws and norms may provide access to a critical view of regulatory orders in that a focus on the discursive or ideological elements of it would offer insight into the conflict in views

that in fact were validated or relegated as rejected, neglected or ignored. In doing so the connection between knowledge and its lack of neutrality or objectivity may become apparent.

How regulatory orders will interact with each other is dependent on an examination of the essential functioning of any particular legal order. A comparison of how a legal order essentially operates and the logic underlying it will enable one to view the similarities and differences of regulatory orders.[368]

The interaction between legal orders is not predetermined, but conditional and dynamic. By rejecting the hierarchical view of legal pluralism implicit in the doctrinal and social scientific views of legal pluralism, one is able to incorporate a more complex analysis of First Nations justice initiatives in relation to state law. Adopting the view that competing legal orders struggle for power challenges the assumption that the dominance of one particular order is inevitable. Significantly, there is room to suggest that dominance may occur however, it is not pre-determined in its character or extent Additionally, postmodern analysis implores legal pluralists to recognize that legal or regulatory orders which guide social behaviour are not completely distinct or isolated but, in fact' interact [369] As such the interaction may serve to conceive how the relationship between regulatory orders may be mutually influencing. This does not imply that there is necessarily overlap in content, nature or structure of the differing legal orders however, it does allow explanation for some influence if there was.[370] Similarly, if some of the ideology or structure of a legal order was incorporated into the other, it does not necessarily follow that the quality or nature of that incorporated regulatory form or structure is

---

[368] David and Brierly offer the following composite characteristics of which any order would consist: one, norms, institutions, procedures, authority and political tradition which sustains it. For more detailed discussion see: R. David and J.E.C. Brierley, Major Legal Systems in the World Today, London: Sweet and Maxwell, 1985.

[369] Boaventura De Sousa Santos, supra note 286, p. 288.

[370] Santos (Ibid., pp. 291-296) offers the view that influences would be at the periphery of the regulatory and not in terms of its center, that is its fundamental principles and values.

compromised;[371] the relative autonomy of each regulatory order remains intact. In this way, First Nations initiatives rooted in Aboriginal concepts of justice could stand on their own in terms of an autonomous operating ideology and substantial change in terms of regulations along traditional concepts. It also suggests that the type or structure of the initiative may not necessarily be the underlying determination of whether it may be considered potentially dominated and/or assimilated by the state, or any other regulatory order, as long as the underlying logic is different. Justice initiatives that work within the structure of the legal system cannot be considered net widening then if it is operating within incompatible ideology.[372]

Legitimacy of Regulatory Orders

The competition of regulatory orders within society creates a requirement to constitute what counts for the authority or perceived legitimacy of any regulatory order.

There are contrasting definitions within legal pluralism as to what constitutes the degree of validity and legitimacy intuitively accorded to the 'law' and 'legal orders'. The doctrinal perspective, focusing exclusively on rules and jurisprudence, has aligned its validity as a paradigm with its intimate connection with legitimacy of law itself. In this way, this tradition is self-validating, according exclusive legitimacy to the study of law as it is in the books and, in turn, reasserting its disciplinary legitimacy through its intimate connection and focus on 'law' itself. The doctrinal paradigm rests entirely on a view of official law as rightful and good and does not conceive that there are any other legitimate sources of law.

The social scientific view of legal pluralism accords law with validity and legitimacy through its focus on its social significance and function in the social world. While the

---

[371] Santos (Ibid.) the idea here is that the complex relation between differing legal orders will be rooted in different interpretive standpoints and ideology, as such interaction can only operate on predefined boundaries implicit to the legal system. So while there may be some influence to the periphery of the order, the central assumptions persists.

[372] Perhaps instead of net widening one could suggest that it could be seen as juridification of the social world, where more law-like structures are operating in civil society. It may be a question of construing the relation to the regulated social world rather than the expansion of the state institutions.

focus may shift from the law in the books, it is associated with 'behavioural jurisprudence' and, accordingly, takes on the legitimate residue that comes with applying law-like procedures in the social world Unofficial law may be recognized in this paradigm, however it is only seen in relation to, or having similar characteristics of, official law The latter is the measuring-stick and appropriate wielder of validity In this way, the perceived legitimacy of law for the sociologist hardly wavers, while the focus of its study might

The postmodern view, while challenging the legal order as the only valid source of law, and analyzing it in relation to other regulatory orders, still perceives 'law' in terms of legitimacy in the sense that a legal order, rather than a regulatory order, could be considered one of the primary ordering forces in society. Vanderlinden argues that in society a system of some kind regulates more or less the coherent whole.[373] There is reliance on the idea that *something* constitutes order in society and despite the fact that this could be any of an infinite number of regulatory orders, it is conceived in traditional legal terms. In other words, while primacy is not given to the legal system per se, there is room to surmise that legitimacy is equated with the characteristics of a legal order In this way, legal pluralism postmodernists could also associate law/legality with validity and legitimacy.

Recognizing the interaction of plural regulatory orders while at the same time associating rules and procedures of a regulatory order as law-like provides a way to conceptualize how the legitimacy and authority of a legal order is constituted. Rather than conceiving state law as (predetermined) authority, the legitimacy of law or rules of behaviour can be

---

[373] Vanderlinden, supra note 351, p. 150. Taking up a similar argument, Rothman points to the necessity of order in society and the search for a primary, overriding regulatory order to provide it, she states:

> However, the elements of a complex configuration vary only slightly, while perceptions of these elements vary widely. The removal of the component of inevitability may destroy a particular order, but it does not destroy the quest for the order. The pieces will be resorted, rearranged, and reestablished, and a new aura of validity will be created. The resonance of language will be available to enhance the aura. Thus, the conditions that can fulfill a people's expectations of order will again be at the focus of attention.

Rozann Rothman, "Stability and Change in a Legal Order: The Impact of Ambiguity," Ethics, 1972, 83, 1, p. 36.

seen as a function of the context and social relations within the social milieu. What is significant is that the interplay of regulatory orders is not predetermined, their emergence as legitimate is a function of its interpenetration and competition with other normative orders in an individual's life. In this way, legitimacy is not predetermined but variable. Analysis allows for an avenue in which to see whether or not a First Nations justice initiative could successfully operate in the community depending upon how that initiative was perceived in its community of origin.

What has been quite illusive in the legal pluralism literature is a way to envision how the de-centralized state law interacts with other regulatory orders. Consideration of this relation is argued by Santos not as a return to an analysis of the monolithic domination of the state and state law, but as a "recognition of the centrality of state power and law [which] is compatible with the recognition of the multiplicity of forms of power and forms of law in capitalist societies."[374] It is necessary to examine this relation in order to address how a regulatory order other than state law is accorded legitimacy. This apparent contradiction to reject the centrality of the state as a given yet accord it with qualities of an overriding normative order has been offered as a means of circumventing the problems of seeing power and regulatory orders fragmented throughout society without any explanation of how one order can become predominant in society;[375] that the role of the state is reconceptualized in the sense that it is not accorded primacy but viewed in relation to its position in society.[376]

Santos offers a way to view the problem of power in society by debunking the "commonsensical reduction of law and politics to the realm of the state,"[377] postulating instead a perspective of:

---

[374] Santos, supra note 340, p. 327.
[375] Ibid., p. 299. Similar argument is made by Hunt in discussing the limits of Foucault analysis to account for law in postmodern society. Alan Hunt, "Foucault's Expulsion of Law: Toward a Retrieval," Law and Social Inquiry, 1992, 17, pp. 1-38.
[376] Boaventura De Sousa Santos, "State, Law and Community in the World System: An Introduction," Social and Legal Studies, 1992, 1, p. 138.
[377] Ibid.

> The political nature of power [as] not the exclusive attribute of any given form of power, it is rather the global effect of the combination of the different forms of power and the modes of production thereof. Similarly, the legal regulation of social relations is not the exclusive attribute of any form of normative order, it is rather the end result of the combination of the different forms of law and the modes of production thereof.[378]

He offers four clusters of social interaction/relations as a way to structure modern societies: the householdplace, the workplace, the citizenplace and the worldplace. By distinguishing these four structures, Santos shows how structurally autonomous they are, yet interpenetrated.[379] Comparison is made of their distinguishing features i.e., "a unit of social practice, an institutional form, a mechanism of social power, a form of law, and a mode of rationality."[380] For Santos, power emanates from the social interactions between these social structures. Political evaluation of the social relations of legal power allows one to expand the concept of law and the concept of politics in order to uncover the social relations of power better than meta-theories of dominance (i.e., Marxism, feminism, etc.).

In terms of First Nations initiatives as part of the regulatory and normative orders in society, their legitimacy and resilience has much to do with their own ideological foundations, however one cannot deny that state law will play a factor It would seem that the extent of that factor and in what terms is not predetermined In terms of the operating ideology of a First Nation system, whether integrated or separate, its legitimacy will be viewed in terms of its ability to compete with other regulatory orders to assert its authority in its particular social field. While other regulatory orders will play a part in this process as they will be competing for recognition and adherence to other norms, they may exist and persist depending on their target populations. The influential nature of power and power relations and their potential impact on First Nations legal orders cannot be dismissed. However, given that power is exercised through social interaction and not top-down there is optimism that such initiatives are not at the outset intangible or essentially reproducing prior historical social relations.

---

[378] Ibid., p. 307.
[379] Ibid., p. 308.
[380] Ibid.

Legal Pluralism as a Socially Transformative Project

By viewing plural legal orders as arenas of struggle and sites of power and resistance, it is possible to consider the potential for empowerment of First Nations people.

