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1 Key Themes (to be explored)

This chapter should be read closely with the chapter on "Culture/Tradition/Diversity"

Justice reform cannot be removed from the demands for self determination of aboriginal people. There is a widespread view, among both governmental officials (especially in the justice system) and Aboriginal leaders, that the field of justice is a center-piece, if not the leading edge, in the development of greater Aboriginal self-government, autonomy and community development. See 5.21 & 5.52

"It is ironic that Aboriginal people are over represented as offenders in the justice system - yet it is they who provide some of the best models for many of the new approaches we are adopting." See 5.25

Aboriginal values/perspective are quite different from those underlying the mainstream system, and particularly suited to the chief social and justice problems facing Aboriginal peoples today. There is a challenge to incorporate traditional practices of social control within the context of contemporary communitie. Re-thinking justice for Aboriginal peoples - it must be appreciated that there is no singular answer or Aboriginal system, but rather there are myriad possibilities associated with the diversity of experience, geography, and culture of Canada's Aboriginal peoples. See 5.53

There is a question of the extent to which present methods of decision-making in law and justice, in Aboriginal communities have been built upon traditional practices, and to what extent have they been influenced by non-Aboriginal methods. See 5.65

The tendency to utilize uniform restorative justice strategies depreciates and overlooks the heterogeneity of identities and experiences amongst Native populations. Although a plurality of views on justice is evident among Aboriginal people, there is significant emphasis on holistic approaches to justice that integrate the social, religious, and economic functioning of the offender vis-a-vis the community.

Have the longstanding models of community justice historically embedded within Aboriginal culture have been dismissed and ignored? Is credit s not given to the importance of the Aboriginal historical narratives and experiences? Has authorship, and subsequently "ownership" been given to the Western judicial system?

Aboriginal people are not only over-represented as offenders in the justice system; they are also over-represented as victims. A long-term goal must be to reduce the victimization of Aboriginal people. This means greater focus on crime prevention measures in Aboriginal communities to improve a wide range of social factors – to focus on the roots of social disorganization. See chapter on "Crime Prevention"

Victim's advocates have noted that victims should not be obligated to succumb to the possibility of being "re-victimized" at the hands of their assailant, and community as a result of restorative justice practices. Do such findings indicate that restorative justice programming is not effective or instead that more detailed and substantive evidence must be identified regarding the development and delivery of restorative justice to Aboriginal communities? This knowledge should not be imposed, but instead should come from within Native peoples. Information regarding process and implementation of restorative justice is located specifically within the cultural and historical narratives of Native individuals. Only Aboriginal peoples are able to interpret the symbolism and significance of their culturally understood symbols and practices. Through utilizing the knowledge and experience of Aboriginal populations, restorative justice models can be implemented within their communities to directly target their unique situations and needs? See 5.11

In Canada today, is there a potential for three justice system models to operate: (1) the main criminal justice system that uses coercive force as its power base; (2) a criminal justice system that is attempting to augment itself with restorative justice processes; and (3) Aboriginal justice systems within communities that use respect and teaching as the basis of knowledge for living together – a system of justice that seem simplistic, however its practice is hard work, based on a complex philosophy. There are currently at least two aboriginal courts operating in Canada, in Alberta and in Ontario. See 5.18

Aboriginal women are pivotal to developments in the Aboriginal community – "if you see any Aboriginal justice project that doesn't centrally involve the women, then you're not looking at real justice". See5.38

A monograph written by an Aboriginal psychologist focuses upon the active intervention of the community. It criticizes the way sexual abuse is now handled – the way it is reported, the procedures followed, the disposition rendered – as reflecting a legalistic approach. He argues for focusing on the harm that has been done and the best way to repair the damage. See 5.67

2 Research Questions

2.1 How does restorative/community justice and aboriginal justice fit together?

2.2 How does restorative/community justice and First Nations administration of justice fit together?

3 Relevant Documents, Studies and Practices – Yukon

3.1 Communities First: First Nations Governance- 2002?[1]

Preliminary Findings - Yukon
Legal Standing and Capacity

- It was suggested that by-laws and policies need to be written to allow leadership to properly run communities.
    - For example, an economic development policy should be drafted to allow leaders to invest and borrow money to initiate economic development projects that could eventually lead to self-sufficiency.
- Requests were made to create other governing bodies such as a Justice Council to manage appeals regarding by-laws and social issues, however other individuals suggested transferring judiciary responsibility to the Yukon Supreme Court.
- Discussions took place surrounding the lack of an established conflict resolution process.
    - It was suggested that an elected Ombudsman could resolve social issues.
- There is a need for the new legislation to reflect cultural diversity.

Leadership Selection and Voting Rights

- Process of elections was addressed regarding Elders Council, spokesperson and leaders.
- Participants expressed the need to establish a set term of office for leadership.
- It was stated that a neutral party should handle election appeals such as the Elders Council, Traditional Justice System and/or representatives from a regional or central body.
- Qualification requirements for Chief and Council are needed.
- Leadership removal regulations need to be established.
- Women need to be involved at the leadership level.

Accountability

- A clear division between administrative and political responsibilities was a considerable concern.
- Participants said there is a lack of community involvement in the decision making process.
- Communication is a major issue.
    - Policies and roles must be clear, concise and accessible to be understood by members.
- Transparency and financial accountability was raised as an issue.
- There was some discussion around DIAND's accountability to First Nations.

Other issues

- Lack of funding to draft the necessary policies and procedures to enhance First Nation communities.
    - Lack of funding to implement sustainable programs.
- Balance of interest of on and off reserve was discussed.
    - A process needs to be created for off reserve First Nations to be included in decision-making.
- Leadership should receive similar benefits as other governments such as a pension plan.
- The timelines regarding the consultation process are inadequate.
- To increase accountability, it was suggested that signing authority for Contribution Agreements should be transferred to the Department Managers not the Chief and Council.

3.2 Restorative Justice in the Yukon - 1999[2]

[1] Indian and Northern Affairs Canada, Communities First: First Nations Governance, 2002, http://www.First Nations Governance Community Consultations.htm

[2] In December 1998, the Minister of Justice tabled a draft discussion paper on Restorative Justice in the Yukon as part of the government's goal of fostering safe and healthy communities. To focus the consultation process, the draft Restorative Justice in Yukon paper and information pamphlets highlighted a number of issues and questions dealing with correctional reform, crime prevention, policing policy, victim services and community and aboriginal justice projects. In May-June 1999, the Minister of Justice, the Commanding Officer of the RCMP and members of their staff visited most of the Yukon communities to hear what Yukon people had to say about the future direction for Justice in the Territory. During the months of July-August 1999, the comments heard at the public consultation meetings were included in "Restorative Justice in the Yukon, Community Consultation Report." Copies of the report were made public.

- Five (5) communities stated there was lot of confusion between the Restorative Justice Initiative and First Nation administration of justice and they wanted to know how do they all fit together?

3.3 Royal Commission on Aboriginal Peoples - 1996[3]

Yukon First Nations

- The Aboriginal people of the Yukon speak seven distinct languages (Gwich'in, Northern Tutchone, Southern Tutchone, Tagish, Kaska, Han and Tlingit). Some members of these language groups also live in Alaska, northern British Columbia and the Northwest Territories. There are 17 First Nations communities in the Yukon, and together they will negotiate 14 comprehensive claims agreements under a single umbrella final agreement.39 In 1991 an estimated 5,100 people reported Aboriginal identity, about 18 per cent of a total Yukon population of approximately 27,800.40 Aboriginal people are the majority in smaller communities such as Pelly Crossing and Old Crow, but non-Aboriginal people are the majority in towns such as Haines Junction, Dawson and Watson Lake and in the capital, Whitehorse.
    - Probably the pivotal contact events for Yukon First Nations were the 1898 Klondike gold rush and the construction of the Alaska Highway during the Second World War. The Gold Rush brought thousands of outsiders to the region over a very short period. Many of the migrants came from the United States. For the distant federal government in Ottawa, the gold rush presented an immediate problem of sovereignty and a secondary problem of preserving local order. To establish a federal presence in this remote area, the Yukon Territory was quickly formed and a legislature established, and police were dispatched to the area.
    - By the early 1900s the gold rush was ebbing, and many non-Aboriginal migrants left the area. Those newcomers who chose to make the Yukon their home changed the demographic balance in the territory, but the territory was large and resources were plentiful.41 Aboriginal people continued to hunt, trap and fish, moving across the land as was their custom. While gold mining had been environmentally destructive, the damage was confined to a few river valleys in the Klondike region. The gold rush nevertheless began the process of land alienation, which was exacerbated by the fact that while a territorial administration was being created, no treaties were negotiated.
    - The construction of the Alaska Highway in 1942 brought even greater and far-reaching changes to the lives of the Aboriginal people living in the regions through which the highway passed. During the construction phase, 34,000 construction workers and military personnel came to the Yukon, bringing with them opportunities for wage employment but also alcohol, infectious diseases, and social disruption. The highway itself became a major instrument for social change. It brought tourists and some small business development and facilitated the introduction of education, health and social programs.
    - All of these changes occurred without reference to the land rights of Yukon First Nations, despite residents' persistent objections. Nearly a century of frustration was articulated in 1968 by a Whitehorse chief, Elijah Smith, speaking to the Indian affairs minister of the day, Jean Chrétien:
        - We, the Indians of the Yukon, object to the treatment of being treated like squatters in our own country. We accepted the white man in this country, fed him, looked after him when he was sick, showed him the way of the North, helped him to find the gold; helped him build and respected him in his own rights. For this we have received very little in return. We feel the people of the North owe us a great deal and we would like the Government of Canada to see that we get a fair settlement for the use of the land. There was no treaty signed in this Country and they tell me the land still belongs to the Indians. There were no battles fought between the white and the Indians for this land.42

  Land claims

- The Council for Yukon Indians (cyi) was formed in 1973 to represent everyone with "Indian ancestry" in the Yukon, irrespective of status under the Indian Act.43 Cyi advanced its claim on the basis of Aboriginal rights to lands that had never been surrendered.44 Aboriginal people saw their claim as a means to close economic, social and communication gaps between Aboriginal and non-Aboriginal people in the Yukon.

[3] The Final Report of the Royal Commission on Aboriginal Peoples, Volume 4 - Perspectives and Realities, 5. Regional Dimensions of Political Development http://www.indigenous.bc.ca/v4/Vol4Ch6s5tos5.3.asp

Initially, the federal government refused to admit the existence of Aboriginal rights and would consider only claims to land and financial compensation.45 Limited federal recognition of the dimensions of the problem created long delays. While the cyi claim was certainly about land, much of the public debate concerned self-government. As the debate unfolded in the Yukon, it posed alternative arrangements: under a proposed one-government system, First Nations communities would share most institutions, services and programs with non-Aboriginal people; by contrast, a two-government system would involve some co-operation and shared institutions, but First Nations communities would establish their own school boards, health systems and local self-government institutions. This choice was particularly important in the Yukon, where many favoured independent institutions but where Aboriginal people constituted only about one-fifth of a small population and where Aboriginal and non-Aboriginal people lived in close proximity in many places.

- These alternatives remained on the table for over a decade while – with some interruptions – negotiations proceeded. Finally, in 1988, an agreement in principle was reached that led to the signing of the Umbrella Final Agreement (UFA) in 1993.46 The UFA broke new ground, providing constitutional protection for wildlife, creating a constitutional obligation to negotiate self-government agreements, and finding language for the agreement that avoided complete extinguishment of Aboriginal title.

- Among its other provisions are title to 44,000 square kilometres of land, compensation of $260 million to be divided among the First Nations communities, the creation of a Yukon-wide land-use planning council and regional planning commissions and joint wildlife management boards. Under the terms of the UFA, First Nations communities will negotiate their own final agreements. Enabling legislation for these as well as for the Umbrella Final Agreement and Model Self-Government Agreement (which provide a framework for individual self-government agreements) was passed by Parliament in 1994.47

Issues for the future

- The land and self-government agreements launch a new stage in the political and constitutional development of the Yukon. While the Yukon government's jurisdiction and authority are expanding through a process of devolution from the federal government,48 the comprehensive claims agreements ensure that Aboriginal people will have a major influence on the political evolution of the territory. Under the terms of the agreements, Yukon Aboriginal peoples are guaranteed participation in public bodies dealing with everything from land use and development assessment to the management of wildlife and other resources. They also control significant pools of capital.

  - The UFA ensures that the developing government systems will incorporate, to varying degrees, traditional elements of leadership and decision making. For example,
    - the preamble of the Champagne and Aishihik First Nations Self-Government Agreement asserts that "the Champagne and Aishihik First Nations have traditional decision-making structures based on a moiety system and are desirous of maintaining these structures...". The Teslin Tlingit have already developed a form of government based on their five clans.49

- To date, the development of political institutions in the Yukon has followed conventional lines. Although some policies and programs such as heritage programming, <<community>> <<justice>> and health care delivery draw somewhat on traditional Yukon Aboriginal knowledge, the way the Yukon government operates would be familiar to any Canadian. Decision-making and policy-development processes owe very little to Aboriginal political traditions.50
  - The creation of First Nations governments will have a major effect on the way the Yukon territorial government carries out its responsibilities, and there might be an opportunity for institutional change to harmonize public decision making with Aboriginal traditions. There is also a significant risk of inefficiency and policy gridlock, however. Under the self-government agreements, First Nations communities will be able to choose which programs and services they will run on their own. In other cases, there may be agreements for service delivery between a First Nation community (or several communities) and the territorial government. There may ultimately be as many as 15 separate governments sharing jurisdiction: the Yukon territorial government and the governments developed

on the basis of the 14 final agreements being negotiated by First Nations communities. Considering the small size of the population and the limited revenue base, co-operation and simplification of the mechanisms for joint undertakings are urgent:
The effectiveness of the territorial-First Nations relationship will be critical in minimizing these inefficiencies [resulting from the ability of First Nation communities to negotiate separate and different arrangements]. In managing this relationship and in relating to the agreement-based boards with their guaranteed Aboriginal participation, the territorial government will be highly motivated to respond to Aboriginal concerns rather than risk the high costs of difficult relations. The territorial government will particularly want to avoid relations becoming so difficult that frustrated First Nations decide to turn their backs on the usually more cost-effective joint activities and develop their own programs.51

- Once the resources are transferred, First Nations communities will have a greater degree of administrative control over activities in the territory than ever before.52 But there will continue to be a role, albeit a changed one, for the territorial government. A conventional political system is having to make room for Aboriginal governments.53

3.4 Putting Aboriginal Justice Devolution Into Practice – 1995[4]

Justice Devolution: Lessons and Future Directions

- ***One only needs to look at Yukon in the past five years to realize the amount of changes which have taken place in the devolution of the administration of justice.***
  - Many people point to the decreasing official statistics, in the number of people processed or incarcerated, etc.
  - However, the greatest lesson to learn may lie in a ***Kwanlin Dun saying, "If you walk too fast, you will walk right past." We should take our time.***
- The need for change is self-evident and undeniable, but more importantly, the need is in the Canadian justice system, for all groups, and not just in aboriginal justice.
  - Changes are coming.
  - Especially with the impending creation of Nunavut, the different groups in the present Northwest Territories will witness an unprecedented level of activities.
  - The possibilities are endless; we should avoid looking for "the" model.
  - The case studies of the Workshop bear testimony to that.
    - ***For example, while Kwanlin Dun started with less serious offenses and does not feel prepared as yet to tackle sexual abuse,*** Hollow Water started with the toughest and what it considered the core problem, sexual assaults and abuse.
    - Both are "right" for their community.
  - A common observation is that expanding community involvement holds out more promise than any other methods.

- There are also limitations to change.
  - One cannot ignore the declining public support, the tighter fiscal climate, and the political agenda respecting self-government.
  - For Aboriginal communities, there is a danger of replicating the mainstream court system, of widening the net of the alternative system or process, and in silencing the voice of healing and restoration.
  - The tendency to legislate minimum sentences will impact on the options available to communities.

- What would future models look like?

[4] Don Avison (Canada) *cited in* The International Centre for Criminal Law Reform and Criminal Justice Policy and The School of Criminology, Simon Fraser University and with the support of The Department of Justice Canada and The Ministry of the Attorney General of British Columbia, Putting Aboriginal Justice Devolution Into Practice: The Canadian And International Experience Workshop Report, July 5-7, 1995 http://137.82.153.100/Reports/Aboriginal.txt

- They are likely to be different across the country.
- One future trend may be the movement of cases between territorial/provincial courts and the community level.
- There will be a presumption that less serious cases would go to the community level, but with an option to be heard before the courts, while more serious cases would proceed to the courts, but the possibility of interplay with the community.
- The starting point of any change should be the empowerment of the community.

3.5 Exploring the Boundaries of Justice: Aboriginal Justice in the Yukon – 1992 [5]

- Yukon First Nations, like those elsewhere in Canada, are faced with the dilemma of incorporating traditional practices of social control within the context of contemporary communities.
    - Some communities and community members are caught in the traditional/modern conflict where a return to traditional practices is seen as the logical justice extension by some, while others argue the need for new responses to contemporary problems.
    - The desire to have a tribal justice 'system' limits the debate to one or the other, when in reality, both could be incorporated with a clearer delineation of community standards and values about what constitutes crime.
        - Individual behaviours, whether remaining a 'crime' or decriminalized could be treated as distinct with a variety of responses to suit the particular circumstance.
    - There is a danger that communities feel pressured by aboriginal political organizations and government alike to negotiate justice systems before having done the essential developmental work.
        - The need to ensure that what is implemented is long-lasting and effective in meeting justice needs, cannot be over-emphasized.
        - First Nations often lack accurate information about the existing criminal justice system and about aboriginal or non-aboriginal approaches tried elsewhere.
        - Most communities do not have clear and developed ideas about local justice approaches.
        - Nor is there always knowledge in communities about traditional or customary mechanisms of social control.
        - In the absence of traditional rules and practices, familiarity between people and extended family relationships will be difficult areas to define when developing and operating tribal justice systems in small communities.
        - In addition, communities often lack people with experience to operate local systems and resources to support local dispositions.
        - An added complication is the population mix in many communities where aboriginal and non-aboriginal people live side-by-side and where inter-marriage is commonplace.
        - Because of these factors, justice initiatives may of necessity, move in the direction of 'community' justice.

- First Nations and government face the task of negotiating justice boundaries and developing and assessing appropriate initiatives.
    - In addition, there is the requirement for coherent criminal justice polices and programs under existing arrangements.
    - These may involve consultations about jurisdiction where, for example, a band member commits an offense outside settlement lands and the RCMP involve the local system of justice.
    - Other policies may reflect activities clearly within the mandate of the existing system but where there is a request to involve the local system
    - A commitment to a more experimental approach should also be considered.

[5] Laprairie, Carol, Report to Department, Yukon Territorial Government, First Nations, Yukon Territory, Justice Canada, Exploring the Boundaries of Justice: Aboriginal Justice in the Yukon. September 1992.

- At present, initiatives are driven by individuals, groups or circumstances with no clearly identifies or stated objectives, piloting, monitoring or evaluations to determine their effectiveness in meeting the needs of communities or individuals.
- Development work to ensure that communities are consulted and information disseminated is, at present, largely by-passed.

- There is variation in the priority First Nations place on justice issues.

  - The signing of self-government agreements, however, may raise the profile of justice and create a sense of urgency among some First Nations to access funding and initiate local justice initiatives.

- The most important task facing First Nations is clarity about the meaning of justice and about what constitutes crime.

  - Little work in this country has been on definitions of crime in aboriginal communities and the criminal justice system has proceeded as if the aboriginal and non-aboriginal definitions about what constitutes crime are the same.

  - Available research reveals, however, differences in the degree of seriousness accorded certain criminal behaviours and differences in that nature of crime and disorder among some aboriginal and non-aboriginal groups.

  - Communities must ultimately decide which behaviours deserve the designation of 'crime', the degree of seriousness of the act and the most appropriate community and/or justice response.

- In their deliberations about tribal justice and the administration of justice provisions in self-government agreements, First Nations will have to confront their preferences for formal or informal methods of social control, lack of consensus about the criminal nature of certain behaviours, such as spousal assault and disturbances (among others) and other value conflicts.

  - The role of community leaders and community members as formal or informal 'mechanisms' of social control will have to be defined in local justice systems.

- The situation of aboriginal justice in the Yukon is a microcosm of what is happening more widely across the country.
  - It is increasingly clear to all players that the 'old way' of doing things has been dramatically altered and in many communities the justice systems and the criminal justice system, in particular, will be serving aboriginal people quite differently than in the past.
  - There is a growing recognition that, in some cases, it may be aboriginal-controlled systems serving aboriginal people.
  - Those living where these systems do not have jurisdiction, will fall within existing arrangements.
  - Where local, aboriginal systems are in place, the existing system will continue to be used under certain circumstances.
  - The main difference, however, in the use of that system will be the involvement of aboriginal people in decision-making.
- The relationship between the Federal Aboriginal Justice Initiative and self-government justice negotiations is not immediately apparent.
  - If First Nations adopt an experimental approach to the administration of justice self-government potential, development monies from the Initiative could be a mechanism to further those ends.
  - The Initiative could fund research to inform justice development; facilitate consultations in regard to community needs, resources, and capabilities, and assist to implement, monitor and evaluate new approaches.
- It is also clear that few tribal (aboriginal) justice consultation and development activities have been carried out in communities, and that information and consultation must be integral to any new approaches.

- At the community level, some First Nations are advancing their own responses in the form of diversion and input into the formal sentencing process, while other are caught in apathy.
- There are two ways in which tribal (aboriginal) justice could proceed in the Yukon.
  - The first involves the consideration of specific activities in identified communities where the objective is to develop more useful justice responses.
    - This direction would be community and issue-specific and limited to two or three projects.
  - The second is the Yukon as 'testing' site for comprehensive justice programming, where information and evaluation results would be transferable to communities in other parts of the country.
    - The second approach is preferred because it accomplishes two important goals
      - Responding to the needs of First Nations communities in the Yukon and
      - Collecting information about the value of certain approaches to facilitate activities in communities with similar characteristics in other parts of the country.
    - It also allows for active collaboration between the three parties toward addressing the complex problems facing the communities and tribal (aboriginal) justice.
    - If adopting the second, the justification for the selection of the Yukon as a model site is that the characteristics of
      - First Nation communities and urban areas,
      - the state of land claims and self-government,
      - the community-based nature of policing,
      - judicial interest in justice reform and the fact
      - Justice Canada has both an Aboriginal Justice Initiative in place and the prosecutorial responsibility in relation to the Criminal Code and other Statutes make the Yukon Territory the preferred site for the implementation and evaluation of new aboriginal justice initiatives.
    - If there is a tripartite agreement to such an approach and to developing an agenda for comprehensive programming, information elicited from projects over the next few years could be used to justify long-term funding of justice projects in Yukon communities and to stimulate similar initiatives in other parts of the country.
      - It is clear that monies will not be immediately available to support justice initiatives in every aboriginal community.
      - It is therefore imperative that a knowledge base about useful approaches is developed and disseminated.

  - In both approaches, however, a commitment to consultation, research and development and evaluation are paramount if new initiatives are to be effective in meeting community and individual needs.

- Examining aboriginal justice in Canada has become somewhat of a national obsession in the past few years but the volume of activity has not made the task any less difficult or the boundaries any clearer.

3.6 A Review of the Justice System in the Yukon - 1986[6]

- **Tribal Justice Committees:** All Band Councils visited raised concerns about Tribal Justice Committees.
  - It was felt that this type of committee should be established in all communities and should be dominated by Elders of the community.
  - The committee would be involved in diversion and mediation programs as well as providing a source of knowledge about the community for police, crown counsel, lawyers, judges and justices of the peace.

- **Recommendations**
  - Bands be encouraged to and assisted in establishing Tribal Justice Committees to:

[6] John Wright and Joanne Bill – A Review of the Justice System in the Yukon, 19 December 1986 – The Government of the Yukon, in response to concerns expressed about the justice system, appointed a panel to review the Justice System in the Yukon.

- Implement and monitor diversion and mediation programs; and
- Act as an advisory to judges, JPs, defence and Crown lawyers and police.

4 Relevant Documents, Studies and Practices – Other Northern Territories

5 Relevant Documents, Studies and Practices – Other Canadian

5.1 Aboriginal Peoples in Canada [7]

5.2 Understanding restorative justice practices within the Aboriginal context[8]

[7] Stats Canada – Canadian Centre for Justice Stats Profile Series

[8] Melanie Achtenberg, Corrections Services Canada, Understanding restorative justice practices within the Aboriginal context, www.csc-scc.gc.ca/text/pblct/forum/v12n1/v12n1a10e.pdf

Understanding restorative justice practice within the Aboriginal context

by ***Melanie Achtenberg***[1]
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Restorative Justice practices are becoming increasingly more popular as the guideposts to effective corrections policy, both inside prisons and within the wider community. Restorative Justice philosophy is based on the traditional practices of Indigenous Cultures around the world. It is founded on the belief that criminal behaviour is primarily caused by the alienation of certain members from society at large. Although it is the responsibility of every individual to make positive choices for their life, regardless of personal circumstances, Restorative Justice principles are based on the understanding of compassion, that no one is an island, and that everyone is an equal member of society and has a contribution to make to the greater good. Therefore, when a person becomes alienated or disconnected from that society, it is the responsibility of everyone in that society to bring the person back into a harmonious relationship with him/her "self", as well as with the rest of the community. This may mean that the society itself needs to take a long hard look at its own practices and systems which may be "contributing factors" to the person's alienation from it. The society may need to heal itself. The Gladue decision, which is based on section 718.2 of the *Criminal Code of Canada*, is a cornerstone for building Restorative Justice practices in Canada, and opens the door for the creation of alternative sentencing.

When imposing a sentence, Section 718.2 of the *Criminal Code of Canada* requires a court to consider the following principle: that

> "e) all available sanctions other than imprisonment that are reasonable in the circumstances, should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders".[2]

In lay person's terms, this means that incarceration or imprisonment is to be used only as a last resort for all Canadian offenders who come before a court, and in particular, for Aboriginal offenders. This section of the *Criminal Code* is significant because our prisons are currently overpopulated with Aboriginal offenders, — especially in the Western provinces, where in many instances, 60–80 % of the prison population is comprised of Aboriginal offenders.

> "Although Aboriginal persons represent about 3% of the adult population in Canada, they represent 15% of provincial admissions to custody. Attempts to reduce the number of Aboriginal admissions at the federal level seem to have failed. In fact, the percentage of federal admissions that are Aboriginal continues to increase: it was 11% in 1991-1992, 15% in 1996-97 and 17% last year. Whether this is a problem for judges to resolve, as the much-criticized recent Supreme Court judgement suggests, is another question entirely."[3]

This over-representation of Aboriginal people in the correctional system is due in part to the historical relationship of Aboriginal people with Canada:

> "In *Bridging the Cultural Divide*, p. 309, the Royal Commission on Aboriginal Peoples listed as its first "Major Findings and Conclusions" the following statement, "The Canadian criminal justice system has failed the Aboriginal peoples of Canada — First Nations, Inuit and Metis people, on-reserve and off-reserve, urban and rural — in all territorial and governmental jurisdictions. The principal reason for this crushing failure is the fundamentally different world views of Aboriginal and non-Aboriginal people with respect to such elemental issues as the substantive content of justice and the process of achieving justice."
>
> "Far from being a Canadian anomaly, these conclusions are global. The failure of an imposed foreign criminal jurisdiction system over Indigenous nations has haunted each British colony's legal system. In recent decades, every Commonwealth country that has studied the problem has reached a similar conclusion: the British legal system is not succeeding with Aboriginal peoples. The failure is a function of relationships of force rather than justice."[4]

Therefore, it is imperative to change the dynamics of corrections from one of force, domination and control to more restorative methods for implementing accountability and a correctional plan that ensures lower incarceration rates and improved community dynamics. In correctional jargon, we talk about

providing "dynamic security" in our institutions, and most of those who work directly with offenders know that dynamic security is best created by building a rapport with an offender. Dynamic security is the use of relationships to build more secure prison environments. This concept, when extended to the community context, becomes what is also known as Restorative Justice practice.

Current trends in sentencing demonstrate a willingness to create options to incarceration, because prisons are expensive and overcrowded, and in the long term, everyone realizes today, that offenders will eventually return to their original communities — be they urban, rural, or remote locations. Ensuring that offenders return with a more positive state of mind rather than reinforced criminal ideals, is the responsibility of everyone. When creating a dynamic of respect and restoration, all community members are an integral part of the process from establishing sentencing alternatives to working directly with offenders to assist them on their healing path. Providing dynamic security in all situations becomes the overall goal for creating a corrections model that will help everyone involved take responsibility for the security of their environment, thereby reducing the repetition of criminogenic behaviour in the future. *How we do this — both in the community and within the prison walls, is the subject for the rest of this article.*

Thus, "the Gladue decision clearly endorsed the notion of restorative justice and a sentencing regime which pays fidelity to "healing" as a normative value. Healing is an Aboriginal justice principle which is slowly becoming merged into Canadian criminal law through the practice of circle sentencing and community based diversion programs."[5]

The Gladue decision acknowledges that the underlying roots of discrimination must be addressed if we are to lower the over-representation of Aboriginal people within the correctional justice system. It also focuses on the overutilization of prisons as a sentencing tool for all Canadians, and requires that in future, judges consider prison sentences only as a last resort. Therefore, the Supreme Court decision on the *R. v Gladue* case is an historical achievement for all Canadians.

This decision opens the door for the use of sentencing alternatives. Restorative Justice practices within the Aboriginal context provide sentencing alternatives such as the use of Section 81 and Section 84 of the Corrections and Conditional Release Act (CCRA). As communities in both urban and reserve settings become aware of how these regulations can be implemented, sentencing alternatives will evolve. Judges need to know that the facilities for best practices are in place before they can provide sentencing which is innovative and restorative.

Briefly, Section 81 (CCRA) provides General Custody Agreements for the transfer of an Aboriginal offender to an Aboriginal community in a non-institutional setting with supervision, treatment and programming provided under 24 hour supervision of community members. Three other types of arrangements are also possible under Section 81 to facilitate the transfer of an Aboriginal offender to a spiritual or Healing Lodge, or other treatment facility in an urban setting.

Section 84 (CCRA) provides Aboriginal communities with the opportunity to participate in an offender's release plan from a penal institution. The release plan must address the concerns and needs of the community as well as those of the offender. Successful reintegration becomes part of the overall healing path for all involved: the community, the offender and the victim.

Restorative Justice practices look for ways to enable offenders to take responsibility for the harm they've done, and to correct their behaviour on a deeper and more meaningful level. It is based on the belief that offending is not the "decision of choice" if one is meaningfully connected to the society in which one lives. Therefore Restorative Justice and the Gladue decision is a way of creating a criminal justice system that restores the offender to himself, and thereby empowers him/her to make better choices in the future. In this way we are creating a dynamic within the society that restores the health of individuals while maintaining law and order, for the security of the community.

This change in the philosophy can also be seen inside the prisons where Aboriginal specific training programs are being developed and delivered to Aboriginal offenders. Elders and Native Liaison Workers provide healing circles, counselling, and personal growth opportunities which assist offenders to change their lifestyle once they are on parole. Likewise the prison culture itself is changing as Elders and Native Liaison Workers work with other prison staff to create more peaceful solutions to prison conflicts and develop innovative options for the practice of Restorative Justice.

As we all learn how to work together to create a leadership culture of respect, accountability, and trust, I am hopeful that the future of effective corrections will be based on restoring human relationships for the benefit of all people on the Circle of Life. ■

- 340 Laurier Avenue West, Ottawa, Ontario, K1A 0P9.
- *Pocket Criminal Code*, (Scarborough, ON:Carswell and Thomson, 1999): 400.
- Julian V. Roberts, *"Recent Correctional Trends"*, SENTENCING MATTERS; Newsletter 2:1 Autumn 1999. (865 Richmond Square, Montreal, QC, H3J 1V8).
- James (Sa'ke'j) YoungBlood Henderson, *Changing Punishment at the Turn of the Century: Finding Common Ground*: "Changing Punishment for Aboriginal Peoples of Canada", Canadian Institute for the Administration of Justice Conference, Saskatoon, (September 1998) 2. Also see, Canada, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa, ON: Minister of Supply and Services Canada, 1996) 309.
- Judge M.E. Turpel-Lafond, *Changing Punishment at the Turn of the Century: Finding Common Ground*, "Sentencing within a Restorative Justice Paradigm. Procedural Implications of R. v. Gladue. (1998) 2.

5.3 AFN Justice Portfolio, Justice Secretariat [9]

The AFN opened communications with the departments and agencies of the Federal Justice System to work jointly on all aspects of community and criminal Justice. The Justice Initiative is an approach proposed by the Assembly of First Nations (AFN) to establish a partnership between federal government departments and

[9] AFNhttp://www.afn.ca/Programs/Justice/justice%20and%20firearms.htm

agencies in Justice and First Nation communities. It includes the development of clearer communication and partnership processes between communities and the federal justice system.

This has led to the development of an Inter-departmental Working Group that will partake in the assessment of policies, practices and procedures as well as developing plans, activities, programs and solutions that have greater impact at the community level. It also opens a new area for partnership with Government and attacks the walls of mistrust and non-confidence between First Nations and the Canadian Justice System.

There are many challenges facing this initiative. The first challenge is to involve First Nations in the development of justice policy. Historically, this is one area that has had difficult times with First Nations' peoples and communities. The second is to provide FN communities with access to different government programs and services. The other challenge here is to ensure that these programs and services are developed and implemented in a comprehensive and coordinated fashion.

In compliance with Confederacy of Chiefs Resolutions #6/2001 and #42/2000 on Firearms, the AFN through the Justice Secretariat developed a national process with the Canadian Firearms Center undertaking the establishment of a First Nations' approach to firearms that included a Working Group comprised of an AFN Firearms Coordinator and regional representation. The Working Group has developed a methodology to establish a First Nations' Approach to Firearms and drafted an options paper for discussion. This was distributed at the 2001 Annual General Assembly in Halifax. Discussions are on-going.

Objectives

- Promote the development of First Nation Community Justice Systems.
- Develop a National First Nation Forum on Justice that is in line with the Royal Commission on Aboriginal Peoples Justice recommendations that called for national Justice Committee.
- Involve First Nations in the development of justice legislation and policy.
- Provide a structure and process to discuss policies, issues and specific incidents in the areas of Justice including policing.
- Provide a National First Nation resource for influencing the development of government strategies and policies related to criminal justice.
- Ensure that policy and program development in Justice is community and regionally focused.
- Provide FN communities with better access to the spectrum of justice-related programs and services which includes courts, policing, corrections and firearms.
- Ensure that these programs and services are developed and implemented in a comprehensive and coordinated fashion.

Current Activities

- Developing a protocol agreement and 5 year work plan with the Department of Justice (DOJ) that includes a review of First Nation Community Justice capacity and the development of a National Justice Forum.
- Developing an agreement with the Solicitor General and the RCMP for a review of First Nation relations with the RCMP.
- Organizing a National First Nations Think Tank with CSC on "Reducing the Incarceration Rate of First Nations' People".
- Drafting a Terms of Reference for a project with CSC, the Anishinabek Nation and the Nishnawbe-Aski Nation that will explore and develop opportunities for First Nations regarding Section 81 and 84 of the Corrections and Conditional Release Act.
- Developing operational plans as part of the 5 year agreement with Correctional Services Canada (CSC) that will promote the development and understanding of Section 81 and 84 of the Corrections and Conditional Release Act's activiti0es as well as address correctional policy issues affecting First Nations' peoples.
- Conducting a project with CSC that explores the "gangs" issue.
- Conducting legal/policy research on: enquiry options regarding the Dudley George incident and OPP actions; the impacts of the new Youth Justice Legislation; and the impact of the Immigration Act on First Nation people in the Criminal Justice System.

- In compliance with Confederacy of Chiefs Resolutions #6/2001 and #42/2000, continuing discussions with the Canadian Firearms Centre of DOJ for the establishment of a First Nations approach to Firearms.

Key Developments and Products

- The National Chief has received commitment from Justice Minister Anne McLellan for the development of a working relationship with the AFN and First Nations' involvement in policy development.
- The AFN has formed (along with DOJ and SOLGEN) an Interdepartmental Working Group to fully develop and implement this initiative.
- The Assistant Commissioner of the RCMP agreed that the RCMP must begin to include First Nations input into their strategy and to establish a better working relationship with the AFN. He agreed to using the proposed Terms of Reference in developing this arrangement and that this should be based in their strategic plan.
- Drafted Terms of References for: a review of First Nation Community Justice needs and capacity; a Justice/Solicitor General/AFN inter-departmental working group, and the development of a National Justice Forum comprised of regional chiefs and technicians.
- Drafted a Terms of Reference for a review of First Nation relations with the RCMP
- Developed a national First Nations Firearms development process that included a dedicated Firearms Coordinator at the AFN and a working group comprised of regional representation.
- Drafted a methodology to establish a First Nations' Firearms approach through a Cabinet Submission process.
- Developed long-term strategies, options and recommendations (including litigation concerns) for the Annual Assembly regarding the AFN's on-going work on Firearms.
- Began the second year of a 5-year agreement with Correctional Services Canada regarding Community Corrections.
- Participated on a study with Correctional Services Canada and National Crime Prevention Center on Family and Traditional Values and attachments.
- Participated in a partnership with DIAND on a major Victimization Study.

Planned Activities

- Meetings are planned between the National Chief and the Solicitor General (as well as the Commissioners of the RCMP and Corrections) to address issues surrounding Aboriginal Policing, the RCMP and the over-representation of First Nations' people in the Criminal Justice System.
- Pursuing a meeting between the National Chief and the Minister of Justice to secure a long-term commitment from the Government of Canada for a First Nations approach to Firearms.
- Continuing to develop "Partnership Strategies and Agreements" with specific Government Departments and Agencies.
- Work with First Nation organizations and communities to develop an overall system and structure that provides a coordinated point for policy, coordination and advocacy including a network of justice technicians and a library of research reports.
- Establish the Justice function at the AFN fully so as to include a Chiefs Committee and Technical Committee.

5.4 CAP Aboriginal Justice Program[10]

The Congress of Aboriginal Peoples (CAP) is undertaking a five-year program, co-sponsored by Correctional Service Canada, focused on issues in the Canadian justice system as they apply to CAP constituents. The information on the following pages will outline the goals, scope and activity of the project and provide a series of off-site links to justice issues.

Goals and Five-Year Plan

Year 1 Perform a needs assessment - design and conduct a research study, working closely with CAP affiliates to identify the following:

[10] Congress of Aboriginal Peoples (CAP) http://www.abo-peoples.org/programs/Justice/Goals.html

- Existing correctional services being used by CAP communities
- What is being provided and by whom;
- Where services are located;
- Elements of Aboriginal cultural influences, if any;
- Best practices;
- What works, what does not;
- Demographic information related to the incarceration of Aboriginal peoples.

Year 2 Develop several models (with associated costs and funding proposals) for the provision of correctional services to Aboriginal offenders.

Year 3 Consult with CAP constituents in relation to the models developed during Year 2 including:

- The identification of appropriate models for piloting;
- The planning of a pilot study;
- The identification of appropriate sites for piloting;
- The identification of funds to support the piloting.

Year 4 The coordination of piloting and implementation planning related to the provision of correctional services to Aboriginal offenders including:

- Piloting of several models in selected sites;
- Evaluation and reporting on the pilots;
- The identification of sites and models for implementation in selects sites;
- The identification of funds to support the implementation.

Year 5 The coordination and implementation of correction services to Aboriginal offenders

5.5 The Case for Aboriginal Justice/Healing: The Self Perceived through a Broken Mirror[11]

The Blues point out the disproportionately high percentage of First Nations' people incarcerated in Canada. In response, they argue for the merits of aboriginal justice ideas and practices, especially aboriginal and not Euro-Canadian justice for aboriginal peoples.

As the basis for their argument and for aboriginal justice, the authors discuss key elements of the worldview of First Nations' peoples. This worldview emphasizes the holistic interrelatedness and interdependence of all parts of existence, such as the spiritual and the material, the animate and the "inanimate," and animals and humans. Therefore, key ideas and values of living within this worldview include harmony, mutuality, relationship, and responsibility. Moreover, in this worldview, the individual human self achieves true humanness through development of an awareness of the self as "other" (as when a person looks in a mirror and sees the reflection of himself or herself), where the "mirror" or identity of that self comes from being embedded in his or her cultural tradition.

The interaction of Euro-Canadian cultures with aboriginal cultures has led to severe and damaging identity crises for aboriginal people as groups and as individuals. With all of this in mind, the authors argue that aboriginal justice, based on a different worldview, is characterized more by restoration of harmony, mutuality,

[11] Arthur W. Blue and Meredith A. Rogers Blue. The Case for Aboriginal Justice and Healing: The Self Perceived through a Broken Mirror, http://www.restorativejustice.org/rj3/Spiritual_Roots_of_Restorative_Justice/Aboriginal.htm

relationship, and responsibility, thereby promoting conflict resolution and healing. In contrast, Euro-Canadian justice is characterized more by punishment and retribution.

The Blues then describe traditional practices that express and effect these realities and values: the sweat lodge; the vision quest; the pipe ceremony; and the sentencing circle (which is specifically related to aboriginal justice).

5.6 Justice In Aboriginal Communities: Sentencing Alternatives - ? [12]

- His book looks at real life experiences to date with alternative sentencing in four areas:
  - Sentencing circles: elders' or community sentencing panels; sentence advisory committees, and community mediation committees….Green doesn't claim to have all the answers. However, his book is a useful and accessible resource on a problem in the justice system that will only get worse if it isn't addressed. -Verne Clemence, Saskatoon Star-Phoenix
  - **In this book...**
  - Sentencing circles, elder and community sentencing panels
  - Sentence advisory committees
  - Community mediation projects
  - Challenges facing new sentencing alternatives
  - How the justice system can accommodate new alternatives
  - Problems with circuit courts
  - Failures of the current system in meeting Aboriginal concerns
- *[A] lot of these guys go to jail, and they sit around this ten-by-twelve cell…And they get very bitter. Here in a sentencing circle, we make sure somebody tells the offender that we're here to help.* - Harry Morin from Sandy Bay, as quoted in the book.
- Ross Green looks at the evolution of the Canadian criminal justice system and the values upon which it is based.
  - He then contrasts those values with Aboriginal concepts of justice.
  - Against this backdrop, he introduces sentencing and mediation alternatives currently being developed in Aboriginal communities within the structure of the current Canadian justice system.
  - At the heart of the book are case studies of several communities, which Green uses to analyze the successes of and challenges to the innovative sentencing approaches currently evolving in Aboriginal communities.
- This book is based on the author's scholarly research; field trips to the communities profiled; interviews with judges, prosecutors, community leaders, and participants in sentencing circles, sentencing panels, and mediation committees; and the author's personal experiences as a defence lawyer.
- Table of Contents:
  1. Sentencing Law and Practice in Canada
  2. An Historical Overview of Aboriginal Perspectives on Justice
  3. Aboriginal People and the Canadian Justice System
  4. Opportunities for Community and Victim Participation and Sentencing Discretion in Conventional Sentencing
  5. The Sentencing Circle
  6. The Elders' or Community Sentencing Panel
  7. The Sentence Advisory Committee
  8. The Community Mediation Committee
  9. The Development and Impact of Community Sentencing and Mediation Initiatives
  10. Post-Colonialism, Legal Pluralism, and Popular Justice
  11. Justice and Policy Issues Raised by Community Sentencing and Mediation

5.7 Commission On The Future Of Health Care in Canada • Interim Report - 2002

[12] Ross Gordon Green Justice In Aboriginal Communities: Sentencing Alternatives, ? http://www3.sk.sympatico.ca/purich/law.htm

Responsibility for Aboriginal Health Care Another area that demands resolution is responsibility for Aboriginal health and health care programs. It is an area that has been surrounded by uncertainties that have had serious consequences to the health and health care of Aboriginal peoples. As noted by the Royal Commission on Aboriginal Peoples, Aboriginal control of health and social services is essential to improve the quality and accessibility of health care for Aboriginal peoples and ensure that health programs meet their often very unique needs. In the last two decades, a process has been in place to gradually transfer control over delivering health services from the federal government to Aboriginal authorities. However, defining which Aboriginal peoples qualify for what federally funded health services or programs is complex. As a result, many Aboriginal peoples find themselves relying on provincial health programs that are designed to meet the health needs of the general population and may not reflect their specific needs. Traditionally, Aboriginal peoples have emphasized a more integrated and comprehensive view of health than the current health care system has provided, with its narrower focus on hospital and doctor-delivered health services. In recent decades however, provincial and territorial governments have moved toward a more integrated approach that is perhaps more consistent with traditional Aboriginal perspectives on health. As a result, there has been some movement toward the integration of Aboriginal health services within provincial and territorial health care systems and the creation of Aboriginal-specific health programs. Aboriginal peoples and provincial and territorial governments, however, typically emphasize that greater Aboriginal control of health service delivery should not mean less responsibility by the federal government.

5.8 "The Dilemma of Alternative Dispute Resolution in First Nations" - 2002

The Program on Dispute Resolution at UBC is pleased to invite you to attend a free talk by Professor Bruce Miller on Monday, February 25th at 5:00 p.m. at the Coach House at Green College.

> Professor Miller will speak on the topic: "The Dilemma of Alternative Dispute Resolution in First Nations". This talk is based on the comparative, historical, and ethnographic study of the contemporary law/justice practices of Coast Salish communities based in Washington state and those in British Columbia. Prof. Miller will address two topics: the problems raised in the diversionary justice experiments in BC communities and the possibilities offered in the tribal codes and courts of Puget Sound tribes. His argument, in brief, is that BC tribes, limited to diversionary justice projects, are distracted from engaging with fundamental community problems, particularly community diversity and the distribution of power, and are sidetracked in disputes over misleading Edenic, healing, and related justice discourses.

5.9 A Journey in Aboriginal Restorative Justice - 2002[13]

The Oglala Lakota Nation Mennonite Central Committee unit has been working at restorative justice for many years through efforts the past program coordinators and continuing with my wife and me as the current program coordinators. We find ourselves using the concepts of restorative justice in many situations and are called on often by the people in the community to share what knowledge we may have-as well as our contacts and resources. Teaching restorative justice at the local Lakota College where we use an indigenous model is one area of focus in our work on the Pine Ridge Reservation, also known as the Oglala Lakota Nation.

It is important for me to start this article by stating that these thoughts are from my perspective of things thus far in my journey into restorative justice and peacemaking. It is also important for me as an Indigenous person to state that writing is a format that I am not completely comfortable using. I come from an oral tradition and culture. I feel that when a person puts his or her thoughts on a matter down in ink, it is assumed by most readers that this is what that person will believe far the rest of time. It is my understanding that when things are written on paper, a misconception arises that this is the way it is forever and always. The thoughts of that person are "frozen in time," if you will, and that person becomes static in the mind of the reader. I would ask

[13] Harley Eagle, the program coordinator of the Oglala Lakota Nation Mennonite Central Committee Voluntary Service Unit, Harley is of the Saulteau and the Dakota Nations and a tribal member of the White Cap reserve near Saskatoon, Saskatchewan, A Journey in Aboriginal Restorative Justice, Conciliation Quarterly Vol. 20, No. 3,
http://www.restorativejustice.org/rj3/Feature/MARCH2002/Conciliation/journey.htm

that the reader keep in mind that this is my understanding of aboriginal restorative justice thus far. I look forward to learning more in the passage of time.

Our teaching of the Aboriginal Restorative Justice course for the Oglala Lakota College (OLC) students incorporates a style of teaching that I find comfortable as an Indigenous person. My wife and I make it cleat that we depend greatly on the wisdom, knowledge and experiences of the class participants and incorporate practical applications of our learning in every class. In the field of education this is considered a form of "popular education" though indigenous people understand that it is learning in a natural way. While using this process in class, coupled with the education and participation in talking circles, the students have found themselves focusing on the many uses of the circle process.

A talking circle is a model used for group interaction. Participants are seated in a circle--on chairs or the floor--taking turns in either a clockwise or counterclockwise manner (depending on the particular indigenous nation's practices), without cross-talk or interruption of the speaker. The speaker often holds a talking piece--traditionally something either from the air (a feather), the earth (a stone), or the water (an abalone shell). While the speaker holds the talking piece, he or she is the only one to speak. Upon finishing his or her thoughts, the speaker passes the talking piece on in the person to the right or left, as decided by the circle keeper (facilitator). There are certain guidelines and protocols to follow, including sharing from the heart; respectful, deep listening; and speaking with the intent of supporting one another, rather than encouraging others to take on a certain viewpoint.

For most indigenous cultures throughout this world, circles play a significant role both in the symbolic realm (including their use in teaching and ceremonies) and the practical domain (through their use in problem solving and as a structure for discussions).

In our cultural teachings as Native people, we understand that circles are a part of the natural order of creation and thus should be an important part of our lives. The circle, often referred to as the Medicine Wheel or sacred hoop, is one of our primary teaching symbols. We are often told that in one lifetime we cannot collect all the teachings that this symbol holds for us. One of the foundational teachings of the Medicine Wheel is that it is divided into four quadrants, making up our being as humans. There are many levels of understanding regarding the teachings found within each quadrant of the Medicine Wheel, though only one level will be discussed in this article.

On one level, the first quadrant is the spiritual aspect of our being, the second is the emotional, the third is the physical and the fourth is the intellectual. This is a construct that is very helpful in dealing with conflict. Another basic foundational reaching of the Medicine Wheel is the interconnectedness of all things. It holds that even one thing that happened long ago has a continuing impact on many other areas of a person's life. Those in the restorative justice field can see the evidence if this connection in hearing the "hows" and "whys" behind crimes and the importance of addressing those seemingly insignificant factors in order in to promote holistic healing.

In teaching our class, my wife and I use the four-stage circle approach and rely on its wisdom to better get our point across. This approach is the foundation of aboriginal restorative justice, as well as the basis for the educational experience in the class setting. Our first stage in the course is to set the tone by explaining the protocol of the class and discussing the model of learning, which is very different from the western European style of education.

We must understand the relationship of things that may have happened years ago and their bearing on why we are dealing with the present conflict.

We remind the students that we are all sacred beings and that we all must have a respectful way of treating each other. Since some of the students have been raised with the teachings of the Lakota culture, we are able to blow the dust off these teachings and hold them up to encourage the students to respect one another. This is a direct correlation to the first quadrant of the medicine wheel--the spiritual. The teachings and talking circles used in the class parallel the use of the circle process for dealing with a victim/ offender situation. At this point in the aboriginal restorative justice model, the tone and mood of the process are established.

The second step uses the emotional quadrant of the Medicine Wheel. In the course we could call this developing relationships. We need to learn about the people in the circle by sharing our personal stories: who we are, our hopes and our frustrations and needs. We remain in the emotional quadrant to talk about the ways in which we deal with various kinds of conflict. Mediators may recognize this as the part of the circle process when we listen to the story of the incident and how it has affected each one of us.

The third aspect of our being through the construct of the Medicine Wheel is the physical realm. This is highly important and one area that I think our current justice system chooses to ignore. This is the time in the restorative justice process when we step back from the incident and look at the big picture. In order to do that we must know all the facts, stories and feelings surrounding the issue. We must understand the relationship of things that may have happened years ago and their bearing on why we are dealing with the present conflict. It allows us to see that we are not alone, but are somehow all connected. Our actions have a greater bearing on a larger community than we may have thought. In our class, we take a good look at our history as Native people and try to put some language to the cumulative oppression that we have faced for over five hundred years. We call this "historical oppression." We also examine the concept of racism and white privilege to further this understanding.

We are finding that we can be a part of reestablishing the old way of healing justice and, as a result, excitement and hope is building for this Lakota Nation.

The last quadrant of the Medicine Wheel teaching is the intellectual. This is the time in the healing process of restorative justice when we focus on what we can do to help make things right again in light of all that we have heard and learned. We put our thoughts together to come up with a workable plan. In our class this is when we examine programs and processes in the restorative justice field. We spend most of our time studying and discussing programs with a distinct indigenous flavor and compare them to our own cultural understandings and teachings. We then come up with a class project that will provide a practical application of justice as healing that is appropriate for our community, while enhancing our understanding of restorative justice.

It is a common thread of wisdom through all cultures and teachings that we grow from our mistakes. If conflict is handled in a "good way" it promotes healing and reestablishes harmony within a community. Long before contact with white Europeans, we as Native people understood this and would use the circle process in dealing with our conflict. Sadly, because of contact and the subsequent tearing down of our way of life, we have lost much of our indigenous way of working through conflict. Today, for the most part, we still depend on the adversarial style of the dominant society to deal with our problems. We are finding that we can be a part of reestablishing the old way of healing justice and, as a result, excitement and hope is building for this Lakota Nation. We are observing and interacting with people from other indigenous nations who have reinstated their cultural customary practices of holistic ways of dealing with conflict. We are learning from them.

It seems that the time is ripe for the application of aboriginal restorative justice methods here on the Pine Ridge Reservation. Schools are asking for help in establishing traditional ways to deal with conflict. The courts, public safety commission and the medical system are working together to find alternatives to deal with problems and crime. More and more people are recognizing the value of using the circle process in dealing with conflict on many levels. My personal point of view is that it restores pride in individuals and our nation when we can claim that this process has been ours all along, that it was taken from us and that now we have the opportunity to restore it.

Through my training, research, mediations, teaching and interactions with both indigenous people and people from the dominant culture, I understand that we as Lakota people used this method long before contact with white people. It provided for a fairly harmonious social society. For a time, I didn't understand how we could go back to a system that depended on a constant reinforcement of ethics and morals that we once used on a daily basis, since that system is now in tatters. For five hundred years, indigenous people have faced oppression at the hands of people of white European descent, forcing us to live under their value system and laws. The understanding that I have now is that working through this conflict and dealing with it in a way that is culturally appropriate using the circle and the teachings of the Medicine Wheel, we will reestablish the ethics and morals that we once had. We need to be able to take matters into our own hands and go back to our old ways of justice, which have always been restorative.

5.10 The Criminal Justice System: Significant Challenges – 2002 [14]

- **Issues relating to significant groups: Aboriginal peoples**. In 1996, the last year for which consistent data are available, about 2.8 percent of the Canadian population identified themselves as Aboriginal people.
    - In April 2000 a report was prepared for the Department of Justice on the overrepresentation of Aboriginal peoples in the justice system.
    - The report indicated that in 1996, 17 percent of inmates in adult provincial and territorial correctional facilities and in federal facilities identified themselves as Aboriginal people.
    - About 50 percent of the 5,100 inmates of provincial adult institutions in the Prairie provinces were Aboriginal people.
- The relationship between Aboriginal peoples and the Canadian criminal justice system has been the subject of several public inquiries.
    - According to the Department of Justice, these inquiries have found that the conventional justice system has not adequately met the needs of Aboriginal peoples.
    - The inquiries have recommended that Aboriginal communities have the opportunity to assume greater responsibility for a number of justice programs and processes.
- **Reshaping the criminal justice system:** Governments are reshaping the criminal justice system to respond to the many challenges.
    - They are changing their present programs for youth, Aboriginal peoples, and women.
    - They are funding crime prevention and community safety programs, restorative justice initiatives, diversion programs, and victims' programs.
    - They are developing new kinds of courts.
    - There is not enough information to determine how these many changes interrelate and how they affect the system as a whole.
- **Approaches to justice for Aboriginal peoples.** As youth justice is changing, other changes are slowly increasing Aboriginal peoples' responsibility for delivering Aboriginal justice.
    - The federal government has a number of Aboriginal justice initiatives, including the following:
    - Legislation has authorized Correctional Service Canada to enter agreements with Aboriginal communities to provide correctional services, and to transfer offenders to the care and custody of an Aboriginal community with their consent and the community's.
    - Aboriginal spirituality and Elders have been given official recognition.
    - An Aboriginal Justice Initiative was allocated $22.4 million from 1991 to 1996.
    - An Aboriginal Justice Strategy spent about $29 million from 1996-97 to 2000-01 and was allocated about $6.4 million in 2001-02.

[14] Office of the Auditor General of Canada, The Criminal Justice System: Significant Challenges, Chapter 4, April 2002, http://www.oag-bvg.gc.ca/domino/reports.nsf/html/0204ce.html

- The RCMP holds community justice forums.
- An Aboriginal Community Corrections Initiative was allocated about $2 million from 1996-97 to 2000-01.
- The First Nations Policing Program spent about $285 million between 1992-93 and 2000-01.
- The Native Courtworkers Program, a federal-provincial-territorial cost shared initiative, has spent a total of about $250 million since 1973-74, including a federal contribution of about $82 million.
- The National Parole Board uses Native Elders at Board hearings to help ensure that Aboriginal cultures are respected.
- Together, the goals of these programs include empowering Aboriginal communities to take more responsibility for administering justice; reducing crime and incarceration; and developing community-based restorative justice programs and capacities for post-sentencing supervision.
- The government also has several broader initiatives that will ultimately establish the overall framework for the governance of justice for Aboriginal peoples.
    - The 1995 federal government approach to inherent rights and the negotiation of self-government covers the administration and enforcement of Aboriginal laws, including the establishment of Aboriginal courts or tribunals, the establishment of offences normally created by local and regional governments, and policing.
    - In response to the Royal Commission on Aboriginal Peoples, in 1998 the government published *Gathering Strength: Canada's Aboriginal Action Plan.*
        - The plan indicated that the government would continue to discuss Aboriginal justice issues.
        - This included, for example, developing Aboriginal capacity to manage community-based justice, developing alternatives to the formal justice system, providing effective police services that are accountable to the community, and carrying out crime prevention programs.
- The government has also established the position of federal interlocutor, with authority to negotiate with Métis south of the 60th parallel and with non-status Indians.

5.11 Crime & Custom - 2001[15]

During the past decade, restorative justice models have been widely proposed as potentially effective strategies to deal with the array of socially and culturally problematic situations confronted by Aboriginal communities.

As a result, restorative justice practices are currently being employed in many Native communities for a wide range of criminal behaviours. Restorative justice has been posited as a conceptualization of justice that is most congruent with the historically embedded cultural and communal values of Aboriginal peoples.

Nonetheless, I contend that several challenges are evident in the effective implementation of restorative justice within Aboriginal communities.

[15] Kate J. Burkhardt, Crime & Custom, April 12, 2001.
http://www.broadviewpress.com/writing/PdfFiles/Burkhardt_Justice.pdf

Amongst such obstacles, I claim that restorative justice necessitates implementation as Aboriginal justice originally intended, instead of as a conceptualization of White orientalists.

In my view, the tendency to utilize uniform restorative justice strategies depreciates and overlooks the heterogeneity of identities and experiences amongst Native populations.

I contend that it is integral to acknowledge the distinctions between Aboriginal peoples. I also argue that it is imperative to confront the differences between restorative and contemporary justice philosophies, regarding offenders, nature of crime, conflict resolution and sanctioning, in order to ensure that restorative justice can perform in practice what supporters claim are its capabilities in theory.

Furthermore, restorative justice practices must be tailored to best facilitate the objectives of individual Native communities, based upon their cultural, political, and economic realities. When considering the potential efficacy of restorative justice within criminal and civil cases,

I assert that research must utilize knowledge gathered directly from the Native peoples involved, specifically through the use of narratives. Of greatest importance, the mechanisms of process, which ensure protection of victims' rights, offenders' willing participation, and cultural reintegration, need to be targeted.

Therefore, I conclude that Aboriginal direction and representation in empirical research is essential to ensure the culturally appropriate use of restorative justice practices in Aboriginal communities.

The Development of Restorative Justice Models
The retributive model of justice is employed throughout Canadian corrections. However, this model has not demonstrated effectiveness in either preventing crime or deterring recidivism, particularly amongst Aboriginal peoples (Griffiths, & Verdun-Jones, 1994)[16].

Both male and female Aboriginal offenders are over-represented across all levels of secured custody. Given the enormity of Native involvement within the Canadian Penal System, a Commission of Aboriginal Peoples was convened to resolve this dilemma (Stenning, 1995).[17] Although the premises of the Aboriginal and contemporary models of justice appeared to be mutually exclusive, integration was determined to be both plausible and necessary. Yet, such a strategy has been tremendously difficult to conceptualize and design. The proposed model was to be constrained within the existing Canadian Criminal Code framework, while concurrently addressing the unique and far-reaching justice needs of Aboriginal communities. Restorative justice models were believed to be most capable of meeting this objective.

Restorative justice initiatives are founded upon three key principles: (1.) criminal justice processes should seek reparation of damage and injuries to victims, communities, and offenders; (2.) victims, communities, offenders, and government should have involvement in criminal justice processes; and (3.) the government is responsible for preserving order, whereas the community is responsible for establishing peace[18] (Van Ness, 1990).

Restorative justice practices currently utilized within Aboriginal communities include victim-offender mediation, family group conferencing, sentencing circles, community reparation boards, victim impact statements, and restitution programs. It is important to note that each of these programs differs regarding objectives, adherence to Canadian Criminal Code regulations, empowerment of community, and degree to which the behaviour and incident in question are targeted (Griffiths, 1999)[19]. Frequently, the processes of such strategies are not elucidated, resulting in ambiguous and convoluted conceptualizations about how to appropriately employ restorative justice within Aboriginal communities. Furthermore, the development and understanding of restorative justice within their communities was largely removed from Aboriginal peoples.

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[16] Griffiths, C. T., & Verdun-Jones, S. N. (1994). Canadian Criminal Justice. Toronto, ON: Butterworths.
[17] Stenning, P. C. (1995). Accountability in the Ministry of the Solicitor General of Canada. In P. C. Stenning (Ed.), Accountability for Criminal Justice, (p. 44-73). Toronto, ON: University of Toronto Press.
[18] Van Ness, D. W. (1990). Restorative justice. In B. Galaway, & J. Hudson (Eds.), Criminal Justice, Restitution, and Reconciliation, (pp. 15-22). Monsey, NY: Willow Tress Press, Inc. Restorative Justice 21
[19] Griffiths, C. T. (1999). The victims of crime and restorative justice: The Canadian experience. International Review of Victimology, 6, 279-294.

The Orientalism of Restorative Justice

I contend that Aboriginal justice models have been subject to orientalist ideologies. I will demonstrate that orientalism towards Aboriginal customary law has occurred on both basic and complex levels, largely to support White-directed agendas. Notwithstanding the obvious downfalls of the Westernized model of justice, it has been generally agreed upon as the "magnifying lens" through which the efficacy of justice models employed by the "other" may be evaluated and critiqued.

Firstly, I claim that "basic" level conceptualizations of Native justice have been misrepresented. The restoration of peace and normal relations within the community has been identified as central to the premises of Aboriginal traditional justice (LaPrairie, 1998; Hoebel, 1954)[20] [21].

- Customary arrangements of Aboriginal justice were illustrated to have placed priority upon collective rights, democratic processes through group decision-making processes, as well as reintegration within the community.
- Mediation was viewed as integral with commitment devoted towards simultaneous consideration of the needs of the victim, offender, and community[22] (Linn, 1992).
- Of greatest importance, traditional practices sought to empower disputants to seek healing through equality and preservation of relationships. Hoebel (1954)[23] portrays such "primitive" conflict resolution by his suggestion that song duels "mesmerized" the Inuit through the mere artistry of the singing, which in turn caused them to "forget" their disputes. Such depictions convey that First Nation's peoples have experienced utopian and harmonious community arrangements with minimal conflict..

Yet, I contend that although this model appears idealistic, it is not representative and provides a highly romanticized version of actual dispute resolution processes amongst Aboriginal peoples. Native communities do confront conflicts, both externally and internally. Chataway (1997) [24]provides an example of the Kahnawake Mohawk community that has experienced considerable internal conflict, particularly based community members division over adherence to "traditional" or "pragmatic" ideologies [25] (Chataway, 1997).

Furthermore, I argue that on a more intricate level, "we" have orientalized the creation of restorative justice models. Initially, "we" lifted key principles from Aboriginal models of justice to generate and develop restorative justice models. Yet, the acknowledgement of Aboriginal contributions to restorative practices has been provided only through vague indications that restorative justice has its "…roots within Aboriginal traditions" (Roach, 2000).[26] Although the premises of Aboriginal justice closely parallel those of restorative justice models, strategies such as alternative dispute resolution and mediation programming have been proposed as "new" initiatives[27] (Jackson, 1992). Literature has emphasized the development and growth of restorative justice as an "…emerging criminological perspective known as peacekeeping criminology[28] (Sullivan, Tifft, & Cordella, 1998, p. 7)". As a result, the longstanding models of community justice historically embedded within Aboriginal culture have been dismissed and ignored. Credit is not given to the importance of the Aboriginal historical narratives and experiences. Instead authorship, and subsequently "ownership" is given to the Western judicial system. Through diligent research and policy design, contributions of White man are instead recognized as the impetus of restorative justice models, and "we" are allowed to take credit for providing guidance to Native populations.

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[20] LaPrairie, C. (1998). The 'new' justice: Some implications for aboriginal communities. Canadian Journal of Criminology, 61-79.
[21] Hoebel, E. A. (1954). Song duels among the Eskimo. In P. Bohannan (Ed.), (1967). Law and Warfare: Studies in the Anthropology of Conflict (pp.255-262). New York, NY: Natural History Press.
[22] Linn, P. (1992). Report of the Saskatchewan Indian Justice Review Committee. Saskatchewan, CAN: Government of Saskatchewan..Restorative Justice 20
[23] Hoebel, E. A. (1954). Song duels among the Eskimo. In P. Bohannan (Ed.), (1967). Law and Warfare: Studies in the Anthropology of Conflict (pp.255-262). New York, NY: Natural History Press.
[24] Chataway, C. J. (1997). An examination of the constraints on mutual inquiry in a participatory action research project. Journal of Social Issues, 53, 747-765.
[25] Chataway, C. J. (1997). An examination of the constraints on mutual inquiry in a participatory action research project. Journal of Social Issues, 53, 747-765.
[26] Roach, K. (2000). Changing punishment at the turn of the century: Restorative justice on the rise. Canadian Journal of Criminology, 42, 249-280.
[27] Jackson, M. (1992). In search of the pathways to justice: Alternative dispute resolution in Aboriginal communities. Law Review: University of British Columbia (Special Edition), (147-238).
[28] Sullivan, D., Tifft, L., & Cordella, P. (1998). The phenomenon of restorative justice: Some introductory remarks. Contemporary Justice Review, 1, (7-20).

Yet, I reassert that restorative justice is simply a reformulation of Aboriginal justice practices with a Westernized manipulation to key tenets.

I suggest that largely as a consequence of the White man's role in developing restorative justice, these models are assumed to be superior to Aboriginal customary law.

Through the use of terminology that depicts restorative justice as a conception of White man's intellect, "our" initiatives are viewed as integral in solving crime-related problems of the "other". The process of delivering justice to Aboriginal communities is, thereby, orientalized on a deeper level. Further subordination is engendered in Native peoples. "We" are effectively appropriating responsibility from Aboriginal peoples to locate solutions for "their" deep-seated issues. Yet, I contend that such socially problematic situations have largely been a creation of colonization, and modernization processes imposed by White people.

Ultimately, the intrusion of the "Western" life world upon Native populations has exacerbated their difficulties through cultural alienation and identity loss. I firmly believe that Native peoples should be facilitated to utilize their knowledge and cultural heritage to solve these problems. Through the further imposition of "our" justice, "we" are again interfering with Native realities. Ironically, the restorative justice model had been hoped to empower Aboriginal peoples to locate their own remedies for socio-cultural obstacles.

In the introduction of restorative justice within Aboriginal communities, I suggest it is absolutely imperative to acknowledge the distinct identities of First Nation's peoples.

Although restorative justice initiatives provide hopeful alternatives to contemporary justice processes, First Nation's peoples have expressed considerable concern regarding its use. The resultant controversy amongst Aboriginal communities has focused upon issues related to cultural heterogeneity that would affect the appropriate implementation, traditional congruency, as well as the overall utility of restorative justice practices[29] (Tracy, 1998).

I contend that to ensure restorative justice processes are effectively applied with Native peoples, community dynamics such as population, location, traditional heritage, and residents' relationships must be taken into consideration[30] (Barsh, 1995). Assuming spurious unity. amongst Native peoples, such as the Inuit, Dene, Blackfoot, Métis, and Iroquois, negates the uniqueness of their lived experiences. As indicated by Monture and Turpel (1992), [31]"What must be remembered as we begin to face this new challenge together is that the shape of the answer is not singular (p. 243)". The diversity of culture, geography and social experience of all Aboriginal peoples should be attended to in the development and implementation of restorative justice within each individual community. Power must be given back to Aboriginal peoples to determine how restorative justice needs to be implemented to best fit within the Canadian Code framework.

Philosophies Regarding Crime and Justice

In my view, the integration of restorative and contemporary justice models is complicated by the disparity between the philosophies each posits regarding the offender and nature of crime, as well as conflict resolution and sanctioning. The contemporary model of justice considers the offender and the nature of crime as extrinsically intertwined, in which they are, in essence, one in the same (Stenning, 1995)[32]. The offender is a "criminal" labeled with the crime he committed, for example as a "rapist", or a "murderer". This terminology is inseparable from his person. In restorative justice models, the crime is viewed as external to the offender's identity. The offender is a part of a holistic life model, in which the crime is only a subcomponent[33] (Bopp, & Bopp, 1997). For Aboriginal offenders this life model may involve culturally specific dynamics including losses

[29] Tracy, C. (1998). Associate editor's editorial: The promises and perils of restorative justice. International Journal of Offender Therapy and Comparative Criminology, 42, 275-277.
[30] Barsh, R. (1995). Aboriginal peoples and the justice system: Report of the national roundtable on Aboriginal justice issues (Book Review). Great Plains Research, 359-362.
[31] Monture-Okanee, P. A., & Turpel, M. E. (1992). Aboriginal peoples and Canadian Criminal law: Rethinking justice. Law Review: University of British Columbia (Special Edition), (239-279).
[32] Stenning, P. C. (1995). Accountability in the Ministry of the Solicitor General of Canada. In P. C. Stenning (Ed.), Accountability for Criminal Justice, (p. 44-73). Toronto, ON: University of Toronto Press.
[33] Bopp, J., & Bopp, M. (1997). Responding to Sexual Abuse: Developing a Community-based Sexual Abuse Response Team in Aboriginal Communities. Ottawa, ON: Solicitor General of Canada.

of language, traditions, as well as community and family connections. Other integral aspects of Aboriginal experiences may interplay, such as addictions (i.e., alcohol), identity confusion, low self-esteem, racism, alienation from societal institutions, and unresolved grief. Thus, the offender is believed to be a malleable entity, capable of change, whereas the nature of crime he committed is perceived to be a symptom of environmental difficulties. Restorative justice seeks to elucidate the offender's disadvantaged status, particularly for the purposes of sentencing. In the contemporary justice system, such societal difficulties are recognized; however, little consideration is given to these variables in sentencing procedures. Moreover, the input of the offender is not valued within the courtroom environment. Little credence is granted to the offender's ability to recognize the value of or his need for treatment. Conversely, restorative justice models hold that the offender is an equal participant within the justice process. He is expected to contribute to and co-operate in the determination of a rehabilitation strategy that is appropriate for him.

Differing objectives regarding conflict resolution, in my view, further challenge the ability of restorative justice models to exist within the Euro-Canadian judicial framework.

The contemporary model of justice is a punitive model, which emphasizes the need for retribution and vengeance (Donahue, 1997; Ross 1996).[34] [35]The restorative justice model, as employed within Aboriginal communities, directly opposes this directive of conflict resolution. Restorative justice seeks to utilize the experience of crime to foster the reestablishment of relationships and restore harmonious arrangements within settlements. In the contemporary model, the role of the state, through policing, court processes, and corrections, is paramount in the determination of what constitutes crime and appropriate punishment.

Responsibility for criminal activity is removed from the state and society. The individual offender is exclusively culpable for their actions. Thus, the offender's community and/or social support system have minimal involvement in this process. Restorative justice, instead, seeks to shift the responsibility for resolving conflict from the state to the community, at the level of collective entity. Community, as such, is not simply a geographic location composed of people living within the same vicinity. Instead, community as defined by restorative justice within an Aboriginal framework, is "people", who are each believed to play an integral role in restorative processes (Stuart, 1997).

From my perspective, sanctions serve tremendously different functions according to the philosophies of restorative and contemporary justice. Within the Euro-Canadian model of justice, sanctions are punitive, including imprisonment, conditional orders, fines, and community service work. The restorative justice model purports that sanctions should serve a healing function, and thus are largely based upon community disappointment and disapproval instead of formalized punishment (Stuart, 1997). Sanctions are used to promote reintegration through informal practices, such as support circles. In the contemporary system, compliance to sentencing is ensured through strategies that infringe upon the offender's customary freedoms. The offender's behaviour is monitored and controlled by the correctional system.

Even upon release from custody the offender is obligated to adhere to certain conditions, which if contravened could result in breach charges and re-incarceration. Success is measured by low rates of recidivism. Alternatively, in restorative justice models, the offender's rehabilitation is gauged by their co-operation with support teams and community circles. Treatment is evaluated to be successful if the offender is reintegrated into his family and community.

I contend that the discrepancy between sanctioning objectives may entice first-time offenders to participate in restorative justice measures, which are perceived to demonstrate greater leniency and compassion towards the offender[36] (Griffiths, & Hamilton, 1996). If the offender does not comply with the circle's suggestions and assistance, he risks subsequent prosecution for the offences he committed within the contemporary court process.

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[34] Donahue, B. (1997). The third solitude: Making a place for Aboriginal Justice. Canadian Journal of Native Studies, 17, 315-328.
[35] Ross, R. (1996). Return to the Teachings. Toronto, ON: Penguin Books.
[36] Griffiths, C. T., & Hamilton, R. (1996). Sanctioning and healing: Restorative justice in Canadian Aboriginal communities. In B. Galaway, & J. Hudson (Eds.), Restorative Justice: International Perspectives, (pp. 175-192). Monsey, NY: Criminal Justice Press

Punishment for such crimes may be even lengthier than the sentence that would have been meted out through contemporary practices. Thus, I would argue that the restorative justice model may partially rely upon the threat of imposing regulations from the contemporary system, as formalized punishment is likely if the offender recidivates. At this level, the increased state control of healing circles and family conferencing promoted through restorative justice practices may ultimately act as a net-widening mechanism (Roach, 2000)[37].

Cultural, Political, and Economic Forces

I argue that not only do differing philosophies regarding crime and justice impede upon the effective implementation of restorative justice, but the interplay between cultural, political and economic forces also has a substantial impact.

Firstly, the dynamics of culture and community have been identified as factors that may interfere with the appropriateness and efficacy of restorative justice practices (Griffiths, 1999)[38]. Specifically, restorative models may permit offenders to avoid criminal convictions and lengthy sentences for serious crimes. When the accused is a community leader (i.e., Chief, Elder, and/or political representative) the community may hold a vested interest in reserving the reputation of this individual. A poignant example is provided through the case of an Inuit Member of the Legislative Assembly who was charged with sexual assault (Nunatsiaq News, 2000).[39] The individual was granted impunity through restorative measures upon entering a guilty plea.

However, his community actively encouraged him not to resign from his position in Parliament and instead ostracized his victim. Aboriginal communities have led a tumultuous existence in recent decades. Thus, incidents that could jeopardize the stability of the community, with particular reference to sexual and domestic assault, are perceived by many residents to be best resolved as unobtrusively as possible. The alternative measures provided through restorative justice practices could facilitate this objective, yet may substantially inhibit victims' needs for protection and closure regarding experiences of abuse. Furthermore, communities would remain in danger of additional harm, as the offender is free within the community.

Furthermore, cultural narratives of Native histories suggest that incidents of domestic and sexual violence were exceptionally rare. Yet, I would suggest that the validity of such claims is questionable and may be a consequence of historical distortions that minimize the experiences of women. In studies that investigated the incidence of practices such as "wife discipline" and "wife trading" the narratives depicted by Elder females of many Native communities have contradicted the infrequency of these sexist behaviours[40] (Griffiths, Zellerer, Wood, & Saville, 1995).

I contend that through the implementation of restorative justice, the occurrence of assaultive behaviour towards women may be further concealed or obscured within Aboriginal communities.

Secondly, I assert that legislative and political forces have imposed culturally-inappropriate restorative justice initiatives upon Aboriginal populations. Historically, the federal, provincial, and territorial governments have classified indigenous people as "dependent" (Griffiths, & Patenaude, 1990)[41]. Thus, the government assumed control for the initiation, design, funding, and support of community corrections programming, particularly upon Aboriginal reserves.

The state's commitment was chiefly concentrated upon delivering contemporary justice practices to Native populations instead of fostering the use of Aboriginal models of justice. As it became increasingly apparent that Westernized justice could not meet the needs of Aboriginal peoples, the government relinquished control for the development of justice initiatives to Aboriginal communities. Specifically, the government sought guidance from Aboriginal peoples about how to effectively create and implement restorative justice models. However, in

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[37] Roach, K. (2000). Changing punishment at the turn of the century: Restorative justice on the rise. Canadian Journal of Criminology, 42, 249-280.
[38] Griffiths, C. T. (1999). The victims of crime and restorative justice: The Canadian experience. International Review of Victimology, 6, 279-294.
[39] Nunatsiaq News. (2000). M.L.A. Convicted of Sex-Related Offence. Iqaluit, NT.
[40] Griffiths, C. T., Zellerer, E., Wood, D. S., & Saville, G. (1995). Crime, Law, and Justice Among Inuit in the Baffin Region, NWT, Canada. Burnaby, BC: Criminology Research Centre.
[41] Griffiths, C. T., & Patenaude, A. L. (1990). The use of community service order and restitution in the Canadian North: The prospects and problems of 'localized' corrections. In B. Galaway, & J. Hudson (Eds.), Criminal Justice, Restitution, and Reconciliation, (pp. 145-153). Monsey, NY: Willow Tress Press, Inc.

reality, Native community residents were rarely consulted, and thus, the resultant programming was largely culturally-inappropriate. The unique, symbolically-understood mechanisms of conflict resolution and healing practiced within each distinct First Nation's society were neglected. Furthermore, Aboriginal peoples had been provided with an illusory perception of autonomy. Through encouraging First Nations' attempts to implement a justice model that would best meet their needs and then usurping their efforts, the government instilled further intolerance towards Aboriginal responsibility for cultural reintegration and self-government.

Thirdly, I suggest that economic factors have a strongly negative influence upon the implementation of restorative justice programming in Aboriginal communities. Restorative justice practices frequently promote community work projects; however, the economic reality for many Aboriginal reservations suggests that there is already insufficient work available to support the employable sector of the general public[42] (LaPrairie, 1995).

Thus, the employment base of many reserves could not support the amount of community service work necessitated for Native offenders to fulfill their sentencing obligations. Furthermore, a significant proportion of Aboriginal peoples live in extreme poverty [43](Frideres, 1998). As such, financial resources available to the community are often allocated to community development projects associated with education, health care, and recreation, instead of to reformulate correctional strategies. Based upon economic realities of Aboriginal communities, I would suspect that the implementation of restorative justice would not achieve priority status.

Utility of Restorative Justice Models

- When evaluating the potential utility of restorative justice models within the Aboriginal reserve setting, as well as more broadly in Canadian civil and criminal court proceedings I conclude that a number of dilemmas are evident.
    - These obstacles include the loss of "traditional" community dynamics, offender coercion into participation, and risk of secondary harm to victims. Although restorative justice initiatives emphasize the link between offender, victim and community, I contend that many Aboriginal communities may lack the dynamics necessary to mobilize this directive.
    - Jackson (1992) [44]suggests that there has been a dramatic breakdown in the use of spirituality and teachings of Elders and community leaders to resolve conflict in the processes of restoration and healing. Cultural disintegration and identity confusion have been pervasive in Aboriginal societies throughout recent decades.
    - Thus, I would argue that the segregation between age cohorts has grown within Native communities. Youth are often caught in cultural and societal "limbo", and thereby, unfamiliar with or resistant to practice the ways of traditional Native societies. Elders, conversely, may have difficulty understanding the current pressures and conflicts faced by young members of Aboriginal communities.
    - Therefore, the strength of community required for restorative justice to work may be absent.

- Secondly, I argue that Native offenders' voluntary participation in victim-offender mediation may be questionable[45] (Pate, 1990).
    - If offenders refuse to participate in meeting with the victim, they are likely to face criminal charges in formal court processes.
    - Court sentencing may cause the Aboriginal offender to be removed from his home community and transported to a secured correctional facility in another region.
    - Furthermore, sentencing may be harsher away from the reserve setting. I would suggest that many offenders find it more desirable to remain within restorative justice models, which are both conducted near the offender's home and thought to provide greater leniency with regards to sentencing.
    - Thus, coercion and perceived threat to personal freedom may be fundamental in Native offenders' agreement to adhere to restorative justice models.

[42] LaPrairie, C. (1995). Aboriginal communities and justice. Revue Canadienne de Criminologie, 37, 521-545.
[43] Frideres, J. S. (1998). Aboriginal Peoples in Canada: Contemporary Conflicts (5 th Edition). Scarborough, ON: Prentice Hall, Allyn and Bacon Canada.
[44] Jackson, M. (1992). In search of the pathways to justice: Alternative dispute resolution in Aboriginal communities. Law Review: University of British Columbia (Special Edition), (147-238).
[45] Pate, K. (1990). Victim-Young Offender reconciliation as alternative measures program in Canada. In B. Galaway, & J. Hudson (Eds.), Criminal Justice, Restitution, and Reconciliation, (pp. 135-144). Monsey, NY: Willow Tress Press, Inc.

  - This may cause situations in which offenders meet with their victim even when they are not truly remorseful for the crime they committed.
  - Ideally, within the premises of restorative justice, the offender should be an apologetic and accountable individual, who is prepared to receive help for their behaviour; however, this is not always the case[46] (Stuart, 1997).
  - Unfortunately, there does not appear to be a safeguard with which to resolve the difficulty of offender dishonesty.
    - Ultimately, through the use of restorative justice practices, offenders' self-serving needs may be met, while victims may be further jeopardized.

- Thirdly, I have tremendous concern that restorative justice in Aboriginal communities tends to overlook the effective delivery of justice to victims by placing emphasis upon the treatment needs of offenders (Griffiths, & Bazemore, 1999).
  - Amongst such difficulties, I argue that the lack of attention devoted to the protection and support needs of victims is paramount, particularly when considering issues of secondary harm (Zellerer, 1999).