Postmodernists reject a concept of power that is rooted in hegemonic power structures and instead focuses on the productivity of power on the micro-level and as discourses. The way to pursue social transformation is not linked to social-structural elements, such as the overthrow of the state, but involves offering each of us a way of resisting domination through everyday power relations. In this respect, a legal pluralist stance can move beyond a mere focus on detached ways in which systems of domination control, to a way of seeing how individuals are agents, and are implicated in those same relations. Focusing on social relations at the micro-level of society suggests that state-centered strategies do not necessarily capture power where it is most effective Legal pluralist strategies, while rejecting the centrality of the state, highlight the ways in which the state interacts with other regulatory orders, and offers a conceptualization of larger power structures as social interactions (in this case through four structure of society: household, workplace, citizenplace and worldplace). In this way, even a macro-view of power becomes translated into a site of struggle and competition and therefore avoids meta-theories of power through a primary focus on social interaction. Acknowledging the link between micro- and macro-views of power provides an opportunity to overcome essentialist views of whether power is simply repressive or liberating. Consistent with this rationale, the potential liberating or oppressive nature of the state should not be considered a given but should be determined through context-specific inquiry.

In fact, acknowledging social relations as a site of struggle and the variability of regulatory orders implies that any "political evaluation of the social relations of legal power" are not stable. In a sense, legal pluralism can be considered both emancipatory or reactionary politics as a matter of course because of the temporal nature of social relations. As well due to the context-specificity of legal pluralism analysis, one is discouraged from making generalizations.

Potentially, there is room to surmise that First Nation justice initiatives, from a legal pluralist perspective, could be seen as supportive of a self-government project in that the particular Nation could exercise control over the ideological and norm defining processes for their institution. This could be anticipated because of its reliance on traditional concepts of justice in the community. However, the project undertaken requires collective mobilization of the First Nation community in the social milieu as a prerequisite However, one of the underlying distinctions of how the initiative will be viewed will depend on where it originates and the relative assumptions of the observer.

Conclusion

Reliance on postmodern theory for an analysis of legal pluralism seems to provide a viable way of exploring how legal orders exist and operate in society. Overcoming the pervasiveness of dichotomous thought found within legal pluralism theories provides a way to move beyond simplistic analyses toward an appreciation that the existence and relations between legal or regulatory orders requires a complex and sophisticated analysis of the social world under study.

The themes that have emerged within this legal pluralism which set the tone for such analysis are:

- There are a plurality of legal orders in society, not simply one law or legality.
- To understand how law operates in society one must study both the official and non-official legal orders.
- Regulatory orders are based on norms which regulate social behaviour, so the official legal order does not have exclusive law-making ability
- Regulatory orders are in constant and variable interaction which is not predetermined.
- Legal orders are mutually influencing and dynamic.
- Micro and macro-levels of analysis are required to see the complex power relations emerging between legal orders.

Chapter six utilizes the legal pluralism framework to discuss Aboriginal justice in the Canadian context.

Chapter 6
Possibilities of Legal Pluralism Insights For Aboriginal Justice

I will argue that the assimilation/revolution approach to assessing the worth of criminal justice initiatives for First Nations is unsuitable because it obscures the possibility that reform initiatives can be empowering for First Nations. Two particular points are salient here One, I have narrowed inquiry to an evaluation of First Nations justice initiatives that are formally recognized as part of the mainstream criminal justice system however, the distinction between separate and integrated systems is less obvious than previously alluded to when considered from a legal pluralist perspective One could argue that even separate First Nations legal orders would be interacting with the state institutions and therefore, the difference between integrated and separate systems is less distinct and allows for some similar application of insight proposed within this chapter. Two, I have argued that one cannot view change in the Canadian criminal justice landscape as unequivocally emancipatory or repressive without specific evaluation of the particular legal order under discussion. Rather, the optimism here stems from the view that escaping the dualistic notions of assimilation/revolution overcomes a 'nothing works attitude' and provides an avenue in which to reconceptualize the relationship of First Nations initiatives and state law. Therefore, this project can remain optimistic tempered only by the awareness that the realities and findings of such an evaluation may serve to mitigate such optimism.
The empowering assertion is made through adoption of postmodern legal pluralist theory[381] as a way to reconceptualize the relationship between legal orders in society. The previous chapter was focused on arguing the suitability of the legal pluralists' alternative conception of law and legal orders for an examination of Aboriginal justice. The discussion at hand engages those postulates for application to the current Canadian context.

---

[381] I am referring to that strain of legal pluralism which has been informed by the insights of postmodernism as argued in the previous chapter.

Recognizing Aboriginal Legal Orders

The first premise of the legal pluralisn paradigm which initiates the discussion of Aboriginal justice concerns the view that it is possible to surmise that traditional/customary law exists.[382] The tendency has been to view law in singular terms, i.e., equate law as state law or 'official law' and therefore disregard or neglect any consideration that other law or legal orders do exist in society This trend has not been absent in the Canadian context.[383] There is pervasive argument to contradict this homogenous view of law even from the most liberal perspective, when confronted with the reality that there are a plurality of laws within the state itself, i e , family law, criminal law, civil law, constitutional law, administrative law, etc. Each of these function independently within the state based on their particular principles It is not beyond the realm of possibility, theoretically, that the state could recognize the existence of

---

[382] Clark provides a succinct review of the literature on Aboriginal customary law in his submission to the Aboriginal Justice Inquiry of Manitoba. He outlines the difficulties in providing a definition of customary law as it tends to equate definitions of processes of social control and those as laws (i.e., that which mirrors Euro-centric concepts of formal rules in society). Unfortunately, this has led to customary law in both broad and narrow terms. He offers a broad definition of customary law/traditional law in current society and states:

> It is probably fair to assume that there are few, if any, Aboriginal societies which have not yet been affected to some degree by industrialized societies. This includes impacts in the area of social order; and it is a certainty among Canada's Aboriginal peoples. To reiterate (page 7), above, a definition of customary law would thus include law systems that:
> (a) remain unaffected by other legal systems; or
> (b) have incorporated aspects of other legal systems or have in some what been affected by other legal systems;
> (c) while remaining discrete, are subsumed under another larger system; or
> (d) are characterized by both (b) and (c).
> This suggests that customary or traditional law is not exactly what it once was; nor is it likely that developmental and implementation work in the area will be able to ignore the external impacts and return to a "pure" form of traditional law.

Significantly, Clark offers the term 'community-based law' as a better way of viewing customary law in Canada today.

Scott Clark, Aboriginal Customary Law: Literature Review, Prepared for The Public Inquiry Into the Administration of Justice and Aboriginal People, G.S. Clark and Associates Ltd., 1990.

[383] There has been a tendency to overlook the extent and detail of traditional law in Canadian society. Clark (Ibid.) states that there is very little known nor has there been much written on customary laws of Aboriginal groups in Canada; what is documented is typically not published or available. While customary laws may be considered valid, its lack of documentation relegates it to being virtually ignored by those not familiar with it or by those who choose to reject its claim of authenticity.

Aboriginal traditional law as distinct law with its specific application and jurisdiction either within or outside the system.[384]

In terms of what substantiates Aboriginal traditional law, it would seem that again parallels can be made to state law, providing more potential (due to familiarity of form) for recognition by the state. Laws are not static but are constantly challenged within the context of their application and operate to define and interpret social context. In this way, one could conjecture that law is in a state of variability where the most basic principles and logic may stay relatively stable, while the application and interpretation of law may not. Law must be responsive to situations in which it has not previously been applied; there will be outside factors which may influence it.[385] Similarly, Aboriginal traditional law is not static. Critics have questioned the authenticity of traditional law because it does not exist in 'pure' form and contend that it has been manipulated and socially constructed to constitute something other than 'real' tradition.[386] The operating assumption is that traditional law must replicate pre-contact modes and content and anything less is not 'real'. This logic imposes a contradiction in that the dynamism of state law is assumed, yet this same quality cannot be a characteristic of another legal order. One could conjecture that such parallels on the recognition of internal coherence and change within legal orders may permit an increased understanding of Aboriginal justice orders and their structural compatibility (in the sense that it can operate on the basis of difference without

---

[384] While I recognize that the parallels between Aboriginal traditional orders and divisions of the state legal system is relatively limited in that traditional law would operate on entirely different ideological conceptions of justice, in contrast to the relatively similar ideology pervasive within different realms of state law. However, it is more the point that traditional law could operate within context-specificity (within the First Nation community) similar to how other divisions of law operate within their particular realm of application within legal system generally.

[385] For instance, within legal decision-making the views of the judiciary will determine outcome. Their interpretation of law is not neutral but guided by the perceptions, values, and experiences they hold in relation to the world. Much of the critical legal studies literature explores such ideas and discusses the way in which gender, race, ethnicity, culture and class, etc. will influence judicial decision-making.

[386] One can reject this argument by stating that the creation of traditional law is a product of the contexts in which it is produced. Therefore, the everyday normative system operating within the community will reproduce that normative system within everyday activities and decision-making, and in this way still constitute customary law. Additionally, Dickson-Gilmore actively debunks this view of 'invented traditions' and claims that such claims are rooted in colonialist rationality. Dickson-Gilmore, supra note 10, p. 499.

compromising the function and nature of other parts of the system) as an autonomous legal order alongside or within the larger criminal justice system.

It is necessary to provide an explanation of why an Aboriginal legal order would need to be recognized as legitimate by the state. The focus here on the state is required in that it is the political body that will in fact finance and provide some organizational support (for those state programs utilized but not offered by the First Nations legal order[387]) for the First Nation legal order, as part of the criminal justice system. While this is advantageous due to the resource dependency of most First Nation communities, it is also problematic, in terms of First Nations autonomy over structure and content of the system and long-term financial commitment.[388] It is necessary to explore this relationship however, as it is one expected area of convergence between these two systems (state and First Nation legal orders).[389]

Autonomous Internal Logic

Aboriginal justice orders will have their own internal logic as derived from the norms and values of a given First Nation's world-view. As discussed in Chapter 4, there are commonalties in concepts of justice among First Nations, i.e , a way to heal individuals

---

[387] There may be some overlap in justice practices for First Nations and the state. For example, a particular First Nation community may decide that they would still like to utilize the criminal justice system with respect to their people who commit murder or are criminally insane. In such cases, the First Nation legal order may utilize mainstream structures (court processing) for that individual(s) or set up an arrangement where they can utilize other programs or institutions in the mainstream system (i.e., facilities that treat the criminally insane, prisons, etc.).