- Literature regarding the use of restorative justice within the domain of spousal and sexual assault has documented that victims frequently endure re-victimization and further vulnerability.
  - Although such trends are evident throughout the general population, I note that the salience of these factors is particularly pronounced within Aboriginal communities, where isolation, community-relatedness, and ostracization are central issues.
  - Women have often held a subordinate role within Aboriginal society[47] (Frideres, 1998). Notwithstanding the fact that some Aboriginal groupings were based upon matrilineal tradition, women were typically restricted to roles pertaining to the care of the children and keeping of the home.
  - Women's concerns were expressed within the "private" domain, whereas their husbands expressed views in the "public" forum.
  - Only recently have issues of sexual and familial abuse become elucidated by women in Aboriginal communities.
  - Yet, restorative justice practices may impede disclosure.

I maintain that the difficulties faced by the victim, pertaining to restorative justice, may include stigmatization, protection of the offender, fears for personal safety, and experience of secondary harm through reconciliatory programming[48] (Zellerer, 1999).

In the Hollow Water community restorative justice project victims were forced to disclose their story of abuse or violation in front of a community panel, even though several women indicated they would have preferred that the case had been heard at the court level[49] (Lajeunesse, 1993).

Recollecting the abuse incident before family and friends in this situation was tremendously humiliating for the victims. As well, community pressures, particularly from the family of the accused, may be applied to deter disclosure or persuade greater leniency at sentencing circle conferences. I have witnessed intra- and inter-familial pressures being exerted upon women at Qimaavik Women's Shelter in Iqaluit, Nunavut. These pressures often result in the intimidation or ostracization of victims from their family and community. Furthermore, reconciliatory programs, such as victim-offender mediation and sentencing circles, typically necessitate the victims' participation [50](Brookes, 1998). Many victims may be unprepared to deal with the

[46] Stuart, B. (1997). Building Community Justice Partnerships: Community Peacemaking Circles. Ottawa, ON: Minister of Public Works and Government Services of Canada.
[47] Frideres, J. S. (1998). Aboriginal Peoples in Canada: Contemporary Conflicts (5 th Edition).Scarborough, ON: Prentice Hall, Allyn and Bacon Canada.
[48] Zellerer, E. (1999). Restorative justice in indigenous communities: Critical issues in confronting violence against women. School of Criminology and Criminal Justice,
[49] Lajeunesse, T. (1993). Community Holistic Circle Healing: Hollow Water First Nation: Aboriginal Peoples Collection. Ottawa, ON: Solicitor General of Canada.
[50] Brookes, D. R. (1998). Evaluating restorative justice programs. Humanity and Society, 22, 23-37.

trauma associated with the direct confrontation of their offender. However, formal and informal pressures alike may be employed to coerce the victim to cooperate with restorative justice practices.

Crnkovich (1995)[51] reported that the judge had "suggested" the victim's participation in a support group with her abusive husband on a weekly basis. Within many Aboriginal communities the respect for and fear demonstrated towards court officials would render the judge's "suggestion" akin to a court order. In such a situation, many victims would comply with restorative justice proceedings. Yet, in reality this could jeopardize their safety, as their abuser would still be free within the community and might even be urged to return home with her.

- There is a paucity of research regarding the efficacy of restorative justice programming [52](Griffiths, & Bazemore, 1999). However, findings from a case study regarding a sentencing circle program in the Nunavik region of Quebec found:
    - (a.) a reluctance of victims and participants to speak;
    - (b.) domination of discussion by certain high profile members of the community;
    - (c.) focus of the discussion on the needs of the accused and not the victim;
    - (d.) little information about the circle or preparatory work before it occurred; and
    - (e.) concern regarding adequate representation by all involved community members (LaPrairie, 1998).[53]
- Crnkovich (1995) [54] expressed similar concerns in a report she prepared about an initial meeting of a sentencing circle conducted in Nunavik.

- Moreover, victim's advocates have noted that victims should not be obligated to succumb to the possibility of being "re-victimized" at the hands of their assailant, and community as a result of restorative justice practices.
    - Such findings do not indicate that restorative justice programming is not effective.
    - Instead, I suggest that more detailed and substantive evidence must be identified regarding the development and delivery of restorative justice to Aboriginal communities.

This knowledge should not be imposed, but instead should come from within Native peoples. Information regarding process and implementation of restorative justice, in my view, is located specifically within the cultural and historical narratives of Native individuals.

Only Aboriginal peoples are able to interpret the symbolism and significance of their culturally understood symbols and practices. Through utilizing the knowledge and experience of Aboriginal populations, restorative justice models can be implemented within their communities to directly target their unique situations and needs.

Conclusions

I conclude that restorative justice models provide an innovative, yet historically-embedded perspective through which to conceptualize justice issues faced by Native communities. I would suggest that orientalist practices have denied and minimized the role of Aboriginal peoples in the development of restorative justice.

However, I assert that it is integral to acknowledge the contributions of Native customary law, particularly to address the heterogeneity of Native populations. Furthermore, the divergence of restorative justice philosophies from those of the contemporary model, in my perspective, has provided the opportunity for Native peoples to reintegrate their cultural value systems.

I contend that Aboriginal communities benefit from restorative processes, which directly connect the various social, interpersonal and relational difficulties believed to contribute to the generation of criminality. I conclude

[51] Crnovich, M. (1995). Report on sentencing circles in Nunavik. In Pautuutit Women's Association, Inuit Women and Justice: Progress Report No. One.
[52] Griffiths, C. T., & Bazemore, G. (1999). Introduction to the special issue. International Review of Victimology, 6, 261-263.
[53] LaPrairie, C. (1998). The 'new' justice: Some implications for aboriginal communities. Canadian Journal of Criminology, 61-79.
[54] Crnovich, M. (1995). Report on sentencing circles in Nunavik. In Pautuutit Women's Association, Inuit Women and Justice: Progress Report No. One.

that restorative justice demonstrates tremendous potential for resolving the complex interplay of cultural, political, and economic issues faced by Aboriginal communities.

Although the utility of restorative justice within civil and criminal cases amongst Native peoples is yet unknown, I argue that consideration must be devoted towards the possible negative impacts of such strategies, including the structure of power relationships within the community, specifically between the offender and victim.

I contend that it is essential to develop the structure and process of restorative justice initiatives through communication with Aboriginal populations.

To achieve this end, in my view, the use of Native narratives is central in the effective implementation of restorative justice initiatives within Aboriginal communities.

Only through giving voice to the experience of Aboriginal populations can justice truly meet the needs of their people.

5.12 Aboriginal People And Justice Issues -2000[55]

5.13 Aboriginal Justice Strategy (AJS) Evaluation - 2000[56]

- To receive cost-shared funding, communities were to meet eligibility criteria which include being involved in, or expected to be involved in, self-government negotiations and justice program tripartite negotiations (between provincial/territorial governments, federal government and the Aboriginal community.) For a number of reasons this proved difficult to apply. The reasons are set out below:
  - The part of the AJS that supports the federal government's policy in relation to self-government differs from the project component. Self-government negotiation focuses more on the enforcement and adjudication of Aboriginal laws, while the focus of the project component has been on Aboriginal participation at all levels of the existing justice system.
  - Once a community has expressed interest in initiating self-government negotiations, the decision to commence the process is made at the federal level by DIAND. While DIAND controls which First Nations enter into self-government negotiation process, the province/territories play a large role in determining which projects are funded as AJS funding must be matched by the province/territory.
  - Given that there are only 27 negotiations of self-government that involve the administration of justice, if the criterion of involvement in self-government negotiations was strictly adhered to, relatively few communities would have been eligible for AJS funding of the community justice projects.
  - While there is no direct link between communities engaged in self-government negotiations and the majority of the projects funded through the AJS, the skill sets and tools necessary to develop and administer justice projects provide a foundation for the eventual implementation of the administration of justice provisions in self-government negotiations.
    - In addition, administering and managing the projects provides communities with an increased understanding of the cost, responsibilities, and infrastructure required for similar models proposed for jurisdictional arrangement through self-government negotiations.
    - In this sense, self-government component of the AJS is complementary to the development of sustainable Aboriginal community justice projects and project experience is beneficial preparation for self-government.

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[55] Hon. Murray Sinclair Associate Chief Judge, Manitoba http://www.realjustice.org/Pages/t2000papers/t2000_msinclair.html

[56] Department of Justice Canada, Evaluation Division, Final Evaluation Aboriginal Justice Strategy, Technical Report, October 2000

5.14 Aboriginal Peoples and Justice System- 2000 [57]

Overview

- Over the past thirty years, there have been numerous studies, reports and justice inquiries across the country, and a growing body of statistical information, that confirm that Aboriginal peoples experience disproportionately high rates of crime and victimization, are over-represented in the court and the correctional system, and further, feel a deep alienation from a justice system that is to them foreign and inaccessible, and reflects both overt and systemic racism.
  - And the costs, in both human and fiscal terms, are seen to be not only exorbitant, but also spiraling.
- Through persistent dialogue with various levels of government, Aboriginal communities across Canada have gradually begun to explore the possibility of administering various components of the criminal justice system.
  - This has been a slow process, with the greatest strides achieved over the past two decades.
  - Unfortunately, many problems still exist within the current relationship between Aboriginal offenders and the judicial system.
  - Of principal concern is the disproportionate number of Aboriginal offenders in the justice system and the necessity to find methods to remedy this situation.
- Aboriginal people often experience some of the following problems with respect to the criminal justice system:[xci] [58]
  - Aboriginal accused are more likely to be denied bail;
  - more time is spent in pre-trial detention by Aboriginal people;
  - Aboriginal accused are more likely to be charged with multiple offences, and often for crimes against the system;
  - Aboriginal people are more likely not to have legal representation at court proceedings;
  - Aboriginal clients, especially in northern communities where the court party flies in the day of the hearing, spend less time with their lawyers;
  - as court schedules in remote areas are poorly planned, judges may have limited time to spend in the community;
  - Aboriginal offenders are more than twice as likely to be incarcerated than non-Aboriginal offenders;
  - Aboriginal Elders, who are also spiritual leaders, are not given the same status as prison priests and chaplains, in all institutions, and
  - Aboriginal people often plead guilty because they are intimidated by the court and simply want to get the proceedings over with.[xcii] [59]
- Criminologists Mary Hyde and Carol LaPrairie discovered that Aboriginal crime is very different from non-Aboriginal crime.
  - Their study found a higher proportion of violent and social disorder offences were committed by Aboriginal than non-Aboriginal offenders.
  - Fewer property offences and almost no crimes for profit, such as drug trafficking, fraud, and armed robberies, were committed by Aboriginal people.
  - Petty offences constitute the majority of Aboriginal crime and, of the violent crimes committed, a high proportion (a minimum of 41.4%) were directed against family members.[xciii] [60]
- A study of Aboriginal admissions to provincial correctional centres revealed that 50% of the offences committed by these offenders were alcohol-related.

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[57] Canadian Criminal Justice Association, Aboriginal Peoples and Justice System A special issue of the Bulletin Ottawa, May 15, 2000 http://home.istar.ca/~ccja/angl/abori.html

[58] R. Shillington, «Estimates of the Extent of Child Poverty: Census 1986» cited in Aitken and Mitchell, «The Relationship between Poverty and Child Health» as cited in the Report of the Royal Commission on Aboriginal Peoples, supra note 20 at 167.

[59] [xcii]Op. cit., p. 171.

[60] Report of the Royal Commission on Aboriginal Peoples, vol. 3, supra note 20 at 167.

- Only 10% of crimes committed by all Aboriginal offenders were against persons, with the majority of these being against other Aboriginal people.

- These trends indicate that Aboriginal offenders are incarcerated in the provincial correctional system for minor infractions and reflect social, rather than criminal, problems.

Disproportionate Levels of Aboriginal Incarceration

- Canada's criminal justice system is rooted in a strong reliance on incarceration and, as a result, Canada is placed among the highest users of imprisonment in the world.
- Despite declining levels of most forms of crime, the Canadian public still supports incarceration and harsh punishment for criminal conduct.
- This emphasis on incarceration as punishment has had a detrimental effect on offenders, particularly Aboriginal offenders, on whom confinement places particularly onerous pressures, given their traditional relationships with the land.
- In addition to the conditions that contribute to crime (poverty, poor education, unemployment, marginalization, substance abuse, sexual abuse and other forms of violence, dysfunctional families etc.) which are particularly prevalent in Aboriginal communities, several other factors contribute to the disproportionate levels of Aboriginal incarceration.
- These include limited rehabilitative options and resources, imprisonment of First Nations people for offences against the system such as fine default, fail to appear, non-compliance with restriction etc., and inadequate funding for community-based, proactive approaches to crime prevention.

- Further, a justice system that is not responsive to the experiences and needs of Aboriginal people also contributes to the high Aboriginal incarceration levels.

Language as a Barrier in the Criminal Justice System

During court proceedings, communication problems can result in an unfair trial for the accused Aboriginal individual. The Canadian criminal justice system conducts proceedings in English or French and this can be a barrier if the accused does not understand the charges, the plea options or the availability of counsel. The following comment was made in a survey on Aboriginal involvement with the law:

"It appears that they have little understanding of their legal rights, of court procedures, or of resources such as legal aid and most Indian people enter guilty pleas because they do not really understand the concept of legal guilt and innocence, or because they are fearful of exercising their rights. In remote areas the Aboriginal people appear confused about the functions of the court, particularly where the Royal Canadian Mounted Police officers also act as Crown prosecutors, or where the magistrates travel about in police aircraft."[xciv] [61]

Although many First Nations people today are educated in English or French speaking schools, for those who do not understand English or French, many problems can arise. The justice system does not provide pamphlets, signs or informational videos in Aboriginal languages and those who speak only Aboriginal languages are not permitted to be jurors. Translation is provided only for the accused and the court party, thus excluding other community members. Problems can also occur when the individual called upon to interpret for the Aboriginal offender is not trained for this task and has limited knowledge of legal concepts.

Aboriginal Values and the Justice System

The divergence between Aboriginal and Euro-Canadian values has also contributed to the high proportion of incarcerated Aboriginal offenders. Many values common to First Nations groups are fundamentally different to the non-Aboriginal justice system.

The following are values common to many Aboriginal communities: [xcv][62]

- desire for community harmony;

[61] Ibid. at 167.
[62] Ibid.

- avoidance of confrontation and adversarial positions;
- preservation of relationships;
- reluctance to show emotions;
- generosity and sharing;
- respect for others and individual freedom (non-interference);
- teaching through example (non-interference and conflict avoidance values), and
- respect for life (human and otherwise).

Aboriginal peoples have traditionally used ridicule, avoidance, shaming and teasing to maintain order and community harmony. Historically, measures such as banishment and the death sentence were resorted to only where the actions of an individual had placed the survival of the community at risk.

In his article "Justice and Aboriginal People", James Dumont contrasts Aboriginal values with non-Aboriginal values: [xcvi][63]

Aboriginal Values	***Non-Aboriginal Values***
Get along with group (conformity)	Get ahead, or on top of the group
Get ahead for the group	Get ahead for oneself
Focuses on the present	Focuses on the future
Does not show fear when faced with difficult situations	Does not always face difficult situations with an impassive face
Uses nature and maintains reverence for it (has respect for and a relationship with the land)	Uses nature for personal
Awareness of the Creator	Spirituality is often in the background of one's life
Acts of religion are spontaneous and can occur at any time	Religion is compartmentalized (eg. Religious acts are restricted to certain days of the week)

Conflicts arise when Aboriginal values mix with the Canadian justice system. In many Aboriginal communities it is unacceptable to express emotions such as anger, grief or sorrow. According to Rupert Ross, in his book, *Dancing with a Ghost*, this tendency to put forward an emotionless front may be traced back in history when the survival of an Aboriginal community depended on the suppression of any emotions which could potentially threaten the family, tribe or clan. Ross, a Crown prosecutor with extensive experience working with Aboriginal people, found that Aboriginal witnesses often described traumatic events in a flat emotionless fashion[64].[xcvii] This tendency can often be misunderstood by the court and by psychiatrists responsible for writing psychiatric assessments of offenders. As Ross indicates, many of the assessments indicate that Aboriginal offenders are "Unresponsive", "uncommunicative", and "uncooperative". [xcviii] [65]

Judge Murray Sinclair notes that the legal concept of innocence/guilt is not granted the same importance by Aboriginal cultures as it is in the Canadian criminal justice system. In Aboriginal communities, guilt is usually secondary to the main issue: the primary concern is that 'something is wrong and it has to be fixed.' Because the main objective is the restoration of harmony rather than the imposition of punishment, the accused is more likely to admit wrongdoing. Judge Sinclair suggests that perhaps this explains why so many Aboriginal people plead guilty when in court[66].[xcix]

The following table demonstrates the conflict between Aboriginal and non-Aboriginal values in a court setting:[c] [67]

Western justice	***Traditional Aboriginal justice***

[63] Ibid. at 174.
[64] [xcvii]Corinne Mount Pleasant-Jette, «Creating a Climate of Confidence: Providing Services Within Aboriginal Communites», in National Round Table on Economic Issues and Resources (Royal Commission on Aboriginal Issues: Ottawa, April 27-29, 1993) at 11.
[65] Ibid.
[66] Ibid. at 12.
[67] Ibid. at 11.

	Western justice	***Traditional Aboriginal justice***
Justice system	-Adversarial	-Non-confrontational
Guilt	-European concept of guilty/not guilty	-No concept of guilty/not guilty
Pleading guilty	-The accused has the right against self-incrimination. Thus, it is not seen as dishonest to plead not guilty when one has actually committed the offence (interference come into play here)	-It is dishonest to plead not guilty if one has committed the crime (values of honesty and non-interference come into play here)
Testifying	-As part of the process, witnesses testify in front of accused	-Reluctance to testify (it is confrontational to testify against the accused while in his/her presence)
Truth	-Expectation to tell the "whole truth"	-It is impossible to know the "whole truth" in any situation
Witnesses	-Only certain people are called to testify in relation to specific subjects	-Everyone is free to give their say. -Witnesses do not want to appear adversarial and often make every attempt to give answers that please counsel, thus often changing their testimony
Eye contact	-Maintaining eye contact conveys that one is being truthful	-In some Aboriginal cultures, maintaining eye contact with a person of authority is a sign of disrespect
Verdict	-Accused is expected to show, during proceedings and upon a verdict of guilty, remorse and a desire for rehabilitation	-Accused must accept what comes to him/her without a show of emotion
Incarceration / probation	-Means of punishing/rehabilitating offender	-Completely absolves Aboriginal offender of responsibility of restitution to victim
Function of justice	-Ensure conformity, punish deviant behaviour and protect society	-Heal the offender -Restore peace and harmony to the community -Reconcile the offender with victim/family that has been wronged -Punishment is not the objective

Aboriginal Youth

Many Aboriginal youth today face numerous obstacles. They live near or below the poverty line, many of their families are dealing with histories of substance, violence and illness, they have limited access to educational or recreational facilities, and they have few employment opportunities. The ensuing hopelessness, despair, and boredom often leads to petty offences and, for some, going to jail can be an escape from a desperate situation.[68ci] As a result, Aboriginal youth face an increasing number of charges and young offenders issues have been of primary focus in recent Canadian criminal justice debates.

Aboriginal youth are faced with a hurdle that non-Aboriginal youth do not encounter: "They must try to adapt to mainstream Canadian society while at the same time attempt to learn and retain their traditional culture."[cii] [69] Further to input from Aboriginal leaders, and consistent with Sections 4 and 69 of the Young Offenders Act, a number of alternative measures programs and Youth Justice Committees were established within Aboriginal communities. These initiatives aim to keep youth out of the court system and firmly rooted in their communities. However, referrals to alternative measures have not been widely used in cases involving Aboriginal young offenders. This can be seen in the results examined by the Cawsey Task Force in Alberta.

[68] [ci]Zimmerman, supra note 42 at 412.
[69] Basic Departmental Data 1993, supra note 32 at 43.

This task force studied youth offenders between the years of 1986 and 1989 and found that only 11.1% of Aboriginal young offenders were referred to the alternative measures program, compared with a 33% referral rate for non-Aboriginal offenders[70].[ciii] In addition, Aboriginal youth offenders spend, on average, longer periods of times in custody than non-Aboriginal young offenders for the same offences.

Aboriginal young offenders living in remote communities often experience:

- difficulties with acquiring legal counsel for trial,
- trial delays due to scheduling and transportation problems of judges, and
- complications in the maintenance of detainment facilities for youth offenders separate from those for adult offenders because of their remote locations.[71][civ]

As a result of these obstacles and the discrepancies in applying alternative measure to Aboriginal youth offenders, Aboriginal communities have been spurred on to take the initiative to implement alternative measure programs as well as Youth Justice Committees to assist their youth.

The *Report of the Royal Commission on Aboriginal Peoples* clearly demonstrated the judicial system has not always been just or fair to First Nations peoples. The federal and provincial governments have recently undertaken a number of initiatives (as discussed in Part V) designed to reduce the number of Aboriginal offenders within correctional facilities. A comprehensive strategy must advanced and implemented in order to deal with the over-representation of Aboriginal inmates in provincial and federal correctional institutions.

Summary

The Canadian criminal justice system is based on Euro-Canadian values and, as a result, often conflicts with Aboriginal values. High levels of incarceration, increased focus from law enforcement, language barriers, conflicting values and conceptual frameworks regarding crime and punishment, as well as particular issues faced by First Nations youth, all contribute to the failure of the criminal justice system to meet the needs of Aboriginal people.

[cii], supra note 5 at 487.

5.15 Restorative Justice in Canada - 2000[72]

Commonalties: Aboriginal Justice and Restorative Justice:

- There is a strong relationship between restorative justice and Aboriginal justice.
- Both philosophies emphasize healing, forgiveness, and active community involvement, and restorative models have drawn heavily upon Aboriginal methods of resolving disputes.
- Furthermore, the rise of restorative justice has been influenced by the activities of Aboriginal groups in Canada, Australia, and New Zealand, as they have called for self-determination and control over the justice systems that affect them.

Aboriginal Concepts of Restorative justice:

- tend to be strongly focussed on the community, with an emphasis on collective well-being rather than individual rights.
- They stress the need to heal relationships between clans or family groupings as well as between the offender and the victim, so that balance may be restored to the community as a whole.
- Aboriginal communities attempt to look at all of the factors leading to an incident, in order to understand the offender as a person and to uncover the causes of their behavior.

Differences: Aboriginal Justice and Restorative Justice:

[70] Pleasant-Jette, supra note 79 at 10.
[71] Frideres
[72] Federal-Provincial-Territorial Working Group on Restorative Justice Restorative Justice in Canada: A Consultation Paper (May 2000) available from the Department of Justice Canada, http://canada.justice.gc.ca/en/ps/voc/rjpap.html

- While these practices overlap with restorative justice in general, there are also important differences, especially because of the link between Aboriginal justice and the desire for self-determination.
- Aboriginal programs may at times draw upon practices from other cultures, but their main concern is to address the unique needs of Aboriginal people using methods that are grounded in their own values and customs.
- General restorative justice programs, on the other hand, need to be sensitive to a range of different communities within Canadian society as a whole.

5.16 Restorative Justice Week – 1999 [73] [74]

Models of Justice in Canada

Criminal Justice System **Old Paradigm: Retributive[75]**	**Criminal Justice System** **+** **Restorative Justice** **New Paradigm: Restorative[76]**	**Aboriginal Law and Justice (Restorative Model)[77]**
Crime defined as violation of the state.	Crime defined as violation of one person by another.	Crime is a violation of one person by another.
Focus on establishing blame, on guilt, on past (did he/she do it?).	Focus on problem solving, on liabilities and obligations, on future (what should be done?).	The focus is on problem solving and restoration of harmony
Adversarial relationships and process normative.	Dialogue and negotiation normative.	Dialogue and process negotiation are normative.
Imposition of pain to punish and deter/prevent.	Restitution as a means of restoring both parties; reconciliation/restoration as a goal.	Restitution and reconciliation are used as a means of restorative.
Justice defined by intent and by process: right rules.	Justice defined as right relationships; judged by the outcome.	
Interpersonal, conflictual nature of crime obscured, repressed; conflict seen as individual vs. state.	Crime recognised as interpersonal conflict; value of conflict recognised.	The holistic context of an offence is taken into consideration, including the holistic context of moral, social, economic, political and religious and considerations.
One social injury replaced by another.	Focus on repair of social injury.	
Community on sideline, represented abstractly by the state.	Community as facilitator, restorative process.	The community acts as a facilitator in the restorative process.
Encouragement of competitive, individualistic values	Encouragement of mutuality.	
Action directed from state to offender:	Victim and offender's roles recognised in	

[73] The Mennonite Central Committee cited in Correctional Services Canada, Restorative Justice Week, 14-21 November 1999, http://www.csc-scc.gc.ca/text/forum/rjweek/guide/guide_e-04.shtml
[74] R.A. Cawsey. Task Force on the Criminal Justice System and Its Impact on the Indian and Metis People of Alberta as cited in Sanctioning and Healing: Restorative Justice in Canadian Aboriginal Communities. 1996 cited in Correctional Services Canada, Restorative Justice Week, 14-21 November 1999, http://www.csc-scc.gc.ca/text/forum/rjweek/guide/guide_e-04.shtml
[75] The Mennonite Central Committee cited in Correctional Services Canada, Restorative Justice Week, 14-21 November 1999, http://www.csc-scc.gc.ca/text/forum/rjweek/guide/guide_e-04.shtml
[76] The Mennonite Central Committee cited in Correctional Services Canada, Restorative Justice Week, 14-21 November 1999, http://www.csc-scc.gc.ca/text/forum/rjweek/guide/guide_e-04.shtml
[77] R.A. Cawsey. Task Force on the Criminal Justice System and Its Impact on the Indian and Metis People of Alberta as cited in Sanctioning and Healing: Restorative Justice in Canadian Aboriginal Communities. 1996 cited in Correctional Services Canada, Restorative Justice Week, 14-21 November 1999, http://www.csc-scc.gc.ca/text/forum/rjweek/guide/guide_e-04.shtml

Criminal Justice System **Old Paradigm: Retributive**[75]	**Criminal Justice System** **+** **Restorative Justice** **New Paradigm: Restorative**[76]	**Aboriginal Law and Justice (Restorative Model)**[77]
- Victim ignored - Offender passive	both problem and solution: - Victim rights/needs recognised - Offender encouraged to take responsibility	
Offender accountability defined as taking punishment.	Offender accountability defined as understanding impact of action and helping decide how to make things right.	The offender is impressed with his/her action on the total order
Offence defined in purely legal terms, devoid of moral, social, economic, political dimensions.	Offence understood in whole context - moral, social, economic, political.	
"Debt" owed to state and society in the abstract	Debts/liability to victim recognised	
Response focused on offender's past behavior	Response focused on harmful consequences of offender's behavior	
Stigma of crime unremovable	Stigma of crime removable through restorative action	Stigma of offences is removable through conformity
No encouragement for repentance and forgiveness	Possibilities for repentance and forgiveness	Remorse, repentance and forgiveness are important factors.
Dependence upon proxy professionals	Direct involvement by participants	

5.17 Aboriginal Legal Theory and Restorative Justice: Part Two-1999[78]

The use of a restorative approach gives the offender the experiences of the victim. The building of connections between the actions of the offender and the consequences of their actions upon the victim, the victim's family, the victimizer's family, the community and all his/her relations is a necessary part of the learning process. Only when the offender understands the full extent of the consequences of their actions will thoughts equivalent to a conscience enter into an offender's risk profit analysis. These aspects of teaching, inculcation, or brainwashing are important elements in the individual development of an internal moral code. "Being your own person" reduces crime. The intensification of an external legal code cannot reduce crime to the same extent that a self-policing moral code can.

Teaching is the distinguishing point between defining a person acting badly and a bad actor. Whether it be in the Aboriginal or non-Aboriginal community, a person may act upon false presumptions in new situations and disturb the ethos of the community. The distinguishing point, in how these two distinct communities would dispose of this type of case is stark. The mistake would be recognized within the Aboriginal community.

The lack of knowledge shown by the victimizer would be addressed and reparations would be made. Within the existing criminal justice system there is no middle ground between guilty and not guilty. "I did it, but..." is not a plea but an admission of guilt carrying the full weight of the prescribe punishment. "I didn't know..." is sure to receive a rebuke of "ignorance of the law is no excuse."

The existing criminal justice system is malignant and completely incapable to teaching without first inflicting harm. The use of mitigating circumstances in sentencing or even the use of alternative sentencing does not mitigate the use of coercive force. Abuse is not a proper precursor to learning and healing; respect is. It seems an oxymoron to state, "I sentence you to heal" and is reminiscent of an exorcist crying "I cast the devil out of you". The difference between the two system is too great for the implementation of restorative justice

[78] James J R. Guest, B.A., University of Manitoba (I994); LL.B., University of Manitoba (I997); LL.M., Harvard University (I998). Mr. Guest is presently the Law Clerk of the Mashantucket Pequot Tribal Nation. Aboriginal Legal Theory and Restorative Justice: Part Two Justice as Healing, Vo1. 4, No. 1 (Spring 1999) http://www.usask.ca/nativelaw/jah.htmlJustice as Healing

principles to become fully effective. There first needs to be a realization that the existing criminal justice system is a failure. Secondly, that people who commit crime can be characterized by: (1) lack of knowledge; (2) not acting with consideration of others; or most seriously, (3) not being capable of acting with consideration for others.

All three types of criminals are capable of learning, but, in the case of career criminals, predatory criminals or psychopaths this approach may not work and these criminals may be bound to repeat there crimes. However, it could be argued that the criminal justice system also fails in the same regard. How do you protect society from those without consideration for other people. If you can not teach people to respect and empathize with others then incarceration may be necessary as a replacement for the Aboriginal practice of banishment. In fact, public safety concern leading to incarceration would have to be predicted on the subjectivity of the individual victimizer and not under the principles of a uniform external legal code.

Criminal Justice System + Restorative Justice Approaches - Challenges

- The attempt to institutionalize restorative justice approaches with the existing criminal justice system have unveiled several problems that warrant close scrutiny.
- Restorative Justice processes are holistic approaches to the problems of conflict.
    - The use of Restorative Justice processes within the linear criminal justice system present problems where these processes are used in inappropriate situations.
        - This is not the typical excuse of "oh that can't work in this situation."
        - In fact I advocate that with an Aboriginal justice system every type of situation can and should be addressed using restorative justice approaches.
    - However, the use of a restorative justice process within the linear criminal justice
        - system raises issues regarding the level of coercion or the size of the stick being place above the head of the victimizer.
        - This sword of Damocles defeats the open, honest and respectful discourse sought by invoking the use of the Restorative Justice holistic processes with the criminal justice system.
        - Victimizers, victims and communities cannot hope for resolution of their problems when the constant threat of incarceration chills the air.
        - When an offender opens his/her mouth, they forego the institutionalized safeguards protecting them from the full coercive effect of the criminal justice system.
    - The use of family group conferencing is probably inappropriate after a charge has been laid.
    - The use of a sentencing circle is inappropriate where exists the chance that the recommendations of elders and community members will not be not respected by the judiciary.
    - The use of Restorative Justice principles is inappropriate where the actors within the criminal justice system are not knowledgeable in the process or lack confidence in the use of the process; either results in a danger that the process will be incapacitated.
    - Where the use of Restorative Justice processes with the criminal justice continuum is most appropriate must be carefully considered.
        - There remains the real danger that reforms in the area of restorative justice will be a simple repackaging and relabeling of the existing criminal justice system.
        - That these attempts will be used to deflect criticisms levied against the criminal justice system by the many reports and commissions.
        - And that these attempts at reform will come to be embodied within statistical data used to "prove" that restorative justice doesn't work.

Aboriginal Justice System + Restorative Justice Processes

- The most appropriate place for Restorative Justice processes remains to be within separate aboriginal justice systems existing within Aboriginal communities.
- The diversity of Aboriginal cultures makes it difficult to generalize to this extent.
- However, for the purpose of this short and robust article I will simply state that Aboriginal societies are marked by a

- horizontal social structure (Rupert Ross. *Return to the teachings*. pg. 123)
- The use of offender and victimizer are often used interchangeable; but each is different in the center points of their address.
  - The use of the word offender highlights the person who has created outrage because their act is judged to have transgressed the moral and legal code of society. This implies the action of the individual in the context of judged expectations. The central concern with the use of the word offender is the lack of acknowledgement for the victim. The very terminology of the criminal justice system ignores the victim and instead concentrates on the offense of a code. The use of the word victimizer centers the concern around the victim. The victimizer is linked in an unhealthy and destructive relationship with the victim. The length of the relationship many only be of short duration but its destructive effects can have great longevity and dire consequences.
  - This words victim and victimizer complement each other and highlight the creation of a imbalance; an imbalance that must be addressed by the victimizer. The use of the term victimizer highlights an important distinction between the two systems and is the more appropriate term when discussing the restorative justice (Rupert Ross).
  - This is a distinguishing point in the use of language. The difference between the statement, "X is good", and the statement "I think I liked X" portrays the difference in the use of language between Aboriginal people and non-Aboriginal people. The former statement, while more powerful, leaves no doubt and little room for another opinion. The later opinion suggests a preference of the individual and invites other opinions with the potential for confrontation.

5.18 Aboriginal Legal Theory and Restorative Justice: Part One -1999 [79]

Aboriginal Peoples are attempting to displace the legal system from their communities and replace it with culturally relevant systems of justice. Aboriginal perspectives on what constitutes justice are as varied and distinctive as the various Aboriginal nations throughout the world. There is, however, more overlap than differences as to a sense of what the basis for truth and justice is. The definition of justice is not the sole domain of any single nation, Aboriginal or non-Aboriginal.

In Canada today there are three justice system models in operation: (1) the main criminal justice system that uses raw coercive force as its power base; (2) a criminal justice system that is attempting to augment itself with restorative justice processes and remake its image after years of locking up Aboriginal peoples; and (3) Aboriginal justice systems within communities that use respect and teaching as the basis of knowledge for living together.

In this short article I will not address the main criminal justice system and the problems of marginalization, assimilation and racism as much has already been written on that subject. This article will concentrate of the use of restorative justice principles within the criminal justice system and the differences in legal theory that make the implementation of these processes difficult.

A number of problems have been created with the attempts to integrate restorative justice approaches within the existing criminal justice system. These problems all stem from the fundamental differences between Aboriginal legal theory and Euro-American legal theory. Aboriginal legal theory utilizes respect and teaching as its fundamental tenets unlike the existing criminal justice system where raw coercive force and the threat of incarceration are used to induce the citizenry to abide by an external legal code. Aboriginal justice systems are more organic than that. An Aboriginal justice system is flexible to the needs of the community and its "body of law" springs from the life of the community itself.

The main procedural element of Aboriginal legal theory is the involvement of community members in the justice system rather than state intervention. Respected members of the community inculcate the children of the community in its values and traditions. When conflicts arise, it is community members who come forward

[79]James J R. Guest, B.A., University of Manitoba (I994); LL.B., University of Manitoba (I997); LL.M., Harvard University (I998). Mr. Guest is presently the Law Clerk of the Mashantucket Pequot Tribal Nation. Aboriginal Legal Theory and Restorative Justice, http://www.usask.ca/nativelaw/jah.htmlJustice as Healing Vo1. 4, No. 1 (Spring 1999) Native Law Centre http://www.usask.ca/nativelaw/jah_guest.html

to help ensure there is a speedy and peaceful resolution in keeping with the traditions of the community. While this system of justice seems simplistic, its practice is hard work based upon a complex philosophy.

Horizontal Structures: We're All Equal

Aboriginal societies are horizontal structures. When a crime is committed it results in the creation of an inequality between the victim and the victimizer. Unlike the vertical structures of Euro-American Justice systems where crime is a violation of the law of the state, all matters in an Aboriginal society are private. Aboriginal societies do not make the distinction between criminal and civil law that is found in the Euro-American tradition. In an Aboriginal society, when a crime is committed the debt that is created is owed to the victim, not the state. The victim has been placed in a lowered statue by the victimizer. It becomes the obligation of the victimizer to raise the victim to the status previously held; that being equal with all others within the society.

The processes within the community are present to help facilitate the resolution of the dispute. When the conflict is of a nature that is of concern to the community or if the dispute remains unsettled and threatens to disturb the harmony of the community, then the community may take a more active role in the dispute resolution process. Thus, the justice process is a teaching/learning experience for the entire community. The conflicts that arise spark conversations within the community and through the process of discussion the consensus of the community as to what should or needs to be done, is ascertained. There are no hierarchical structures, no judging, no written substantive rules that resemble a "meat chart," only a fluid process of justice.

Justice is a Fluid Process

In the Navajo Justice and Harmony Ceremony, the Peacemaker does not ask if the existing relationship is bad or good. Such value judgments are neither respectful, helpful or truthful. The Navajo peacemaker will ask "Hashhkeeji" is this relationship moving towards disharmony? - or "Hazhooji" - is this relationship moving towards harmony? It is important to emphasize the movement aspect of these words. The Aboriginal belief is that all living things are in a constant state of flux, moving towards or away from harmony. Therefore, bright fines marking people as good or bad do not exist; there is no black and white, everything is complex, everything is gray.

The difference in basic perceptions result in differing views on how best to treat a "wrongdoing". In the criminal justice system the commission of a crime results in the labeling of a person as bad. The label is established through a long and complex series of events, from the description of a crime to the finding of guilt based on either an admission or the use of "objective" evidence. In the Aboriginal communities, a wrongdoing is considered to be misbehavior. The reasons for the wrongdoing are said to be the result of the person's relationship with the community moving towards disharmony. Based upon this view, the treatment of the person is not dependent upon the labeling of the crime committed and subsequent prescribed punishment to be handed out. The scope of the justice system is broadened to address victimization caused by conflict instead of an offence described under criminal law.

The flexibility of viewing the underlying cause for the conflict permits the victimizer's misbehavior to be addressed through lecturing or by treating an underlying illness. The goal is to facilitate the person's healing process and help them feel connected to the community once again rather than seeking blind justice through punishment under the guise of general and specific deterrence.

The inclusive nature of Aboriginal justice widens the scope to include concern for the victim. The criminal justice system often ignores the plight of the victim. Aboriginal justice system recognizes the fact that although the victim did not "do" anything, their experience can cause a ripple effect within the community. This cascading effect can result in cycles of abuse, self abuse, etc. In other words, the victim may find him or herself moving towards disharmony as a result of the harm done to him or her. This is the very essence of the goal in helping the victim.

In the criminal justice system, the victim resides in an ambiguous spot. The victim has no say in the legal process and is shunted to the side. In the view of the criminal justice system the victim does not fit into the categories of good or bad. Any problems resulting from the crime maybe considered the sole domain of the victim. The victim within the criminal justice system may be reviled because they have been tainted by the crime. The larger society leaves the victim as it found them, in a different position of equality within society; alone, to individually deal with the aftermath of their victimization. The crime is viewed as an individual act

upon an individual person with the larger community interests being embodied in the democratic state. The net result of the criminal justice process is punishment for the offender and isolation for the victim.

Tolerance and Change

In a bipolar world of good and bad where one views one's self as good, a change from your position or a current of change from viewpoint must be bad. However, if you view the world as a place that is dynamic and ever-changing, then one views one's self as being adrift in an infinite continuum. This requires constant re-evaluation of one's starting position in this world with an emphasis on preference and not judgment. This view allows for difference. One person's preference may be at odds with another person's preference.

The valuation of good and bad is not present. There exists only the constant flux of the movement of relationships within the community towards disharmony or harmony. How harmony is attained when there is disharmony is probably the preferential goal of the community. Disharmony in one area of a person's life becomes fully relevant to the community's preference for harmony. When that disharmony encroaches upon the person's relationship with the entire community, the "Ratio", becomes: Lancing the sore so that it might heal. In comparison, the criminal justice system seems like an inadequate band-aid that helps only in allowing existing sores to fester and spread when it prevents communities from describing in what forum or in what form dispute resolution should be in.

– This view of an ever-changing world and a person's position within it develops a greater sense of tolerance for differences between people. People are different from one another, not simply bad or good. This leads me to query; As one approaches a greater bipolar world view, does one become more intolerant? If so, then do persons living with this view have a higher rate of conflict as their world view increasingly becomes separated from reality? It is the loss of one's self in society or a view that one is becoming further and further disconnected from society that is a cause of social ills such as suicide or crime. Anonymity or the feeling of being disconnected with the community is a cause of crime. People who do not feel connected can be likened to those persons who do not a have consciousness. It is the two tenets, teaching and respect, that prevent crime. Connecting a person to their community by helping a person see and "empathize with the victim" may be the **greatest tool in crime prevention.** Those who do not feel a connection with the community must be helped and taught to build one.

The view that a further intensification of the legal system will solve the problems within the criminal justice system is based on the premise that punishment reduces crime through specific and general deterrence. However, if one assumes that criminals either never stop to think that they might be caught, or those that have contemplated being caught have probably weighed the pros and cons of their enterprise and have come to a rational decision that the potential profits outweigh the risks, then the use of punishment as a general and specific deterrence falls upon deaf ears.