[388] Generally, without a negotiated self-government agreement, First Nations will still be under the purview of the Canadian state and therefore still operating within the confinements of the Indian Act. As such, the First Nation will remain financially dependent (in varying degrees) on the state. Any justice initiatives will likely be funded through tripartite agreements between the federal, provincial and First Nations government and therefore differing institutional criteria from each of the parties may come into play. Without self-government, First Nations may potentially be in a position of having to meet more demands and criteria as dictated by the federal and provincial governments; with self-government First Nation will be better suited to 'call the shots' so to speak.

[389] It is necessary to explore the state-First Nation relationship in terms of this regulatory order as it is formally institutionalized in society and therefore the site of struggle will be on these terms. This does not undermine the view of a First Nation legal order as competing with other regulatory orders, it is just that one significant point of struggle will be directed to its legitimacy and authority with relation to the state.

and the community at large, achieve community harmony, promote restitution and reconciliation. These particular characteristics, subject to national variations,[390] will inform the rules, procedures, organization, and authority of Aboriginal justice orders. Relying on Clark's description of traditional law, one is able to see that there are differing forms that an Aboriginal order may take whether existing unaffected or in varying degrees of affectedness by other regulatory orders. As such, an Aboriginal legal order may operate on cultural constructs and traditions, remaining autonomous and ideologically intact outside of criminal justice system, within the criminal justice framework but in traditional ideology and forms, or incorporate some of the forms or structures traditionally associated with the criminal justice system.

One example of an Aboriginal legal order operating autonomously outside the auspices of the criminal justice system would be the proposed Longhouse justice system at Kahnawake. It would be separate and internally autonomous in relation to the criminal justice system, however argument can be made that it may never be completely separate from the state. With or without constitutional change, the fact is that this regulatory order may potentially be subject to state influences such as the Charter of Rights and Freedoms.[391] All this to say is that there is no way to have absolute separation from the influences and interpenetration of other normative or regulatory orders in society; legal pluralism shows that it is regulatory autonomy, not complete separation, in Canadian

---

[390] Galanter views "traditional law in many contexts" where it is "a situation of legal pluralism with respect to normative principles and concepts legitimated by reference to tradition or custom." M. Galanter, "Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law," Journal of Legal Pluralism, 1981, 19, pp. 1-47.
Benda-Beckmann states:

> What is called traditional law, or adat law, or native law and custom, is reproduced and changed in many different contexts with often different normative contents, and with different economic, social and political consequences, among them the mutual influence of different processes of reproduction and their resulting normative contents. (p. 30)

Franz von Benda-Beckmann, "Law Out of Context: A Comment of the Creation of Traditional Law Discussion," Journal of African Law, 1984, 28, 1-2, pp. 28-33.

[391] Even engagement in a discussion of the applicability of the Charter of Rights and Freedoms in this context illustrates that the system would still have to operate in competition with other regulatory orders, despite its internal autonomy. Constitutional change creates the space for First Nation self-government however, that in and of itself does not preclude that a First Nation will be separate from the rest of Canada, its incorporation in the Constitution allows it to be subject to it.

society. However, such interlegality in society does not automatically reduce a legal order to assimilating influences of another, due to differences in ideology, the system can still be autonomous.

Similarly, other First Nation legal orders can operate autonomously even within the purview of the criminal justice system. Indicative of this type of arrangement would be the Gitksan and Wet'suwet'en initiative where the two autonomous systems, i e , the criminal justice system/social system and the Gitksan and Wet'suwet'en traditional governance structures converge at some points but remain distinct and autonomous. The Gitksan operate under shared responsibility in terms of diversion, sentencing advisors, parole advisors and alternative dispute resolution, pointing to the way that traditional systems, in cooperation with the provincial systems can operate within their community without undermining the legitimacy or ideology of either system

Interpenetration and incorporation of different regulatory forms with a legal order does not undermine its autonomy if the ideological characteristics remain intact A useful illustration in this regard is that offered by Santos, who states that "each legal order has a center and a periphery."[392] The center is defined by the dominant ideological assumptions and norms of that system, whereas at the periphery those dominant idec' ›gical configurations from:

> the center tend to be taken out of their context in which they originate and exported to (and imposed upon) the periphery. They are then applied in the legal periphery with little attention to local regulatory needs, since such needs are always interpreted and satisfied from the point of view of the center [393]

While the form of the legal order may get more distorted from the center to the periphery because this is "where the interpenetration between legal order is most frequent,"[394] the logic of the system remains ideologically stable What is necessary is that even within the periphery the particular legal order operates its law within its own view of social reality

---

[392] Santos, supra note 286, p. 292.
[393] Ibid., p. 292.
[394] Ibid.

and therefore "ha[s] an autonomy of [its] own and an efficacy that extends beyond the stakes of the conflicting interests or power positions."[395] This supports the view that an Aboriginal legal order could incorporate aspects of the state legal system and remain ideologically intact, not reduced to the state system, the key being the degree to which the norms and values of that system are challenged or changed, superficially or substantially.

Influence

Consider the different levels of interpenetration of both state and First Nations legal systems.[396] One example of the limited ideological influence that traditional law has had on state law has been the incorporation of circle sentencing within court processing and sentencing.[397] In such cases, there are physical and procedural changes within the courtroom in order to incorporate community discussion/participation and knowledge within the context of the proceedings. Incorporating such elements in this way is held as a way to rely on the community for input and contextualization making the legal proceeding more locally relevant. The significant drawback of this approach is that the judiciary who are centered on a differing legal ideology maintains ultimate authority in the courtroom. There seems to be less incorporation of traditional procedures and values than the sentencing circle would appear. In this way, it could be suggested that while the ascetics of the courtroom have changed its fundamental ideological structure, norms and roles are not, thereby reinforcing the 'central' ideology at work.[398] The application of traditional law and procedures by Euro- and western legal-centric judges is not valid application of

---

[395] Ibid., p. 294.

[396] It is necessary to show the interpenetration or influences on both state and First Nations legal orders. Focus on customary law alone limits analysis and highlights only the influences on and dynamism of customary law without consideration that state law, too, is dynamic and able to be influenced.

[397] This has been a significant trend within the Yukon.

[398] This is consistent with Benda-Beckmann (supra note 390, p. 29) who claims that within traditional law research that:

> It has also been shown that, in the non-traditional organizational context of a court, local processes of decision-making, e.g. following a consensus oriented ideal, could not be reproduced even where judges were fully attentive to the ways in which norms and process were conceived by villagers.

traditional law, it is operating out of context and loses its identity within different legal structures.[399]

One example of the limited ideological influence state law has had on traditional law has been in relation to diversion-type initiatives, such as the youth diversion within the South Island Tribal Council Justice Program. The diversion takes place within the context of the criminal justice system (due to the fact that the authority to divert is granted under the Young Offenders Act), however the initiative is grounded in a commitment to traditional processes and values in order to provide distinctly Aboriginal solutions Elders aim to reestablish the youth's identity and Native pride, to facilitate reconciliation of the youth with himself or herself. Although under the purview of the larger criminal justice system, what is operating are distinctly traditional concepts of justice, i e , community and individual healing and balance. Here, it does not appear that the ideology of either legal order has been compromised.

Incorporation of a competing legal system's structures and logic may change the internal nature of a legal system. For instance, in situations where there is limited influence from a competing order's legal forms and/or principles incorporated within a legal order, that system will likely remain ideologically stable However, in situations where extensive amounts of ideology or structure are imported to another legal system, the nature of that importing legal system will likely change, to become a replicate or assimilated to the system it imported from or change in such as way that both ideological views coexist in one system which is altered to an entirely new form [400] In such a case of combined law, the new legal order would consist of an amalgamation of both normative systems, operating with combined legal rationalizations and processes.[401]

---

[399] Argument could be made that perhaps there are no traditional concepts operating within sentencing circles. While the community is invited to participate within the process, there seems to be no consensual decision-making or other traditional views of justice or dispute resolution involved.

[400] Fitzpatrick refers to this as 'combined law'. Peter Fitzpatrick, supra note 361.

[401] For our purposes here, such cases of combined law would be viewed as a system where elements of both state and customary legal notions are reproduced in the same process.

A good example to illustrate the influential nature of legal orders in Canada has been the proposal for the implementation of tribal courts in Manitoba.[402] While tribal courts[403] are not presently operating in Canada, they would operate in a very similar fashion to mainstream Canadian courts and would rely on similar laws, forms and structure. While there are indications that codified customary law would be incorporated within this type of system, tribal courts basically mirror the mainstream system.[404] By these indications, one could not surmise that tribal courts would constitute a traditional or combined legal system because of the dominance of Euro-Canadian legal ideology.

Constant, Variable and Dynamic Interaction

Significantly, while tribal courts may be seen as an extension of the mainstream legal order, there seem to be indications that they have incorporated or evolved more traditional concepts within them.[405] As with any legal order, its dynamism may influence or change its nature as it operates. This has been the case for some trends in the United States, which have indicated that tribal courts are operating "with a high degree of institutional flexibility"[406] and have incorporated Councils of Elders, diversion strategies to mediation

---

[402] Tribal courts were the preferred option for the creation of Aboriginal justice orders in Manitoba as offered by the Manitoba Justice Inquiry. For discussion of the development of tribal courts in Canada, see for example: Ric': H. Hemmingson, "Jurisdiction of Future Tribal Courts in Canada: Learning From the American Experience," Canadian Native Law Reporter, 1988, 2, pp. 1-50; Jonathon Rudlin and Dan Russell, Native Alternative Dispute Resolution Systems: The Canadian Future in Light of the American Past, Toronto: Toronto Native Council on Justice, 1993; AJI Report, Vol. 1, supra note 14.