5.19 Restorative justice in Urban Aboriginal Communities - 1999[80]

On the farthest end of the scale, restorative justice can mean developing an *entirely separate court or court system.*

- A separate justice system for aboriginal offenders has been recommended by the Royal Commission on Aboriginal Peoples, both as a way of addressing problems with the current justice system, and as consistent with the inherent right to self-government[81]

- It was also a recommendation of the Manitoba Aboriginal Justice Inquiry in 1991,[82] although that province does not plan to proceed with a separate system.[83]

[80] Plett, Irene, Restorative justice in Urban Aboriginal Communities, Canadian Forum on Civil Justice, December 17, 1999, http://www.law.ualberta.ca/centres/civilj/full-text/restorative.htm

[81] Canada, Royal Commission on Aboriginal Peoples, Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada (Ottawa: Canada Communications Group, 1996), at 224. *cited in* Irene Plett , Restorative justice in Urban Aboriginal Communities, December 17, 1999, http://www.law.ualberta.ca/centres/civilj/full-text/restorative.htm

- An American precedent of a separate justice system, the Navajo Peacemaker Court, has been operating in the Navajo Nation since 1959.[84]

- The Province of Alberta recently created an aboriginal court to be headed by Ojibwa Judge Leonard (Tony) Mandamin, which will be patterned somewhat after the Navajo model. "It will be a pilot project, and we have great hopes it will become a model for Canada"[85]

5.20 "Rekindled Spirit" - 1998 [86]

- The purpose of this research project is to identify Hodinohso:ni (Iroquoian) law/culture and practices that existed prior to the enforcement of sending Aboriginal children to residential school.
  - Violations of those traditional laws will also be identified as a result of Eurocentric laws that forced thousands of Aboriginal children across Canada to residential schools.
- Aboriginal law can be equated to Aboriginal culture or can be translated into being one's way of life.
- Hodinohsoni way of life recognizes all its laws; languages, ceremonial practices including the teachings of the Thanksgiving Address, the Great Law of Peace and the Code of Handsome Lake.

5.21 Developing & Evaluating Justice Projects in Aboriginal Communities -1998[87]

There has been a proliferation of Aboriginal justice initiatives in recent years, and all signs indicate that there is much more to come. The main push factor has been a wide-spread view, common among both Aboriginal people, and officials and key players in the justice system, that the conventional criminal justice system has not worked well for Aboriginal peoples. The main pull factor has been the congruence of Aboriginal wishes and governmental policy concerning the desirability of greater Aboriginal self-government and autonomy. There is widespread enthusiasm about the prospect of Aboriginal justice moving beyond the state or condition where the legacy has been over-representation (as regards victims, offenders, and inmates), minimal Aboriginal participation in the determination of justice, and general Aboriginal estrangement. A future state is envisaged where Aboriginal justice furthers other Aboriginal collective objectives, incorporates appropriate traditions and experiences, manifests Aboriginal control, and deals effectively with the harm that crime and social disorder have wrought for all parties (i.e. the victim, the offender, and the community). If this transition is to be successful, resources, Aboriginal and non-Aboriginal co-operation, and well-developed, implemented, and evaluated justice projects will be required. Thus far, there has been little quality assessment of the projects that have been implemented; accordingly, there is much uncertainty about the extent of projects' implementation, the nature and efficacy of the programs and treatments called for, and the impacts on the various parties. It is hoped that this working bibliography can assist in improving that situation.

The Context For Aboriginal Justice Initiatives: A Perspective from the Literature

[82] Manitoba, Public Inquiry into the Administration of justice and Aboriginal People*:* Report of the Aboriginal Justice Inquiry of Manitoba (Winnipeg: Public Inquiry into the Administration of Justice and Aboriginal People, 1991). cited in Irene Plett , Restorative justice in Urban Aboriginal Communities, December 17, 1999 http://www.law.ualberta.ca/centres/civilj/full-text/restorative.htm

[83] Scott Edmonds, "Manitoba finally moves on native inquiry: Implementation of 1991 report won't include a separate aboriginal justice system", The [Toronto] Globe and Mail (30 November 1999) A4A. cited in Irene Plett , Restorative justice in Urban Aboriginal Communities, December 17, 1999 http://www.law.ualberta.ca/centres/civilj/full-text/restorative.htm

[84] Yazzie, supra note 8 at 177. cited in Irene Plett , Restorative justice in Urban Aboriginal Communities, December 17, 1999 http://www.law.ualberta.ca/centres/civilj/full-text/restorative.htm

[85] Carol Harrington, "Alberta court to blend native, traditional justice", The [Toronto] Globe and Mail (21 September 1999) A8, quoting Brian Stevenson, Assistant Chief Provincial Court Judge. *cited in* Irene Plett , Restorative justice in Urban Aboriginal Communities, December 17, 1999 http://www.law.ualberta.ca/centres/civilj/full-text/restorative.htm

[86] Jacobs, Beverley K "Rekindled Spirit" Research Project In Preparation For the Law Commission of Canada, December, 1998. http://www.visions.ab.ca/health/health%5Fprograms/rs%5Fimpact/Rekindled_%20spirit_main.htm

[87] Ministry of the Solicitor General of Canada, Don Clairmont, Dalhousie University and Rick Linden, University of Manitoba, Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature, 1998 http://www.sgc.gc.ca/epub/Abocor/e199805/e199805.htm

Aboriginal wishes and governmental policy are in apparent unison concerning the desirability of greater Aboriginal self-government. As the latter development evolves, entailed changes regarding the direction of policies and programs, resource allocation, and administrative structures and procedures, require that mechanisms be put in place so that Aboriginal leaders and others can assess whether change is proceeding in an efficient, effective, and equitable manner. This may be particularly required in a 'small community' situation, given the realities of small scattered populations with limited resources and increasing internal differentiation, the dangers of cliques exercising excessive control, and of dependence upon informal processes alone. In addition to issues of self-control and autonomy, there is also the question of the extent to which Aboriginal systems will be different in principle, reflecting different values, priorities, and world views. It is not surprising then that in all institutional sectors attention is increasingly being paid to mission statements, objectives, performance indicators, outcomes, monitoring, and evaluation feedback.

The justice system has considerable importance in discussions of Aboriginal self-government and outside self-government negotiations as well. There is a widespread view, among both governmental officials (especially in the justice system) and Aboriginal leaders, that the field of justice is a centre-piece, if not the leading edge, in the development of greater Aboriginal self-government and autonomy. A common position appears to be that significant changes can and should be readily made with regard to how justice is organized and delivered in Aboriginal communities. Moreover, there seems to be considerable agreement that the conventional justice system has failed Aboriginal people, and that alternative and innovative practices, rooted in Aboriginal traditions and experience, should be encouraged. Accordingly, there is widespread enthusiasm about the prospect of Aboriginal justice moving beyond the present state with its legacy of over-representation (as regards offenders and victims), minimal Aboriginal participation in the determination of justice, and general estrangement. A future is envisaged where Aboriginal justice furthers other Aboriginal collective objectives, incorporates traditions and experiences, manifests Aboriginal control, and deals effectively with the harm that crime and social disorder have wrought for all parties (i.e. victim, offender, community).

From the point of view of styles of governmental approach to "aboriginal people and the criminal justice system", there have been three major policy era (McNamara, 1995), namely:

a) *pre-1975:* Little attention was paid in any official or programmatic way to the distinctive problems, needs, and participation of Aboriginal people in the criminal justice system

b) *1975 to 1990:* Following the 1975 National Conference on Native People sponsored by the Solicitor General Canada and Justice Canada, an agenda was set forth calling for the provision of better access to all facets of the justice system, more equitable treatment, greater Aboriginal control over service delivery, recruitment of Aboriginal personnel, cross-cultural sensitivity training for non-natives, and more emphasis on alternatives to incarceration and crime prevention. Between 1975 and 1990 more than twenty government reports reiterated these types of recommendations.

c) *1991 to the present:* In 1991 two major reports set the stage for the development of a new agenda, one emphasizing the establishment of Aboriginal justice systems where Aboriginal peoples would presumably exercise control over the administration of their governing justice systems and also over how justice would be defined in those systems. These two reports were the Law Reform Commission's 1991 report, Aboriginal Peoples and Criminal Justice, and the 1991 report of the Aboriginal Justice Inquiry of Manitoba. During this period the federal government re-organized its administrative structures and delivery systems for Aboriginal justice. Responsibilities for First Nations policing were transferred from Indian Affairs to Solicitor General Canada. In the Solicitor General Canada the Aboriginal Corrections Policy Unit was formed, and in Justice Canada the Aboriginal Justice Directorate came into being. Both were launched as part of the Aboriginal Justice Initiative. The mandates of these groups were to advance Aboriginal justice interests, improve the response of the conventional justice system and facilitate greater Aboriginal direction of, and innovation in, justice in Aboriginal communities. The 1996 final report of the Royal Commission on Aboriginal Peoples emphasized the need to develop further the new agenda of autonomy and legal pluralism.

A major thrust of the Solicitor General Canada's Aboriginal policing policy has been the development of tripartite agreements (federal and provincial governments and Aboriginal communities). Since 1991 the number of such agreements has increased more than fifty-fold and they now cover about two-thirds of the targeted population. A recent study (Murphy and Clairmont, 1996) has indicated that the large majority of front-line

officers in Aboriginal communities across Canada are themselves Aboriginal, and that the fastest growing type of police organization is the self-administered, First Nations police service. The latter is popularly called 'stand alone policing'. None of these police services is fully autonomous and all have established protocols with the R.C.M.P. and/or provincial police organizations; nevertheless the trend towards increased autonomy is unmistakable.

Under the sponsorship of the Solicitor General Canada, important developments have also been occurring in the area of Aboriginal corrections. New Aboriginal-based penitentiaries have been constructed for female and male inmates in western Canada, supplementing extant policies and programs of penitentiary liaison, and Aboriginal counselling and spirituality. The Department of the Solicitor General of Canada also participated in the 1992 Aboriginal Justice Initiative and the 1996 Aboriginal Justice Strategy. The Department established an Aboriginal Corrections Policy Unit in 1992 to support, through research and development, communities to increase their knowledge of correctional issues and to assume greater responsibility for corrections. More recently, the Unit has been mandated to explore offender treatment in selected Aboriginal communities returning to a restorative, healing approach in dealing with criminal activity. The Unit has an extensive communications program and is involved in negotiating the corrections provisions of the federal self-government policy.

The Correctional Service of Canada has also expanded its activities for Aboriginal offenders. The Service has introduced new Aboriginal-specific programs, such as Aboriginal substance abuse programs, to augment their existing core Aboriginal programs that included cultural, elders and spiritual programming and inmate liaison worker programs. Two new penitentiaries have been constructed for female and male inmates in western Canada. Both institutions were developed in partnership with Aboriginal people and reflect a healing approach to institutional corrections. The National Parole Board has introduced elder-assisted parole hearings in the Pacific and Prairie regions.

Since the early 1970s Justice Canada has had two regularly funded programs relating specifically to Aboriginal people, namely a Native Legal Studies Program, particularly for Metis and non-status Indians, and the Native Court Worker Program. The latter is a federal-provincial, cost-shared program which has been slightly modified over the years (e.g. to include applicability to young offenders) and which has been the subject of considerable policy deliberation over the past decade. The discussions have largely centred around expanding the authorized areas for funding (i.e. expanding the role of the court worker to include other justice activities such as public legal education, and general justice work in the community).

In 1992 the Federal Government established the Aboriginal Justice Initiative in the departments of Justice and Solicitor General. For its part, Justice Canada formed the Aboriginal Justice Directorate whose role was to examine community-based strategies through the funding of Aboriginal justice initiatives on a pilot project basis. Renewed in 1996 as the Aboriginal Justice Strategy, Justice Canada expanded its role to support the creation of long-term, viable justice programs and institutions that are cost-shared with provinces and territories. Particular emphasis is placed on those communities that are engaged in negotiating, or are working towards, sectoral agreements for justice under the inherent right of self-government.

A new element of Justice's strategy is the Aboriginal Justice Learning Network, an initiative designed to mobilize key players in the justice system (i.e. judges, police, crown attorneys and correctional workers) and Aboriginal people to work towards common objectives. A major emphasis of the Network is to support Aboriginal communities to explore culturally appropriate justice processes, such as circle sentencing and healing circles, and incorporate new Aboriginal-based approaches that appear to work in other countries (i.e. family group conferencing).

There are some special circumstances that are especially relevant to the development of Aboriginal policing, corrections, and justice initiatives, and especially to restorative justice initiatives. As Turpel (1993) has observed, Aboriginal communities have seen their societies and cultures destroyed in large measure by European colonization, but there remains, certainly among some Aboriginal peoples in the highly diversified Canadian Aboriginal community, both a difference in world view vis-à-vis the larger Canadian society, and a desire to implement a different kind of justice system. It is also important to appreciate the pattern of crime and social disorder that characterize many Aboriginal communities, namely a pattern emphasizing personal assault and public disorder (LaPrairie. 1994; 1996). These latter offences appear to reflect, at times, a community

breakdown, and certainly suggest the need for justice initiatives that reconcile people and facilitate community development. At the same time Aboriginal community justice has to contend with the common pattern of a small group of recidivists (usually young adult males), and the less common pattern of extensive female crime, both of which present challenging rehabilitative problems.

The literature indicates that the small size of many Aboriginal communities raises issues of adequate resources to sustain justice initiatives (e.g. avoiding burn-out among staff and volunteers), and of bias in enforcing social disorder. At the same time these small communities, as Depew (1996) has observed, have an ability to "reproduce themselves as a community of relatives and friends", to reproduce communitarianism which can be an effective underpinning for restorative justice programming. With increasing education, and the development of regional networks (linking small communities in a tribal or multi-tribal system), the strengths of small communities may be harnessed to effectively serve justice objectives. The lack of resources for many communities also can create what LaPrairie (1994) has termed "funding dependency", where available funding rather than community needs and preferences shape Aboriginal justice initiatives. Clearly there is a challenge for Aboriginal peoples to forcefully advocate their own solutions, and a challenge for governments to respect Aboriginal differences.

There are several recurring themes in the literature concerning Aboriginal justice initiatives. As noted above, many Aboriginal and non-Aboriginal leaders consider Aboriginal justice as the leading edge in the movement towards Aboriginal self-government. These initiatives may have considerable symbolic significance for successful Aboriginal stewardship of Aboriginal life, as well as for their inherent rehabilitative and healing potential. The literature shows that there are no profound legal or constitutional obstacles to the creation of quite different Aboriginal justice programs and practices (e.g. Hunt, 1991; Macklem, 1992; Royal Commission on Aboriginal Peoples, 1996). Many commentators have emphasized that for a variety of reasons, some intrinsic such as the strategies for healing, and some extrinsic such as the band organization imposed by the Indian Act, Aboriginal justice initiatives have to be community-based. In light of the social disorder circumstances noted above, justice initiatives are seen as both requiring, and impacting upon, community development (LaPrairie, 1996; Stuart, 1997). Commentators such as McDonnell, 1995; Fitzpatrick, 1992; and Monture, 1995), referring to the significant internal differentiation that exists and the competing alternative justice strategies, have stressed the need for widespread "community conversations", involving all sectors of the community. Another important theme has been that Aboriginal communities may well be at the forefront of the increasingly popular restorative justice movement, because the failure of the conventional justice system has been so evident in relation to Aboriginal peoples, because Aboriginal emphases on healing and holistic approaches are so compatible with restorative justice principles, and because both Aboriginal and restorative perspectives emphasize rebuilding communities. At the same time, as Jackson (1992) and others have observed, Aboriginal justice thinking appears often to differ from restorative justice in the larger society in that in the Aboriginal instances there is more emphasis on collective responsibility, greater community involvement and more explicit spirituality.

Overall then, it can be argued from the literature that the main push factor for the proliferation of Aboriginal justice initiatives has been the consensus, among Aboriginal peoples and justice officials, that the conventional justice system has not worked well for Aboriginal people. The main pull factor has been the congruence of Aboriginal aspirations and governmental policy with respect to greater autonomy and self-government for Aboriginal peoples. There is scant, quality material available on the extent to which Aboriginal justice initiatives are any more effective, efficient, and equitable than the justice provided by the mainstream system. There is little information on the actual implementation of programs, on the treatments called for, or on the intermediate or long-tern impact for victims, offenders, and communities. Insofar as Aboriginal justice initiatives reflect well the ideas and methods of restorative justice, there would be reason for scepticism. The diversion, mediation, and other restorative justice programs, extensively implemented in North America in the 1960s and 1970s proved to be relatively ineffective and inefficient (Feeley, 1983; Nuffield, 1997). Still, the restorative justice movement has been resurrected throughout North America (Braithwaite, 1996), testimony both to the flaws of the conventional justice system, and to the potential of restorative justice. And Aboriginal communities with their traditions, socio-demographics, and potential for communitarianism might well lead the way. If that is to happen then well-developed and well-implemented programs and quality evaluations will be required.

That Aboriginal people are taking steps toward greater involvement and control over justice and corrections in

their societies is an important part of their rebuilding as nations. The nations that inhabited this continent before contact had their own systems of justice though they were seldom, if ever, separated from the daily workings of their everyday lives. As we approach the millennium it is fair to say that it would be virtually impossible to totally recreate such systems, but that does not mean that First Nations must buy into the justice system of Canadian society with its adversarial approach and long periods of unproductive detention. Aboriginal people are searching for, and some have found, a justice that suite them in today's world. Understanding these approaches will not only help them to refine and improve but it will allow Canadian society to learn more about justice systems which may very well suit better than the one which currently serves its citizens.

5.22 Planning/Evaluating Community Projects - 1998 [88]

Restorative Justice in Aboriginal Communities

- Aboriginal communities have been at the forefront of the restorative justice movement for several reasons.
    - First, there has been a serious failure of the conventional justice system in Aboriginal communities.
        - While Aboriginal offenders are over-represented in the system, Aboriginal people play only a small role in running it.
        - Standards are applied that are not appropriate to the circumstances of Aboriginal offenders.
            - For example, parole decisions that favour those who have jobs waiting for them on release discriminate against those come from communities with high unemployment.
            - Small Aboriginal communities may also lack parole officers and others who exercise community supervision, so alternative dispositions may not be available for offenders who come from these communities.
            - There is a need to develop community-based alternatives to avoid the situation in which offenders are removed from their communities and sent to correctional institutions that may be far from home.
            - Aboriginal people are also more likely than other Canadians to be jailed for non-payment of fines [89](Department of Justice, 1994).
                - In these cases Aboriginal people may go to jail even though the sentencing judge did not feel such a disposition was appropriate.
        - Many Aboriginal people feel that the justice system has been imposed on their communities and does not reflect their needs, their values, or their traditions.

[88] Solicitor General Canada, Rick Linden University of Manitoba and Don Clairmont Dalhousie University, Making It Work: Planning And Evaluating Community Corrections & Healing Projects In Aboriginal Communities, 1998
http://www.sgc.gc.ca/epub/Abocor/e199805b/e199805b.htm

[89] Department of Justice. 1994. "Minister of Justice Introduces Sentencing Reform Bill". Ottawa: Press Release, June 13, 1994 *cited in* Solicitor General Canada, Rick Linden University of Manitoba and Don Clairmont Dalhousie University, Making It Work: Planning And Evaluating Community Corrections & Healing Projects In Aboriginal Communities, 1998
http://www.sgc.gc.ca/epub/Abocor/e199805b/e199805b.htm

- Second, traditional Aboriginal justice practices have generally taken a holistic approach emphasizing healing and the importance of community involvement in the justice process.
    - Many of the features of restorative justice have deep cultural roots in Aboriginal communities including:
        - Informality;
        - The important role played by respected community members;
        - The involvement of family;
        - The focus on the problems underlying the criminal activity rather than on the principle that justice should take place in the community, not in the prison system;
        - The behaviour itself;
        - The importance of counselling offenders;
        - The emphasis on consensus-building;
        - The need for talking things through and letting victims and offenders have their say;
        - The expectation that the offender will accept responsibility for his or her action.
    - The community corrections movement is a means of returning responsibility for justice to these communities.
- Third, many Aboriginal leaders have recognized that restorative justice practices can be a means of rebuilding their communities.
    - There is a close linkage between justice and healthy communities.
    - Clearly, the mainstream justice system, and particularly the prison, is not helping to improve the situation in Aboriginal communities and is in all likelihood making it worse.
    - The underlying causes of crime, alcohol abuse, family violence, and other symptoms of community disorganization lie in the history of Aboriginal people.
    - For many, this is a history of oppression by governments, residential schools, and churches.
    - The consequences of these problems are addressed in the justice healing process.
    - Restorative justice can help empower members of the community and help them to leave the past behind.
- Fourth, the small size of many Aboriginal communities means that treatment can be applied within the context of the whole community.
    - It is far easier to take a holistic approach to healing in a small, rural community where the behaviour of offenders can be closely monitored and where the different

institutions that touch an individual's life can work closely together. (Solicitor General, 1997).

- Finally, restorative justice initiatives have been seen as a step toward Aboriginal self-government, as it is a way for communities to begin to regain control over the justice system.

- Because restorative justice is so closely linked with traditional practices, Aboriginal communities have been very receptive to the new initiatives.
  - In this acceptance they may provide an example the rest of society may follow. As Zion has noted: Traditional Indian justice rules and methods are not 'alternative dispute resolution'; they are the way things are done … They provide lessons for general methods of alternative dispute resolution … Canada has the opportunity to foster and nourish Native laboratories for change. In doing so it will give its nation and the world the advantage of seeing other approaches to justice, law and government" (Cited in Royal Commission on Aboriginal Peoples High Arctic Relocation Report 1996:74).

- While there are many similarities between restorative justice initiatives in the larger society and those in Aboriginal communities, there are also differences. [90]
  - Aboriginal initiatives have a greater sense of collective responsibility, are more likely to involve extensive community and family networks, and are typically grounded in spiritual beliefs.
  - These differences are due to factors such as the relative isolation and homogeneity of Aboriginal communities and to their distinct cultural and spiritual traditions.

5.23 Aboriginal People and the Canadian Justice System-1998[91]

"At the most basic level of understanding, justice is understood differently by Aboriginal people," wrote the AJI:

"The dominant society tries to control actions it considers potentially or actually harmful to society as a whole, to individuals or to the wrongdoers themselves by interdiction, enforcement or apprehension, in order to punish harmful or deviant behaviour. The emphasis is on the punishment of the deviant as a means of making the person conform, or as a means of protecting other members of society."[1]

The purpose of a justice system in an Aboriginal society is to restore peace and equilibrium within the community, and to reconcile the accused with his or her own conscience and with the individual or family that has been wronged. This is a primary difference. It is a difference that significantly challenges the appropriateness of the present legal and justice system for Aboriginal people in the resolution of conflict, the reconciliation of offenders and victims, and the maintenance of community harmony and good order.[2]

I frequently encountered perspectives supporting this interpretation of Aboriginal justice within the communities studied. Initially I thought the criticisms of the conventional justice system simply reflected a deep

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[90] Jackson, Michael. 1992. "In Search Of The Pathways To Justice: Alternative Dispute Resolution In Aboriginal Communities". University of British Columbia Law Review, 26. *cited in* Solicitor General Canada, Rick Linden University of Manitoba and Don Clairmont Dalhousie University, Making It Work: Planning And Evaluating Community Corrections & Healing Projects In Aboriginal Communities, 1998 http://www.sgc.gc.ca/epub/Abocor/e199805b/e199805b.htm

[91] *Ross Green, B. Comm., LL.B., LL.M.* Mr. Green has practised law in several of the communities described in this book, Justice in Aboriginal Communities: Sentencing Alternatives, and has advocated for the kind of sentencing alternatives he describes therein. Mr. Green currently lives and practices law in Melfort, Saskatchewan.

Editor's Note: The following is Chapter 3 of Ross Green's book entitled, Justice in Aboriginal Communities : Sentencing Alternatives, originally printed in 1998 by Purich Publishing in Saskatoon, Saskatchewan. The editor would like to thank both the author and the publisher for granting permission to reprint an excerpt from Mr. Green's book. http://www3.sk.sympatico.ca/greer/index.htm

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distrust and rejection of that system and were a sign of anger against it. Later, however, I saw these criticisms as more likely reflecting a fundamental difference in the meaning of justice and the process to be followed upon a[n] offender's transgression. A recurrent theme was the replacement of the punitive focus of conventional Canadian law with a more conciliatory approach that emphasized the restoration of peaceful relations between offender, victim, and community. This view was reflected in the comments of Harry Morin, a Cree from Sandy Bay, who was active in the development of circle sentencing within his community:

"Like a lot of times, to me personally, the system is right now just a punishing system, it's punishing. They're not looking at what's causing these problems, they're looking at, hey, we have to punish this guy for what he's done, basically, that's all it's at. And a lot of these guys go to jail, and they sit around this ten-by-twelve cell or whatever size they may be, and they sit there and think. And they get very bitter. [The offender's] bitter at the people that put him in there, the victim that reported him. He's mad at the justice system, he's mad at the RCMP. Here in a sentencing circle, we make sure somebody tells the offender that we're here to help, for support, and not only that, if recommendations are made that he takes some kind of programming to better himself back in society, he's not only promising to the magistrate or the probation officer, he's promising it to his own community. And then he knows he's got all that support."[3]

The Hollow Water assessment team also articulated a justice process that stands in sharp contrast to the conventional adversarial system:

"[W]e are attempting to promote a process that we believe is more consistent with how justice masters would have been handled traditionally in our community. Rather than focussing on a specific incident as the legal system does at present, we believe a more holistic focus is required in order to restore balance to all parties of the victimization. The victimizer must be addressed in all his or her dimensions physical, mental, emotional, spiritual and within the context of all of his or her past, present, and future relationships with family, community, and Creator. The legal system's adversarial approach does not allow this to happen."[4]

Closely related to the perspective that questions the overall focus of the system is a sense of estrangement between local community members and the conventional justice system. This sense of estrangement is shared by many Aboriginal people and is reflected in the report of a 1988 Cree justice symposium in northern Quebec:

"Whether because of being historically obliged to do so or whether in a certain way they accept it, owing to fate or the fact of its usefulness, the Cree communities have relied for almost a half century on a Western system of justice. In court a Cree has to answer only very indirectly to his own society; he is more answerable to a little known world, to a society foreign to his habits and traditions. And what is more, the society that bears the social costs of the transgression by that individual has neither control over that individual nor any say in the judicial process."[5]

Despite this sense of estrangement, the goals of Aboriginal and Canadian justice are similar. Members of the Indigenous Bar Association suggest that those similarities include deterrence of members from misconduct, public condemnation of offenders, restoration of the offenders to society, and punishment, if necessary.[6]

Although a plurality of views on justice is evident among Aboriginal people, there is significant emphasis on holistic approaches to justice that integrate the social, religious, and economic functioning of the offender vis-a-vis the community.[7] The Law Reform Commission of Canada recognized this and commented that "[t]he Aboriginal vision of justice gives pre-eminence to the interests of the collectivity, its overall orientation being holistic and integrative."[8] Similarly, the Task Force on the Criminal Justice System and Its Impact on the Indian and Metis People of Alberta commented that "[j]ustice and dispute resolution in traditional aboriginal societies can be illustrated by a restorative model of justice.... The holistic context of an offence is taken into consideration including moral , social[,] economic, political and religious considerations."[9]

Many Aboriginal dispute-resolution traditions and perspectives appear at odds with those accepted within the conventional Canadian justice system. Despite a common aim of controlling and deterring deviant behaviour and thereby protecting the community, Aboriginal justice approaches are characterized more by private inter- and infra-familial solutions, collective decision making, and an emphasis on reconciliation between offender, victim, and community, and less by an emphasis on punishment, the conventional Canadian approach.

The following section considers how such differences in perception and tradition, together with other factors' have affected conventional sentencing practices in Aboriginal communities.

The Circuit Court as Absentee Justice System – see chapter on "Courts"

The Misinterpretation of Aboriginal Offender Information and Behaviour at Sentencing

A further problem during sentencing of Aboriginal offenders is obtaining accurate and relevant information about the crime committed and the offender. In obtaining and assessing such information, caution must be exercised not to misinterpret interpersonal behaviours of Aboriginal offenders. Lawyer and author Rupert Ross explained the tendency of people of European descent to interpret lack of direct eye contact as indicating evasiveness, and noted that direct eye contact among the Cree and Ojibway of northwestern Ontario was a sign of disrespect as "[you] only look inferiors straight in the eye."[24]

Similarly, expectations of appropriate court behaviour may influence a judge's conclusions about the attitude of the offender. I have appeared with many Cree and Saulteaux offenders in the courts of central Saskatchewan from 1988 to the present, and I have noted that many of them respond to the stress of court by smiling or laughing nervously. This behaviour has sometimes been misinterpreted by the presiding judge as indicating a lack of respect, despite the seriousness with which the offenders viewed the proceedings when I interviewed them prior to court.

A further example of potentially misunderstood behaviour is the lack of verbal participation by Aboriginal offenders at sentencing. Such passivity may lead to an erroneous conclusion respecting offender attitude. Judge Murray Sinclair of the Provincial Court of Manitoba explained:

"A final example is the implicit expectation of lawyers, judges and juries that accused will display remorse and a desire for rehabilitation. Because their [Aboriginal offenders'] understanding of courage and their position in the overall scheme of things includes the fortitude to accept, without protest", what comes to them, Aboriginal people may react contrary to the expectations of non-Aboriginal people involved in the justice system. Many years of cultural and social oppression, combined with the high value placed on controlled emotion in the presence of strangers or authority, can result in an accused's conduct in court appearing to be inappropriate to his plea."[25]
Rupert Ross also cautioned against drawing an immediate link between lack of participation by Aboriginal offenders and lack of remorse.[26]

Language has also created problems during sentencing in Aboriginal communities. As explained by Derek Custer and Cecile Merasty of Pelican Narrows, lack of familiarity with English exacerbates fear and misunderstanding of court processes. By contrast, the Pelican Narrows sentencing circle committee, which began to meet with offenders outside of court in the spring of 1994, operated in Cree. This empowered offenders to explain their behavior and their plan for compensating and reconciling with their victims.[27]

In Saskatchewan, problems with language at sentencing have been compounded by a shortage or absence of trained court interpreters. This has been recognized by the Saskatchewan Indian Justice Review Committee.[28] The need for a trained interpreter was clearly displayed at a sentencing circle conducted on November 14, 1994, at Pelican Narrows, Saskatchewan.[29] Of the thirty people within the circle, the only non-Cree speaking participants were the judge, a defence lawyer, two police officers, and the operator of a group home in Creighton, Saskatchewan. Approximately half of the circle's discussion was in Cree. Some comments were interpreted on an *ad hoc* basis by various circle participants, while others were left uninterpreted. Towards the conclusion of the circle, which lasted approximately two hours, Judge Fafard apologized for his poor grasp of Cree and indicated his hope that the community would soon have the benefit of a Cree-speaking judge. In contrast, a court communicator formed a regular part of the circuit court party in Manitoba. This was evidenced at court in Pukatawagan on April 11, 1995, where a court communicator was present to assist Aboriginal offenders appearing before the court.

A further difficulty with language at sentencing is incompatibility between languages. Professor Tim Quigley of the University of Saskatchewan, a former defence lawyer in northern Saskatchewan, commented on the difficulties associated with translation:

"I recall from my legal aid days being told that the Dene language does not make the same precise legal distinction between 'rape' and 'intercourse,' something that is obviously important in a sexual assault case. Likewise, in Cree, it is apparently difficult to distinguish between an accidental pushing from an intentional one - again, a vital difference in an assault trial. Yet both languages are very precise in their own cultural context. It is simply that our legal system is alien and difficult to describe in those languages."[30]
My own experience with Cree people in the courts of central Saskatchewan has repeatedly evidenced their difficulty in explaining sexual interaction. Although one of the explanations of this may well be shyness and the

trauma associated with the recollection of an unpleasant memory, it also appeared that the Cree language simply does not contain a similar vocabulary to English respecting sexual acts.

Aboriginal approaches to sentencing focus on greater community involvement in sentencing and more individualized sentences. What are the opportunities for increasing community participation and sentencing discretion, given the current practice in Canadian law?

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1. AJI, *supra* chap.2, note 10 at 22. [Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People*, vol. I (Winnipeg: 1991).]

2. *Ibid.*

3. Interview with Harry Monn, October 19,1994, Sandy Bay, Saskatchewan.

4. Community Holistic Circle Healing, *CHCH Position on Incarceration* (Hollow Water, Manitoba, 1993) [unpublished] at 4.

5. Department of Justice of Quebec, *Cree and Justice Symposium: Problematics on Justice the Cree Milieu* (Prepared by the Consulting Services in Social Sciences, Development an Cultural Change SSDCC Inc. English versio by the Department of Justice of Quebec [unpublished] at 14.

6. L. Mandamin *et al*, "The Criminal Code an Aboriginal People', (1992) U.B.C. L. Rev Special Edition 5 at 9.

7. M. Nielson, "Native People and the Criminal Justice System: The Role of the Native Courtworker" (1982) 5:1 Can. Legal Aid R.55 at 56.

8. Law Reform Commission of Canada, *Report on Aboriginal Peoples and Criminal Justice: Equality, Respect* (Minister's Reference, Report 34, Ottawa 1991) at 6.

9. Task Force on the Criminal Justice System and Its Impact on the Indian and Metis People of Alberta, *Justice on Trial: Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta (Canada)*, vol.l (Edmonton, Alberta: The Task Force, 1991) at 9-6.

10. Former director general of the Aboriginal Justice Initiative, Justice Canada, and subsequently deputy minister of Justice in the Northwest Territories, Don Avison previously practised as a defence lawyer and Crown counsel in the Yukon.

11. D. Avison, "Clearing Space: Diversion Projects Sentencing Circles and Restorative Justice" in R. Gosse, J. Youngblood Henderson, & R. Carter, eds., *Continuing Poundmaker and Riel 's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (Saskatoon, Saskatchewan: Purich, 1994) 235 at 238.

12. Interview with Derek Custer and Cecile Merasty, October 20, 1994, Pelican Narrows, Saskatchewan.

13. N. Sibbeston, "Circuit Court: The Community's Perspective" (Presentation at the founding convention of The Northern Conference in March 1994 at Yellowknife) in *Circuit Court and Rural Court Justice in the North: A Resource Publication* (Vancouver: Simon Fraser University, 1985) at 1-6.

14. H. Morin interview, supra chap. 3, note 3.

15. C. Griffiths & S. Verdun-Jones, *Canadian Criminal Justice* (Toronto: Butterworths, 1989) at 751.

16. Interview with RCMP constable Brian Brennan, November 15, 1995, Sandy Bay, Saskatchewan.

17. C. Fafard, "On Being a Northern Judge" in R. Gosse, J. Youngblood Henderson, & R. Carter, eds., *Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice.* (Saskatoon, Saskatchewan: Purich, 1994) 403 at 403-04.

18. Brennan interview, *supra* chap. 3, note 16.

19. *Ibid*

20. R. v. Bear (Sask. Prov. Ct.) [unreported], hereafter called the "Sandy Bay circle."

21. Telephone interview with Judge Bria Huculak, October 12, 1994.

22. J. Batten, Lawyers (Toronto: Macmillian, 1980) at 117- 18. The colourful career of this judge was also portrayed in J. Scissons, *Judge of the Far North: Memoirs of Jack Scissons* (Toronto: McClelland & Stewart, 1968).

23. Interview with Greg Bragstad, October 19, 1994, Sandy Bay, Saskatchewan.

24. Ross, "White Eyes," *supra.* chap. 2, note 21 at 2. [R. Ross, "Leaving Our White Eyes Behind: The Sentencing of Native Accused" [1989] 3 C.N.L.R. 1.]

25. M. Sinclair, "Aboriginal Peoples, Justice and the Law" in R. Gosse, J. Youngblood Henderson, & R. Carter, eds., *Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (Saskatoon, Saskatchewan: Purich, 1994) 173 at 183-84.

26. Ross, "White Eyes," *supra* chap. 2, note 21 at 6. [R. Ross, "Leaving Our White Eyes Behind: The Sentencing of Native Accused" [1989] 3 C.N.L.R. 1.]

27. Custer & Merasty interview, *supra* chap. 3, note 12.

28. *Report of the Saskatchewan Indian Justice Review Committee* (Regina 1992) at 43.

29. Hereinafter called the "Pelican Narrows circle".

30. Quigley, *supra* Intro., note I at 275. [T. Quigley, "Some Issues in Sentencing Aboriginal Offenders" in R. Gosse, J. Youngblood Henderson, & R. Carter, eds., *Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (Saskatoon. Saskatchewan. Purich, 1994

5.24 Aboriginal Justice Programs Handbook - 1997[92]

Self-government and justice

- The Aboriginal Justice Strategy complements the federal government's policy on Aboriginal self-government by helping communities, including Métis and Indian groups off a land base, develop justice programs.
  - It will not, however, replace or limit negotiations about justice issues in self-government discussions.
  - Rather, it will help set up programs and institutions that can become part of a community's self-government plans.
- The document Aboriginal Self-Government: Federal Policy Guide describes the areas of jurisdiction that can be part of self-government negotiations.
  - Some are included because they involve issues that are internal to the community, integral to its culture, and essential to the operation of governments and government institutions.
  - These include the policing, administration, and enforcement of Aboriginal laws through Aboriginal courts or tribunals.

[92] Department of Justice Canada, Aboriginal Justice Programs Handbook, Revised August 1, 1997.

- The Guide also includes the creation of offences by local or regional governments for enforcement of their laws.

- The policy also recognizes that there are self-government issues that go beyond internal matters.
  - For example, the federal government has jurisdiction over some administration of justice issues, including penitentiaries and parole.
  - As part of self-government, it is prepared to negotiate some measure of Aboriginal jurisdiction in such areas. It is important to remember, however, that the provinces have jurisdiction over civil courts and the administration of justice, including the Criminal Code of Canada.
  - For this reason, provincial and territorial governments must be involved in discussions concerning each Aboriginal justice proposal.

5.25 Restorative justice in Urban Aboriginal Communities -1997[93]

- Non-aboriginal communities are learning from what were largely aboriginal justice initiatives.

- "It is ironic that Aboriginal people are over represented as offenders in the justice system - yet it is they who provide some of the best models for many of the new approaches we are adopting."

5.26 Legacy of Colonialism-1997[94]

Editor's note: Following are some comments from Christine Stafford's article, *"Colonialism, indigenous peoples, and the criminal justice systems of Australia and Canada: Some comparisons"*.[1]

In May 1991 the Royal Commission into Aboriginal Deaths in Custody concluded that between 1 January 1980 and 31 May 1989, ninety-nine Aboriginal and Torres Strait Islander people died in the custody of prison, police or juvenile detention institutions. Of the eighty-eight males and eleven females, their average age was thirty-two years. All deaths were premature and that upon examination

"...that facts associated in every case with their Aboriginality played a significant and in most cases dominate role in their being in custody and dying in custody."[2]

For each individual whose death was investigated, files had been maintained by the State which included records of contact with schools, community welfare, adoption agencies, medical agencies, police, prison, probation, parole and, finally, coroner[1]s fil es. It was noted that these records documented each life to a degree that few non-Aboriginal peoples' lives would be recorded and the files often included the prejudices, ignorance and paternalism of those making the record.[3] The investigation also determined that, of the ninety-nine, all were uneducated or under-educated (in the European sense); their standard of health was poor to very bad; their social position was marginal; eighty-three were unemployed prior to detention; forty-three had experienced childhood separation from their natural families through State intervention or missions; all had early and repeated contact with the criminal justice system (forty-three had been charged with an offence by age fifteen, seventy-four had been charged with an offence by age nineteen); and all misused alcohol to a grave extent (forty-three were in custody directly for reasons related to alcohol).[4]

The Commission concluded that Aboriginal inmates did not die at a greater rate than non-Aboriginal inmates but that the proportion of Aboriginal people in custody was totally unacceptable. Unfortunately, Aboriginal incarceration and deaths in custody have continued to increase in Australia.

1. In Kayleen M. Hazelhurst (ed.), *Legal Pluralism and the Colonial Legacy* (England: Avebury, 1995) 217-241.

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[93] Ujjal Dosanjh as British Columbia Attorney General, Notes for opening address to Diversion Workshop (11 February 1997) at 3 cited in Irene Plett , Restorative justice in Urban Aboriginal Communities, December 17, 1999 http://www.law.ualberta.ca/centres/civilj/full-text/N_57_#N_57_

[94] http://www.usask.ca/nativelaw/jah.htmlJustice as Healing * Vol. 2, No. 1 (Spring 1997)

2. Commissioner Elliot Johnston, Q.C., *Royal Commission into Aboriginal Deaths in Custody, National Report*, vol. 1, (Canberra: Australian Government, 15 April 1991) at 1.

3. As quoted by Stafford at 220.

4. *Ibid.* at 221.

5.27 Navajo Peacemaker Courts/Canadian Native Justice Committees - 1996[95]

- This article describes Navajo Peacemaker Courts and Alberta Youth Justice Committees1.
  - Peacemaker Courts are Navajo Nation courts that offer mediation in civil disputes.
  - Youth Justice Committees are community-based sentencing advisory bodies for young offender courts.
- **Conclusions:** Similarities between these programs include using community members, involving family members, incorporating traditional Native practices, being less formal and adversarial than the courts, and having healing as a goal.
  - The operational and developmental ideologies are also similar and include the ineffectiveness of Euro-based adversarial courts in dealing with Native offenders, the revitalization of traditional justice practices, and the need for increased community control.

5.28 Royal Commission on Aboriginal Peoples, Bridging The Cultural Divide – 1996-1998[96]

- This is the report of the Royal Commission that focuses on Aboriginal justice issues. It is an important contextual document for Aboriginal justice initiatives of the future.
- It is consistent with the roundtable consensus and sets out a new national agenda for Aboriginal justice,
  - one where improvements are sought in the conventional justice system but also
  - where the prospects for legal pluralism are explored (i.e. where Aboriginal systems of justice are given rein to develop).
- **Conclusions:**
  - Improve the conventional justice system
  - Develop Aboriginal systems of justice

5.29 Alternative Justice Issues For Aboriginal Justice - 1996[97]

- This paper discusses the circumstances behind the development of, and the central issues in, recent Aboriginal justice alternatives.
  - It then examines one particular kind of justice alternative, namely adult Aboriginal diversion projects, in four areas of Canada: metropolitan Toronto, Sandy Lake and Attawapiskat in Northern Ontario, and Indian Brook in Nova Scotia.
  - The projects are compared in terms of social context, objectives, protocols, operations, and impact for divertees, victims, and the community.