[403] I make a distinction between traditional courts, tribal courts and Section 107 courts similar to the distinction that the Manitoba Justice Inquiry makes in relation to U.S. courts. Traditional courts are those operating under traditional values and are not structured and functioning as mainstream Euro-Canadian (e.g., the Navajo Peacemaker Courts which functions in arbitration-like ways), tribal courts which are heavily based on the structures, processes, and laws of the mainstream court system, and Section 107 courts where justices of the peace assume limited jurisdiction over offenses in their community (e.g., Akwesasne Reserve, Mohawks at Kahnawake). AJI Report, Ibid., pp. 275, 305.

[404] These views are echoed by the Manitoba Justice Inquiry (Ibid., p. 295):

> Tribal courts have borrowed heavily from the Anglo-American legal system. While there are exceptions, such as the Peacemaker Court developed by the Navajo, tribal courts generally have not widely developed or utilized traditional Aboriginal means of conflict resolution, or fostered Aboriginal-based alternatives to the adversarial approach through mediation, conciliation and peacemakers. Undoubtedly, this is toward utilizing more recognizable Western legal concepts, processes and institutions. However, there does appear to be more thought being given to modifying the ways in which tribal courts go about their work, so as to include even more cultural aspects within tribal courtrooms.

[405] See Jonathan Rudlin and Dan Russell, supra note 402.

[406] AJI Report, Vol. 1, supra note 14, p. 297.

even before court, or informalized procedures.[407] These trends sound similar to those which were proposed by the Teslin Tlingit First Nation, wherein the proposed courts were to start out similar in function to mainstream courts, and then develop into something more traditional. It would be difficult to determine what would result. The line between what would constitute a tribal court or traditional court might be difficult to draw, especially if the traditional court grew out of the tribal court, and preserved the latter Euro-Canadian orientation. While it is useful to investigate the relationship between legal orders and surmise that Aboriginal legal orders can and do exist based on their internal ideology and structure, it is not useful to suggest that particular strategy is better than another.[408]

Internal Legitimacy

The seeming contradiction is essential to the analysis of Aboriginal justice at hand It is necessary to discuss why First Nations would support an initiative that mirrors the same system which they so strongly criticize. Would such a project be rejected because it acquiesces to the mainstream justice system rather than implementation of a more traditional alternative? It seems contradictory that First Nations would implement legal orders that are based on the characteristics of the dominant system, if they are attempting to develop something more culturally appropriate for themselves In that regard, there have been varying degrees to which traditional law and ideology are incorporated in First Nations initiatives and equally, there are varying types of relationships between First Nations legal orders and state system. The underlying drive within the discourse has been to evaluate First Nations' desires to achieve self-government through traditional revitalization and revival in criminal justice initiatives While this has been undertaken by First Nations communities, it has led others to misdirect analysis by creating binary

---

[407] Ibid.

[408] There are obvious limits to this rationale in terms of success and failure of the different strategies, and of course it would be wise to consider what factors will in fact affect the potential or limitations of each initiative. However, there is no advantage to evaluating what initiative is more traditional or 'real' First Nation, if it originates, is defined, and operates from the First Nation community that should suffice to be considered First Nation. This is not an essentialist stance rather it recognizes that development of reform must be founded on First Nation initiative and in consultation with First Nations people.

analytical tools of assimilation/revolution in which to evaluate these strategies of criminal justice reform emerging from First Nations communities. As such the dualist assumption has defined the parameters of the debate to an evaluation of criminal justice reform from a cultural standpoint, where the more culture that is incorporated or informs the legal order the better, and if there is very limited amounts of culture, the order is relegated as micro-reformist or assimilationist. It is necessary to revisit this assumption.

Culture as Development/Development as Culture

There is basis to support the view that the criminal justice system is culturally inappropriate for First Nations world-view and values.[409] However, one must be cognizant of the fact that strategies of criminal justice reform for First Nations have been connected with overall processes of self-determination. In perspective, this dual agenda has been the underlying distinction between the differing criminal justice reform strategies proposed by First Nation communities. The commitment to cultural appropriateness and autonomy has never wavered but it has amounted to the development of two relative emphases of reform: (1) strategies which are primarily directed towards the involvement of traditional processes and law within the criminal justice processes and structures, and (2) those strategies which are primarily focused on gaining a measure of control over criminal justice processes. Obviously, these two foci are not mutually exclusive, but they can speak to the major variations between current initiatives.[410] It seems that a more accurate way of viewing contemporary Aboriginal justice initiatives is a 'snapshot' of what is being undertaken in the overall 'journey' towards self-determination. A temporal-specific view is more useful in that it accounts for a 'process of development' of self-determination rather than engaging in an evaluation or debate as to the ability of one particular initiative to embody the absolute goal of self-determination. Therefore, one must take a realistic view of current criminal justice initiatives by First Nations as

---

[409] This was reviewed in Chapter 3.

[410] For example, tribal courts could be seen as more focused on gaining 'immediate' control over the mainstream justice institutions versus diversion which is focused on incorporating culturally relevant programming within the system. Initiatives such as the Longhouse Justice at Kahnawake would obviously incorporate both such focuses, however its disadvantage is that it has not been implemented to date.

essentially interim means toward a larger ultimate goal of self-determination While it is important to evaluate the relationship between legal orders, there seems to be an inevitable tendency to focus exclusively on Aboriginal legal orders and take them out of context Aboriginal justice orders need to be evaluated in terms of their temporal and contextual appropriateness in the short-term, rather than reducing them to the false assimilation/revolution dichotomy.

Viewing Aboriginal justice initiatives as temporal and context-specific provides a good indication of the dynamism and change that can occur within legal orders generally Viewing the changing relationship and mutual influence of Aboriginal justice orders and state law over time may also potentially challenge the longstanding assumption that state law is static, universal and transhistorical Unlike traditional law, state law is not considered 'invented' if its structure and form changes over time

Culture Determinism

While preserving culture and identity have been the fundamental reasons for criminal justice reform and self-determination for First Nations, there has been a tendency to view First Nations culture as static. One such example of this view is the assumption that the amount of culture, or traditional law, that has been incorporated in First Nations justice initiatives is indicative of its 'true First Nationness'. However, a second way this static assumption has operated has been the premise that First Nation culture is static across First Nations communities. That is, there are distinct Aboriginal values which are similar in nature and degree and shared throughout First Nation communities, not only in terms of Canada-wide culture but community-wide culture.[411] While the accuracy of the former has been previously discussed, the focus here is in terms of an individual First Nation community. While my suggestion here does not imply that there may be shared values

[411] While it may seems as though I have fallen victim to this very same assumption when I discussed Aboriginal world-views in Chapter 2 and 3, for the record, I was attempting to build the general analogy between First Nations and Euro-Canadian views. At that time, I acknowledged the limitation of that review because of the generalizations made there but did assume that there were variations between Euro-Canadians as well as First Nations people.

within the community, within the literature there has emerged an assumption of cultural determinism.[412] However, analysis of Aboriginal legal orders must resist this assumption that a First Nation community will have a prescribed set of shared values and behaviours or that Aboriginal legal orders will operate or exist on those rule-making and regulations embedded in a given culture. While culture may account for common behaviour, the tendency to ascribe to all persons in the community shared culturally-determined behaviour undermines the realities of social interaction and limits analysis by excluding how a justice initiative/order becomes defined and formed within the community. It is possible to surmise that cultural determinism cannot account for the influence of state law within the context of an Aboriginal justice order, or vice versa.

In terms of Aboriginal justice it is necessary to reevaluate the assumption that, on the basis of the culture alone, all persons in a First Nations community will have similar, or follow to the same degree, their particular groups' cultural values and norms. While there may be generally shared cultural norms, there may be significant differences as well. As Carol LaPrairie has pointed out:

> The potential for discrepancy between the values of the younger and the older community members in justice hearings and decision-making, is considerable. Few communities are untouched by events of the last two decades where women's issues, victims rights, and alternate life-styles have gained respectability and recognition. The social changes evolving from these event may be more in the psyche of the younger than the older members of communities. The use of elders in justice system to the exclusion of other age groups may reflect values not representative of contemporary community values.[413]

As well, Rupert Ross notes that the difference in commitment to traditional concepts such as consensus-based decision-making or the "potential breadth of the investigation of, and response to, socially disruptive events" may be a problem in consideration of formalizing

---

[412] Benton argues that while legal pluralism work has been centered on exposing the structuralist assumptions such the distinction between informal/formal law and legal orders there has been a tendency to employ the ideas such as cultural hegemony as a given. Benton, supra note 358.
[413] LaPrairie, supra note 234, p. 109.

cultural legal orders.[414] Simply assuming that cultural values and rules are constant across the community generalizes quite substantially and undermines analysis.

One of the strengths of legal pluralism is that it can provide a way in which to explore individual behaviour as an influence upon, and function of, the operation and nature of legal order. Challenging the assumption of cultural determination requires an analysis of the micro-level workings of the community. Individuals negotiate within the matrix of social relations of which they are a part, making sense out of the competing normative orders and practices they interact with, therefore culture should not be seen as determined. As such, one must reexamine how culture may operate to pattern social relations and interaction but not structure it, otherwise static assumptions of social interaction and culture are again assumed. [415]

Beyond Cultural Determinism: Community-Based Legal Orders

The advantage of viewing the potential conflict of values within culture provides insight as to how regulatory orders must compete not only with other regulatory orders for legitimacy but also within their own regulatory sphere for continued existence. Significantly it is the acknowledgment that cultural rules and regulations are in competition within the group as well as outside it. However, in the end there will be two possible ways of accounting for cultural traditions that emerge from the community: (1) that the legal orders are, in fact, a product of the patterns of social interaction which reflect shared values and are derived from shared experience in that community, or (2) it arises as a negotiated agreement for participants to act as if they had shared experiences

---

[414] Ross, supra note 250, p. 264.

[415] I have consciously resisted providing a definition of culture within this analysis in order to avoid specifying specific or general parameters of shared behaviour and values that First Nations or Euro-Canadians may hold and the problems of generalization and universality inherent in such an attempt. However, I do believe that culture is essentially the shared values and norms within a particular society; I do not believe culture is a definitive concept nor that it pre-determines behaviour. How one acts or behaves may be influenced by many things, including culture but I do not think that culture necessarily dictates action, as each individual has the means to choose their behaviour. My actions and behaviour are not structurally and inevitably determined because of my culture, rather may be influenced by it. Cultural determinism assumes that all people in a given society will act in rather predictable and similar ways. This is not adequate.

and values Instead of asking one to assume the cultural congruity of a community rather one makes assumptions about the particular set and outcome of social relationships.[416]

Once cultural determinism is rejected, it becomes clear that what in fact does determine the shape and nature of the legal order is the specific community. Therefore, it would be appropriate to embrace Clark's view that traditional law should in fact be considered a community-based legal system. This position would better reflect the fact that it is the outcome of the matrix of social interaction in the community which determines the prospective shape and form of the legal order. Other normative orders will also have an effect on individual behaviour and social interaction, e.g , family, spiritual (churches or traditional spirituality), and workplace norms. The shape of the legal order that emerges from the community will depend on these types of factors Cultural ideology will indeed be a basis of the legal order however, it will not solely determine it, as its form and nature will be influenced and directed by community aspirations and political agenda.

The legitimacy and authority of the emerging legal order in the community will be the result of the pattern of relationships and social realities in that community. Viewing the legal order as a site of struggle illustrates that the approach and purpose (healing or case-processing) of the legal order will not be predetermined, it will rather be a function of the community's internal dynamics. Community support and confidence will be mediated through the development and operation of the legal order. It may also be the case that a legal order will not emerge, or more than one legal order will compete for authority in the community. This has been the case of the Mohawk who have both Section 107 courts and the proposed Longhouse Justice at Kahnawake; the effect has been the non-implementation of the Longhouse Justice System to date. Significantly, the internal dynamics of the community as indicated by patterns of social behaviour may undermine or support a formal regulatory order in its claim to be legitimate or authoritative Problems such as longstanding hostilities or antagonisms between groups in the community,

---

[416] Benton, supra note 358, p. 239.

favoritism, the aggregation of power in the hands of a small amount of people[417], etc., generate significant threat to the acceptance and success of justice initiatives by undermining confidence or breeding mistrust within the community [418]

It is necessary to appreciate that the degree of legitimacy and authority a First Nation legal system possesses will not necessarily be a function of the homogenous nature of the community. While this may increase the chances of its survival and legitimacy, a community-based legal order could operate in heterogeneous communities.[419] There would also be some optimism for community-based initiatives for those First Nations who live within urban centers if one does not rely on a culture determinism approach, it would be similar to other communities where community mobilization is needed The differences between First Nations initiatives comes down to a function of different community realities (size of community, resources, world-view), abilities (to mobilize), and aspirations (legal forms) of the differing communities

There is some indication of the realities First Nations communities will face in mobilizing and implementing justice initiatives, including: definition of the root problem(s) in the community so the problem may properly be addressed, definition as to what constitutes 'crime' or 'wrong-doing'; what approach is necessary to take when dealing with anti-social behaviour (i.e., traditional or contemporary methods of dispute resolution), whose values will the legal order be based on; how to get funding for the development, implementation and operation of the legal order; what will be the jurisdiction of the legal order, who will

---

[417] This may include but is not limited to situations where the First Nation Chief and Council have all the power in the community, a powerful family or group of families controls the First Nation administration, or the exclusion of women in the decision-making processes and development of justice initiatives within communities as Monture-Okanee speaks of. Patricia A. Monture-Okanee, "Reclaiming Justice: Aboriginal Women and Justice Initiatives in the 1990s," in Aboriginal Peoples and the Justice System: Report of the National Round Table on Aboriginal Justice Issues, Ottawa: Royal Commission on Aboriginal Peoples, 1993, pp. 105-132.

[418] Ross, supra note 250, p. 253.

[419] For instance, communities which consist of mixed populations of people could still negotiate have a legal order. The purpose and ideological orientation of the order will be dependent on the wishes of the community itself. If there are substantial differences between groups in the community there is still potential for a legal order through compromise, as would be the case if people chose to act as if they had shared values.

the system cater to in terms of offenders; how to secure legitimacy and authority of the system; and how to secure autonomy over the system [420] For Ross, these issues will determine "whether or not the particular projects are able to achieve their goals in safety, with the least community turmoil and in the shortest period of time."[421] Given the breadth of work that must be undertaken to develop, implement and operate a legal order, the most important factor will be mobilizing the community to undertake the project.

The community-based justice approach allows one to infer that there may be insights within informal justice or alternative dispute resolution (ADR)[422] literature that would apply here with regard to the potential and limits of Aboriginal justice.[423] Informal justice involves the use of mediation and reconciliation as alternatives to judicial-based court processing for resolving disputes. The similarity between some Aboriginal justice initiatives and ADR are obvious in the following list of the general characteristics of informal justice:

> (a) emphasis on satisfying mutually agreed outcomes rather than on strict normative observation;
> (b) preference for a decision model based on mediation or conciliation rather than on adjudication;
> (c) competence of the parties to take care of their defense in the setting which is both de-professionalized and run in ordinary language;
> (d) the third party will be a non-jurist though with some legal training, elected or not by the community or by the group to be served by the conflict resolution setting or institution;
> (e) the institution has none or very few coercive powers which it can mobilize in its own name. [424]

Similar to the community-based Aboriginal justice initiatives, informal justice is rooted in justice outside of the formal state and based in the community.

---

[420] Carol La Prairie, "Self-Government and ' 'minal Justice: Issues and Realities," in John H. Hylton (ed.), Aboriginal Self-Government in Canada: Current Trends and Issues, Saskatoon: Purich Publishing, 1994, pp. 108-129.

[421] Ross, supra note 250, p. 249.

[422] The terms popular justice, alternative disputes resolution (ADR), neighborhood justice, community justice and informal justice are used interchangeably within the literature. Here the terms informal justice and ADR are used.

[423] I provide only a brief review of informal justice to indicate the general debates and trends.

[424] Boaventura de Sousa Santos, "Law and Community: The Changing Nature of State Power in Late Capitalism," International Journal of the Sociology of Law, 1980, 8, p. 384.

When informal justice was first implemented, it was intended to provide a radical reconstruction of justice in terms of minimizing state control, empowering communities to resolve their own social conflict, and provide more equal distribution of power among people. However, after some time this optimism was replaced by scathing criticism that informal justice expanded state control,[425] was a product of the changing nature of state power and form of law,[426] and that it re-legitimated the formal legal system [427] Unfortunately, informal justice literature has tended to rely on meta-theories of power (i.e., Marxism) which have tended to reduce analysis of structural power as that of the state and relied on dichotomous thinking such as informal/formal control which has led to the elevation of one over the other As such the optimism and potential for empowerment was easily dismissed. While there are connections to Aboriginal justice, it is limited in its use due to the reductionist conclusions it produces However, given that legal pluralism has overcome these same difficulties it would be useful to revisit some of the initial claims of informal justice for their potential for empowerment of First Nations communities, including the claim that it gave more autonomy to individuals and social groups, was financially cheaper; de-centered the interests of the state, reconciled relationships, grassroots collective action to treat the needs of the participants, transfer of power to the people; strengthen communities by building leadership, training citizens in resolutions skills and increasing cohesiveness

There seem to be two general underlying ways which these empowerment strategies can be focused: (1) on agency and power (individual level), and (2) on community (collective level). The ideas presented here are useful when contemplating how Aboriginal justice initiatives can be empowering, for while these refer to mainly ADR type initiatives, there is room for generalization. Within the ideas of agency and power, the informalism literature

---

[425] Abel, supra note 291.
[426] Stephen Spitzer, "The Dialectic of Formal and Informal Control," in R. Abel (ed.), The Politics of Informal Justice, Vol. 1, New York: Academic Press, 1982, pp. 167-201.
[427] Richard Hofrichter, Neighborhood Justice in Capitalist Society: The Expansion of the Formal State, New York: Greenwood Press, 1987.

speaks to such things as the minimization of state control and the interests of state, more equal distributions of power in society, and the transfer of power to the people. Legal pluralism accounts for power on two differing levels, the micro and the macro. In the former level, power is understood in terms of the individual person who is an active producer and resistor of power within his or her social relations; power is relational and it can be exercised and resisted through counter-power. In both cases it is a productive power in that even an act of resistance can reverse or modify the power it resists.[428] In the latter macro level, power seen in a configuration of powers occupying a field which more or less successfully organizes the actions of subject more or less comprehensively.[429] Both of these conceptions of power allow for individual autonomy and choice within power relations.

Aboriginal justice as a legal order is empowered by those who comprise it and work in competition with the state legal system. In this analysis, the power of the state is not the supreme authority, and this perspective encourages an improved conception of one's own part in power relations. This does not render one powerless, which has been the common perception of First Nations people and legal orders. Through this analysis First Nations are able to reconcentualize their resistance to the state and therefore can be seen as power holders who are negotiating justice, and shared power relations Power is not determined, so it allows for First Nations to have some power at all times, even within perceived assimilationist strategies (power of resistance). State control is minimized as it is another regulatory order, thereby illustrating how the state must compete for power and is dynamic and not the center of power -- the state must share power. Within the justice landscape, the issue is one of sharing power in relatively autonomous ways, or renegotiating the current relationship of empowerment for individuals and orders. These power relations also work in connection to community interests. The community can actively have power and mobilize for collection action; the community is not simply

---

[428] Peter Fitzpatrick, "The Rise and Rise of Informalism," in Roger Matthews (ed.) Informal Justice? London: Sage Publications, 1988, p.185.
[429] Ibid., p. 188.

powerless, but can work toward reconciliation of relationships toward the building of community pride and action and increased collective cohesiveness and self-government

Community mobilization is the key element in the development of Aboriginal justice initiatives. Similarly, the Aboriginal community must be the one to initiate, define and implement the legal order as a way to ensure local relativity and control Continued community support and ownership of the initiative would be necessary to ensure its continued legitimacy and authority within the community Justice initiatives for First Nations must resonate from their specific communities in order to ensure that their goal of self-government and autonomy, in whatever form, is not compromised State imposed initiatives will not be able to reflect the ideology and needs of the particular community as that must come from First Nations themselves [430] This does not mean that First Nations communities should not rely on any resources or resource-people outside of their community in the development, implementation or development of their legal order, just that all work must be done in extensive consultation and subject to the wishes of that community.[431]

Conclusion

In the end, there are two ways in which to see Aboriginal legal orders as empowering One, it could be surmised that any Aboriginal legal order works in one or both of two ways means toward empowerment, i e., (1) to better the current justice system in terms of criminal justice and (2) to gain control over criminal justice structures for self-determination. This second point can be especially effective for the community as it may

---

[430] The danger here would be another example of the imposition of a culturally inappropriate system on a First Nations community. While this might change if there was significant input from the community, it would still reflect the logic and goals of the mainstream criminal justice system. Despite the fact that a First Nations community implemented tribal courts, the key difference would be that the initiative came from the community itself.