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[95] Nielsen, M. (1996). A Comparison of Developmental Ideologies: Navajo Peacemaker Courts and Canadian Native Justice Committees. In: B. Galaway and J. Hudson (eds.), *Restorative Justice: International Perspectives*. Monsey, NY: Criminal Justice Press, pp. 207-223. *cited in* McCold, Ph.D. for the Working Party on Restorative Justice Alliance of Non-Governmental Organizations (NGOs) on Crime Prevention and Criminal Justice (NY), Restorative Justice An Annotated Bibliography, 1997, http://members.ozemail.com.au/~igmnet/restorativejustice/library/Annotated%20Bibliography.html

[96] Canada, Royal Commission on Aboriginal Peoples, Bridging The Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada. Ottawa: Public Works and Government Services Canada, 1996 cited in Ministry of the Solicitor General of Canada, Don Clairmont and Rick Linden, Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature, March 1998 http://www.sgc.gc.ca/epub/abocor/e199805/e199805.htm

[97] Clairmont, Don. "Alternative Justice Issues For Aboriginal Justice" in Journal of Legal Pluralism and Unofficial Law, #36, 1996 cited in Ministry of the Solicitor General of Canada, Don Clairmont and Rick Linden, Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature, March 1998 http://www.sgc.gc.ca/epub/abocor/e199805/e199805.htm

- Analytical considerations of equity, effectiveness, and efficiency are considered for each project as well as issues of the extent to which the projects have manifested Aboriginal cultural themes, advanced the self-government agenda, and effected new practices or lessons for restorative justice.
- ***Conclusions:***
  - Results of aboriginal justice alternatives are positive but quite modest.

5.30 Returning to the Teachings: Exploring Aboriginal Justice, 1996[98]

- This book continues Ross' exploration of the Aboriginal ethos and perspectives on justice.
- It aims at filling a void in discussions of how Aboriginal perspectives may indeed be quite different from those underlying the mainstream system, and particularly suited to the chief social and justice problems facing Aboriginal peoples today.

5.31 Popular Justice and Aboriginal Communities-1996[99]

Depew places Aboriginal popular justice initiatives in the larger context of community development and crime prevention, both theoretically and globally. In discussing popular justice as a general phenomenon, he emphasizes its assumption of communitarianism (i.e. a strong consensus, cultural homogeneity), its strategic direction of reaching a non-coercive, consensual resolution to disputes and conflicts, and the variety of informal and flexible techniques employed. He raises a number of critical issues concerning popular justice. He highlights, for example, "the rush to embrace 'nostalgic' models which nowadays are usually initiated by the state and could be a form of "net-widening", enhancing governmental control, but doing little to effect desirable change with respect to how social relations are structured. He also argues that often popular justice programs take on the characteristics of professionalism, hierarchy, and bureaucracy, and exclude public participation. They become rather similar to the structures to which they are presumed to be alternatives, thereby becoming more or less appendages, and often second-rate ones at that, to modern justice systems where the emphasis is on legal rights. It is not surprising then that popular justice programs in advanced societies frequently are not selected by eligible accused persons, that the constituency served is often the disadvantaged who cannot command other legal resources, and that there is little actual community development or empowerment. Yet, Depew acknowledges the promise of community-based justice systems that work and provide not only an alternative to the current system but also the possibility of a more comprehensive and effective approach to problems of crime and disorder.

Turning to popular justice in the Aboriginal context, Depew contrasts perspectives which emphasize Aboriginal cultural uniqueness (e.g. Ross, Turpel) and those which emphasize structural factors (e.g. LaPrairie), a distinction that could have significant social policy implications. While favouring the structural perspective, he acknowledges that certain cultural factors may especially apply in Aboriginal communities which he argues are set apart often by "their ability to reproduce themselves as a 'community of relatives and friends' rather than 'communities of strangers'". Depew appreciates the need for better access to a quality of justice that is more in tune with Aboriginal realities and where Aboriginal peoples can claim some ownership and exercise more control. Still, he suggests that underlying proffered Aboriginal justice interventions (e.g. sentencing circles, healing circles, Aboriginal traditions) has been an illness, healing and health metaphor which is insufficient to the complexities of current Aboriginal society. Depew highlights the situation of women in Aboriginal society in order to illustrate dysfunctional aspects of the "Aboriginal culture as healer" paradigm. He also cites the preliminary results of some pilot projects in Aboriginal justice which suggest victims are less satisfied, that "traditional culture" may be manipulated to defend offender behaviour, that power imbalances are neglected, and that there has been little community-building. There has been precious little in-depth evaluation and scant attention to what the disproportionate levels of person offences, and high female victimization, imply for

[98] Ross, Rupert. Returning to the Teachings: Exploring Aboriginal Justice. Toronto: Penguin, 1996 cited in Ministry of the Solicitor General of Canada, Don Clairmont and Rick Linden, Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature, March 1998 http://www.sgc.gc.ca/epub/abocor/e199805/e199805.htm
[99] Depew, Robert. "Popular Justice and Aboriginal Communities", Journal of Legal Pluralism and Unofficial Law, 36, 1996 *cited in* Ministry of the Solicitor General of Canada, Don Clairmont and Rick Linden, Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature, March 1998 http://www.sgc.gc.ca/epub/abocor/e199805/e199805.htm

communities' culture and structure.

Depew contends that justice problems in Aboriginal communities are more complex than the current "healing paradigm" suggests. He refers to power and opportunity structures there that rarely imply shared interests, values, or equality of access. In his view there is a need to reconfigure these structures, and this imperative has somehow to become part of the popular justice movement in Aboriginal society. It is a good argument though it does not address the larger political questions or strategies of the self-government movement, nor the priorities for realizing long-term common interests that may be intricately involved with current emphases on holistic myths and cultural uniqueness.

5.32 The Mnjikaning Community Healing Model – 1996 [100]

This document describes the model developed by this First Nation to deal with the problems of sexual abuse. Basically, it adheres to the principles and procedures developed in the Hollow Water Circle Healing model. The Biidaaban Circle has been accepting families for healing since the summer of 1996 although the program has yet to be fully implemented. The program was a response to concern about "the degree of child sexual abuse in the community and the hidden nature of this problem". A core group of sixteen persons who constituted the circle received training (some 13 full days) and also prepared the manual. The model described aims at "healing the person who has abused, the person who has been abused, the spouse of the abuser, the family and the entire community". In the model there is a Biidaaban coordinator, a disclosure team (including the coordinator, the police, crown attorney, and a representative from family services), and a validation team (including the disclosure team plus a justice of the peace and all Circle members); specific Circle members provide support for the various parties. According to the proposed model, when all parties have been "prepared" there is a Special Gathering where a Healing Contract is generated, and the completion of the latter (anticipated to be usually at least two years after the Special Gathering) is to result in a Cleansing Ceremony.

5.33 Community Justice or Just Communities? - 1995[101]

- This article explores the role of justice in aboriginal communities in Canada, and discusses the growing willingness of the Federal Government to accommodate a more informal, accessible form of local justice for native peoples.
- The author challenges the conventional wisdom that popular justice and State transformation are in opposition to each other, and that the State is in need of transformation through the activities of popular justice.
- ***Conclusion:*** *popular justice is concerned with the potential for transforming communities by responding more realistically and effectively to their needs, inequalities, and conflicts.*

5.34 Evaluating the quality of justice -1995[102]

- *Measuring Aboriginal Justice*
  - There have been few empirical studies hazarding a measurement of the extent to which modern Western legal systems apply rules equally.
  - There are even greater challenges to meet before attempting to measure "justice" in the Aboriginal sense.
- *Justice and Culture*

[100] Williams-Louttit, Pennie. BIIDAABAN; The Mnjikaning Community Healing Model. Second Edition. Mnjikaning Ontario, 1996 cited in Ministry of the Solicitor General of Canada, Don Clairmont and Rick Linden, Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature, March 1998 http://www.sgc.gc.ca/epub/abocor/e199805/e199805.htm

[101] LaPrairie, C. (1995), Community Justice or Just Communities? Aboriginal Communities in Search of Justice, *Canadian Journal of Criminology* 37(4): 521-545 cited in McCold, Ph.D. for the Working Party on Restorative Justice Alliance of Non-Governmental Organizations (NGOs) on Crime Prevention and Criminal Justice (NY), Restorative Justice An Annotated Bibliography, 1997, http://members.ozemail.com.au/~igmnet/restorativejustice/library/Annotated%20Bibliography.html

[102] Russel Lawrence Barsh, Associate Professor, Native American Studies, University of Lethbridge. Professor Barsh is U.N. representative for the Mikmaq Grand Council of Nova Scotia in association with the Four Directions Council, a non-governmental organization in consultative status with the Economic and Social Council of the United Nations. Evaluating the quality of justice, http://www.usask.ca/nativelaw/jah.htmlJustice as Healing Spring 1995 http://www.usask.ca/nativelaw/jah_barsh3.html

- What people deem "just" in a particular era plumbs the deepest levels of their culture.
- It is an expression of the basic principles attached to human relations.

- *Non-Aboriginal and Aboriginal Views of Justice*
  - When I asked by students to define "justice," most non-Aboriginal students referred to *equality before the law* or the application of the same rules to everyone.
    - Most Aboriginal students used "harmony," or a synonym.
    - To my mainstream Canadian students, the reality of life in a bureaucratic state, which manifests its "justice" by treating everyone at arm's-length, indistinguishably.
    - My Aboriginal students experience a reality of all-pervading kinship, not only in the home, but economic life and politics.
    - For them, "justice" is minimizing the frictions of living among kinfolk, and maximizing its potential synergies.
- *Justice and Order*

A threshold issue is the widespread contemporary confusion of the term "justice" with the concept of "order".

- We routinely refer to the police, criminal courts and prisons as institutions of "justice", when they were clearly devised for the purpose of maintaining "order" among certain social classes (first non-Normans, later commoners, eventually the poor).
- *Justice* was an afterthought, historically, as the governments tried to reconcile the measures they had traditionally taken to impose order on society, with the developing sense of "rights" and resistance among the people to whom it was applied.
- Order can be maintained without any "justice" at all, for example by a ruthless but efficient dictatorship.
  - Studies of the Nazi, Soviet and South African legal systems amply shoe that a high degree of legal formality and consistency in applying rules can be observed by highly repressive regimes.
  - *Deterrence*, the principal tool of Western notions of order, can be achieved to some degree and in certain circumstances by extreme, bureaucratically consistent cruelty - albeit societies that choose this path may not last for more than a generation or two. [103]

- *Measures of Order*
  - Purportedly "objective" measures such as changes in the frequency of reported offences or recidivism, are related to the deterrence goal of legal systems, rather than justice.
  - Most existing subjective tests are also deterrence-oriented, such as measures of individual feelings of physical security, or their belief that "crime is being dealt with" effectively.
- *Measures of Justice*
  - The challenge posed by Aboriginal peoples is a different one, and requires distinguishing between:

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[103] Russel Lawrence Barsh, Associate Professor, Native American Studies, University of Lethbridge. Professor Barsh is U.N. representative for the Mikmaq Grand Council of Nova Scotia in association with the Four Directions Council, a non-governmental organization in consultative status with the Economic and Social Council of the United Nations. Evaluating the quality of justice, http://www.usask.ca/nativelaw/jah.htmlJustice as Healing Spring 1995 http://www.usask.ca/nativelaw/jah_barsh3.html

- the *just-ness* of responses to violence and disorder, and the *effectiveness* of responses in reducing, short-term, the quality of violence and disorder. [104]

5.35 Aboriginal Justice Reform In Canada: Alternatives To State Control - 1995[105]

- McNamara refers to the 1975 National Conference on Native Peoples sponsored by the Ministry of the Solicitor General Canada as the landmark conference setting the stage for Aboriginal justice reforms for the next 15 years.
- During those years more than 20 reports identified a similar 'top ten' list of recommendations, chiefly
  - greater Aboriginal access to and participation in the criminal justice system, and
  - more emphasis on cross-cultural training and crime prevention.
- It was an integrationist orientation though there was often a call for studying how self-determination might be achieved.
- Since 1990 there have increasingly been calls for a new direction, one where emphasis is given to the establishment of Aboriginal justice systems (e.g. Law Reform Commission of Canada, 1991; Report of the Aboriginal Justice Inquiry of Manitoba, 1991).
- Indeed in the 1990s the constitutional reform movement which would have provided a constitutional amendment recognizing the right of Aboriginal self-government, and which was backed by the government and the major political parties, was narrowly defeated in national referendum on the Charlottetown Accord.
- Regional self-government agreements have provided significant formal self-government within the existing constitutional framework.
- McNamara stresses the need for formal realization of the inherent right of Aboriginal self-government since "meaningful autonomy must include the right to define justice and to adopt and apply laws and processes consistent with this definition".
- ***Conclusions:***
  - *Need for formal realization of the inherent right of Aboriginal self government - "meaningful autonomy must include the right to define justice and to adopt and apply laws and processes consistent with this definition".*

5.36 Defining the Parameters of Justice Devolution – 1995[106]

The Philosophy, Policy and Practice of Justice Devolution: An Overview

- To date, four common concepts or key issues can be discerned from the experience to date to devolve justice programs and services to Aboriginal communities.
  - The first key issue is the **definition of "aboriginal justice devolution"**, what it is and what it is not.
    - Too often, the concept of devolution is undefined.
    - Nor do governments or indigenous peoples seem to have any master plan for it.
    - Because it is often ill-defined or even misused, some experiences have been caught up in the political process, or subjected to a certain degree of naiveté or idealism.
    - Questions which may assist in defining "devolution" include:
      - What qualifies as a devolution situation?

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[104] Russel Lawrence Barsh, Associate Professor, Native American Studies, University of Lethbridge. Professor Barsh is U.N. representative for the Mikmaq Grand Council of Nova Scotia in association with the Four Directions Council, a non-governmental organization in consultative status with the Economic and Social Council of the United Nations. Evaluating the quality of justice, http://www.usask.ca/nativelaw/jah.htmlJustice as Healing Spring 1995 http://www.usask.ca/nativelaw/jah_barsh3.html

[105] McNamara, Luke. "Aboriginal Justice Reform In Canada: Alternatives To State Control" in Perceptions of Justice. Winnipeg: Legal Research Institute, University of Manitoba, 1995 *cited in* Ministry of the Solicitor General of Canada, Don Clairmont and and Rick Linden, Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature, March 1998 http://www.sgc.gc.ca/epub/abocor/e199805/e199805.htm

[106] Curt Taylor Griffiths (Canada) cited in The International Centre for Criminal Law Reform and Criminal Justice Policy and The School of Criminology, Simon Fraser University and with the support of The Department of Justice Canada and The Ministry of the Attorney General of British Columbia, Putting Aboriginal Justice Devolution Into Practice: The Canadian And International Experience Workshop Report, July 5-7, 1995 http://137.82.153.100/Reports/Aboriginal.txt

- Does it need to be community initiated or a state-sponsored system?
- What is the role of customary law?
- Can a devolution exercise involve a hybrid (Western and customary law) system, or does it need to be a pure system?
- What are the objectives?
- What are the effects and repercussions of devolution, in the larger community, for women, and for offenders and their behavior?

- The second key issue is the **role of the community.**
  - The community is obviously a central component in any devolution exercise, yet little is known of the dynamics of indigenous communities and their view on justice matters.
  - Questions can be and are raised as to who decides which voices are heard.
- The third key issue is the **role of the government(s).**
  - Too often, the government is only cast in the role of the resource provider.
  - Important questions which should be addressed regarding the government include:
    - What is being devolved?
    - What powers are retained?
    - What is the role of the existing criminal justice system?
- Finally, the **issue of research.**
  - It is recognized that there is a need for community-driven research that can form a baseline of information for the use of governments and communities.
  - There is at present an insufficient information base on issues such as crime patterns, views of community members (not just the views of the elite) or evaluative data.

5.37 Putting Aboriginal Justice Devolution Into Practice -1995

The Move Toward Devolution in Quebec – 1995 [107]

- After the 1992 Sommet de la Justice, organized by the then Minister of Justice Gil Rémillard, the Minister made a commitment to set up a committee to consult all the Aboriginal peoples of Quebec.
  - The goal of the consultation was to develop with them new approaches to the administration of justice, which would better meet their needs and would take into account their social and cultural values.
  - The committee has recently completed its work with a report ready for submission to the Minister.
- The presentation summarized the results of the consultation and recommendations.
  - The committee visited many Native communities in Quebec.
    - In conducting the consultations, it was found that the communities did not reject the justice system.
    - There was in fact support for both Canadian and Quebec laws (with the exception of laws related to hunting and fishing).
    - The main problem as perceived was that the system was administered by strangers.
    - The consultation also found that, while the justice system was seen as a solver of problems, there was also an insufficient knowledge among the people of existing laws.
    - By and large, communities had difficulties expressing what they wanted from the justice system or from devolution.
    - Some indicated a readiness to assume more responsibilities for administration of justice, but none indicated that they were ready to assume total responsibility.

[107] Jean-Charles Coutu (Canada) *cited in* The International Centre for Criminal Law Reform and Criminal Justice Policy and The School of Criminology, Simon Fraser University and with the support of The Department of Justice Canada and The Ministry of the Attorney General of British Columbia, Putting Aboriginal Justice Devolution Into Practice: The Canadian And International Experience Workshop Report, July 5-7, 1995 http://137.82.153.100/Reports/Aboriginal.txt

- The main proposals resulting from the consultation are:
  - mediation, diversion and referral to the Justice (of the Peace).
    - These proposals are not new, of course, but if they are accepted, it will be the first time that they are incorporated into the official system in the province.
      - In order to implement the proposals, the approach that has to be adopted must be global, flexible, "devolved" (i.e. the community assumes the level of responsibility it can at any given stage and progresses in its assumption of further responsibility as trained personnel become available), and involving permanent programs (not pilot projects).
    - It is also proposed that every community have a group of people (who can be called a justice committee) to take responsibility for justice matters, as well as working with and counseling the local Justice of the Peace.
    - There should also be a maitre d'oeuvre who will oversee the implementation of the recommendations of the report of the advisory committee.
    - Potential initiatives include exhaustive examination of sworn witnesses, consultation of the justice committee, and sentencing circles.

The Canim Lake Family Violence Program Charlene Belleau (British Columbia, Canada) [108]

Canim Lake is a small community in the British Columbia Interior. The majority of the adult population went to Indian residential schools. In a community-driven research study, it was found that 83% of the population have a history of alcohol and drug abuse, 70% experienced sexual abuse and 15% admitted to sex offenses. The Canim Lake Family Violence Program, which has taken five years to develop, is a diversion and treatment program for sexual assault and abuse. It was spearheaded and planned mostly by the women and victims of the community. There is a community oversight committee.

The program consists of seven phases, each dealing with problems of personal violence. It requires complete disclosure of sexual offending by abusers, confirmed by polygraphs. It uses deferred reporting in order to allow abusers to participate in the program. Structured groups formats characterize the primary intervention. "Community living contracts" and monitoring by polygraphs are part of the treatment and renunciation process. Crisis intervention training for community members is an integral part of the program. The program has accepted self-referrals, and has started youth groups and elders groups.

The program has developed supportive relationships with the official agencies. A protocol is signed between the Canim Lake Band and the British Columbia Ministry of Attorney General for the guarantee of the rights of the accused and victims. The Band successfully lobbied for a full-time RCMP officer and a half-time probation officer for Canim Lake, and for court sittings in the community. It receives strong support from provincial social departments, and liaises with provincial and federal boards of parole for community input into parole decision-making.

5.38 Restorative Justice: Four Community Models - 1995[109]

This paper reports on a restorative justice conference held in Saskatoon in 1995. The purposes of the conference were "to listen to Aboriginal perspectives on restorative justice", to find out what interesting developments are occurring in different social contexts (Aboriginal, Australia, New Zealand, Japan), and to examine issues in victim-offender mediation. Several Aboriginal presenters expressed scepticism about the mainstream society's responsiveness to restorative justice. One Aboriginal person argued that healing and an

[108] cited in The International Centre for Criminal Law Reform and Criminal Justice Policy and The School of Criminology, Simon Fraser University and with the support of The Department of Justice Canada and The Ministry of the Attorney General of British Columbia, Putting Aboriginal Justice Devolution Into Practice: The Canadian And International Experience
Workshop Report, July 5-7, 1995 http://137.82.153.100/Reports/Aboriginal.txt

[109] Saskatoon Community Mediation Services. Restorative Justice: Four Community Models. Saskatoon: Department of Justice, 1995 cited in Ministry of the Solicitor General of Canada, Don Clairmont and Rick Linden, Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature, March 1998 http://www.sgc.gc.ca/epub/abocor/e199805/e199805.htm

holistic approach are central to the Aboriginal perspective, while a female presenter contended that Aboriginal women are pivotal to developments in the Aboriginal community – "if you see any Aboriginal justice project that doesn't centrally involve the women, then you're not looking at real justice". Sentencing circles were discussed by several presenters and generally seen as representing a positive step and considerable improvement over existing mainstream justice practices. One judge contended that "if you involve the community ... you open up the possibility of forgiveness and reconciliation so people can get on with their lives. In small communities this is absolutely critical". The Australian and New Zealand versions of family conferencing were also discussed. Successes were noted, as were Aboriginal influences and the parallels with Canadian Aboriginal sentencing circles. The Japanese system of restorative justice was seen as similar in many ways (e.g. an emphasis on harmony, healing, and the local community) to Aboriginal justice initiatives.

5.39 Justice for the Cree: Communities, Crime and Order -1994[110]

This major study involved a team of several scholars headed by LaPrairie. Perhaps the fundamental thesis developed here is the idea that there should be less focus upon oversentencing and the response of the justice system and more attention paid to the cultural and structural factors that generate crime and conflict, and in particular to the community and community development. She emphasizes on and off reserve differences, the problem of repeat offenders, the erosion of traditional social controls due to irrevocably changed social and economic circumstances, and variation by community. There is a vision here, more than a convincing analysis of either the problem or the need for community control. Certainly, specific interventions such as extensive mediation, alternative dispute resolution, and community policing are encouraged and seemingly unproblematic but the core vision is not well delineated.

5.40 Considerations for Achieving "Aboriginal Justice" in Canada -1993[111]

Other papers/articles/papers can be found at http://www.sfu.ca/~palys/articles.htm

Justice - Non Aboriginal Perspective

- When those of us who are non-Aboriginal consider issues of justice, the usual place we look, if only as a reference point, is to the contemporary justice system, both civil and criminal.
- A key concept for us, and particularly for those of us who are in Criminology, is that of the "crime".
- We may disagree radically in terms of what should or should not be considered "criminal", and we may vary in our opinions about what it is that should be done with the people who commit particular actions we consider "criminal", but the criminal justice system is our reference point, and the Criminal Code one of our key scorecards.

Justice – Aboriginal Perspective

- It is argued that the language inherent in "justice" talk poses constraints which may preclude resolutions that are satisfactory to First Nations and their people.
- Although "justice" in Euro-Canadian nomenclature may be a meaningful concept (albeit too infrequently achieved), aboriginal languages have no similar concept that can be disentangled from the broader concept of "the way we live".
- Thus, while dominant governmental and criminological perspectives have no problem separating "justice" issues from other aspects of life, or in talking about "justice systems", these are foreign

[110] LaPrairie, Carol. Justice for the Cree: Communities, Crime and Order. Cree Regional Authority, Nemaska, Quebec, 1994 cited in Ministry of the Solicitor General of Canada, Don Clairmont and Rick Linden, Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature, March 1998 http://www.sgc.gc.ca/epub/abocor/e199805/e199805.htm

[111] Ted S. Palys, School of Criminology, Simon Fraser University Considerations for Achieving "Aboriginal Justice" in Canada presented at the annual meetings of the Western Association of Sociology and Anthropology, held in Vancouver, British Columbia, in 1993. http://www.sfu.ca/~palys/wasa93.htm

concepts to many First Nations who would prefer to speak in terms of concepts such as social harmony, dispute resolution, peacemaking, and healing.

- These concepts imply concerns with broader social relations, and yield implications for the general nature of aboriginal-governmental relations which must be addressed as the terms of self-government are negotiated.

Possible Aboriginal Justice Models

- Governments have thus far shown itself to be responsive to "aboriginal justice" initiatives which take the dominant Euro-Canadian system as its departure point, but appear unwilling and bureaucratically unable to respond to initiatives which attempt to incorporate justice into broader self-determinative strategies of responsibility and governance.

- One alternative that is open to individual First Nations is to join us in that model, and, much to the pleasure of the federal government, many of them do. There are many First Nations in the country where the community is simply pleased as punch with the service they get from the RCMP and the courts, and would like to continue that way for at least the foreseeable future.

- The main problem with that model is that the criminal justice practitioners who keep it in motion are still numerically overwhelmingly non-Aboriginal, however, and there are many First Nations who feel great aggravation about that.

    - Certainly some of the Commissions and Inquiries of the last decade - like the Donald Marshall Commission in Nova Scotia, and the Manitoba Aboriginal Justice Inquiry, just to mention two - have shown that aboriginal misgivings about the quality of formal justice they have received, has considerable basis in fact, and have demonstrated in elaborate detail the racist attitudes and cultural insensitivities that have characterized much of the aboriginal experience.

Indigenization

- For many, the response to such revelations has been to argue for the greater **indigenization** of the justice system - if only we had more aboriginal police officers, and translators, and judges, and probation officers, then all would be better because aboriginal people would be arresting and convicting and imprisoning their own, and in all likelihood showing greater cultural sensitivity in the process.

- Some First Nations have liked that idea, and have indeed signed on to Native policing programmes, or have even pushed hard for Tribal Courts along the lines of that run by the Navajo in New Mexico-Arizona.

- And the federal government has no problem with that alternative either.

- Tribal courts may take a bit of doing to accomplish, but the federal government, at least as recently as when Kim Campbell was its Minister of Justice, could live with that reality.

There are also several variants of that theme, all of which involve some greater degree of participation by Native communities in the resolution of criminal actions committed by their members. Two examples are of particular interest here.

Government institutions find it difficult to comprehend and interact with decentralized societies. Two different traditions with two different ways of righting wrongs are attempting to deal with the same problems. Both perspectives have their strengths but require detailed work to integrate and apply them." (p.3).

According to my criteria, therefore, the government has once again failed the test, and pursued assimilation instead of self-determination. Indeed, although the Minister of Indian Affairs indicated that he and the Prime

Minister were "committed" to finding "...practical ways to ensure that aboriginal communities can exercise greater control over the administration of justice" (p.160), he added immediately thereafter that: "However, we must keep in mind that there will clearly be some limitations on this control. ... Indians must respect the laws of this country and the rights of its non-native citizens." (Siddon, 1991, p.160).[112] Siddon's comments would seem to suggest that the shape of aboriginal justice must conform to non-aboriginal conceptions of it. But as Donna Greschner (1992)[113] notes:

"It is almost oxymoronic to talk of non-aboriginal conceptions of aboriginal rights; if aboriginal rights are not given their meaning by aboriginal peoples, they are not truly Aboriginal." (p.344).

Ovide Mercredi, Head Chief of the Assembly of First Nations, expresses a similar view. He is quoted in the Law Reform Commission's (1991)[114] report to have eschewed the idea that small-scale "fixing" might solve the current situation, or that limits should be declared *a priori*. Putting these matters in the context of broader relations, he stated:

"The real issue is what some people have called cultural imperialism, where one group of people who are distinct make a decision for all other people. ... Our experiences are such that, [even] if you make [the current system] more representative, it's still your law that would apply, it would still be your police forces that would enforce the laws, it would still be your courts that would interpret them, and it would still be your corrections system that houses the people that go through the court system. It would not be our language that is used in the system. It would not be our laws. It would not be our traditions, our customs or our values that decide what happens in the system. That is what I mean by cultural imperialism." (p.13).

Part of our role as researchers, and as policy analysts, and practitioners, is to listen to aboriginal communities as they tell us their wants, and their needs, and their aspirations. Aboriginal peoples, as the indigenous inhabitants of this land, have a unique collective right to be self-determining, and have the right to expect Canada to walk its talk when we say that we want and hope for aboriginal peoples to once again flourish. But they cannot do so unless we are responsive to their cultural requirements, which includes the right to exist as they wish, and to have their conceptions and structures of justice mirror their preferred structures of authority and governance. Until that is an institutionalized reality, then, to paraphrase Chomsky (1993)[115], the conquest continues.

I'm not aboriginal; nor do I purport to speak for aboriginal peoples in terms of what their preferred futures might entail.

Nonetheless, I do believe it **is** reasonable for me to comment on the other side of the equation, i.e., on the kinds of considerations that the non-aboriginal community, and particularly our governments, should keep in mind as they negotiate both broad framework agreements, and consider whether to fund particular projects, involving aboriginal peoples and their individual First Nations.

The area on which I will focus concerns "aboriginal justice" initiatives, though it is extremely difficult to divorce justice in the narrow sense from its broader meanings.

I assume you know much about our mixed history of aboriginal-governmental relations.

In the early years of the New World colony, when the European explorers depended heavily on this continent's indigenous peoples for survival from the elements, and protection from other European powers, the sovereignty of indigenous First Nations was acknowledged, and a process of treaty-making enacted. With their foot in the door, however, and particularly by the 1800s, once colonists were here aplenty, the British and French had established an equilibrium, and the danger of hostility from the new United States had passed, Native peoples were seen as more of an impediment to progress than anything else, and were treated as such.

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[112] Siddon, The Honourable Tom. (1991). The road to self-determination. In F.Cassidy (Ed.) Aboriginal Self-Determination. Lantzville, B.C.: Oolichan Books, pp.155-161.

[113] Greschner, Donna. (1992). Aboriginal women, the constitution and criminal justice. University of British Columbia Law Review (Special edition), pp.338-359.

[114] Law Reform Commission of Canada. (1991). Report on Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice. Ottawa: Law Reform Commission.

[115] Chomsky, Noam. (1993). Year 501: The Conquest Continues. Montréal: Black Rose Books.

Beliefs that Natives were "the vanishing race" proliferated; treaty-making rapidly became a more one-sided process; and soon, as was the case here in British Columbia, there was no treaty-making at all.

So Canada took shape, and those who governed took it upon themselves to decide what was best for "their" Indians. The official policy was one of **assimilation**, and its vehicle was the *Indian Act*, which gave the government, through its network of Indian Agents, the power to regulate virtually every element of Indian life. That policy, as you probably all know, continued for many years, and was certainly evident as recently as 1969, when the Trudeau-Chretien White Paper proposed the desiderata of terminating the *Indian Act*, terminating the Department of Indian Affairs, terminating any sort of Indian special status, and releasing aboriginal Canadians into the mainstream of society with all of the **individual** rights and responsibilities that all of us share, but with no recognition of the **collective** rights that are a part of aboriginal culture, nor of their unique past and prospective contributions to Canadian culture (e.g., see Weaver, 1981)[116].

But Native peoples were incensed at yet another example of decisions about "what was best for Indians" being made by somebody else, and the 1969 White Paper is now identified by many as one of several key factors that forged the beginnings of a pan-aboriginal coalescence, and helped give root to contemporary Native Power (e.g., see Tennant, 1990).[117]

Much has changed since 1969. Aboriginal peoples and their leaders have asserted themselves in the Courts, have seen to it that "aboriginal rights" have been written into the *Constitution*, have had impact on the broader political scene despite their continued absence from the institutional structures of the country, and have re-activated a process of cultural renewal.

One would hope that the same would be true of the other side of the renegotiating equation, i.e., particularly the Federal government: That they would have come to see the importance of recognizing the inherent aboriginal right to self-determination; to acknowledge the special contributions that aboriginal peoples have made to the birth of this country; and to appreciate the unique contributions that a healthy and respected aboriginal community can bring to the future of this country. And, to some extent, that is so, at least in theory. The Federal Government, through its Department of Indian Affairs and Northern Development (DIAND) has formally abandoned its explicitly assimilative objectives, and entered into a period of "devolution" of powers to aboriginal peoples.

At first glance, therefore, Canada looks progressive and positive. But in practice, my paper will suggest that something else is the case. Perhaps the most appropriate reference here is to Noam Chomsky, whose most recent book - *Year 501* (1993) - makes the case that, in the world of both domestic politics and international law, the conquest that formally began in 1492, and the imperialist attitudes that guided it, still continue. One intention of this paper is to discuss the extent to which this can be said of Canada, in terms of its relations with indigenous peoples.

In the realm of "aboriginal justice", for example, the question to be asked is to what extent the rhetoric of self-determination has been matched by the reality of its promotion. Can we take talk about "devolution" and "self-governance" at face value, or are the strings attached to its realization really little more than a continuation of the assimilation policy in a subtler guise?

Let me state from the start a few "givens" from which I can depart. First, I am a believer in aboriginal self-determination, period. I accept that, as the indigenous peoples of this country, aboriginal peoples have a very special right, which they exercised for thousands of years and have never rescinded, to govern themselves. I also accept that First Nations are a unit unto themselves, such that individual First Nations have the right to choose what is right for them, and that no single solution need be accepted by all First Nations in order to become adopted. A corollary is that any resolution that might be negotiated between the federal government and any individual First Nation must be freely consented to by that First Nation, and by the federal government, before it can take effect.

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[116] Weaver, Sally M. (1981). Making Canadian Indian Policy: The Hidden Agenda, 1968-1970. Toronto: University of Toronto Press.

[117] Tennant, Paul. (1990). Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989. Vancouver: University of British Columbia Press.

These assertions were important for me to state, not only to set them out for you as an audience of uncertain makeup, but also insofar as I can now offer them as a set of criteria by which we can consider the extent to which they are met by given projects in the realm of aboriginal justice. Let us consider a range of projects, therefore, to see just how self-determining contemporary options can be.

5.41 National Roundtable on Aboriginal Justice Issues - 1993[118]

- This roundtable discussion brought together leading Aboriginal political representatives and scholars, governmental leaders, academics and others to frame the justice issues for the Royal Commission.
- There was extensive consensus on seven points, namely that
- ***Conclusions:***
    - *the Canadian Justice System so far has failed Aboriginal people;*
    - *the system has been too removed from Aboriginal people and Aboriginal communities;*
    - *there is an emerging Aboriginal system being formulated that is generating different and potentially effective principles for action;*
    - *the time for action is now;*
    - *there is no fundamental constitutional impediment to change;*
    - *local communities should be the bases for change; and*
    - *a merging of Aboriginal and mainstream justice system thrusts is very possible.*

5.42 Accommodating Concerns of Aboriginal Peoples Within the Existing Justice - 1993[119]

- Giokas makes two principal points in this article.
- He emphasizes:
- Conclusions:
    - *the need for projects dealing with the development of internal community structures for Aboriginal criminal justice and*
    - *he argues that the best way to avoid Aboriginal alienation is to avoid the court altogether, diverting people to more appropriate forums where there can be a focus on community methods of restoration and healing.*

5.43 Balancing Rights: The Native Justice Debate - 1993[120]

- In this brief article the author presents, without revealing her own bottom-line position, some pros and cons for the idea of a separate Aboriginal justice system.
- The author notes that while commission reports (e.g. the Manitoba Aboriginal Justice Inquiry of 1991) and many experts, academic and political, have strongly supported the concept, governments at both the federal and provincial levels, have emphasized accommodation within the existing justice system, albeit promising significant positive change for Aboriginal peoples.
- In the author's view a central issue in the controversy concerns the status of the Charter of Rights and Freedom.
- Governments, as well as certain Aboriginal interests, have emphasized the need to guarantee the Charter rights and freedoms for all Canadians, while proponents of a separate justice system, in the author's view, either discount the Charter's significance or suggest that Aboriginal peoples can develop an adequate alternative to it.
- ***Conclusions:***

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[118] Canada, Royal Commission on Aboriginal Peoples, National Roundtable on Aboriginal Justice Issues. Ottawa: Supply and Services Canada, 1993 *cited in* Ministry of the Solicitor General of Canada, Don Clairmont and Rick Linden, Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature, March 1998 http://www.sgc.gc.ca/epub/abocor/e199805/e199805.htm

[119] Giokas, John. "Accommodating Concerns of Aboriginal Peoples Within the Existing Justice System", in Aboriginal Peoples and the Justice System. Ottawa:
Royal Commission on Aboriginal Peoples, 1993 *cited in* Ministry of the Solicitor General of Canada, Don Clairmont and Rick Linden, Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature, March 1998
http://www.sgc.gc.ca/epub/abocor/e199805/e199805.htm

[120] Kulig, Paula. "Balancing Rights: The Native Justice Debate" in Canadian Lawyer, February, 1993 cited in Ministry of the Solicitor General of Canada, Don Clairmont and Rick Linden, Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature, March 1998 http://www.sgc.gc.ca/epub/abocor/e199805/e199805.htm

- *idea of a separate Aboriginal justice system*

5.44 Recognizing and Legitimating Aboriginal Justice - 1993[121]

- The author deals with the larger question of legal pluralism in contrast with the present system of legal centralism or monism where adversarial adjudication is the dominant procedural model and the key to justice is "ensuring that everyone has an equal opportunity to set in motion the system which permits the designated 'official' actors to play their defined roles."

- MacDonald holds that reality is not congruent with the thrust of legal centralism, especially at the ideological level and in the administration of justice.

- He places Aboriginal alternatives in the context of legal pluralism and the development of mechanisms for addressing conflict in the socio-cultural frame from which it arises.

- ***Conclusions:***
  - *In his view the most significant failures of the present system of justice are failures of recognition not failures of access; accordingly, acknowledgement of Aboriginal difference (i.e. recognition) can benefit Canadian society as a whole and especially disadvantaged segments within it.*

5.45 Adapting Canadian Criminal Justice System For Aboriginal Peoples - 1993[122]

- In this paper prepared for the National Roundtable on Aboriginal Justice Issues (Royal Commission on Aboriginal Peoples) Turpel discusses the general issue of whether the Canadian Criminal Justice System can be adapted for Aboriginal people.
- She emphasizes that there are differences in value-orientations, principles, and strategic directions between Aboriginal peoples and their traditional systems on the one hand and the Canadian system on the other.
- At the same time she considers the impact of the destruction caused by colonialism and oppression, and also the diversity among Aboriginal peoples.
- She stresses differences between Aboriginal and mainstream systems that exist on a variety of fundamental Justice principles, and emphasizes the Aboriginal focus on harmony, healing, and consensus.
- She argues that dual respect of differences (and rights) should be the theme of future Justice considerations and collaboration, and holds that a single inclusive model will be problematic, especially outside urban areas.

5.46 Justification For A Parallel System Of Aboriginal Justice - 1993[123]

- Webber deals with the moral and everyday rationalization for a parallel Aboriginal justice system vis-à-vis Canadian concerns for fairness, equity, commonness and so forth.
- He sees Aboriginal justice as a matter of roots, context, and identity.
- He deals with several possible objections to an autonomous Aboriginal system.
- In discussing concerns about the protection of individual liberty, Webber observes that undoubtedly there would be the possibility of opting-out, and the Charter of Rights and Freedom would protect certain rights.

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[121] MacDonald, Roderick. "Recognizing and Legitimating Aboriginal Justice" in Aboriginal Peoples and the Justice System. Ottawa: Royal Commission on Aboriginal Peoples, 1993 *cited in* Ministry of the Solicitor General of Canada, Don Clairmont and Rick Linden, Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature, March 1998 http://www.sgc.gc.ca/epub/abocor/e199805/e199805.htm

[122] Turpel, Mary Ellen. On The Question Of Adapting The Canadian Criminal Justice System For Aboriginal Peoples: Don't Fence Me In. National Round Table On Aboriginal Justice Issues, Royal Commission on Aboriginal Peoples, Ottawa, 1993 cited in Ministry of the Solicitor General of Canada, Don Clairmont and Rick Linden, Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature, March 1998 http://www.sgc.gc.ca/epub/abocor/e199805/e199805.htm

[123] Webber, Jeremy. "Individuality, Equality And Difference: Justification For A Parallel System Of Aboriginal Justice" in Aboriginal Peoples and the Justice System. Ottawa: Royal Commission on Aboriginal People, 1993 cited in Ministry of the Solicitor General of Canada, Don Clairmont and Rick Linden, Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature, March 1998 http://www.sgc.gc.ca/epub/abocor/e199805/e199805.htm

- On another possible objection, namely the legitimacy of authority, Webber contends that concern would be about institution building at the community, band or First Nation level. and the question of whether Aboriginal societies lack the safeguards which non-Aboriginal Canadians consider important.
- Here he argues for a reinvention of tradition appropriate to the new societal Aboriginal circumstances which may, for example, require inventing checks to prevent abuse which were unnecessary hundreds of years ago.
- He contends that any Aboriginal system will have to pass some standards for effectiveness and lack of corruption.
- On equality and commonness, Webber notes that since some basic standards are essential to the continued cooperation of Aboriginal and non-Aboriginal peoples, there would need to be some consistency in minimal standards of conduct upheld by the criminal law or other means.
- Webber emphasizes that he is not suggesting that a completely separate Aboriginal justice system is essential or even desirable.

5.47 Community Justice or Just Communities? -1993[124]

The theme of the Mexico conference was "the need to move beyond the confines of legal institutions to other bodies and agencies which construct social relations".

- There was substantial criticism, however, concerning the legitimacy and the efficacy of **popular justice** and the extent to which it is really an alternative to state control and more than a tool for the locally powerful elite.
- As LaPrairie observes, "legal pluralism and community justice have no fixed political content and may serve either progressive or reactionary politics".
- LaPrairie tries to make a case for the former, arguing that popular justice, especially Aboriginal justice initiatives, should be directed at transforming communities into 'just communities', clearly a broader role than the mainstream justice system has.
- Turning to justice initiatives in Aboriginal communities, LaPrairie discusses a variety of issues in relation to her own justice research among the Cree, in the Yukon, and in the inner cities of Canada.
- Her argument is that there is an absence of detail in the plans for Aboriginal justice, little discussion of community needs and realities, and that the agenda is largely driven by the idea of self-government where jurisdiction is the key issue.
- The over-representation of Aboriginals among offenders and incarcerates also fuels this uncritical discourse in her view.

The net result is less attention to structural problems and less discussion of needed resources (both material and educational) for Aboriginal communities, both of which militate against the creation of 'just communities'.

5.48 An Evaluation of the Attawapiskat First Nation Justice Pilot - 1992[125]

The Attawapiskat adult diversion project was similar to that of Sandy Lake in many respects (e.g. objectives, elders sit with judges, pay and budget, post-charge diversion, clients were mostly young men, participation of offender was voluntary, misuse of intoxicants was the chief offence, similar dispositions were rendered, the coordinator acted like a court clerk) but was different in that elders handled some minor offences (i.e. band bylaws) on their own. There was significant satisfaction with the project on the part of the offenders but victims and community leaders were often ambivalent, especially arguing that some serious sexual assault cases were inappropriately diverted to not sufficiently well-trained elders. Friction developed between Council and the project. The project coordinator had to act as probation monitor since Correctional Services had no

[124] LaPrairie, Carol. "Community Justice or Just Communities? Aboriginal Communities in Search of Justice". Folk Law and Legal Pluralism Symposium. Mexico City, 1993 cited in Ministry of the Solicitor General of Canada, Don Clairmont and Rick Linden, Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature, March 1998 http://www.sgc.gc.ca/epub/abocor/e199805/e199805.htm

[125] Obonsawin-Irwin Consulting Inc. An Evaluation of the Attawapiskat First Nation Justice Pilot. Ottawa: Department of Justice, 1992 cited in Ministry of the Solicitor General of Canada, Don Clairmont and Rick Linden, Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature, March 1998 http://www.sgc.gc.ca/epub/abocor/e199805/e199805.htm

jurisdiction in diverted cases. The evaluators recommended that the project be scaled back in scope pending a review of the project's mission, operational philosophy and objectives, something they said should be done with significant community involvement. They also recommended criteria and guidelines for the selection of members to, and the operation of, the elders' council. This project was in a state of limbo after two years of operations.

5.49 An Evaluation of the Sandy Lake First Nation Justice Pilot Project-1992 [126]

The Sandy Lake adult diversion project began in 1990 with the swearing in of an elders' justice council which would sit with the judge and the justice of peace to assist in the adjudicating and sentencing process. This evaluation was based solely on interviews with a wide range of role players but neither files nor data were accessed. Project documentation identified the objectives as increasing self-determination and community involvement while reducing offences and incarcerations. By far the most frequent offence involved the misuse of intoxicants. Both the elders and the project coordinator were paid. The elders apparently received little training. Accused persons, community leaders, and outside officials were generally satisfied that the intervention represented an improvement over the extant justice system. While it is argued that objectives were being met a number of recommendations were made including greater development of the healing and the preventive / educative approaches, and of conflict of interest guidelines. Clearly this project dealt only with minor offences and while there was community involvement through the elders it was not clear whether an alternative philosophy was in operation. Transition problems occasioned by new band elections and conflict over the role of elders have seriously limited this project.

5.50 Aboriginal Criminal Justice in Canada - 1992[127]

- A special issue of the journal is devoted to Aboriginal crime and justice, primarily in Canada which use Braithwaite's (1989) "Crime, Shame and Reintegration" as an explanatory framework.
- Articles include:
  - customary law among aboriginal groups in British Columbia;
  - crime control in 3 Ontario Nishnawbe-Aski Nation communities;
  - dominant and dominated cultures of native villages in Alaska;
  - the role of police on 25 reserves in Quebec;
  - homicide trends among Aboriginals and other Canadians;
  - Aboriginal female suicides in custody;
  - the dimensions of "owning" crime and disorder in the east James Bay Cree communities of Quebec;
  - the juvenile court system in 22 Manitoba communities;
  - factors influencing native policing arrangements;
  - critiques the theory of invention of tradition, with the People of the Longhouse of the Kahnawake Mohawk Nation;
  - the issue of community participation in socio-legal control within the Inuit of the Northwest Territories; and the characteristics of Aboriginal recidivist.
  - Lastly, Scott Clark attempts to tie together the underlying themes of this special issue.

5.51 Crime and Community: Issues and Directions in Aboriginal Justice -1992 [128]

- The broad question of aboriginal justice is important on the national agenda.

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[126] Obonsawin-Irwin Consulting Inc. An Evaluation of the Sandy Lake First Nation Justice Pilot Project. Ottawa: Department of Justice, 1992

[127] LaPrairie, C., et. al. (1992). Aboriginal Criminal Justice in Canada, *Canadian Journal of Criminology* 34(3-4):281-521. cited in McCold, Ph.D. for the Working Party on Restorative Justice Alliance of Non-Governmental Organizations (NGOs) on Crime Prevention and Criminal Justice (NY), Restorative Justice An Annotated Bibliography, 1997, http://members.ozemail.com.au/~igmnet/restorativejustice/library/Annotated%20Bibliography.html

[128] Clark, S. (1992). Crime and Community: Issues and Directions in Aboriginal Justice. Canadian Journal of Criminology 34(3-4): 513-516 cited in McCold, Ph.D. for the Working Party on Restorative Justice Alliance of Non-Governmental Organizations (NGOs) on Crime Prevention and Criminal Justice (NY), Restorative Justice An Annotated Bibliography, 1997, http://members.ozemail.com.au/~igmnet/restorativejustice/library/Annotated%20Bibliography.html

- This summary of a special edition of the Journal suggests that we are leaving individual aboriginal communities out of the policy debate, especially aboriginal women's groups.
- This essay reviews the papers in this volume from the explanatory framework of Braithwaite's (1989) *Crime, Shame and Reintegration.*
- ***Conclusion:*** *warns that there may not be consensus on approach within aboriginal communities.*

5.52 Aboriginal Involvement in the Criminal Justice System – 1992 [129]

- This is an overview of Aboriginal involvement in the Canadian Justice System.
- The author, affiliated with the Law Reform Commission of Canada at the time, carried out the study in conjunction with the Manitoba Inquiry on Justice and Aboriginal Peoples.
- She provides a brief factual description of Aboriginal involvement in the criminal justice system, along with some policy discussion and extensive recommendations, for each stage or level of the justice system, from policing to parole and aftercare.
- At each step it is clear that Aboriginal people are disadvantaged if not discriminated against.
- The paper represents the conventional, progressive non-perspective on Aboriginal peoples and the Canadian justice system.
- But analyses are limited (e.g. what is the role of socio-economic status?) and few hard choices are made; for example, in referring to the debate over whether in corrections the emphasis should be on cross-cultural training of non-Aboriginal staff or the hiring of Aboriginal staff, the author's solution is "more of both".
- Moreover, the article could not take into account justice system developments of the 1990s including the development of diversion and of sentencing circles, as well as the indigenization and increasing Aboriginal administration of policing across Canada.
- Still, it is a fine article and two points in particular should be noted.
- **Conclusions:**
  - In general, the main thrust of the paper is advancing recommendations for a more equitable Canadian justice system for Aboriginal peoples, and the main theme is the call for more governmental funding (i.e. human, material, and program resources) and more Aboriginal control over and direction of these resources.
  - The author acknowledges that such recommendations can be characterized as mere "tinkering" and falling far short of "the aspiration of Aboriginal peoples to assert control over their lives and destinies", something she strongly supports as a long-run objective.
  - The author observes that the responses of Aboriginal participants during the Law Reform Commission consultations emphasized the need for respect for Aboriginal values and customs, and for their having ownership of the system of laws which govern them.
  - Additionally, she notes that community involvement (and by implication, community development in all respects) is central to the success of Aboriginal justice alternatives

5.53 Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice - 1992 [130]

- These authors emphasize that in re-thinking justice for Aboriginal peoples it must be appreciated that there is no singular answer or Aboriginal system, but rather there are myriad possibilities associated with the diversity of experience, geography, and culture of Canada's Aboriginal peoples.
- As Aboriginal communities develop ideas and initiatives about justice it is important, the authors argue, that these are treated with respect by non-Aboriginal peoples and the mainstream justice system.

[129] Zimmerman, Susan. "The Revolving Door of Despair: Aboriginal Involvement in the Criminal Justice System", U.B.C. Law Review, Vol. 26, 1992 cited in Ministry of the Solicitor General of Canada, Don Clairmont and Rick Linden, Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature, March 1998 http://www.sgc.gc.ca/epub/abocor/e199805/e199805.htm
[130] Monture-Okanee and M.E. Turpel. "Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice" in U.B.C. Law Review, vol. 26, 1992 cited in Ministry of the Solicitor General of Canada, Don Clairmont and Rick Linden, Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature, March 1998 http://www.sgc.gc.ca/epub/abocor/e199805/e199805.htm

- In their words "Justice requires a legally based commitment to cultural diversity and Aboriginal collective rights to determine our own destiny ... Justice must mean justice as understood by Aboriginal peoples and not only as conceptualized by non-Aboriginal Canadians".

5.54 Criminal Justice and Native Self-Government – 1992 [131]

- Here Nielsen discusses the characteristics of traditional Aboriginal justice (e.g. woven into society, flexible, situational, welfare and harmony of the group emphasized, etc.), most of which follows deductively from these traditional societies being small, economically interdependent kinship-based units, rather than from any empirical evidence.
- Using Black's categories she labels that traditional system's thrust as conciliatory more than penal, therapeutic, or compensatory; further, she argues it was a rational system featuring consensus and mediation rather than one dependent upon prayer, contests, and the like to effect justice.
- **Conclusions:**
  - She thinks that much of this traditional (Aboriginal) justice is very appropriate in current and future society and is optimistic about its contribution to a new and better justice system.
  - Still she does caution that
    - Aboriginal values may have changed too much with modernization; that basis of the traditional (Aboriginal) system, such as shaming, may be ineffective in the socially and geographically mobile, modern Aboriginal community;
    - community cohesion and deep value sharing may be problematic; and, finally,
    - there will undoubtedly be jurisdictional issues and conflicts between Aboriginal and mainstream justice systems.

5.55 Dancing With a Ghost: Exploring Indian Reality - 1992[132]

- This book is based upon a paper written by Ross in 1987 where he speculated upon his experiences with Aboriginal peoples in the justice system, discussing an Aboriginal 'way', a traditional ethos.
- Non-confrontation, avoidance of a show of emotion or being critical of others, use of parables rather than direct orders or statements, and so forth are components, he argues, of a different, Aboriginal cultural style.
- He explores the thesis that retention of this cultural style, this ethos, in the radically different modern societal context may be a major reason for present-day problems in Aboriginal communities.
- He suggests that individuals may not have "the tools" to deal with all the current critical turmoil that modernity has effected (e.g. the whole essence of community has changed), something which explains the necessity of an alternative justice system that encourages people to 'open up the heart', that encourages healing and getting / restoring balance.

5.56 National Inventory of Aboriginal Justice Programs -1992[133]

This document provides a detailed listing of Aboriginal justice programs, projects and research as of 1992. It lists these more than 400 items by federal department (Justice, DIAND, Solicitor General, Other) and also by province and territory. In each instance there is specification of the delivery agency, the purpose of the project, its target groups, funding arrangement, contact person, and starting and completion dates. The projects cover the entire spectrum of justice concerns from family violence, alternative measures for youth, to training for

[131] Nielsen, Marianne. "Criminal Justice and Native Self-Government" in Robert Silverman and Marianne Nielsen (eds.). Aboriginal Peoples and Canadian Criminal Justice. Toronto: Butterworths. 1992 *cited in* Ministry of the Solicitor General of Canada, Don Clairmont and Rick Linden, Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature, March 1998 http://www.sgc.gc.ca/epub/abocor/e199805/e199805.htm

[132] Ross, R. Dancing With a Ghost: Exploring Indian Reality. Markham: Octopus Publishing Group 1992 cited in Ministry of the Solicitor General of Canada, Don Clairmont and Rick Linden, Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature, March 1998 http://www.sgc.gc.ca/epub/abocor/e199805/e199805.htm

[133] Aboriginal Justice Directorate. National Inventory of Aboriginal Justice Programs, Projects and Research. Update. Ottawa: Department of Justice, 1992 cited in Ministry of the Solicitor General of Canada, Don Clairmont and Rick Linden, Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature, March 1998 http://www.sgc.gc.ca/epub/abocor/e199805/e199805.htm

special constables. In addition there is an executive summary and useful updated socio-demographic and crime and corrections data for each province and territory as well as for Canada as a whole.

5.57 In Search of the Pathways to Justice: Alternative Dispute Resolution in Aboriginal Communities-1992[134]

In this ninety-two page paper Jackson provides a comprehensive overview of Aboriginal justice initiatives as a social movement. He outlines the several theoretical explanations commonly used to explain the over-representation of Aboriginal peoples in the criminal justice system and observes that each entails a different package of alternative initiatives.

- The cultural model (i.e. the clash of Aboriginal and western cultures) invites alternatives such as cross-cultural training, native court-workers and, more generally, indigenization.
- The structural model (i.e. the focus on economic and social marginality) invites alternatives such as greater access, fine options, and anti-poverty strategies.
- The third model, and the one held by Jackson, stresses the factor of colonization and subjugation.
    - Its entailed alternatives would focus on Aboriginal peoples' right to control their own destiny, including control over the justice process in Aboriginal communities.

Jackson observes that many Aboriginal groupings have advanced the latter position (see submissions by the Blood Tribe to the Cawsey Task Force and the report of the Osnaburgh/Windigo Tribal Council, cited in this bibliography).

In discussing, briefly, the nature of Aboriginal systems of law and justice, Jackson refers to American and Australian materials as well as Canadian. He identifies some distinctive themes (e.g. the emphasis on community, on restoration and reintegration rather than punishment, the higher priority given to collective rights) but cautions that Aboriginal systems are themselves quite diverse. Jackson also places Aboriginal justice initiatives vis-à-vis the alternative dispute resolution movement in the Canadian justice system. He notes that there has been a clear trend over the past twenty years in calling for greater focus on restorative justice principles in criminal justice policy and practice. Recently much attention has been given to the many parallels between restorative justice principles and Aboriginal traditions of justice. At the same time he argues that there are sharp differences, such as the greater emphasis in Aboriginal systems on collective responsibility, on social and family networks, and on Aboriginal spirituality. Consequently, while the shift in the mainstream justice system towards restorative justice may permit greater accommodation between it and emerging Aboriginal systems, Jackson contends that the legal pathway to justice for Aboriginal people must be found in their own initiatives.

In the last section of the paper Jackson discusses recent alternative dispute resolution initiatives in Aboriginal communities. He cites the recommendations of several major inquiries (e.g. Marshall, Cawsey) and specifically details initiatives advanced by the First Nations of South Vancouver Island (Coast Salish), and the Gitksan and Wet'suwet peoples of North-Western British Columbia. Jackson notes that these initiatives focus upon issues of special concern to the communities (e.g. sexual abuse, wife battering) and entail strategies that are unique to Aboriginal systems (e.g. the significant role of elders). While acknowledging that such initiatives can be developed within the existing justice system, he makes it clear that enabling legislation would guarantee respect, and perhaps funding, from non-native participants in the criminal justice process, as well as facilitating a sense of ownership and accountability in the Aboriginal communities. It can be noted that virtually all Aboriginal justice initiatives cited by Jackson were in the preliminary stage and did not have significant secure funding; nor was there any evidence marshalled to assess issues of equity, efficiency and effectiveness with respect to the new Aboriginal justice initiatives.

Overall, while the examples provided may be dated, this is an excellent paper which consistently develops a particular viewpoint.

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[134] Jackson, Michael. "In Search of the Pathways to Justice: Alternative Dispute Resolution in Aboriginal Communities", U.B.C. Law Review (Special Edition: Aboriginal Justice), vol. 26, 1992 cited in Ministry of the Solicitor General of Canada, Don Clairmont and Rick Linden, Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature, March 1998 http://www.sgc.gc.ca/epub/abocor/e199805/e199805.htm

5.58 An Implementation Evaluation of the Native Community Council Project of the Aboriginal Legal Services of Toronto-1993[135]

This is a comprehensive evaluation of the adult diversion project implemented by Aboriginal Legal Services of Toronto in 1991. Evaluators reviewed documentation, conducted interviews with a wide range of appropriate role players (including outside officials), and sat in on hearings for four different clients. The objectives of the project are specified. The process of selection and hearing procedures are described. Interestingly, the members of the diversion hearing councils, while Aboriginal, are not elders as initially planned for, but rather, as in such programs in the larger society, are primarily active and economically successful people between the ages of 35 and 55. The evaluators suggest that the project has been well implemented, is efficient, and has maintained good relations with outside Justice officials. Project clients viewed their diversion experience in a very favourable light. Other role players were also positive. Overall the project is deemed quite successful in relation to its objectives but evaluators note that it has been somewhat under-utilized, that there is too little monitoring of non-compliance, and that there has been little formal client needs assessment. They also suggest that there be a developmental phase for all future Aboriginal justice projects, especially perhaps for projects in urban contexts.

5.59 Aboriginal Peoples, Criminal Justice Initiatives/the Constitution-1992[136]

The author provides an interesting and clearly stated analysis of the constitutional bases for Aboriginal justice initiatives. His essential position is that the combined effect of s. 35(1) of the Constitution Act, 1982 and s. 25 of the Charter of Rights and Freedoms provide a strong basis for enabling "Aboriginal peoples to assume more responsibility for the administration of justice in Aboriginal communities across the country". S. 35(1) enshrined in the Constitution Aboriginal rights that existed at common law. The crucial issue with respect to s. 35, as seen in Supreme Court decisions such as R v Sparrow, is establishing that a practice, a specific form of social and political organization (such as unique arrangements with respect to criminal justice), that had not been extinguished by law prior to 1982 is indeed integral to the self definition of an Aboriginal community, and therefore can be defined as an existing Aboriginal right. Macklem gives the example that the role of the clan councils in the mediation of disputes involving wrongdoing in Iroquois society may well be integral to the self-definition of the Iroquois nation. Other sections of the Constitution Act, 1982, such as s.25 of the Charter (which shields Aboriginal rights from Charter scrutiny) provide legislative flexibility for initiatives that confer greater control over criminal justice onto Aboriginal communities and permit differential rights for Aboriginal peoples. In sum, Macklem argues persuasively that the current constitutional framework affords a great deal of scope for the enactment of laws that recognize Aboriginal difference in the realm of criminal justice.

5.60 Report of the Aboriginal Justice Inquiry of Manitoba - 1991[137]

- This is the first of two volumes produced by the above commissioners of the Public Inquiry into the Administration of Justice and Aboriginal People in Manitoba.
- While this volume focuses upon general considerations and contains numerous recommendations covering the whole gamut of criminal justice issues, the second volume deals specifically with the deaths of Helen Betty Osborne and John Joseph Harper, specific incidents that sparked the demand for a public inquiry.
- Volume One is an indictment of the justice system as far as Aboriginal peoples' rights and level of received service are concerned.

[135] Moyer, Sharon and Lee Axon. An Implementation Evaluation of the Native Community Council Project of the Aboriginal Legal Services of Toronto. Toronto: Ontario Ministry of the Attorney General, 1993 cited in Ministry of the Solicitor General of Canada, Don Clairmont and Rick Linden, Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature, March 1998 http://www.sgc.gc.ca/epub/abocor/e199805/e199805.htm

[136] Macklem, Patrick. "Aboriginal Peoples, Criminal Justice Initiatives and the Constitution" in U.B.C. Law Review, vol. 26, 1992 cited in Ministry of the Solicitor General of Canada, Don Clairmont and Rick Linden, Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature, March 1998 http://www.sgc.gc.ca/epub/abocor/e199805/e199805.htm

[137] Hamilton, A.C. and C.M. Sinclair. The Justice System and Aboriginal People: Report of the Aboriginal Justice Inquiry of Manitoba, Volume 1. Winnipeg: The Queen's Printer, 1991 cited in Ministry of the Solicitor General of Canada, Don Clairmont and Rick Linden, Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature, March 1998 http://www.sgc.gc.ca/epub/abocor/e199805/e199805.htm

- While many of the recommendations as regards policing, and the administration of justice, are similar to those advanced in other public inquiries, the commissioners call for a major reorganization of justice for Aboriginal peoples in Manitoba, going far beyond the Marshall Inquiry (see below) in calling for province-wide:

Conclusions: Aboriginal-controlled justice structures for Aboriginal peoples and a significantly autonomous Aboriginal system, based on Aboriginal principles and experience.

5.61 Justice and Aboriginal Peoples - 1991[138]

- Dumont contrasts Aboriginal values and behaviours with the non-Aboriginal, abstracting culture from social organization and social ecology.
- It is largely uncritical and non-empirical in its treatment of Aboriginal culture and does not consider the great variation that existed among diverse groups in relation to size, ecology, and so forth.
- Dumont discusses Aboriginal culture as respect for harmony, emphasis on reconciliation, respect for the teaching of elders, and the use of ridicule and ostracism to control behaviour.

5.62 Aboriginal Peoples and Criminal Justice - 1991[139]

- This document called for the establishment of Aboriginal justice systems.
- The report stressed the merits of Aboriginal-controlled justice systems quite apart from the "political considerations" of self-government.
- While reaffirming its general position on the desirability of the criminal justice system imposing the same requirements on all members of society, the Commission held that Aboriginal persons have a 'different constitutional status' and therefore constitute an acceptable special case.
- ***Conclusions:***
  - *Establishment of Aboriginal justice systems.*

5.63 Breaking Down The Walls: Bibliography on the Pursuit of Aboriginal Justice - 1991 [140]

5.64 Justice on Trial - 1991[141]

The Cawsey Task Force issued three volumes, the main volume noted here, a summary volume, and a third one which contains working papers and bibliography. The Task Force received many submissions, made site visits, and collected relevant data. Its sections on policing, courts, corrections, and so forth are well developed with solid supporting evidence. This report shows that the Canadian-wide over-representation of Aboriginal peoples in the justice system, as offenders and incarcerates, applies in Alberta. The Task Force concludes that systemic discrimination exists within the criminal justice system, even when uniform policies are being applied. It advances some 340 recommendations, a third of which pertain to policing. One of the principal recommendations is the re-establishment of community control (as opposed to professional, bureaucratic

[138] Dumont, James. "Justice and Aboriginal Peoples" in Aboriginal Peoples and the Justice System, edited by the Royal Commission on Aboriginal Peoples. Ottawa: Ministry of Supply and Services, 1991 cited in Ministry of the Solicitor General of Canada, Don Clairmont and Rick Linden, Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature, March 1998 http://www.sgc.gc.ca/epub/abocor/e199805/e199805.htm

[139] Law Reform Commission of Canada, Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice. Ottawa: Law Reform Commission of Canada, 1991 cited in Ministry of the Solicitor General of Canada, Don Clairmont and Rick Linden, Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature, March 1998

[140] Harding, J. and B. Forgay. Breaking Down The Walls: A Bibliography on the Pursuit of Aboriginal Justice. Regina: Prairie Justice Research, University of Regina, 1991. cited in Ministry of the Solicitor General of Canada, Don Clairmont and Rick Linden, Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature, March 1998 http://www.sgc.gc.ca/epub/abocor/e199805/e199805.htm

[141] Cawsey, R.A. Justice on Trial: Task Force on the Criminal Justice System and Its Impact on the Indian and Metis People of Alberta. Edmonton: Province of Alberta, 1991 cited in Ministry of the Solicitor General of Canada, Don Clairmont and Rick Linden, Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature, March 1998 http://www.sgc.gc.ca/epub/abocor/e199805/e199805.htm

control) in the criminal justice system. While sympathetic to the possibilities of an Aboriginal alternative to the conventional justice system, it focuses upon improving the present system and strengthening local community controls, explicitly leaving the issue of how autonomous Aboriginal justice might be to negotiations between Aboriginal leaders and the governments. Recommendations are advanced dealing for example with diversion, sentencing panels, Aboriginal justices of the peace, and the location of provincial criminal courts. Interesting presentations were provided the task force by various Aboriginal groups (e.g. the Blood Tribe analyzed over-representation from the perspective of colonization and also discussed its traditional concepts of justice).

5.65 Aboriginal Decision-Making and Canadian Legal Institutions-1991[142]

This paper deals with the question of the extent to which present methods of decision-making in law and justice, in Aboriginal communities have been built upon traditional practices, and to what extent have they been influenced by non-Aboriginal methods. The article is based on library research, examining statutes, court cases and the like. The author notes that both the Inuvialuit Agreement of 1984 and the Cree-Naskapi Act (a fundamental part of the James Bay land claim agreements of 1975 and 1978) do entail significant Aboriginal uniqueness. Inuvialuit procedures clearly allow for a major role to be played by local people (e.g. in assessment of development applications) and the procedures "are very different than would be found in a non-Aboriginal setting elsewhere in Canada". The Cree-Naskapi Act is seen as "far beyond the Indian Act in recognizing customs and traditional forms of decision-making" (e.g. community involvement, band distinctiveness). Recent court rulings have also strengthened the power of Indian band by-laws, in the case of conflict of a validly-enacted band by-law in conflict with a more general federal fishery regulation. The Constitution Act of 1982 (especially s. 35) has rooted the special status of Aboriginal peoples and provided an entry for them to the constitutional amendment process. While constitutional entrenchment of Aboriginal rights of self-determination remains unfulfilled the federal government has been pursuing self-government arrangements on a band-to-band basis. Some bands such as the Sechelt of British Columbia have formalized decision-making (e.g. electoral rules, band law authority procedures) that are not very different from those followed in non-native communities. The author also notes that there are some unique aspects (e.g. no party politics as such) in the operations of governments in the Northwest Territories and some differences in the courts and law enforcement that reflect Aboriginal uniqueness. The article is clearly an overview of the amalgam of the old and the new, reflecting the way Aboriginal communities are evolving to their changing circumstances and advancing in the adaptation of tradition to Canadian laws and institutions. The article is now somewhat dated, missing of course all the developments in the justice field that have occurred in the 1990s. Still it focuses upon an important question and by example provides a useful methodology for examining the question.

5.66 The Young Offenders Act and Aboriginal Youth-1988[143]

This paper establishes the considerable over-representation of Aboriginal youth in the criminal justice system. Associated with this pattern were major structural differences between Aboriginal and non-Aboriginal youth (e.g. income, education, family background) but little difference in the kinds of offences committed. Causes of Aboriginal delinquency were identified as culture conflict, boredom, alienation, and loss of parental discipline, all generated by years of colonialization and underdevelopment. Environmental factors such as socio-economic marginality, geographic isolation, and community erosion suggest that Aboriginal youth may be especially vulnerable to justice processing and hence the harsher effects of some YOA provisions. To correct for this systemic structural discrimination, in LaPrairie's view, requires more community control over justice matters where traditional customs, values, and practices can be incorporated but this will require significant resources as well as creative interventions.

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[142] Hunt, C. "Aboriginal Decision-Making and Canadian Legal Institutions" in Journal of Law and Anthropology, 6, 1991 cited in Ministry of the Solicitor General of Canada, Don Clairmont and Rick Linden, Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature, March 1998 http://www.sgc.gc.ca/epub/abocor/e199805/e199805.htm

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[143] LaPrairie, Carol. "The Young Offenders Act and Aboriginal Youth" in Joe Hudson et al, (eds.). Justice and the Young Offender in Canada. Toronto: Wall and Thompson, 1988 cited in Ministry of the Solicitor General of Canada, Don Clairmont and Rick Linden, Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature, March 1998 http://www.sgc.gc.ca/epub/abocor/e199805/e199805.htm

5.67 Dealing With Sexual Abuse In A Traditional Manner - 1988[144]

This monograph is written by an Aboriginal psychologist and focuses upon the active intervention of the community. It criticizes the way sexual abuse is now handled – the way it is reported, the procedures followed, the disposition rendered – as reflecting a legalistic approach. He argues for focusing on the harm that has been done and the best way to repair the damage. Emphasized are truth-telling, identifying the needs of all concerned, establishing forums for emotional release and as support groups, and developing means for repentance and reparation. The author argues that in Aboriginal culture no one was considered 'unchangeable', that deviance or 'crime' was deemed a situation where a person was 'out of balance', and that healing was effected in an holistic manner. He emphasizes dealing with sexual abuse within the extended family rather than through police, external agencies, etc. which is now the legally required way to proceed. He recommends what might be called a diversion program where the offender plus some supporter or ally meets with a trained Aboriginal sexual abuse coordinator and also with extended family members and/or elders. The offender has to accept full responsibility and cooperate or the case is referred to the conventional legal system. The conclusion of the alternative process, in his model, is a reparation feast. In effect what he describes is very similar to what nowadays is called family group conferencing.

The author lists some 17 features of the traditional process – disclosure, confrontation, protection, support groups, the extended family gathering, the ceremonials, the consensus solutions, etc. As he spells out these features, he allows for interaction with the formal justice system at various stages, and, in fact, calls for guidelines to be developed to determine what offences can be handled specifically in this traditional process. Again for the most part what is described is something similar to the Hollow Water model.

5.68 Locking Up Natives In Canada - 1988[145]

This monograph details the considerable over-representation of Aboriginal people in Canada's federal and provincial prisons. The over-representation was particularly outrageous in Saskatchewan, but it was (and continues to be) very significant throughout western Canada and even in the eastern provinces. In addition, Jackson documents the extent to which the justice system as a whole controlled Aboriginal peoples insofar as they had the highest rates of charges, arrests, and incarceration of any ethnocultural grouping in Canada. The report now has the status of a classic, both for its indictment of the Canadian justice system and for its suggestions concerning Aboriginal empowerment. More up-to-date incarceration data can be found in several works cited in this bibliography, notably LaPrairie's Examining Aboriginal Corrections In Canada.

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[144] Oates, Maurice Jr. Dealing With Sexual Abuse In A Traditional Manner. Prince Rupert, B.C., unpublished manuscript 1988 cited in Ministry of the Solicitor General of Canada, Don Clairmont and Rick Linden, Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature, March 1998 http://www.sgc.gc.ca/epub/abocor/e199805/e199805.htm

[145] Jackson, Michael. Locking Up Natives In Canada. Ottawa: A Report of the Canadian Bar Association Committee on Imprisonment and Release, 1988 cited in Ministry of the Solicitor General of Canada, Don Clairmont and Rick Linden, Developing & Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature, March 1998 http://www.sgc.gc.ca/epub/abocor/e199805/e199805.htm

6 Relevant Documents, Studies and Practices – USA

6.1 Indigenous Justice Systems and Tribal Society[146]

In many contemporary tribal communities, dual justice systems exist. One is based on what can be called an American paradigm of justice, and the other is based on what can be called an indigenous paradigm.

The American paradigm has its roots in the world view of Europeans and is based on a retributive philosophy that is hierarchical, adversarial, punitive, and guided by codified laws and written rules, procedures, and guidelines.[1] The vertical power structure is upward, with decision making limited to a few. The retributive philosophy holds that because the victim has suffered, the criminal should suffer as well. It is premised on the notion that criminals are wicked people who are responsible for their actions and deserve to be punished. [2] Punishment is used to appease the victim, to satisfy society's desire for revenge, and to reconcile the offender to the community by paying a debt to society. It does not offer a reduction in future crime or reparation to victims.

In the American paradigm, the law is applied through an adversarial system that places two differing parties in the courtroom to determine a defendant's guilt or innocence, or to declare the winner or loser in a civil case. It focuses on one aspect of a problem, the act involved, which is discussed through adversarial fact finding. The court provides the forum for testing the evidence presented from the differing perspectives and objectives of the parties. Interaction between parties is minimized and remains hostile throughout. In criminal cases, punitive sanctions limit accountability of the offender to the state, instead of to those he or she has harmed or to the community.

The indigenous justice paradigm is based on a holistic philosophy and the worldview of the aboriginal inhabitants of North America. These systems are guided by the unwritten customary laws, traditions, and practices that are learned primarily by example and through the oral teachings of tribal elders.[3] The holistic philosophy is a circle of justice that connects everyone involved with a problem or conflict on a continuum, with everyone focused on the same center. The center of the circle represents the underlying issues that need to be resolved to attain peace and harmony for the individuals and the community. The continuum represents the entire process, from disclosure of problems, to discussion and resolution, to making amends and restoring relationships. The methods used are based on concepts of restorative and reparative justice and the principles of healing and living in harmony with all beings and with nature.[4]

Restorative principles refer to the mending process for renewal of damaged personal and communal relationships. The victim is the focal point, and the goal is to heal and renew the victim's physical, emotional, mental, and spiritual well-being. It also involves deliberate acts by the offender to regain dignity and trust, and to return to a healthy physical, emotional, mental, and spiritual state. These are necessary for the offender and victim to save face and to restore personal and communal harmony.

Reparative principles refer to the process of making things right for oneself and those affected by the offender's behavior. To repair relationships, it is essential for the offender to make amends through apology, asking forgiveness, making restitution, and engaging in acts that demonstrate a sincerity to make things right. The communal aspect allows for crime to be viewed as a natural human error that requires corrective intervention by families and elders or tribal leaders. Thus, offenders remain an integral part of the community because of their important role in defining the boundaries of appropriate and inappropriate behavior and the consequences associated with misconduct.

In the American justice paradigm, separation of powers and separation of church and state are essential doctrines to ensure that justice occurs uncontaminated by politics and religion. For many tribes, law and justice are part of a whole that prescribes a way of life. Invoking the spiritual realm through prayer is essential throughout the indigenous process. Restoring spirituality and cleansing one's soul are essential to the healing process for everyone involved in a conflict. Therefore, separation doctrines are difficult for tribes to embrace; many find it impossible to make such distinctions. Whether this is good or bad is not the point. It is, however,

[146] Ada Pecos Melton, President, American Indian Development Associates, Indigenous Justice Systems and Tribal Society http://www.ojp.usdoj.gov/nij/rest-just/ch1/indigenous.htm

an example of the resistance of indigenous people to accept doctrines or paradigms that contradict their holistic philosophy of life.

Law as a Way of Life

The concept of law as a way of life makes law a living concept that one comes to know and understand through experience. Law, as life, is linked to the elaborate relationships in many tribal communities. In some tribes it is exemplified by tribal divisions that represent legal systems prescribing the individual and kin relationships of members and the responsibilities individual and group members have to one another and to the community.[5] For example, in several Pueblo tribes, one is born into one of two moieties, or tribal divisions, decided by patrilineal lines. A woman can change membership only through marriage, when she joins her husband's moiety. Males generally cannot change their moiety, unless it is done during childhood through adoption or if their mother remarries into the opposite moiety. This illustrates how tribal law becomes a way of life that is set in motion at birth, and continues through an individual's life and death.

The indigenous approach requires problems to be handled in their entirety. Conflicts are not fragmented, nor is the process compartmentalized into pre-adjudication, pretrial, adjudication, and sentencing stages. These hinder the resolution process for victims and offenders and delay the restoration of relationships and communal harmony. All contributing factors are examined to address the underlying issues that precipitated the problem, and everyone affected by a problem participates in the process. This distributive aspect generalizes individual misconduct or criminal behavior to the offender's wider kin group, hence there is a wider sharing of blame and guilt. The offender, along with his or her kinsmen, are held accountable and responsible for correcting behavior and repairing relationships.[6]

Indigenous Systems Today

The status of tribes as sovereign nations are both preconstitutional and extraconstitutional. Tribes continue to possess four key characteristics of their sovereign status: a distinctive permanent population, a defined territory with identifiable borders, a government exercising authority over territory and population, and the capacity to enter into government-to-government relationships with other nation-states.[7]

The administration of justice, law, and order is a function of government retained by the tribes as sovereign nations. It is within this realm that indigenous justice systems exist. Although there have been many efforts to limit the jurisdiction of tribal justice system [8], tribes retain the authority to determine the legal structure and forums to use in administering justice and to determine the relationship of the legal structure with other governing bodies. Tribes have personal jurisdiction over their members and non-member Indians, territorial jurisdiction over their lands, and subject matter jurisdiction over such areas as criminal, juvenile, and civil matters. While limited by the Indian Civil Rights Act in sentencing, [9] tribes have concurrent jurisdiction over the felony crimes enumerated under the Major Crimes Act.[10]

The forums for handling disputes differ for each tribe, which may use varying combinations of family and community forums, traditional courts, quasi-modern courts, and modern tribal courts.

Family forums, such as family gatherings and talking circles, are facilitated by family elders or community leaders. Matters usually involve family problems, marital conflicts, juvenile misconduct, violent or abusive behavior, parental misconduct, or property disputes. Customary laws, sanctions, and practices are used. Individuals are summoned to these gatherings following traditional protocols initiated by the chosen elder. For example, in Pueblo communities the gathering is convened by the aggrieved person's family, which must personally notify the accused and his or her family of the time and place of the gathering.

Generally, elders are selected as spokespersons responsible for opening and closing the meetings with prayers. During the meeting, each side has an opportunity to speak. The victim may speak on his or her own behalf, and the family may assist in conveying the victim's issues. Extended family members often serve as spokespersons if the victim is very young or vulnerable. Similarly, a spokesperson may be designated to speak on behalf of the accused, especially if the accused is a juvenile or if other circumstances prevent the accused from speaking. When the family forum cannot resolve a conflict, the matter may be pursued elsewhere. Offender compliance is obligatory and monitored by the families involved. It is discretionary for decisions and agreements to be recorded by the family.

Community forums require more formal protocols than family forums, but draw on the families' willingness to discuss the issues, events, or accusations. These are mediated by tribal officials or representatives. Some tribes have citizen boards that serve as peace makers or facilitators. Customary laws, sanctions, and practices are used. Personal notice is made by tribal representatives to the individuals and families involved. Usually, this is all that is necessary to compel individuals to meet in both the family and community forums. When necessary, a personal escort to the gathering place may be provided by tribal officials. In some tribal communities notice may be by mail.

In the community forum, the tribal representative acts as facilitator and participates in the resolution process along with the offender and victim and their families. As with the family forum, prayers are said at the beginning and at closure. An unresolved matter may be taken to the next level, however, but tribes may or may not offer an appeal process for the community forum. In the Navajo peacemaker system, formal charges in the Navajo district court may be filed. In some Pueblo communities, matters may be pursued through the traditional court. Offender compliance is obligatory and monitored by the families involved and tribal officials.

Traditional courts incorporate some modern judicial practices to handle criminal, civil, traffic, and juvenile matters, but the process is similar to community forums. These courts exist in tribal communities that have retained an indigenous government structure, such as the Southwest Pueblos. Matters are initiated through written criminal or civil complaints or petitions. Defendants are often accompanied by relatives to the hearings. Generally, anyone with a legitimate interest in the case is allowed to participate from arraignment through sentencing. Heads of tribal government preside and are guided by customary laws and sanctions. In some cases written criminal codes with prescribed sanctions may be used. Offender compliance is mandated and monitored by the tribal officials with assistance from the families. Noncompliance by offenders may result in more punitive sanctions such as arrest and confinement.

Defendants are notified in writing. Although rare, matters may be appealed to the tribal council. In some tribes where a dual system exists, interaction between the modern American court and traditional court are prohibited. That is, one may not pursue a matter in both lower-level courts. However, an appeal from either court may be heard by the tribal council, which serves as the appellate court. Generally, then courts record proceedings and issue written judgment orders.

Quasi-modern tribal courts are based on the Anglo-American legal model. These courts handle criminal, civil, traffic, domestic relations, and juvenile matters. Written codes, rules, procedures, and guidelines are used, and lay judges preside. Some tribes limit the types of cases handled by these courts. For instance, land disputes are handled in several Pueblo communities by family and community forums. Like traditional courts, noncompliance by offenders may result in more punitive sanctions such as arrest and confinement. These are courts of record, and appellate systems are in place.

Modern tribal courts mirror American courts. They handle criminal, civil, traffic, domestic relations, and juvenile matters and are guided by written codes, rules, procedures, and guidelines. They are presided over by law trained judges and often exist in tribal communities that have a constitutional government. Like traditional courts and quasi-modern tribal courts, non-compliance by offenders may result in more punitive sanctions such as arrest and confinement. Like quasi-modern tribal courts, these are courts of record, and appellate systems are in place.

Some of the quasi-modern and modern courts incorporate indigenous justice methods as an alternative resolution process for juvenile delinquency, child custody, victim-offender cases, and civil matters. The trend of tribal courts is to use the family and community forums for matters that are highly interpersonal, either as a diversion alternative, as part of sentencing, or for victim-offender mediation. Some are court-annexed programs such as the Alternatives For First Time Youth Offenders Program sponsored by the Laguna Pueblo tribal court in New Mexico. Under this program, juvenile offenders are referred to the village officers, who convene a community forum. Recommendations for resolving the matter may be court-ordered, or the resolution may be handled informally by the village officers. This joint effort by the court and village officers allows them to address the problem at the local village level and to intervene early to prevent further delinquency.