[431] It would seem likely that certain legal order styles (i.e., trial courts) may require specialized knowledge and if it was not available in the community then the First Nation may wish to consult other First Nations who have implemented similar structures or systems. This does not preclude the possibility that other specialized resource people could assist as well as long as the conditions for community ownership and control were met.

allow for mobilization of the community I believe Aboriginal legal orders are a vehicle for social justice and transformation.

Realism prevails, however, in the sense that one cannot predetermine the effect of the competing orders. In any case, it points to the necessity to undertake such projects in order to allow for the possibility that it could be emancipatory. This contrasts to the assimilation/revolution view of justice initiatives where such a project would be considered doomed from the beginning to one of these two extremes. However, as legal pluralism has informed us, this binary is false in some fundamental ways, even revolutionary means to an end will require some interaction with the formal criminal justice system and, if applying the same logic of the binary, any point of contact by the state is oppressive, then even revolution strategies are doomed to failure from the beginning. Such a view reduces to the perception that there is no potential fulfillment of political and social aspirations for First Nations and thereby immobilizes the possibility of social justice. I do not consider this an adequate starting point.

This does not suggest that any First Nation justice initiative is better than none. Clearly, there is room to suggest that in developing and implementing justice, First Nations communities should strive to address such things as community mobilization and development, so to ensure the longevity and institutionalization of their views for justice and enable self-government. To undertake an initiative or execute a poorly developed plan that will undermine the effort and confidence of the community will be ultimately disempowering generally. This does not suggest that one must be convinced of a plan's success before implementation, which may well be impossible to predict, but that significant care must be taken to ensure that the moment of the move toward empowerment is, as much as possible, the right one.

Chapter 7
Conclusion

This thesis has been centered on the claims and debates that have been made within Aboriginal justice literature. Argument has been made to the emergence of two competing discourses within this field, that of state-sponsored and First Nations views. Historically, these positions have been divided along distinct forms of criminal justice reform. In specific terms, state-sponsored strategies of reform tended to focus on more liberal notions of justice and access to law to better the mainstream justice system for First Nations; First Nations discourse was centered on the access to social justice mandate and was concerned with contextualizing criminal justice reform within the larger mandate of changing the fundamental social relations in society for First Nations through the realization of self-determination. Rather than polarized views, it was shown that in recent years both discourses have in fact converged into their proposals for criminal justice reform based on the social justice agenda and pursuit of First Nations self-determination. While this similarity in analysis of the problem provides a good starting point for reform, there have been a wide range of justice initiatives which are offered between and within these two groups.

One of the problems that has emerged alongside the convergence of focus on social justice for First Nations in the criminal justice system has been the tendency to rely on romanticized views of First Nation culture and tradition. This tendency has not been critically reviewed in Aboriginal justice literature and in fact has instead implicitly enforced an evaluation of Aboriginal justice proposals and initiatives in a binary comprised in assimilation/revolutionary terms. Such evaluations have served to limit the analysis of the potential for empowerment for First Nations in an either-or relationship, wherein Aboriginal justice initiatives which are incorporated or rooted in First Nation culture and 'traditions' are considered macro-reformist, whereas incorporation of the structure and logic of the mainstream criminal justice system

within a justice initiative renders it micro-reformist. In this way, First Nation tradition and culture becomes the evaluative tool to determine whether an initiative is perceived as supporting a self-determination mandate or not.

This dichotomous view of empowerment is not adequate because it ignores any potential facet of empowerment that cannot be viewed in terms of the incorporation of tradition in justice initiatives. Such potential colloraries of empowerment in First Nations communities to implement justice initiatives such as the mobilization of the community toward collective empowerment within the administration of justice and the resolving of their own conflict, the strengthening of First Nations communities, the realization of more culturally appropriate conflict resolution, and so on are not considered. Legal pluralism was relied upon here in order to circumvent such binary evaluative tools and in order to give fair consideration to both the micro- and macro-processes of power.

In the end, it was argued that the potential ability to view Aboriginal justice as empowering had less to do with the incorporation of traditional law than a reconceptualization of Aboriginal justice initiatives as a developmental process toward self-determination. While the importance of cultural and traditional concepts of justice to overcoming the ethnocentricity and discriminatory nature of the contemporary criminal justice system is not contested here, it is felt that it is counter-productive to isolate the amount of culture in the Aboriginal justice initiative at stages of the developmental process rather than looking at the end. This does not allow for a view that all Aboriginal justice initiatives are unequivocally good or empowering, but a recognition that a temporal and context-specific evaluation is necessary.

References

Abel, Richard (ed.) The Politics of Informal Justice, Vol. 1, New York: Academic Press, 1982.

Barnes, Barbara Kawenghe Traditional Teachings, Akwesasne: North American Indian Traveling College, 1984.

Barrett, Stanley R. "White Supremists and Neo-Fascists: Laboratories for the Analysis of Racism in Wider Society," in Ormond McKague (ed.), Racism in Canada, Saskatoon: Fifth House Publishers, 1991, pp. 85-99.

Benda-Beckmann, Franz von "Changing Legal Pluralisms in Indonesia," Proceedings of the VIth International Symposium, Commission on Folk Law and Legal Pluralism, Volume Two, Ottawa, Ontario, August 14-18, 1991, pp. 608-629.

Benda-Beckmann, Franz von "Comment on Merry," Law and Society Review, 1988, 22, 5, pp. 879-901.

Benda-Beckmann, Franz von "Law Out of Context: A Comment of the Creation of Traditional Law Discussion," Journal of African Law, 1984, 28, 1-2, pp 28-33

Benda-Beckmann, Franz von "Theme III - Legal Pluralism in the Third World After Decolonization: Introduction and Overview," in Proceedings of the VIth International Symposium, Commission on Folk Law and Legal Pluralism, Volume Two, Ottawa, Ontario, August 14-18, 1991, pp. 556-559

Benevides, Hugh "R. v. Moses and Sentencing Circles: A Case Comment," Dalhousie Journal of Legal Studies, Annual, 1994, 3, pp. 241-250.

Benton, Lauren "Beyond Legal Pluralism Towards a New Approach to Law in the Informal Sector," Social and Legal Studies, 1994, 3, pp. 223-242

Blanchard, David Seven Generations: A History of the Kanienkehaka, Kahnawake Kahnawake Survival School, 1980.

Bohannan, Paul "Ethnography and Comparison in Legal Anthropology," in Laura Nader (ed.), Law in Culture and Society, Chicago: Aldine Publishing Co , 1969, pp 401-418

Bohannan, Paul Justice and Judgment Among the Tiv, London: Oxford University Press, 1957.

Bolaria, B. Singh and Peter S. Li Racial Oppression in Canada, Toronto: Garamond Press, 1985.

Brant, Clare "Native Ethics and Rules of Behaviour," Canadian Journal of Psychiatry, 1990, 35, pp. 534-539.

Canadian Corrections Report, Indians and the Law.

The Canadian Human Rights Commission, Annual Report, 1988.

Cawsey, A. Justice on Trial, Report of the Task Force on the Criminal Justice System and Its Impact on the Indian and Metis People of Alberta, Edmonton: Government of Alberta, 1991.

Chesney-Lind, Meda "Putting the Brakes on the Building Binge," Corrections Today, August 1992, pp. 30-34.

Clark, Scott Aboriginal Customary Law: Literature Review, Prepared for The Public Inquiry Into the Administration of Justice and Aboriginal People, G S. Clark and Associates Ltd., 1990.

Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.) 1982, c.II.

Cotterrell, Roger "Law and Sociology: Notes on the Constitution and Confrontations of Disciplines," Journal of Law and Society, 1986, 13, 3, pp 9-34.

Coyle, Michael "Traditional Indian Justice in Ontario A Role for the Present," Osgoode Hall Law Journal, 1986, 24, 3, pp. 605-633

Creating Choices: The Report of the Task Force on Federally Sentenced Women, Ottawa, Correctional Service of Canada, 1990.

David, R. and J.E.C. Brierley Major Legal Systems in the World Today, London: Sweet and Maxwell, 1985.

Declaration of the First Nations, December 1980, Ottawa: The Assembly of First Nations.

Dickason, Olive Patricia Canada's First Nations: A History of Founding Peoples from Earliest Times, Toronto: McClelland and Stewart Inc., 1992.

Dickson-Gilmore, E.J. "Finding the Ways of the Ancestors: Cultural Change and the Invention of Tradition in the Development of Separate Legal Systems, Canadian Journal of Criminology, 1992, 34, 3-4, pp. 479-502.

Dickson-Gilmore, E.J. "Resurrecting the Peace: Traditionalist Approaches to Separate Justice in the Kahnawake Mohawk Nation," in Robert A. Silverman and Marianne O Nielsen (eds.), Aboriginal Peoples and Canadian Criminal Justice, Toronto Butterworths, 1992, pp. 259-277

Dumont, James "Justice and Aboriginal People," in Royal Commission on Aboriginal Peoples, Aboriginal Peoples and the Justice System Report of the National Round Table on Aboriginal Justice Issues, Ottawa: Ministry of Supply and Services Canada, 1993, pp. 42-85.

Dwyer, Daisy Hilse "Substance and Process. Reappraising the Premises of the Anthropology of Law," Dialectical Anthropology, 4, 4, 1979, pp 309-320

Fiddler, Jonas and Josias Fiddler "Current Initiatives on the Sandy Lake Reserve, Ontario," in Curt Griffiths (ed), Self-Sufficiency in Northern Justice Issues, Simon Fraser University for the Northern Justice Society, Winnipeg Kromar Printing Ltd , 1992, pp 95-105.

Fitzpatrick, Peter "Law, Plurality and Underdevelopment," in D. Sugarman (ed), Legality, Ideology and the State, London. Academic Press, 1983, pp. 159-182

Fitzpatrick, Peter "Marxism and Legal Pluralism," Australian Journal of Law and Society, 1983, 1, pp. 45-60.

Fitzpatrick, Peter "The Political Economy of Dispute Settlement in Papua New Guinea," in Colin Sumner (ed.), Crime, Justice and Underdevelopment, London: Heinemann Educational Books Ltd., 1982, pp 228-247

Fitzpatrick, Peter "The Rise and Rise of Informalism," in Roger Matthews (ed) Informal Justice? London: Sage Publications, 1988, pp 178-198

Fleras, Augie and Jean Leonard Elliott The 'Nations Within' Aboriginal-State Relations in Canada, the United States, and New Zealand, Toronto Oxford University Press, 1992

Foucault, Michel Power/Knowledge: Selected Interviews and Other Writings 1972-1977 New York: Pantheon Books, 1977.

Friedman, Lawrence M "The Law and Society Movement," Stanford Law Review, 1986, 38, pp. 763-780.

Galanter, Marc "Justice in Many Rooms Courts, Private Ordering, and Indigenous Law," Journal of Legal Pluralism, 1981, 19, pp. 1-47

Gluckman, Max "Concepts in the Comparative Study of Tribal Law," in Laura Nader (ed.), Law in Culture and Society, Chicago: Aldine Publishing Co , 1969, pp 349-373

Gluckman, Max The Judicial Process Among the Barotse of Northern Rhodesia, Manchester: The University Press, 1967.

Good News Bible, Toronto: Canadian Bible Society, 1976.

Griffiths, John "What is Legal Pluralism?" Journal of Legal Pluralism and Unofficial Law, 1986, 24, pp 1-55

Griffiths, C.T. and J.C. Yerbury "Natives and Criminal Justice Policy: The Case of Native Policing," Canadian Journal of Criminology, 1984, 26, pp. 147-160

Gulliver, P.H. Social Control in An African Society, A Study of the Arusha: Agricultural Masai of Northern Tanganyika, London: Routledge and Kegan Paul Ltd , 1963.

Harding, Jim and Bruce Spence An Annotated Bibliography of Aboriginal-Controlled Justice Programs in Canada, Regina: Prairie Justice Research, 1991.

Hemmingson, Rick H. "Jurisdiction of Future Tribal Courts in Canada Learning From the American Experience," Canadian Native Law Reporter, 1988, 2, pp. 1-50

Henderson, James Youngblood "Implementing the Treaty Order," in R. Gosse et al , Continuing Poundmaker and Riel's Quest Presentations Made at a Conference on Aboriginal Peoples and Justice, Saskatoon: Purich Publishing, 1994, pp. 52-62.

Hofrichter, Richard Neighborhood Justice in Capitalist Society The Expansion of the Formal State, New York: Greenwood Press, 1987

Hooker, M B. Legal Pluralism: An Introduction to Colonial and Neo-colonial Laws, Oxford: Clarendon Press, 1975.

Horton, John "Order and Conflict Theories of Social Problems as Competing Ideologies," The American Journal of Sociology, 1966, 71, pp 6-24

Hunt, Alan "The Big Fear: Law Confronts Postmodernism," McGill Law Journal, 1990, 35, pp 507-540.

Hunt, Alan "Dichotomy and Contradiction in the Sociology of Law," British Journal of Law and Society, 1981, 8, 1, pp. 47-77.

Hunt, Alan "Foucault's Expulsion of Law Toward a Retrieval," Law and Social Inquiry, 1992, 17, pp. 1-38.

Hunt, Alan "Rights and Social Movements. Counter-Hegemonic Strategies," Journal of Law and Society, 1990, 17, pp. 309-328

Jackson, Michael "Locking up Natives in Canada," University of British Columbia Law Review, 1989, 23, 2, pp 215-300.

Jefferson, Christie Conquest By Law, Ottawa Solicitor General Canada, 1994

Kellough, Gail "From Colonialism to Economic Imperialism The Experience of the Canadian Indian," in John Harp and John R. Hofley (eds.), Structured Inequality in Canada, Scarborough: Prentice-Hall of Canada, Ltd., 1980.

Kickingbird, Kirke "Indian Sovereignty: The American Experience," in Leroy Little Bear, Menno Boldt and J Anthony Long (eds.), Pathways to Self-Determination: Canadian Indians and the Canadian State, Toronto: University of Toronto Press, 1984, pp 46-53

Kline, Marlee "The Colour of Law: Ideological Representations of First Nations in Legal Discourse," Social and Legal Studies, 1994, 3, pp 451-476

Koch, Klaus-Friedrich "Law and Anthropology: Notes on Interdisciplinary Research," Law and Society Review, 1969, 4, 11, pp. 11-27

Kruper, Adam The Invention of Primitive Society Transformation of an Illusion, London: Routledge, 1988

Lajeunesse, Therese Community Holistic Circle Healing, Hollow Water First Nation, Ottawa: Solicitor General of Canada, 1993

Lajeunesse, Therese and Associates Ltd Selected Urban Aboriginal Correctional Programs in Canada: A Program Review, Aboriginal Peoples Collection, Ottawa Ministry of the Solicitor General of Canada, 1994

La Prairie, Carol Exploring the Boundaries of Justice Aboriginal Justice in the Yukon, Report to Department of Justice, Yukon Territorial Government, First Nations, Yukon Territory; Justice Canada, 1992.

La Prairie, Carol "The Role of Sentencing in the Over-Representation of Aboriginal People in Correctional Institutions," Canadian Journal of Criminology, 1990, 32, 3, pp 429-440.

La Prairie, Carol Seen But Not Heard: Native People in the Inner City, Ottawa Minister of Public Works and Government Services Canada, 1995

La Prairie, Carol "Self-Government and Criminal Justice Issues and Realities," in John H. Hylton (ed), Aboriginal Self-Government in Canada Current Trends and Issues, Saskatoon: Purich Publishing, 1994, pp 108-129

Llewellyn, K N and E. Adamson Hoebel The Cheyenne Way Conflict and Case Law in Primitive Jurisprudence, Norman: University of Oklahoma Press, 1941.

Linn, P et al Report of the Saskatchewan Justice Review Committee, Regina. Government of Saskatchewan, 1992

Linn, P et al Report of the Saskatchewan Metis Justice Review Committee, Regina Government of Saskatchewan, 1992

MacKay, A Wayne "Federal-Provincial Responsibility in the Area of Criminal Justice and Aboriginal Peoples," University of British Columbia Law Review, Annual, 26, SPEISS, pp. 314-322.

McDonnell, Roger F. "Contextualizing the Investigation of Customary Law in Contemporary Native Communities," Canadian Journal of Criminology, 1992, 34, 3-4, pp. 299-315.

McLeod, Clay "The Oral Histories of Canada's Northern People, Anglo-Canadian Evidence Law, and Canada's Fiduciary Duty to First Nations: Breaking Down the Barriers of the Past," Alberta Law Review, 1992, 30, 4, pp 1276-1290.

McNamara, Luke "The Aboriginal Justice Inquiry of Manitoba A Fresh Approach to the 'Problem' of Over-representation in the Criminal Justice System," Manitoba Law Journal, 1992, 21, 1, pp. 47-79.

Macklem, Patrick "Aboriginal Peoples, Criminal Justice Initiatives and the Constitution," University of British Columbia Law Review, Annual, 26, SPEISS, pp. 280-305

Maine, Sir Henry Sumner Ancient Law Its Connection With the Early History of Society and Its Relation to Modern Ideas, Ninth Edition, London. John Murray, 1883.

Malinowski, Bronislaw Crime and Custom in Savage Society, Totowa, New Jersey: Littlefield, Adams and Co, 1969

Mannette, Joy (ed) Elusive Justice: Beyond the Marshall Inquiry, Halifax: Fernwood Publishing, 1992.

Manson, Margot "Justice That Heals: Native Alternatives," Canadian Lawyer, October 1994, 18, 8, pp. 24-28

Matthews, Roger "Reassessing Informal Justice," in Roger Matthews (ed), Informal Justice?, London: Sage Publications, 1988, pp 1-24

Merry, Sally Engle "Legal Pluralism," Law and Society Review, 1988, 22, 5, pp. 869-901

Minow, Martha "Partial Justice Law and Minorities," in Austin Sarat and Thomas R Kearns (eds.), The Fate of Law, Ann Arbor, Michigan The University of Michigan Press, 1991, pp. 15-77.

Moffat, Kelly (Hannah) "Creating Choices or Repeating History Canadian Female Offenders and Correctional Reform," Social Justice, 1991, 18, 3, pp 184-203

Monture, Patricia A. "Ka-Nin-Geh-Heh-Gah-E-Sa-Nonh-Yah-Gah," Canadian Journal of Women and the Law, 2, pp. 159-170.

Monture-Okanee, Patricia A. "Reclaiming Justice. Aboriginal Women and Justice Initiatives in the 1990s," in Aboriginal Peoples and the Justice System: Report of the National Round Table on Aboriginal Justice Issues, Ottawa. Royal Commission on Aboriginal Peoples, 1993, pp 105-132

Monture-Okanee, Patricia "Thinking About Aboriginal Justice Myths and Revolution," in R. Gosse et al , Continuing Poundmaker and Riel's Quest Presentations Made at a Conference on Aboriginal Peoples and Justice, Saskatoon Purich Publishing, 1994, pp 222-232.