Characteristics of Indigenous Law

Common terms or references to the law of indigenous societies include customary law, indigenous law, native law, and tribal or native law ways. All refer to the same concept.

Customary law is generally derived from custom. Custom in this sense means a long-established practice that has acquired the force of law by common adoption or acquiescence; it does not vary. [11]

Tribal common law is based on the values, mores, and norms of a tribe and expressed in its customs, traditions, and practices. In some tribes, the tribal common law has been set out in different court decisions and written opinions over time and has become case law. [12] Among several Pueblo communities, the matrilineal system holds that property belongs to the female. In a divorce or separation, property is divided according to the matrilineal definitions of property ownership and is written into the decisions of the traditional or tribal court. Similarly, Navajo courts incorporate Navajo common law in decisions in probate, criminal, and child custody cases, and marital conflicts. [13]

For many tribes along the Northwest coast such as the Yurok, customary laws dictate the areas where families can conduct their fishing, hunting, and gathering. These areas are passed down from one generation to the next. When someone fishes in another family's area, it is considered an affront to the entire family. By custom, the wronged family convenes a family forum as the proper way to handle the matter and to request compensation. Compensation may be with fish, fishing gear, feathers, hides, beadwork, traditional clothing, or other forms of payment.

Among several Pueblo communities, it is customary for discipline to be administered by the fiscale, who is responsible for maintaining the peace and overseeing the welfare of children and youth. It is a general practice for parents to summon the fiscale when their children are unruly or misbehaving. The fiscale advises the children about the consequences of their misconduct and may reprimand them or refer them and their parents to services such as counseling.

In many tribes, information, beliefs, and customs are handed down orally or by example from one generation to another. [14] For example, in the Minto Tribal Court of Alaska the resolution process involves a segment dedicated to "traditional counseling" by the facilitator or presiding judge. There is a general practice of "advising/giving" in the traditional courts of the Pueblos and the "talking to" in the Navajo peace making system. This segment is traditionally set aside for the spokespersons or tribal officials to speak of community values, mores, and the consequences of misbehavior or misconduct. Often these are conveyed in parables or creation narratives and beliefs. Advice is given about harboring vengeful feelings, and everyone is encouraged to renew relationships.

The Indigenous Justice Process

Indigenous methods of conflict resolution include traditional dispute resolution, peace making, talking circles, family or community gatherings, and traditional mediation, described only by the language of the tribal community. All these refer to the methods of resolving problems and to the methods of restorative and reparative justice.

The structure of relationships in many tribal communities is paramount to a legal system exemplified by the clan system. Tribal law determines clan identification, which is often matrilineal. Among Pueblo communities, moiety and clan affiliations determine for which group an individual will dance, sing, or hunt in social activities, which religious or medicine groups one may join, which political positions one may hold, whom one may court or marry, or what property one may own. The clan system regulates the behavior of its members. The interlocking relationships in tribal communities often determines the flow of how problems are handled.

For example, in many tribal communities, parents and the extended family are expected to nurture, supervise, and discipline their children. When parental misconduct occurs, such as with physical or sexual abuse or neglect, the parents and extended family convene through the leadership of an elder to address the matter. In a minor case of physical abuse or neglect, the family forum is used. The distributive aspect is invoked extensively to ensure protection of the children and to monitor and enforce proper parental behavior and responsibility, which is regulated by the family. More serious cases may involve tribal officials.

In the family and community forums and the traditional courts, those accused of wrongdoing are required to give a verbal account of their involvement in an incident, whether or not they admit to the accusations. [15] This

verbal account is key in discovering the underlying factors precipitating the problem. It requires participation by the offender's family and relatives who may have to explain the offender's misconduct, especially when some type of victimization has occurred. For example, parents may be admonished for not providing proper discipline and supervision for their children who vandalized or destroyed property. Relatives may be criticized for allowing a son or brother to abuse his wife or children.

Verbal accountability by the offender and the offender's family is essential to express remorse to the victim and the victim's family. Face-to-face exchange of apology and forgiveness empowers victims to confront their offenders and convey their pain and anguish. Offenders are forced to be accountable for their behavior, to face the people whom they have hurt, to explain themselves, to ask forgiveness, and to take full responsibility for making amends. Observing and hearing the apology enables the victim and family to discern its sincerity and move toward forgiveness and healing. Forgiveness is strongly suggested, but not essential for the victim to begin healing.

The restorative aspect frequently involves the use of ritual for the offender to cleanse the spirit and soul of the bad forces that caused the offender to behave offensively. Ceremonial sweats, fastings, purifications, and other methods are used to begin the healing and cleansing process necessary for the victim, the offender, and their families to regain mental, spiritual, and emotional well-being and to restore family and communal harmony. [16]

The agreements reached in family and community forums are binding. Participants are compelled to comply through the same interlocking obligations established in individual and community relationships. Compliance and enforcement are important aspects of indigenous systems because there is little coercion. Accepting punishment does not guarantee that an offender will be accountable. Therefore, it is essential that offenders perform outward acts to demonstrate their responsibility for correcting behavior. Offender accountability is essential to ensure compliance with decisions and to prevent further criminality or relapse into deviant behavior. Equally important is for punitive sanctions to be decided and applied by individuals who were affected by the offender's behavior.

Historically, there is little evidence of penal systems in tribal communities. This fact remains today, although there are many who express the need for secure confinement facilities to address serious and violent crimes. Many customary sanctions to appease victims and to safeguard against vengeance are still in use. These include public ridicule, public shaming, whippings, temporary and permanent banishment, withdrawal of citizenship rights, financial and labor restitution, and community service. Some tribes still temporarily or permanently banish individuals who commit serious or violent crimes. Among the Warm Springs Tribes in Oregon, it is customary to refer lawbreakers to the "whipman," who may whip a person for misconduct. In the Laguna Alternatives for First Time Youth Offenders Program, community service is used extensively.

The indigenous process is also used in offenses where there are no victims, such as problems between parents and children, individual misconduct, or alcohol consumption. Family members affected by the offender's behavior or who are concerned with the offender's welfare may participate. Many tribal people view crime, delinquency, and other deviant behaviors as symptoms of bigger family problems. Widening the affected target group to include the offender, parents, siblings, and other extended family members enlists help from those most familiar with the situation to assist in correcting and preventing more serious crime.

The indigenous process can often be extremely uncomfortable and emotional because it involves participation by everyone affected, but great care is taken to provide a safe environment for matters to be discussed. The distributive nature of this process uses the extended family as a resource for the offender, the victim, and the community to resolve problems, to ensure compliance, to provide protection, and to retain ownership of the problems. [17]

Preserving Indigenous Systems

Tribes are faced with the inevitable conflict created by two justice paradigms competing for existence in one community. Many Americans believe the law is something to be applied and justice is something to be administered. In contrast, tribes traditionally believe law is a way of life and justice is a part of the life process. For one paradigm to exist, it must convert people to follow it. Although it appears that tribal courts follow the Anglo-American legal system, many adhere to the traditional values of the tribal justice system. This is largely because tribes have been wary of the ethnocentric view of the Western colonizers who devalued their legal structures and wanted to replace them with an imported Western system. [18] Tribes were also required to

participate in the Anglo American legal system in order to protect their lands and people, but they did so without trusting or believing it. This foreign system was imposed by the federal government, thereby thwarting their efforts to convert the tribes.

Attempts to strengthen and retraditionalize tribal justice systems stem from discontent with the efforts of modern tribal courts to address the crime, delinquency, social, and economic problems in tribal communities. It is joined by the dominant culture's current disillusionment with justice in this country, which causes doubt about retributive justice and a move toward a more restorative framework. [19] This emerging restorative perspective for the American justice system is illustrated by the following values:

All parties should be included in the response to crime-offenders, victims, and the community. Government and local communities should play complementary roles in that response. Accountability is based on offenders understanding the harm caused by their offense, accepting responsibility for that harm, and repairing it...Restorative justice guides professionals in the appropriate and equitable use of sanctions to ensure that offenders make amends to victims and the community. [20]

Conversion to the American justice paradigm is a difficult choice for tribes, particularly those with a functional indigenous justice system. For many, full conversion is not possible because the indigenous justice paradigm is too powerful to abandon. The strong adversarial features of the American justice paradigm will always conflict with the communal nature of most tribes. For this reason, the inherent restorative and reparative features of the indigenous justice paradigm will continue to be more appealing to the majority of tribal people.

Nonetheless, it is important for tribes to identify their community strengths and views on justice, law, and order. The role of non-Indians is to assist and support the tribes in strengthening their justice systems and to suppress the urge to take over or replace them. It is the sovereign and cultural right of tribes to explain, interpret, change, enact, and apply their own laws, oral and written, through whatever mechanisms they choose. It is their responsibility to teach the knowledge and skills embedded in their indigenous paradigm to their young. American Indian and Alaskan Native people have the clearest understanding of their indigenous law ways because they live them. They must be the messengers of this law to preserve its integrity, authority, power, and meaning to the people.

The many intrusions to the tribal way of life have interfered with the natural evolution of the indigenous justice paradigm, but while slowed, it has never stopped. The tribal resurgence to strengthen and retraditionalize their judiciaries has rejuvenated the evolutionary process. While mainstream society is in the midst of shifting from a retributive justice model to a restorative one, many tribes are strengthening their indigenous paradigm. In doing so, they are empowering themselves to provide a justice system that has meaning to the people they serve and the power to perpetuate what was preserved by the ancestors and passed on by the elders as testimony of their commitment to the future of tribes. Contemporary American Indian and Alaskan Native people are now faced with making the same commitment to preserve the indigenous justice system the elders maintained and find ways to perpetuate it.

Differences in justice paradigms

AMERICAN justice Paradigm	INDIGENOUS Justice Paradigm
Vertical	Communication is fluid
Communication is rehearsed	Native language is used
English language is used	Oral customary law learned as a way of life by example
Written statutory law derived from rules, procedure, written record	Law and justice are part of a whole
Separation of powers	The spiritual realm is invoked in ceremonies and prayer
Separation of church and state	Builds trusting relationships to promote resolution and healing
Adversarial and conflict oriented	Talk and discussion is essential
Argumentative	Reviews problem in its entirety, contributing factors are examined
Isolated behavior, freeze-frame acts	Comprehensive problem solving
Fragmented approach to process and solutions	No time limits on the process, long
Time-oriented process	
Limits participants in the process and	

solutions
- Representation by strangers
- Focus on individual rights
- Punitive and removes offender
- Prescribed penalties by and for the state
- Right of accused, especially against self-incrimination
- Vindication to society

silences and patience are valued; inclusive of all affected individuals in the process and solving problems
- Representation by extended family members
- Focus on victim and communal rights
- Corrective, offenders are accountable and responsible for change
- Customary sanctions used to restore victim-offender relationship
- Obligation of accused to verbalize accountability
- Reparative obligation to victims and community, apology and forgiveness

This figure represents differences noted by Judge Christine Zuni, with additional differences outlined by the author.

Endnotes

1. Yazzie, "Life Comes From It: Navajo Justice Concepts," Legal Education Series, *Alternatives in Dispute Resolution and Traditional Peacemaking* (Petaluma, CA: National Indian Justice Center, 1993) and Falk, *International Jurisdiction: Horizontal and Vertical Conceptions of Legal Order.* 32 Temple L. Q. 295 (1959). Back

2. Travis, *Introduction to Criminal Justice,* 2d Ed. (Cincinnati: Anderson Publishing Co., 1995) and Neubauer, *America's Courts and the Criminal Justice System,* 2d Ed. (Monterey: Brooks/Cole Publishing Company, 1984). Back

3. Yazzie, supra n. 1; Tso, "Decision Making in Tribal Courts," 31 *Arizona L. Rev.* (1989); and Zion, "Searching for Indian Common Law," in Morse and Woodman, (eds.), *Indigenous Law and the State* (Forus Publications, 1988). Back

4. Yazzie, supra n. 1. at 4. Back

5. Connors and Brady, "Alaska Native Traditional Dispute Resolution," paper presented at the National Conference on Traditional Peacemaking and Modern Tribal Justice Systems in Albuquerque, New Mexico. Tribal Justice Center (1986), "Indian Jurisprudence and Mediation the Indian Way: A Case Review of the Saddle Lake Tribal Justice System," paper presented at the Conference on Mediation in Winnipeg, Manitoba. Back

6. Melton, "Traditional and Contemporary Tribal Law Enforcement: A Comparative Analysis." Paper presented at the Western Social Science Association, 31st Annual Conference in Albuquerque, New Mexico, (1989).
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7. Valencia-Weber and Zuni, pre-publication draft, (1995), "Domestic Violence and Tribal Protection of Indigenous Women in the United States." Forthcoming, St. Johns University Law Review. Back

8. See, the establishment of the Court of Indian Offenses in 1883; the unilateral imposition of law and order codes in 1884; passage of the Major Crimes Act, 18 U.S.C. §1153 (1885, Stipp. 1986); the Indian Country Crimes Act, 18 U.S.C. §1152 (1817); the Assimilative Crimes Act, 30 Stat. 717 (1898); Public Law 83-280, Indians-Criminal Offenses and Civil Causes-State Jurisdiction, 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, 28 U.S.C. §1360. the Indian Civil Rights Act, 25 U.S.C. §1301 1303 (1968, Suppl. 1986); and Supreme Court decisions such as *Oliphant v Suquamish Indian Tribe,* 435 U.S. 191; and *Duro v. Reina, et al.,* 110 S.Ct. 2953. Back

9. Indian Civil Rights Act, id. at 18, imposes certain protections and limitations on tribal authority and as amended in 1986 limits criminal punishment to one year imprisonment and a $5,000 fine. Back

10. Major Crimes Act, supra n. 8, at 18.Back

11. Zuni, "Justice Based on Indigenous Concepts." Paper presented at the Indigenous Justice Conference(1992). Back

12. Austin, "Incorporating Tribal Customs and Traditions into Tribal Court Decisions." Paper presented at the Federal Indian Bar Association: Indian Law Conference in Albuquerque, New Mexico, (1992). Back

13. Zuni, supra n. 11, at 25. Back

14. Id. Back

15. Melton, supra n. 6, at 16. Back

16. Bluehouse and Zion. "Hozhooji Naaliannii: The Navajo Justice and Harmony Ceremony." 10 *Mediation Q.* 327 (1993). Back

17. Canadian Institute for Conflict Resolution, "Report to the Council of Akwesasne Concerning a Peacemaking Process," in Ottawa, Canada (1990). Back

18. Mohawk, Prologue, in Wallace, *The White Roots of Peace* (Philadelphia: University of Pennsylvania Press, 1946). Back

19. "Victims Seeking Fairness, Not Revenge: Toward Restorative Justice," *Federal Probation* (September 1989). Van Ness, "Restorative Justice," Galaway and Hudson, eds. *Criminal Justice, Restitution, and Reconciliation* (Monsey, N.J.: Willow Tree Press, 1990). Back

20. Bazemore and Umbreit, "Balanced and Restorative Justice: Program Summary." Office of Juvenile Justice and Delinquency Prevention, October (1994).

6.2 Cultural & Ethnic Issues in Restorative Justice: Community Dynamics-1996 [147]

- This paper argues that more complete implementation of restorative interventions in indigenous communities can be facilitated when attention is given to internal community power dynamics.
- For example, an extensive tradition of use symbolic ritual in the response to crime may allow for expression of community disapproval without banishment to facilitate implementation in native, as well as in urban restorative communities.
- **Conclusion:** Efforts to implement restorative justice in ways that do not respect indigenous traditions and without regard to power imbalances and internal patterns of abuse are unlikely to succeed.

6.3 Navajo Restorative Justice: The Law of Equity and Harmony – 1996 [148]

- In 1982, the Navajo Nation established Navajo Peacemaker Courts; respected community leaders organize and preside over traditional Navajo process to resolve disputes.
- This paper describes this process.
    - If one person believes they've been wronged by another they will first make a demand for the perpetrator to put things right.
    - If this is not successful, the wronged person may turn to a respected community leader to facilitate and organize a peacemaker process.
    - The process is not confrontational but involves family and clan members of victims and perpetrators talking through matters to arrive at a solution.
    - The process ends in an action plan to solve the problem.
    - The plan often involves reparation.
    - Peacemaking is designed to resolve problems among people and is not concerned about imposing punishment.

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[147] Griffiths, C.T. (1996). Cultural and Ethnic Issues in Restorative Justice: Considering Community Dynamics. Paper presented at the American Society of Criminology Conference, Annual Meeting, Chicago, November 20-23, 1996, 20p. cited in McCold, Ph.D. for the Working Party on Restorative Justice Alliance of Non-Governmental Organizations (NGOs) on Crime Prevention and Criminal Justice (NY), Restorative Justice An Annotated Bibliography, 1997, http://members.ozemail.com.au/~igmnet/restorativejustice/library/Annotated%20Bibliography.html

[148] Yazzie, R. and J. Zion (1996). Navajo Restorative Justice: The Law of Equity and Harmony. In: B. Galaway and J. Hudson (eds.), Restorative Justice: International Perspectives. Monsey, NY: Criminal Justice Press, pp. 157-174 cited in McCold, Ph.D. for the Working Party on Restorative Justice Alliance of Non-Governmental Organizations (NGOs) on Crime Prevention and Criminal Justice (NY), Restorative Justice An Annotated Bibliography, 1997, http://members.ozemail.com.au/~igmnet/restorativejustice/library/Annotated%20Bibliography.html

6.4 Nez Perce Peacemaker Project: Inter-Cultural Approach to Dispute Resolution - 1996 [149]

- This paper describes the design and implementation of the Nez Perce Peacemaker Project, which enables the tribal court to refer cases to mediation.
- The goal of the Peacemaker Project is to establish a culturally appropriate way for tribal members and institutions to resolve disputes. Tribal members co-mediate disputes with the law students and have successfully mediated two disputes.
- Topic include an overview of the program, implementation stages, collaboration with tribal members to ensure that the project reflects Nez Perce cultural values, and a discussion of how resources from a number of organizations were leveraged to maintain the program.

6.5 The Reemergence of Tribal Society/Traditional Justice Systems-1995[150]

Introduction

For many years now, I have been very close in friendship to my medicine man. When we see each other on the streets we will often wave. On occasion he has come to me for my advice. During one of our cordial discussions, he complemented me on my wisdom, my patience, and my perseverance. He then pointed out to me that our roles within our society were very much the same, except that he dealt with the good side and I dealt with the bad side.

What I did, as a judge within our tribal court system, was never characterized to me in that manner. And for several days, I had to sort through my metaphysics in order to live—in a good way—with his esteemed observation. I am sure that, to him, there is a kinship regarding our stature within our tribal society; as well, he must have noticed that both of us perform functions of ceremony, consultation, and curing. And because of my knowledge of the man, I am without doubt that his observation was not intended as a criticism, nor to vex me with some existential curse.

The medicine man was making a simple observation as to how we Jicarilla Apache people are. He described his role. Then he described my role. One might say that he made a karmic observation.

Whenever a person makes reference to good and bad in American society, one assumes a basic dichotomy or conflict. This was not what my medicine man intended. The medicine man merely pointed out that I have been charged by my destiny to perform those ceremonies, consultations, and cures in order to overcome the bad side of people's lives. It is my place in Jicarilla Apache society. And, as is often the case, I then send the individual to the medicine man in order for the medicine man to bless or baptize the individual towards complete cure of the calamity which has befallen him. We work together. For us, the rectification—or, if you prefer, the adjudication—of a problem spans a broad continuum from bad to good, and as good is accomplished, so too is the full restoration of the individual. While, on occasion, during the handling of problems within a court setting, the court may embark upon a determination of the mens rea of an individual, such a determination has limited usefulness and we must then return to our concern for the fate of the individual and the restoration of his spirit.

When Americans and Indians talk about "culture," they mean two different things. To the Native American. Culture is pervasive, encircling, all-inclusive. To the mainstream American, culture consists of an elective identity added to the essential American character.

It is not surprising, therefore, that in American society the question of justice is relegated to one institution, and all other things are left to a marketplace of religion and culture that prospers or fails depending upon how

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[149] Brettin, C., R. McCarthy, P. Weeks, M. Laffin, F. Paisano, M. Guilfoyle, L. Shull and S. Platts (1996). Nez Perce Peacemaker Project: An Inter-Cultural Approach to Dispute Resolution. Paper presented at the American Society of Criminology Conference, Annual Meeting, Chicago, November 20-23, 1996, 20p. cited in McCold, Ph.D. for the Working Party on Restorative Justice Alliance of Non-Governmental Organizations (NGOs) on Crime Prevention and Criminal Justice (NY), Restorative Justice An Annotated Bibliography, 1997, http://members.ozemail.com.au/~igmnet/restorativejustice/library/Annotated%20Bibliography.html

[150] Carey N. Vicenti, Chief Judge, Jicarilla Apache Tribe, The Reemergence of Tribal Society and Traditional Justice Systems (Originally published in *Judicature*, Vol. 79, No. 3, November-December 1995) http://www.ojp.usdoj.gov/nij/rest-just/ch1/reemerge.htm

individuals choose to exercise the liberty given to them under American law. By stark contrast, the Indian concept of the human being is one in which all aspects of the person and his or her society are integrated. Every action in daily life is read to have meaning and implication to the individual and guides how he or she interacts with tribal society or fulfills obligations imposed by society, law, and religion.

This helps explain why tribal courts do and should differ substantially from courts of the non-Indian world. Mainstream Americans do not consider that the very viability of the systems of tribal governance depend on the degree to which such governments are allowed to develop their institutions free from any outside interference. They assume that culture is a modular element to be merely added to one's life at one's election. Americans do not seem to understand that their system of government, that the institution of the courts and the workings of an adversarial system of justice, all amount to a large portion of American culture. Thus, America, in its attempts to correct what it perceives as a rampant injustice in Indian America, creates a greater injustice by forcing its culture upon Indian peoples.

Against the large tide of American culture that sweeps across Indian America with daily relentlessness, tribal cultures must struggle. Indian tribal culture is in crisis. We no longer possess the cultural objects that may stimulate our collective memory to recall many lost customs, traditions, and values. And yet, every reservation is experiencing the return of educated Indian people who are capable of discerning the invasion of non-Indian values into the Indian world. These new Indians, who have equal footing in both the Indian and the non-Indian world, are capable of articulating the effects America has had on the development of tribal society. Over the past two decades they have been successful in litigating and in gaining passage of federal legislation ultimately to create a wide enough path for the distinct culture in Indian society to reemerge. For the tribal courts, this means the restoration of traditional forms of adjudication.

The reader will notice that the parts to the rest of this essay appear to have been placed in reverse chronological order, going from "Death" to "Birth." But it could not have been written any other way. It was specifically organized so as to illustrate that not every American presumption has implicit validity. Some peoples have a different frame of reference. I will always be an Apache man advancing the beliefs of my grandfather and his father, and all our predecessors. I am not unlike most other Indians, whether educated or not. I am willing to challenge the ineluctable death of our culture and bring it to a new life. With this essay I hope to take care of one portion of the bad side and I will leave to my medicine man his blessing for the good side.

Death and Burial

The tribal court is a relatively new phenomenon in Indian country. It emerged originally out of the need, as perceived by the non-Indian occupants of Indian territory, to prosecute the "bad" Indian. In the early decades, therefore, the institution was inquisitional and was not intended to provide the constitutional safeguards that are now deemed indispensable. In 1934, Congress passed the Indian Reorganization Act, which was intended to loosen the authoritarian grip the federal government exercised over the management of the internal affairs of Indian reservations. The act allowed a tribe to organize under two vastly different forms of government. Under section 16 of the act a tribe could adopt a constitution that governed the newly organized tribe. Under section 17, a tribe could organize a business committee to manage the tribe's affairs. It is important to recognize that many tribes did not take advantage of either section, choosing blindly to accept what the federal law would allow them to do in the future

After 1934, much of the inquisitional nature of the tribal court was shed, due primarily to the fact that the constitutions adopted by the various tribes provided sufficient guidance to Indian people regarding the administration of law in Indian country. That is not to say that federal control over the internal affairs of tribes had disappeared altogether. Rather, more elusive mechanisms were employed by federal officials to maintain the degree of control they deemed necessary. It should also be admitted that in many Indian communities the newly appointed judges were incapable of fulfilling the colonial role that existed prior to 1934, so non-Indian officials were occasionally invited in to "advise." By the mid-1960s, however, the influence of the federal government in the internal affairs of tribes had waned substantially.

As Indians gained greater control over their internal affairs, corruption also crept in. Tribal courts were occasionally manipulated by politically elected leadership. It having been determined that the federal constitution was not applicable to Indian tribes, the tribes freely adjudicated cases without concern for the emerging civil rights expectations of Indian people.

In the mid-1960s, Congress recognized that federal Indian law did not require constitutional rights to be afforded to people subject to the powers of tribal government. In an era when civil rights were prominently in the foreground of American politics, such omission was considered to be irreconcilable with the mood of the times. Therefore, in 1968 Congress passed the Indian Civil Rights Act. Under its terms, a list of civil rights, roughly reflecting the Bill of Rights, was imposed upon every tribal government.

Passage of the Indian Civil Rights Act was accomplished over the opposition of many Indian tribes. The relationship between the individual and his or her society was considered by many tribes to be their exclusive prerogative. By legislating civil rights upon Indian country, Congress inserted a portion of American culture into Indian society and attempted to supplant tribal culture, imposing a new order within tribal society that elevated the interests of the individual well above that of the family, the clan, the band, or the entire tribe. For many this signaled certain death to tribal society.

But tribal culture received a reprieve in 1978. In *Santa Clara v. Martinez,* the Supreme Court made it clear that although Congress had the prerogative through its plenary powers to impose a system of civil rights protection upon Indian country, it was nonetheless left to the Indian tribes themselves, through their judicial tribunals, to interpret how these concepts should be applied. The very narrow holding of *Martinez* was that the federal court was without jurisdiction to hear an alleged civil rights violation given that the only statutory relief into the federal forum was by a writ of habeas corpus. A claimant must therefore be in custody, suggesting that review within the federal court system was available only in criminal cases.

The *Martinez* decision was sufficient to place a makeshift wall between American culture and the cultures of the various tribes. The intrusion of civil rights philosophy into Indian society, and the commensurate elevation of the status of the individual, were postponed. Many Indian tribes took this opening as an opportunity to return to practices that had evolved since the initial establishment of the inquisitional form of court in the late 1800s. Other tribes took the opportunity to reinstate traditional practices of problem solving. This renaissance of traditional adjudication practices was reinforced by the growing dissatisfaction with Western legal process as a whole. American courts have been experimenting with alternate dispute resolution in its many Western forms, thus validating, in part, the restoration of traditional Indian practice.

In the early 1990s many tribal judges and tribal leaders sought additional funding from Congress. After 2 and one-half years, Congress passed the Indian Tribal Justice Act, which was signed into law on December 3, 1993. Although it authorized up to $58 million to reinforce the functioning of tribal courts, to this day the act remains unimplemented and unfunded.

Preparation for Death

The brief history outlined above does not fully explain the evolving tribal court. It is hard for many Indian people to believe that the Indian Civil Rights Act did not bring the demise of traditional values and practice. American society did not realize the genuine sadness felt by traditional Indian people as their way of life became slowly dismantled.

Over the past two decades tribes have made sporadic efforts to preserve tribal culture. Most have focused on the preservation of native languages. But rapidly those languages are disappearing. Many tribes have undergone initiatives to restore the various tribal arts. On many reservations the practices of basketry, pottery, beadworking, woodcarving, sculpture, quillwork, and many other natives arts have been restored and have become part of daily life. However, the mere restoration of the Indian arts plays all too well into a modular notion of cultural pluralism. In part, these attempts to renew these traditional practices succeeded because they cater efficiently to the non-Indian concept of culture: a bit of culture one can buy at the market.

The real battle for the preservation of traditional ways of life will be fought for the bold promontory of guiding human values. It is in that battle that tribal courts will become indispensable. It is in the tribal court that the competing concepts regarding social order, and the place of the individual within the family, the clan, the band and the tribe, will be decided. It has been clear to tribal court judges for the past several decades that the expectations of the litigants in the tribal forum have not wholeheartedly favored an open adoption of American justice values. But in order to fulfill the expectations of the tribal litigant, the courts have found it absolutely necessary to consult tribal custom and traditions and incorporate these values into American-style legal systems.

In the past 50 years, since the passage of the Indian Reorganization Act, Indian country has greatly diversified. Perhaps it would have been possible 200 years ago to give a finite number to all the various settled forms of justice systems existing in North America. Today, we can point to more than 535 federally recognized Indian tribes. This does not necessarily mean there are that many different legal systems. Rather, there are more than 535 potentially identifiable discreet systems of adjudication, each of which must account for cultures in their midst that are in volatile transition.

Many contemporary popular movements now operate in Indian country, affecting the development of the tribal courts. For instance, many tribal societies are being affected by the forces of evangelical Christianity. Other communities have seized upon the Archaeological Resources Protection Act, the Native American Graves Protection and Repatriation Act, and the American Indian Religious Freedom Act to assist in the assertion of traditional cultural rights. Those within Indian country are becoming vastly diversified compared to what may have been a more homogenous population 50 years ago. To a lesser degree, but not entirely absent as influences upon Indian society, are the global changes involving the fine tuning of human rights and the global trend toward regional and ethnic independence. Indian people also aspire to greater independence in spite of their long history as Americans.

Given the forces affecting tribal societies, the question must arise as to whether tribal courts can find stability within their own systems of government, and if so, to what extent will Western notions of justice or traditional Indian notions become prevalent.

Maturity

Before contact with non-Indians ever occurred, every tribe had its own institution for resolving problems. A "court," in many cases, never really existed. But among Indian peoples murders did occur, property was stolen, adultery was committed, and other transgressions against the social order occurred. We Apaches had a context against which the transgression could be read, interpreted, and resolved. We did not centralize all of our remedial powers into one institution. Rather, we would involve different elements of our society—the chief, the warrior societies, the families, the clan, the medicine man, and so on—in the resolution of the problem. Laws were not made by an institution such as a legislative body but by the normative power of the entire society. Each individual knew what was prohibited, where the prohibition came from, who would be empowered to decide corrective action, who would administer corrective action, and what the corrective action would be.

Expectations of justice were entirely different. For instance, among the Apaches the telling of truth is extremely important. It was not because truthfulness had achieved such a high virtue in our society. Instead, we view our reputations as being the most important of personal possessions. Thus, if a person told a lie, the person would fall into disrepute as a liar. The implications of such values in current legal process have been that few criminal cases are contested. A person who has committed a wrong freely confesses it. To a certain degree, the requirement that government prove guilt beyond a reasonable doubt legitimizes deception. Therefore, a defendant's rights are not necessarily perceived by Indian culture as something good.

Apaches rarely seek compensation for injuries. This is because we come to view injuries as defining moments. A person who loses an eye loses an eye for a reason—in some way to define himself. It is a teleological view of human experience. For the most part, this view disposes of all injuries that occur by mere and gross negligence. Traditionally, if an intentional harm occurred, the offender would "own up" to the offense and make a restitutional gesture to the victim. An individual who confessed to having committed an offense could thus protect his or her good reputation.

In American society, restitution constitutes a very admirable traditional Indian practice. But our Apache restitutional gesture has little to do with economic value. The item or items used to provide restitution are symbolic of the remorse shown by the perpetrator. In the act of offering restitution, there is a transfer of power from the perpetrator to the victim. In offering restitution the perpetrator demonstrates the degree of remorse for having committed the intentional harm. The victim, after witnessing the gesture, has the power to determine whether the remorse was genuine. That determination depends on the degree to which the item or items involved in the restitutional gesture constitute a harm or loss to the perpetrator. If the offered restitution is without remorse, the victim can reject the restitution, and, thereafter, the perpetrator is disreputed until he or she comes forward with true remorse.

For certain problems there were certain known institutions that resolved those problems. One would not take a problem of one character to an institution that was not charged by tradition to solve those kinds of problems. And because we Apaches had placed such a high value upon our reputations, truthfulness was not a problem. Therefore, our institutions were not designed, as in American society, to discover the truth. Our institutions focused more upon determining the manner in which a transgression against social order would be remediated. As a result, in the development of the contemporary Apache courts, we have had a great deal of trouble developing a fin-tuned sense of legal process and a philosophy regarding evidence and burdens of proof and production. But our powers of remediation appear to go well beyond those employed by the Western world.

In our traditional society capital punishment consisted of exile. I know of no instances where death was ordered. "Shame" was our principal instrument of punishment (although "punishment" may not be an appropriate designation for the principle behind the corrective action). For the offense of adultery, a person had his or her nose sliced. (Adultery was considered an offense from which no person could recover and whose disrepute could shown obviously on the perpetrator's face.) In the Apache concept of transgression, we do not necessarily assign to a person a degree of intent, be it mere negligence, gross negligence, spur of the moment intent, or intention backed by planning. Each individual may take actions resulting in the transgression of tribal norms or mores because of badness that is operating within his or her life. That badness can be, and often is, a badness of heart—what Westerners might call sociopathic behavior—but the badness also may be explained by religious or spiritual reasons that have caused the state of heart, or by medical reasons that have caused momentary or periodic changes of behavior. So, in fashioning a remedy, much more attention has been placed upon determining other facts about the individual that can illuminate the metaphysical exploration of the individual undertaken by traditional participants.

The Apache remediator knows quite well that part of the remedy is in performing the exploration. Family members and friends may be brought in to discuss the changing world of the individual. We may explore everything from what he or she eats to which direction he or she faces when going to sleep at night. We recognize that many of the proscriptions that have been handed down from generation to generation, although potentially obsolete or dogmatic, may have their justifications in older times. We cannot altogether abandon those inherited cautions simply because we have acculturated to the English language and an American way of life and cannot fully understand or appreciate the wisdom of our predecessors.

Although restitution, consisting of equivalent economic value, may be an appropriate remedy under some circumstances, in traditional Apache society we recognize that dialogue about the transgression may also be the best remedy as we restore the individual's reputation. Depending on the nature of the transgression, we may require the restitutional gesture to involve more than merely a victim but a victim's family, and even the entire society. We value remorse as a state of mind to be accomplished by a perpetrator. But we consider it essential that the internal and external life of any perpetrator be examined to determine whether the individual is healthy or whole. And ultimately, we desire to reintegrate the individual back into tribal society.

What I have described in very simple fashion are the salient points of a philosophy I consider important to this world. In our society, we see the importance of accomplishing a state of remorse, in order to humble the perpetrator, but also to cure the victim. In American society, there is no remorse. Remorse appears to be left to the victims and their families. A civil judgment is paid and business goes on; a punishment is meted and the remorseless criminal ferments his hatred in prison for years. How the remorselessness and the victimization collectively affect America is something worthy of exploration.

Youth

In the preceding text I gave what I hoped was sufficient guidance as to the dynamics which might cause a vast diversification of legal systems throughout Indian country. Certainly, by force of federal law, many tribes have had to import non-Indian values into Indian society. Indian people are influenced on a daily basis to accept western values and to expect legal process as it is portrayed on television and in the media. At the same time, many people perceive the early signs of cultural extinction and are fighting furiously to preserve what little we have of the past.

Over the past two decades we have sent young tribal members off to schools and colleges to become educated and gain expertise about the western world. After the return of the first waves of educated Indians, we experienced a brief era of acculturation during which time we accepted the apparent necessity of adopting written laws and refining our western-style institutions of adjudication. But in our growing sophistication and as

a new wave of educated tribal members returned home questioning the values which we had previously uncritically imported, we now perceive our rights to culture as being part of a larger global more.

As a result of a series of federal laws passed in the last century, and reflecting the shifting sentiments of America toward Indian people, we also have further grounds for unique adaptation. Federal law has treated Oklahoma uniquely thereby placing the tribes of Oklahoma largely without territory over which to govern, nonetheless distributing Indian people throughout the state. Public Law 280 deprived Indian tribes in the States of California, Minnesota, Nebraska, Oregon, and Wisconsin of all criminal jurisdictions except within the Red Lake, Warm Springs, and Menominee reservations. As a result of other provisions of Public Law 280, the States of Arizona, Iowa, Idaho, Montana, North Dakota, South Dakota, and Washington assumed a portion of jurisdiction away from Indian tribes. Finally the Alaska Native Claims Settlement Act (ANCSA) established a corporate form of governance for the various regions of Alaska. This system now confuses the efforts of the Alaska natives and the Alaska tribes to organize their own systems of adjudication.

Native American tradition still flourishes in Arizona, New Mexico, Alaska, the Rocky Mountain States and the States of the Northern Plains. This is not to say that there are not communities throughout the United States that maintain a strong tie to the past. The tribes of the Iroquois Confederacy, for instance, have maintained a virtual unbroken tie with the vast complex of values held by their ancestors.

Over the past few years several conferences have brought together many tribes to discuss the emergeing movement toward restoration of traditional justice practices. These conferences have also brought in representatives from the Native Hawaiians. In addition, many tribal people have engaged in dialogue within indigenous groups from Central and South America, Polynesia, Papua-New Guinea, and other distant places. Thus hybridization of tribal justice systems is not only influenced by traditional tribal American culture, but also by the experiences of other tribes and other indigenous populations.

Among the tribes of the United States, there appear to be five general categories that describe the various developing tribal courts: the American model, the American-traditional hybrid model, the dual model, the traditional model, and the explorative or non-existent model.

The American model essentially follows the lead set by American jurisprudence. These courts generally appear within those tribal governments that have been organized under the Indian Reorganization Act. Under these systems there are distinct separations of powers, and mirror-image adoption of American legal process and jurisprudence. These courts refer to federal and state court decisions in order to formulate and justify the development of their own jurisprudence. Generally, these types of courts serve populations that are largely assimilated or acculturated to an American style of living with a more modular recognition of tribal culture and tradition. Often the courts have evolved in this manner due to the early influence of non-Indians. Either the Indian community found itself in close proximity to populations of non-Indians, individual federal officials exerted a great deal of authority and influence over the development of tribal systems, non-Indian attorneys hired by tribes were given greater freedom to influence the development of tribal legal systems, or Indian tribes employed non-Indians to serve in a judicial capacity during the formative years of the tribal court's development.

The hybrid American-traditional model far out-numbers all others. These courts fall in two general categories as well: those in proactive development, and those in reactive development. This hybrid group has developed in large part because of the indecision of populations to go with one or another expectation of justice. On the one hand, many tribal populations insist on importing and advancing traditional cultural values into the process of adjudication and urging a greater degree of flexibility and informality within court procedure. But many of the people are also taken by the allure of civil rights and legal process. These hybrid courts serve populations that have a fairly equal mix of traditional native-language-speaking people and non-traditional non-native-language-speaking people.

The proactive hybrid court is in the minority. Their proactive nature highlights the fact that they are often well-developed, mature courts. The maturity is evidenced by the court's ability to command substantial attention during the tribal funding process (to gain sufficient annual funding), by having experimented with the use of form orders and petitions, by having experimented with the use of computers (in order to organize dockets and generate necessary court documents), and by consciously examining the incorporation of tradition and custom

into the jurisprudence of the tribe. To a degree, the Jicarilla Apache tribal courts fit into this category. The courts of the Jicarilla Apache tribe, however, have only recently emerged from the reactive category.

The larger portion of hybridized courts are reactive. The designation "reactive" actually portrays the court as reacting to the circumstances around it as it evolves into a hybrid type of institution. Those forces include interference from elected leadership, lack of funding, public expectations, human resources limitations (most notably education and training), and so on. This category easily encompasses a majority of the courts in the Northern Plains, Oregon, Washington, Idaho, and Arizona. Many of these courts are conscious of the option to select and incorporate traditional justice practices into the jurisprudence of the tribe, but there is an absence of meaningful communication with the executive or legislative bodies to enable the court to justify or gain approval for such incorporation. Many of these tribes are postured to emerge from a reactive to a proactive state. In large part, funding stands as the single greatest obstacle toward change.

It is useful to examine parenthetically the effects of funding on the development of tribal courts. Although the number of law-trained Native Americans has increased substantially since the early 1970s, few Indian attorneys look to careers in the judiciary. In part, this has much to do with the fact that the educational process in law school, particularly in the field of federal Indian law, tends to encourage lawyers to aspire to careers in litigation. (The recent successful history of litigation of Indian issues tends to support that predilection.) Indian lawyers who fail to make it into the larger law firms generally look to Indian Legal Services or to solo practice. Recently, the Department of Justice has begun hiring many Native American attorneys in order to offset a deficit in its ranks. Still, the tribal courts are last in line to be considered for career development. Tribal courts have had to bear a reputation for providing little in the way of salary, and being particularly vulnerable to political forces, they tend to offer only short tenures on the bench. The inadequacy of funding also often means that courts do not have sufficient buildings, staffing, equipment, and supplies to do their work. This would not be a problem if there were other courts to resort to, but in many cases the tribal court has exclusive jurisdiction. Furthermore, tribal courts tend to take on other cases such as election disputes and constitutional challenges that test the validity and stability of tribal government.

In the absence of a viable court system, tribal government stands consistently at risk of shutdown or failure. In the absence of funding the courts can never quite attain the personnel who are competent to adequately justify the place and purpose of the court within the democratic structure of tribal government. This, in turn, undermines the remainder of tribal government. Legislative and executive efforts to reinforce their regulatory initiatives, such as resource development, environmental protection, and fire protection, or to stimulate economic development, always fall short by virtue of this fundamental defect.