Monture-Okanee, P A and M E. Turpel "Aboriginal Peoples and Canadian Criminal Law Rethinking Justice," University of British Columbia Law Review, Annual, 1992, 26, SPEISS, pp. 239-279

Morin, Gerald "Metis Perspectives of Justice and Aboriginal Peoples, " in R Gosse et al , Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice, Saskatoon Purich Publishing, 1994, pp 37-40

Morse, Bradford W. "Aboriginal Peoples, the Law, and Justice," in R Silverman and M Nielsen (eds.), Aboriginal Peoples and Canadian Criminal Justice, Markham Butterworths Canada Ltd., 1992, pp 45-60.

Nader, Laura "The Anthropological Study of Law," American Anthropologist, 1965, 67, 6, 2, pp. 3-32.

Nicholson, M E R "Ethno-Ideology's Role in Legal Behaviour Another Dimension of Ideological Pluralism," Legal Studies Forum, 1987, 11, 2, pp. 145-163

Nielsen, Marianne O. "Criminal Justice and Native Self-Government," in Robert A Silverman and Marianne O. Nielsen (eds.), Aboriginal Peoples and Canadian Criminal Justice, Toronto: Butterworths, 1992, pp. 243-257

Nielsen, Marianne O. "Introduction," in Robert A Silverman and Marianne O Nielsen (eds.), Aboriginal Peoples and the Canadian Criminal Justice, Toronto and Vancouver Butterworths, 1992, pp. 3-10.

Purich, Donald The Metis, Toronto: James Lorimer and Company, 1988.

Quigley, Tim "Some Issues in Sentencing of Aboriginal Offenders," in R. Gosse et al., Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice, Saskatoon: Purich Publishing, 1994, pp 269-300.

Report of the Aboriginal Justice Inquiry of Manitoba, Winnipeg: Province of Manitoba, 1991.

Report on Aboriginal Peoples and Criminal Justice. Equality, Respect and the Search for Justice, Ottawa: Law Reform Commission of Canada, Report No 34, 1991.

Ridington, Robin "Cultures in Conflict: The Problem of Discourse," in W.H. New (ed.), Native Writers and Canadian Writing: Canadian Literature Special Issue, Vancouver: U B.C. Press, 1990.

Roberts, Simon "Introduction," in Simon Roberts (ed.) Law and the Family in Africa, The Hague, Paris: Mouton Publishers, 1977, pp. 1-14

Roberts, Simon Order and Dispute An Introduction to Legal Anthropology, Oxford: Martin Robertson and Company Ltd , 1979

Rolf, C H Policing in Relation to the Blood Tribe, Report of a Public Inquiry, Edmonton: Government of Alberta, 1991

Ross, Rupert Dancing With a Ghost: Exploring Indian Reality, Markham Octopus Publishing Group, 1992.

Ross, Rupert "Dueling Paradigms? Western Criminal Justice Versus Aboriginal Community Healing," in Richard Gosse, et al., Continuing Poundmaker and Riel's Quest. Presentations Made at a Conference on Aboriginal Peoples and Justice, Saskatoon: Purich Publishing, 1994, pp. 241-268.

Ross, Rupert "Leaving Our White Eyes Behind," Canadian Native Law Reporter, 1989

Rothman, Rozann "Stability and Change in a Legal Order. The Impact of Ambiguity," Ethics, 1972, 83, 1, pp. 37-50.

Royal Commission on Aboriginal Peoples Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada, Ottawa: Minister of Supply and Services Canada, 1996.

Royal Commission on Aboriginal Peoples Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution, Ottawa. Royal Commission on Aboriginal Peoples, 1993.

Royal Commission on the Donald Marshall, Jr , Prosecution, Halifax Province of Nova Scotia, 1989.

Rudlin, Jonathon and Dan Russell Native Alternative Dispute Resolution Systems The Canadian Future in Light of the American Past, Toronto Toronto Native Council on Justice, 1993.

Ryan, Joan, et al. Final Report. Traditional Dene Justice Project, Lac La Martre, N W T , 1993.

Santos, Boaventura de Sousa "Law A Map of Misreading Towards a Postmodern Conception of Law," Journal of Law and Society, 1987, 14, 3, pp 279-302.

Santos, Boaventura de Sousa "Law and Community The Changing Nature of State Power in Late Capitalism," International Journal of the Sociology of Law, 1980, 8, pp 379-97.

Santos, Boaventura de Sousa "On Modes of Production of Law and Social Power," International Journal of the Sociology of Law, 1985, 13, pp 299-336

Santos, Boaventura de Sousa "The Postmodern Transition Law and Politics," in Austin Sarat and Thomas R. Kearns (eds), The Fate of Law, Ann Arbor The University of Michigan Press, 1991, pp. 79-118

Santos, Boaventura de Sousa "State, Law and Community in the World System An Introduction," Social and Legal Studies, 1992, 1, pp 131-142

Sarat, Austin "Legal Effectiveness and Social Studies of Law On the Unfortunate Persistence of a Research Tradition," Legal Studies Forum, 1985, 9, 1, pp 23-31

Sargent, Neil "The Possibilities and Perils of Legal Studies," Canadian Journal of Law and Society, 1991, 6, pp. 1-25.

Shaw, Margaret Paying the Price: Federally Sentenced Women in Context, 1991, Ottawa: Correctional Service Canada.

Silbey, Susan S. and Austin Sarat "Critical Traditions in Law and Society Research," Law and Society Review, 1987, 21, 1, pp 165-174

Sinclair, Murray "Aboriginal Peoples, Justice and the Law," in Richard Gosse, et al , Continuing Poundmaker and Riel's Quest Presentations Made at a Conference on Aboriginal Peoples and Justice, Saskatoon Purich Publishing, 1994, pp 173-174

Smart, Carol Feminism and the Power of Law, London Routledge, 1989

Snyder, Francis G. "Anthropology, Dispute Process and Law: A Critical Introduction," British Journal of Law and Society, 1981, 8, 2, pp. 141-180.

Solicitor General of Canada First Nations Policing Policy, Ottawa: Minister of Supply and Services Canada, 1992.

Solicitor General Canada Task Force on Aboriginal Peoples in Federal Corrections, Ottawa: Minister of Supply and Services Canada, 1988.

Spitzer, Stephen "The Dialectic of Formal and Informal Control," in R. Abel (ed.), The Politics of Informal Justice, Vol. 1, New York: Academic Press, 1982, pp. 167-201.

Starr, June and Jane F. Collier "Introduction: Dialogues in Legal Anthropology," in June Starr and Jane F Collier (eds.), History and Power in the Study of Law: New Directions in Legal Anthropology, London: Cornell University Press, 1989, pp. 1-28.

Thorne, Brian "The South Island Tribal Council Justice Program," in Curt Taylor Griffiths (ed), Preventing and Responding to Northern Crime, Vancouver: Simon Fraser University for the Northern Justice Society, 1990, p. 89-96

Thorne, B , R. Irving and D. Daniels "Toward a More Sensitive Justice System. Initiatives and Outcomes," in Curt Taylor Griffiths (ed.), Preventing and Responding to Northern Crime, Vancouver: Simon Fraser University for the Northern Justice Society, 1990, pp. 269-284

Tizya, Rosalee "Self-Government," in Curt T Griffiths (ed), Self-Sufficiency in Northern Justice Issues, Simon Fraser University for The Northern Justice Society, Winnipeg. Kromar Printing Ltd , 1992, pp 37-69.

Turpel, Aki-Kwe/Mary Ellen "Aboriginal Peoples and the Canadian Charter of Rights and Freedoms: Contradictions and Challenges, in E Comack and S. Brickey (eds), The Social Basis of Law, Toronto: Garamond Press, 1991, pp. 223-237.

Turpel, Mary Ellen "Further Travails of Canada's Human Rights Record. The Marshall Case," International Journal of Canadian Studies, 1991, 3, pp. 27-48

Turpel, Mary Ellen "Reflections on Thinking Concretely About Criminal Justice Reform," in R. Gosse et al , Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice, Saskatoon. Purich Publishing, 1994, pp. 206-221.

Umbrella Final Agreement. Council for Yukon Indians, Ottawa: Supply and Services Canada, 1993

"Unlocking Aboriginal Justice: Alternative Dispute Resolution for the Gitksan and Wet'suwet'en People," in Curt Griffiths (ed.), Self-Sufficiency in Northern Justice Issues, Simon Fraser University for the Northern Justice Society, Winnipeg: Kromar Printing Ltd., 1992, pp. 213-252.

Vanderlinden, Jacques "Return to Legal Pluralism Twenty Years Later," Journal of Legal Pluralism and Unofficial Law, 1989, 28, pp 149-157

Wall, Bob "Analyzing the Marshall Commission Why It Was Established and How It Functioned," in Joy Mannette (ed), Elusive Justice Beyond the Marshall Inquiry, Halifax Fernwood Publishing, 1992, pp. 13-33.

Wildsmith, Bruce H "Treaty Responsibilities. A Co-Relational Model," University of British Columbia Law Review, Annual, 1992, 26, SPEISS, pp 324-336

Willock, I D "Getting on with Sociologists," British Journal of Law and Society, 1974, 1, pp. 3-12.

Worme, Don "First Nations Perspective on Self-Government," in R Gosse et al , Continuing Poundmaker and Riel's Quest Presentations Made at a Conference on Aboriginal Peoples and Justice, Saskatoon Purich Publishing, 1994, p 77-82

Cases

Calder v *Attorney-General of British Columbia* (1970), 8 D L R (3d) 59 (B C S C)

Delgamuukw v *British Columbia* (1991), 79 D L R (4th) 185 (B C S C)

R v *Naqitarvik*, (1986) , 26 C C C (3d) 193 (C A)

R v *Syliboy* [1929] 1 D L R 307 (N S Co Ct)

St. Catherines's Milling and Lumber Co v *The Queen* (1888), 14 App Cas 46 (P C)

END

17-06-97

FIN