The dual model exists where a tribe has chosen to employ a traditional and an American justice system model, but by keeping a clear separation between the two and diverting cases based upon subject matter to the different courts. Predictably, the Western-style court tends to be hybridized. The most notable of this class is the Navajo Nation Court. A brief examination of Navajo case law indicates a regular and methodic reference by the justices of the Navajo Nation Supreme Court to tribal traditions and customs in rendering their decisions. Navajo Nation has what appears to be an America model court, but the jurisprudence relies heavily on Navajo tradition and custom. Many domestic relations type of cases are funneled to the Peacemaker Court, which incorporates Navajo religion into the problem-solving process. Increasingly, business-related cases are being submitted to the Peacemaker Court for solutions. The Peacemaker Court best represents traditional adjudication healing practice.

Nonetheless, it was pushed aside by federal authorities in favor of the American model. Eventually, under proactive judicial leadership the Peacemaker Court was re-established (although it was never truly gone). Many Pueblo courts have two court systems as well. The Pueblos have been highly successful at preserving traditional practice, but nonetheless, they have found it necessary to create an American model court to handle an increasing number of commercial claims.

The traditional model court has become rare. Several Pueblos adjudicate transgressions and solve problems in accordance with age-old practices. Many do not allow non-Indian practitioners to participate in the deliberative process. This restriction has brought much criticism and very little sympathy.

Of the last category, the explorative and the non-existent, there are several important observations. A majority of the Indian tribes and Alaskan Native villages do not have formal recognized systems of justice. This is not to

suggest that these different communities do not have some means of adjudicating transgressions or of problem-solving. Rather, these adjudicative institutions generally are not recognized by the organic or positive laws of the tribes. With the passage of the Indian Tribal Justice Act in 1993, many of these tribes were encouraged to explore creation of a court system. Irrespective of the jurisdictional limitations placed upon any of the tribes by either Public Law 280 or the Alaskan Native Claims Settlement Act, it is clear that the tribes have inherent authority to adjudicate matters touching upon the organization of the family and tribal society. Therefore, the issues involving domestic relations and political organization are within their jurisdictional reach.

By this brief and rather rough generalization, it should be clear that most tribal courts are somewhat between formative and youthful stages of development. Few tribes have reached a level of maturity where they can meaningfully make choices between traditional practice and American legal process. We should all admit, though, that the development of the tribal courts has been significant in light of the fact that most of these courts began earnestly under Indian control in the 1950s and 1960s. American jurisprudence, by contrast, has had more than 200 years to develop.

Birth

Whether tribes adopt traditional cultural practices in the long run is not without impact upon the rest of America. Because tribes are exploring variations on American jurisprudence, they are potentially small laboratories that can test new directions for American jurisprudence. On a more tangible level, because the Supreme Court, in the 1980s, took up the cases of *National Farmers Union Insurance Companies v. Crow Tribe*, and *Iowa Mutual Insurance v. LaPlante*, federal courts (and to some extent state courts), may be forced to examine the workings of the tribal courts. These two cases, though not confirming the civil jurisdiction of tribal courts over non-Indians, nonetheless require federal courts to stay their hands until non-Indian litigants have exhausted their remedies within the tribal court system. If traditional practice is incorporated into the tribal system to such an extent that it does affect commercial transactions with non-Indians or domestic relations concerning non-Indians, the federal courts may be in a position to place tribal courts under a microscope.

Previously these types of cases may have resulted in one form of balancing test or other, which may have sorted out the legitimate governmental interests of the tribe as compared to those interests and rights possessed by the individual. But this type of cross-cultural scrutiny gives abundant opportunity to the federal judge to engage in a dangerous exercise of ethnocentrism, ignoring the history surrounding the development of the particular court, the cultural forces that have shaped the jurisprudence of the tribe, the stage of development the court may be in, the resource deficit the tribal court may have suffered in its development, and the effects the rights of a non-Indian individual may have upon the human rights possessed by a collective of individuals who have lived here for centuries.

The *Iowa Mutual* case made reference to the principle of comity. When comity is brought forth as a measure between sovereigns, the courts abandon inquiries into jurisdiction or authority. The courts determine whether good relations between the sovereigns may outweigh any other interests. An enlightened federal court will surely perceive that with every Indian case appealed into the federal district court through the avenues created by *National Farmers Union* and *Iowa Mutual*, the notion of comity can be further refined. In the alternative, federal judges are likely to be faced with a difficult question as to what weight they must give to a tribe's need and desire to remain independent and unique. Federal courts will have to determine whether or not they are justified to criticize a tribal system where the tribe chooses consciously to avoid written laws, a written record, and other legal positivistic notions. Federal courts will have to develop a standard by which they can cross-culturally measure the validity of tribal process and of Indian expectations of justice. The challenge is whether or not federal and state courts, the American Public, and Congress are willing to allow for the birth of a new respect between Indians and non-Indians.

6.6 Life Comes from It: Navajo Justice Concepts - 1994[151]

- Reports on the Navajo Nation's Peacemaker Courts which focuses on healing and nourishing long term relationships, rather than establishing guilt.

[151] Yazzie, R. (1994). Life Comes from It: Navajo Justice Concepts. New Mexico Law Review 24:175-190. Special edition on The Ecology of Justice published by Context Institute, Bainbridge Island, WA. In Context. No. 38: 29-31174 cited in McCold, Ph.D. for the Working Party on Restorative Justice Alliance of Non-Governmental Organizations (NGOs) on Crime Prevention and Criminal Justice (NY), Restorative Justice An Annotated Bibliography, 1997, http://members.ozemail.com.au/~igmnet/restorativejustice/library/Annotated%20Bibliography.html

7 Relevant Documents, Studies and Practices – International

7.1 Possibilities for Restorative Justice in Papua New Guinea-2002[152]

High crime rates and high levels of insecurity place effective crime control at the forefront of policy debates in Papua New Guinea. Much of the public outcry focuses on stronger law enforcement measures: increasing the training, equipment, and personnel for the police force. However, some initiatives draw from traditional approaches to resolving conflict.

Village Courts

Established in 1974, Village Courts are a hybrid model of community justice that hearken back to pre-colonial practices of exchange and cooperation in resolving conflicts. Separated from the national judicial system, these courts only handle customary law cases and minor crimes. Sanctions include community service and fines. Although the Village courts were originally developed for use in rural areas, they now operate in both rural and urban areas over 84% of the country.

Village Courts have been criticized for their susceptibility to the male-oriented values of society. Particularly in the Highlands, the courts have been charged with reinforcing the subordination of women and children. At times women have not been permitted to speak, and women victims have been held responsible for crimes such as rape or for marital problems. On occasion, Village Courts have illegally ordered prison sentences or taken cases that were outside their jurisdiction.

Mass Surrenders

In mass surrenders, large groups of offenders participate in public ceremonies in which they confess the crimes they have committed, surrender their weapons, and ask for assistance in leaving the criminal lifestyle. These ceremonial displays, often brokered by churches or individual pastors, resemble older Papua New Guinean traditions of reciprocal exchanges used to end conflicts. They are sometimes related to large revival meetings. In these surrenders, the repenting offenders ask forgiveness and promise to leave offending. The community group responds by promising to address underlying contributors to offending behavior by, for example, providing employment, education, and micro-enterprise and social development programs.

Gang Retreats

Gang retreats are also a community-brokered attempt to find solutions to offending behavior. Gangs, known as *raskols*, are a major problem in Papua New Guinea. Comprised of unemployed young people, these criminal organizations can be highly structured and account for much of the increase of violence. Gang retreats are meetings organized by churches, community leaders, politicians, and business people and gang members. The discussion concentrates on structural reasons leading to criminal activity and ways to help offenders become productive members of society.

Teaching Conflict Resolution

Peace Foundation Melanesia is a non-governmental organization working to introduce restorative justice and peaceful conflict resolution throughout Papua New Guinea. The organization has been active in many areas of the country including the rebuilding of community structures in Bougainville after the war.

The group offers training courses in people skills, conflict transformation and community development. Training sessions are held in targeted villages so that as many people as possible from that village are able to attend. This also helps build more support for the new ideas at the community level, and allows more women to participate. There are two goals for including women in the training sessions:

1. Women's active participation in the role-plays and discussions demonstrates their abilities to help resolve conflict in the community.
2. The presence of women mediators helps avoid biases against women seen in the Village Courts.

Since 1994, Peace Foundation Melanesia has trained several hundred mediators and trainers, helped to open mediation centers in many communities, and set-up an oversight team for conflict resolution activities.

Resources used for this article are:

Dinnen, Sinclair. (2001). *"Restorative justice and civil society in Melanesia: The case of Papua New Guinea."* In Restorative justice and civil society, eds. Heather Strang and John Braithwaite, 99-113. Cambridge, UK: Cambridge University Press.

[152] http://www.restorativejustice.org/rj3/Feature/August02/png1.htm

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7.2 Mediation: Towards An Aboriginal Conceptualisation - 1996[153]

Generally, those of us trained in the `Western' model define mediation as a process of assisted negotiation, and negotiation as something done with a view to reaching agreement on issues. In keeping with that model, the Queensland Community Justice Program defines `mediation' as follows:

`[A] highly structured but informal process managed by two mediators, who guide the disputants through a number of stages in order to assist them in identifying and exploring their concerns, generating options for change, testing the options and negotiating a mutually acceptable agreement. The neutrality of the mediators and the confidentiality of the session are regarded as essential to the process. The mediators' involvement in the dispute begins and ends with the mediation session. They are concerned with the process of communication and negotiation, and not the content of the negotiation'.

In the course of my follow-up research on a Mediation Training Project which had been carried out by the Community Justice Program in the community of Hopevale in 1993, I came to understand that the Aboriginal conceptualisation of what `mediation' means bears little resemblance to this `Western' model.

As I listened to the Guugu Yimithirr people of Hopevale express what was important to them with regard to the mediation process and its benefits, it became clear that outside of the `Lets talk about it' construct, we're simply not talking about the same thing. That `mediation' in an Aboriginal context means something quite different originates, I believe, from divergent, if not mutually exclusive, points of departure about relating generally and about community specifically. It is this reality which renders virtually every tenet of mediation, as defined above, as wholly or partly untenable.

If the `success' of the Mediation Training Project in Hopevale were to be measured by the number of active mediators emerging from the training, the number of disputes brought to those mediators, and the number of disputes resolved through this negotiated process, then the failure is near total and decidedly abysmal.

I'm proposing that the key difficulty in effectively practicing Community Justice Program mediation in Hopevale is that the cognitive, problem-solving orientation of the `western' mediation model is far too simplistic, and thus inadequate to achieve what Aboriginal people need and hope mediation will achieve. They seek a change of heart, a transformation, a healing of relationship and spirit--not simply a mutual commitment to honour the terms of an agreement in the future.

In view of what I understood people to be saying about mediation as a process for resolving conflicts, I would like to tentatively offer how the Guugu Yimithirr might more accurately define `mediation' as they understand it.

Mediation is an unstructured, informal conversation `under the mango tree', managed by respected, knowledgeable elders who assist those harbouring hate towards one another to express their anger in a controlled environment. The role of the mediator is to draw out the deep-rooted causes for the spiritual ills which are presenting in anger and violence. The mediator contributes to the healing process by teaching, offering advice and guidance, in effect `answers', for the individuals to think about, and potentially to be

[153] Madeleine Sauve Mediation: Towards An Aboriginal Conceptualisation, Indigenous Law Bulletin Volume 3, No. 80, May 1996, http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/ilb/vol3/no80/2.html

changed by. Ultimately the goal is the transformation and healing of the diseased individuals through transformational learning.

Mediators must of necessity be fair-minded and carry moral authority in the community at large. The mediator's involvement is expected to have spanned the lifetime of the individual. They are concerned with the process of healing the individuals, as opposed to merely symptomatic remedies. Neutrality and confidentiality are non-issues.

While both models have `settlement directed talking' in common, the key distinctions between the two may lie in what it is that needs settling, and what is the quintessential goal of settlement.

`Settlement' in the Aboriginal sense has to do with relatedness, with a construct of `community', not a `settlement which is separable from the whole and which pertains exclusively to the individual disputants, as is primarily the case in `Western' understandings.

What needs `settling', or redress, is not `issues', but relationship. Therein lies, I believe, the key distinction in terms of point of departure between the two conceptions of `mediation'.

`Settlement' means reconciliation: reconciliation of inner conflict (source of illness), reconciliation with the `other' (disputants), and reconciliation with the community (clans from all sides). Extrapolating from the work of psychologist Barbara Miller, it would make sense that the Aboriginal individual might not experience self and other as absolutely separate; that self and kin/clan/community may be so intrinsically bound as to take on similar meaning.

It has been often noted that, due to the nature of Aboriginal family and kinship ties, the overwhelming majority of disputes are expected to be multi-party rather than single-party disputes. I would suggest that virtually all disputes, by definition, are `multi-party'. Conflict, whatever its substance, does not belong exclusively to individuals. It belongs, in a very practical sense, to the community, as is evidenced in very common manifestations of kinship obligations *vis à vis* declared allegiances in most any dispute.

If `settlement' has to do with the Aboriginal premise of relatedness and construct of community, then it would follow that the goal of `settlement' is not in an important or primary way attached to the resolution of the `issues' and the generation of `terms of agreement'. Such `resolutions' may, or may not, be by-products of the essential goal which is, I believe, reconciliation; reconciliation achieved through a `change of heart' and a healing of relationships and spirit.

Concepts of empowerment

Mediation is frequently alluded to and praised as a process which empowers the individuals to resolve their own conflicts. It is therefore consistent with the principle of empowerment of Indigenous peoples, and is significantly closer to traditional ways of dealing with disputes in that it enables those most directly involved to work through the issues together.

There is no doubt that any mechanisms that might distance Aboriginal justice needs from white man's courts is overwhelmingly to be preferred. Aboriginal experience of the adversarial legal and criminal justice system of white Australia has been, at worst horrific, and at best unrelentingly ethnocentric.

Both the Royal Commission Into Aboriginal Deaths in Custody and the work of the Legislative Review Committee highlighted mediation processes as being appropriate mechanisms for Aboriginal and Torres Strait Islander people in managing conflict.

The promise of mediation is that it will allow Communities to retain community ownership of disputes and to respond to them in a flexible manner; to make possible the creation or re-creation of conflict resolution mechanisms which are in harmony with the existing cultural ethos.

The essential difference between mediation in the `Western' sense which seeks to empower individuals, and mediation in the Aboriginal sense which seeks to empower the community, is an important one. The form which `mediation' needs to take in order to achieve `cultural appropriateness' is tied to a recognition and

respect for that difference. Manifestations of that difference are readily discernible in the ways in which two key tenets of mediation, neutrality and confidentiality, are experienced in each of the contexts.

Neutrality and the ethic of non-interference

The standard `Western' model of mediation asks that the mediator be `neutral'. More than impartial, as in unbiased in favour of or against one of the parties, it generally means neutral about the outcome. That is to say, the mediator's values do not surface and are understood to be irrelevant to the outcome. Why is being `neutral' a highly regarded precept in `Western' mediation models? The disputants' right to control the content of the discussion and to freely judge the value of potential solutions is inviolable. In order that any agreement be honoured, it must be fully and internally endorsed by the individuals themselves. That the mediator be respected (held in high regard by the disputants' society), is not particularly relevant; that s/he be highly competent in the process work is relevant. `Neutral', then, has little to do with `fair', seeing as how it is not the mediator's role to judge. It is the disputants who consensually determine `fair.'

In Aboriginal society, it is imperative that the mediator be respected, because it is the moral authority of the community at large that s/he brings to the process. This moral authority must be powerful enough to cause the individual to `think about it', what the mediator has said or advised. Traditionally, heads of families are expected to advise and counsel those in trouble.

Respect for the mediator and their reputation for fair-mindedness far outweighs concerns about neutrality. In a small, tightly bonded community the mediator, of necessity, will be known to the disputants, know the history and nature of the dispute, have family ties and history, and so on. Such a reality is not only desirable but essential. As stated by Pastor Rosendale at Hopevale community:

`It's got to be a mediator of the Guugu Yimithirr tribe, you know. Who relates more ... Has an understanding which is already there ... You have to live with people a long time'.

Confidentiality and the concept of privatisation

Where a dispute is construed as belonging to the individual, the concept that its nobody's business but their own evolves readily into an ethic of confidentiality. In mainstream urban culture disputes are privatised.

In Aboriginal society, close-bonded living arrangements and kinship obligations render the privatisation of disputes rarely possible. The role of gossip--the Murri grapevine--may well be an important aspect of maintaining social order.

For the most part, the whole community is aware of the source of the dispute and the history of the families involved. They may well need to be aware of the outcomes of a mediated resolution in order that the moral weight of the community can be brought to bear on agreements, however non-authoritatively that is done (that is, through gossip mechanisms).

The processes of public exposure, ritualised public fighting, and public redress have deep roots in traditional dispute resolution mechanisms. Marcia Langton, in her study `Medicine Square', concluded that these mechanisms have survived in `settled Australia' in Aboriginal communities.

Traditionally, this ritual fighting was controlled and structured, allowing both an outlet for aggression, and at the same time the management of its intensity. Strict rules regulating the acceptable range of expressions of anger and its restraint were maintained by `blockers', who were part of an elaborate kinship structure. Clearly the involvement of extended family in the resolution of disputes has, at least traditionally, served an important purpose. The community witnessed the `clearing' of the anger; the community ensured the safety of the disputants, and the community collectively witnessed and `ratified' the closure of the conflict. The law of reciprocity had been honoured. It was over. For everyone.

The ethic of confidentiality, premised as it is on individualism, is foreign and may well dismantle a powerful tool of social control deeply rooted in culture.

`Mediation' is a concept well ingrained in Aboriginal history and community. It has its own conceptual etymology. If mediation is to be responsive to community justice, this etymology needs to be grappled with in the present day context.

7.3 Restorative Justice: A Maori Perspective - 1996[154]

This paper is a response to Belgrave (1995) and describes the historical and current Maori justice system. An option to strengthen the restorative process embedded in the Maori community is proposed. Issues regarding the adapting of past practices to principles of restorative justice are discussed from the Maori perspective. Recommendations for the essential elements of a new system based on restorative processes are listed. Includes descriptive overviews of indigenous justice models from North America and Australia. Specific warnings against mistakes of other alternative dispute resolution models are appended.

7.4 Colonization, Power & Silence: History of Indigenous Justice in New Zealand - 1996[155]

This essay discusses the pre-colonial Maori concepts of justice. This system, in the eyes of the British colonists, seemed to encourage disorder and crime and was inconsistent with emerging European concepts of individual responsibility, demand for order and certainty in punishments, replacement of corporal punishments with imprisonment, removing punishment from public view. But Maori practices are being restored, to some extent, in contemporary New Zealand regarding youthful offenders through family group conferences that involve meetings with the youth, his or her family, and victims to work out a satisfactory resolution to the offense. Using Maori concepts when responding to adult offenders is discussed.

7.5 Local Involvement in Legal Policy/Justice Delivery in Greenland – 1995[156]

- The presentation began with a brief outline of the historical development of the legal system in Greenland, which included:
    - the legal practices in pre-colonial times,
    - the loss of traditional law during the first century of colonization,
    - the period of the dual legal system (one for the colonial officials, and one for Greenlanders, where customary law was only applicable to Greenlanders) and
    - de-colonization and the postwar law reform.

- What follows from the postwar law reform is a Greenlandic Penal Code which places more emphasis on rehabilitation than the Danish Penal Code, and Greenlandic law which embodies Western concepts, such as the independence of the court, while conforming to Greenlandic Inuit culture in its a day-to-day administration.

- Today, nine out of ten people working in the Greenlandic justice system are Greenlandic.

    - It is a system which is based on the use of lay people and the indigenous language.
    - A system of lay assessors courts has become a central and unique system of conflict resolution.
    - Although it is not based on traditional Eskimo law-ways, Inuit culture comes in a more subtle way.
    - One may call Greenland law an example of "applied legal technology".

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[154] Maxwell, G. (1996). Restorative Justice: A Maori Perspective. The New Zealand Maori Council. Wellington, NZ: Ministry of Justice, 27p. cited in McCold, Ph.D. for the Working Party on Restorative Justice Alliance of Non-Governmental Organizations (NGOs) on Crime Prevention and Criminal Justice (NY), Restorative Justice An Annotated Bibliography, 1997, http://members.ozemail.com.au/~igmnet/restorativejustice/library/Annotated%20Bibliography.html

[155] Pratt, J. (1996). ÙColonization, Power and Silence: A History of Indigenous Justice in New Zealand Society. In: B. Galaway and J. Hudson (eds.), Restorative Justice: International Perspectives. Monsey, NY: Criminal Justice Press, pp. 137-156 cited in McCold, Ph.D. for the Working Party on Restorative Justice Alliance of Non-Governmental Organizations (NGOs) on Crime Prevention and Criminal Justice (NY), Restorative Justice An Annotated Bibliography, 1997, http://members.ozemail.com.au/~igmnet/restorativejustice/library/Annotated%20Bibliography.html

[156] Finn B. Larsen (Denmark)*cited in* The International Centre for Criminal Law Reform and Criminal Justice Policy and The School of Criminology, Simon Fraser University and with the support of The Department of Justice Canada and The Ministry of the Attorney General of British Columbia, Putting Aboriginal Justice Devolution Into Practice: The Canadian And International Experience Workshop Report, July 5-7, 1995 http://137.82.153.100/Reports/Aboriginal.txt

        - It embodies the principal of Western legal thought but the details and the day-to-day operations of the system have been stamped by Greenlandic culture.
            - Take for example the informal atmosphere that characterizes the court sittings, reflecting the Greenlanders skepticism and hesitation toward the exercise of authority.
            - The local judge would soon get a bad reputation in his community if he behaved in an arrogant or patronizing manner while sitting on the bench.
- It is interesting to note that in the transfer of powers to Home Rule in 1970, the administration of justice, which for decades had been in the hands of Aboriginal personnel, was one of the few issues which was not transferred to the Home Rule Government.
    - As a result the legal system was left behind while extensive reforms were launched in other spheres of the Greenlandic society, and the administration of justice came gradually "out of sync" with the rest of society.
    - In 1994, a Danish government commission was set up in cooperation with the Home Rule Authorities to remedy the situation.
    - Some of the issue tackled by the commission include the education of lay judges in response to the changing crime patterns, services to victims, transfer of correctional services to the Home Rule Government, and the building of a new prison in Greenland.
    - The basic system of use of lay people, however, remains unchanged.

7.6 Popular Justice/Community Regeneration: Pathways of Indigenous Reform - 1995 [157]

This book includes articles involving crime and conflict resolution possibilities for indigenous communities. Hazlehurst discusses the need for First Nation people to reconstruct their communities and rediscover ancient social mechanisms for resolving disputes. H. Hylton discusses Canada's social policy toward their aboriginal people and the need for fundamental reforms. A. Angelo describes the Tokelau Endeavor to reclaim tribal ownership of criminal law. T. Olsen, G. Maxwell, and A. Morris discuss the Maori and youth justice in New Zealand. M. O'Donnell presents issues and challenges of mediation within aboriginal communities. A. Story describes the Native Counseling Services of Alberta and its attempts to strengthen community. E. RedBird considers how native women are honored as the backbone of native sovereignty. M. Hoyle considers how community healing is a fitting strategy for aboriginal justice systems. C.T. Griffiths and C. Belleau consider ways of addressing crime and victimization in Canada to revitalize communities within their own culture and traditions. M. Hodgson discusses issues concerning addictions, treatment and prevention in native communities. J. Atkinson and C. Ober describe the healing process of 'Fire and Water": We Al-Li.

7.7 Putting Aboriginal Justice Devolution Into Practice -1995

Devolution and the Issue of Sovereignty in Alaska[158]

- In Alaska, the devolution of justice to the rural Native communities appears to be dependent upon the exercise of tribal sovereign powers by the individual Native communities.
    - In the United States tribal sovereignty is a limited sovereignty and is subject to the plenary powers of the U.S. Congress.
    - The relationship of tribes to the various states of the United States is less straight forward, but in general, states oppose the exercise of tribal sovereignty and view tribal governments as infringing upon their powers.

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[157] Hazlehurst, K. (ed.) (1995c). Popular Justice and Community Regeneration: Pathways of Indigenous Reform. London, UK: Praeger, 228p. cited in McCold, Ph.D. for the Working Party on Restorative Justice Alliance of Non-Governmental Organizations (NGOs) on Crime Prevention and Criminal Justice (NY), Restorative Justice An Annotated Bibliography, 1997, http://members.ozemail.com.au/~igmnet/restorativejustice/library/Annotated%20Bibliography.html

[158] David Blurton (The United States of America) cited in The International Centre for Criminal Law Reform and Criminal Justice Policy and The School of Criminology, Simon Fraser University and with the support of The Department of Justice Canada and The Ministry of the Attorney General of British Columbia, Putting Aboriginal Justice Devolution Into Practice: The Canadian And International Experience Workshop Report, July 5-7, 1995 http://137.82.153.100/Reports/Aboriginal.txt

- Often times the exercise of sovereign powers is challenged by state governments or by persons who are not tribal members.
- Two issues determine whether a Native group possesses tribal sovereignty:
  - whether the tribe is a federally recognized tribe, and
  - whether the geographical area over which the tribal power are being exercised constitute Indian country.

In addition, in Alaska, two further statutes have relevancy to devolution. The 1971 Alaska Claims Settlement Act terminated Aboriginal land claims, Aboriginal hunting and fishing rights and all but one reservation. In exchange, village corporations created under state laws received compensation for the extinguishment of tribal rights. Public Law 280 recognizes state legal jurisdiction (including the administration of justice) in six states, one of which is Alaska. Taken together, these two statutes indicate that devolution of justice does not appear to be a readily attainable reality.

United States policy has generally favored assimilation, with periodic support for self government. Federal and state governments have been very effective in destroying tribal governments, including destroying institutional memory (e.g. information on customs). The recent Alaska Native Commission, which was a joint federal/state commission, was tasked with determining the welfare of Alaska Native villagers and making recommendations regarding future government policies concerning Alaska Natives. The Commission Report suggests that the source of many justice-related problems is the state of "learned dependency" of many Native Alaskans; the solution can only be derived from a resumption of responsibility by the Native communities. One of the ways of transferring responsibility is to amend PL-280 so as to expressly give criminal jurisdiction to tribal government.

Devolution of Justice in Papua New Guinea: Village Courts and Probation Service[159]

Papua New Guinea is a Melanesian nation composed of many different and fragmented societies and language groups. Prior to independence in 1975, Germany, Britain and Australia imported justice systems into the country. In colonial times justice was administered at the local level by patrol officers call the kiaps. Based in remote parts of the country, they exercised administrative and judicial powers. It was the kiaps who, recognizing traditional forms of dispute settlement, initiated the concept of some kind of village level adjudication of disputes and led to the introduction of the Village Court system in 1975. While there is no formal policy of devolution in PNG, the desirability of involving the community in the maintenance of law and order has been recognized primarily through Village Courts and Probation.

The laws of Papua New Guinea include both English common law and customary law. While custom is applied mainly in the Village Courts, in the Western style court system, it is usually only taken into account in the mitigation of a sentence. Each Village Court was created by proclamation and given jurisdiction over a specific area. They are usually created as a result of local initiative from the villagers and the local government council. In 1993, there were 1100 courts dealing with an estimated 500,000 cases annually. The village court system adjudicates by reference to custom and has criminal jurisdiction over prescribed offenses. If an offense is found to have been committed the court can recommend imprisonment. In most cases compensation and a fine are awarded. Impartiality is not considered an essential attribute in Melanesian dispute settlement and the expectation is that decisions will be made on the basis of self-interest and the interests of the disputants (Lawrence, 1970; Wormsley 1985). Village court decisions are criticized by villagers but disputes which cannot be settled informally are usually dealt with satisfactorily by the system. Women have used the Village Courts as a means of airing their marital problems and as ways of promoting their concerns in a manner which would not have been possible in traditional society. The position of women appearing before the Village Court is dependent on the general level of respect given them in a particular society. The treatment of women by Village Court has recently become a concern and there have been a number of appeals to the Supreme Court.

[159] Cyndi Banks (Papua New Guinea) cited in The International Centre for Criminal Law Reform and Criminal Justice Policy and The School of Criminology, Simon Fraser University and with the support of The Department of Justice Canada and The Ministry of the Attorney General of British Columbia, Putting Aboriginal Justice Devolution Into Practice: The Canadian And International Experience Workshop Report, July 5-7, 1995 http://137.82.153.100/Reports/Aboriginal.txt

Probation was introduced in 1979 but became operational in 1985. Probation can be ordered by all Courts except the Village Court for up to five years. Conditions can be imposed and it is through the use of conditions and supervision that the probation system has attempted to integrate the community and the probationer. At its inception Probation proceeded by way of support from community-based support committees in the form of housing, funding for support services and the provision of volunteers. In preparing the pre-sentence report, a Probation Officer takes into account the community's reaction to the offense and, in particular, whether the offense has offended against custom. Conditions imposed such as restitution, compensation and the performance of community service take into account community expectations and the demand for reciprocity. Volunteer Probation Officers who are members the village supervise probationers and this gives the community some control over the behavior its members. For the women of the community, the pre-sentence reports give them a voice in the justice process. Those who have been sentenced on probation are allowed the chance to stay in the community and maintain their position in the family.

Community Revitalization and the Devolution of Justice Services[160]

Australia is in the early stages of its thinking about restorative justice and community healing programs for indigenous people. While the political climate is progressively more responsive to change, a sense of powerlessness still pervades interpersonal relationships within Aboriginal families and communities. This frustration manifests itself in expressions of rage, despair and apathy. The arbitrariness of events and of associations with government authorities and with wider society seriously affect race relations and community prosperity. The presentation focused on two examples of community revitalization involving non-coercive, community-based responses which tackle underlying social problems.

The "We Al-li" program, developed by two Aboriginal graduate students and influenced by the Canadian Indian sobriety movement, is a community-based psycho-social therapy program which targets trauma injuries and fosters healing through self-understanding. The program uses self-help community groups ("Lift the Blanket" workshops) to address family violence and addiction. It is through the recognition of the layers of pain that individuals could put an end to self destruction and ultimately turn to individual, family and community transformation. The aim of the program is reconciliation, across ages and across cultures. In addition to its work with community people, the program is now welcomed in maximum security prisons to assist violent men. There is also an adapted program for women shelters to facilitate the return of battered women to the community.

The Community Justice Safety Initiatives Program was designed as part of the attempt of the Queensland Government to address and implement the recommendations of the Australian Royal Commission into Aboriginal Deaths in Custody. The program involves targeted support for a variety of existing or planned community justice and community recovery initiatives, supported by training tailored to the specific needs of each group. The initial purpose of each group is of less importance than its potential to undertake broader responsibilities as its experience, confidence, and community acceptability grows. The program involves a focused effort to heal whole communities (rather than a "confetti approach" of widely dispersed short-term funding, which raises expectations but which ultimately fails). Crucial to the conception is a requirement that government departments and agencies working in the selected communities co-ordinate their own policies and operations. Initially four communities were selected. The plan is to employ a technique of "forward-rolling" program funding each year to other communities so that, within three years, a network of twelve participating communities will be created.

After securing the support of the local communities, and a State-wide representative Aboriginal and Islander overview committee, the plan faltered as turf battles and internal bureaucratic conflicts delayed State implementation decisions. A change of ministers and departmental heads in the two major State departments

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[160] Kayleen Hazlehurst (Australia) cited in The International Centre for Criminal Law Reform and Criminal Justice Policy and The School of Criminology, Simon Fraser University and with the support of The Department of Justice Canada and The Ministry of the Attorney General of British Columbia, Putting Aboriginal Justice Devolution Into Practice: The Canadian And International Experience Workshop Report, July 5-7, 1995 http://137.82.153.100/Reports/Aboriginal.txt

concerned has since further delayed devolution initiatives strongly supported by Aboriginal community groups. The researchers are now conducting dialogue at the Federal level in order to continue this project.

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http://www.usask.ca/nativelaw/jah.html

7.8 Implementation of Alternative Structures for Dispute Resolution-1995[161]

The following is a proposed model for dispute resolution within an Aboriginal or Torres Strait Islander community. The purpose of the exercise is to develop an alternative dispute resolution process based on the traditional dispute resolution processes and the values of the indigenous community. This is not the definitive model. It is merely an exercise in developing real alternatives to the legal system. It is an attempt to use creativity and flexibility in the development of legal structures and processes to promote fairness and justice in the outcomes of disputes. It is an example of a possible model that is not merely a transplantation of nonindigenous methods of alternative dispute resolution but a model that is designed to reflect the values of the Aboriginal community.

Aboriginal communities are capable of determining their own methods of dispute resolution. Aboriginal people are adults, not children. One of the underlying aims of this particular model is to promote community autonomy.

The model proposed here can only be implemented as an alternative to litigation in the dominant culture's legal system. It is a method of dispute resolution that could be used as a prelitigation option just as mediation or negotiation are. It is, however, working on the premise that there is an honest attempt by the government and non-Aboriginal people to implement a policy of self-determination and promote greater community autonomy.

With greater community autonomy, Aboriginal and Torres Strait Islander communities may very likely decide to move away from the structures of the dominant culture. Greater community autonomy will facilitate the development of dispute resolution mechanisms that are culturally specific to the community's needs and values. The greater the reflection of traditional community values in the laws and dispute resolution process, the greater respect the process will get from the members of that community. The appearance and reality of greater justice and fairness will be achieved.

The added benefit of this is that it will reinforce the values of the Aboriginal and Torres Strait Islander communities. This is a better alternative to the situation we have now where the imposed legal system, by not recognising traditional values and in many cases directly conflicting with those values, erodes those traditional values.

The model I have developed has been adapted to show that there can be, and necessarily must be, flexibility in dispute resolution models so that they can be used in the different types of Aboriginal communities.

Example 1 deals with a traditional community. These are communities that remain on traditional land or reside on out stations. Such communities are geographically remote. They have stronger links with the traditional laws and processes of pre-invasion society.

Example 2 deals with rural communities. These are communities that are displaced from their traditional land but live on the fringes of towns which are near their traditional lands. They are poorer than the urban communities, having less resources and opportunities.

Example 3 deals with urban communities. Many non-Aboriginal people will state that urban Aborigines are not a distinct community; that the choice of Aboriginal people to live within an urban area means that they have adopted the values and customs of the non-Aboriginal community. Non-Aboriginal people in cities have little understanding of the dynamics within urban Aboriginal communities.

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[161] Implementation of Alternative Structures for Dispute Resolution[161]

Larissa Behrendt. The following is an excerpt from Chapter 6 of Ms. Behrendt's book Aboriginal Dispute Resolution: A Step Towards Self-Determination and Community Autonomy. (Australia: Federation Press, 1995). The excerpt is reprinted with the author's permission. Justice as Healing * Vol. 3, No. 3 (Fall 1998)

Urban communities pose the most difficult questions for Aboriginal/non-Aboriginal relationships in Australia. Over two-thirds of Aboriginal people live in urban areas.

The Aboriginal urban community has strong cultural values that reflect traditional values. (See Table 5, omitted.) There are very few non-Aboriginal people who live within the Aboriginal community in cities because it remains socially unacceptable in non-Aboriginal society.

Aboriginal communities in urban areas remain distinct because of their socioeconomic position, their social position and their cultural differences. Even in urban centres like Sydney, the Aboriginal community is tight-knit and embodies a communal spirit. There are networks and cultural activities as with any distinct cultural group living in Australia.

... Each example of dispute resolution presented here has a proposal for resolving disputes within the community and a proposal for resolving disputes between the community and a non-Aboriginal interest or body.

While it is not controversial to propose that communities be responsible for resolving internal conflict, especially in geographically remote traditional communities, it is controversial to propose that non-Aboriginal people approach the indigenous community on the terms of the Aboriginal or Torres Strait Islander communities.

This approach addresses an enormous power differential that exists between Aboriginal and non-Aboriginal people within the non-Aboriginal community.

It generates a respect for Aboriginal culture and values which are ignored or demeaned by non-Aboriginal Australians. And it is no different than requiring Aboriginal people to approach conflict resolution through non-Aboriginal mechanisms. Making a non-Aboriginal person submit to the authority of an Aboriginal dispute resolution process is the same as Aboriginal people having to be judged by the non-Aboriginal court system.

Aboriginal people have the right to have customs and values respected. Greater community autonomy would promote this. It would also promote the fact that Aboriginal people, as an autonomous group, should have the power to make decisions; and people who are outside the community should recognise this when they wish to deal with issues affecting it.

It will be noted here that advocating this power to Aboriginal people in Australia in no way advocates equivalent power to other minority groups living in Australia. Aboriginal people, as the indigenous dispossessed people of this land, are in a unique relationship with the rest of Australia. It can be argued that when other cultural groups have come to Australia their cultural differences should and must be respected. But they have, by coming to Australia, agreed to succumb to the laws of the sovereign powers that exist here.

The unique status of the Aboriginal community comes from the unique possession they have as the indigenous people of this country. Autonomy and greater acceptance of Aboriginal cultural values are positive steps towards the improvement of the socioeconomic position of the Aboriginal community. This should be a matter of priority to all Australians because even if their personal morality does not give it priority, obligations under human rights covenants demand it.

Model for dispute resolution

The purpose of proposing this model is to show that alternative dispute resolution processes can be established within Aboriginal and Torres Strait Islander communities which reflect indigenous cultural values, that are better than processes developed in the non-indigenous community. The cultural values focused on are:

- community;
- egalitarianism;
- oral presentations;
- co-operation;

- respect for Elders, including female Elders;
- consensus; and
- flexibility of procedure.

These are the values that I believe are the most vulnerable when coming in contact with the dominant legal system. The cultural values of that system are directly opposite and therefore erode those particular indigenous values.

Facilitators

The procedure is facilitated by a council of Elders. The council is not elected or dependent on training. Admittance to the council takes place as it would have done in traditional society - by being a respected member of the community. Credentials come from experience, knowledge of customs and traditions and commitment to the welfare of the community. Elders are male and female. A female Elder can have more power or influence than a male Elder.

This removes the impartial, independent facilitator that is required in models of dispute resolution.

In a traditional or rural community, Elders are easily identifiable and probably already serve as facilitators of dispute resolution. Within urban communities the selection of Elders may seem more difficult because there are so many more people who could qualify. But even in urban areas, the community is tight-knit enough to know who the most respected Elders are.

For example, when there is political or social activity, members of the community know who it is appropriate to include and consult and refer to. An example of this was an Elders' conference that met to discuss community strategies over negotiations with the Federal Government about the *Mabo* case. 500 Elders attended the conference and there did not have to be a big debate about who should be included in that conference because the community just knew who the appropriate Elders were.

Arena

Proceedings need to take place in public within the community. Traditionally, disputes were heard outdoors and in the community of the disputants. This removes disputes from the formal environment of courtrooms and offices.

Having proceedings take place outside might appear to be a trivial aspect of the proceedings, but an outdoors setting gives a more relaxed and informal feel to the process.

The venue for disputes within a community is easily ascertained. When there is a dispute between the Aboriginal community and a non-Aboriginal person or group, the venue should still be in the Aboriginal community. This way the power imbalance that Aboriginal people suffer within the non-Aboriginal community is somewhat diminished.

If the dispute is over community land it would be especially useful to hold the proceedings within the community. This would give the non-Aboriginal party a chance to see the way in which the Aboriginal community values and respects the land in question. This would promote a better understanding of the cultural values of the Aboriginal community.

Format

The Elders control the proceedings. People involved in the dispute sit in a circle with the Elders at one part. One disputant or group of disputants sit on one side with their families and supporters around them. They face the other party or group who also has their family and supporters surrounding them. [See Figure 1, omitted] This gives a communal aspect to the proceedings rather than focusing on the individual. ... [Figure 1, omitted]

Succinctly, the process proposed would follow the following format.

1. The aggrieved person/people or the party initiating a proposal states what the issue is

The airing of the grievance by the complainant is the way that some traditional dispute resolution processes would start ...

This allows an emotional level into the process. It allows any aggrieved person to express what it is that has upset them. This means that the cause of contention is stated and the disgruntled party has had a chance to air their grievance.

If there is a proposal which a party is seeking to be negotiated in the forum, this first step similarly allows that party to state informally what it is that they want, so that it is clearly understood from the start what the issue is.

Gone is the formality of written and oral submissions. Any person affected by the proceedings has the chance to express how they feel about the matter. Perhaps it sounds like it is bordering on the New Age, but the benefit of this is that it becomes immediately clear what it is that the disputants are upset about.

Therefore the central way of resolving the conflict is to define the issues and focus on them.

2. Elders state what the appropriate law is

Once the issue has been established, there should be a discussion of the relevant traditional law or, in an urban setting, what the values of the Aboriginal community are, by the Elders. This will not be the binding law as it stands but it will help with the understanding of traditional values. Aboriginal law would only be bin ding if there were legislative instruments in place to allow this to occur.

The Elders state what the law is and people who have something to add about what is relevant to consider in the law speak at this point. For example, Elders could explain the traditional value of land and specifically the sacred sites on an area, while other members of the community may wish to raise economic issues that me an that the community should allow commercial activity on the land. This step again allows oral expression. It gives importance and value back to the knowledge of the Elders. And it eradicates the ludicrous situation where anthropologists are called to gi ve evidence as to the cultural heritage of Aboriginal groups.

3. The other side speaks

The respondent then speaks. It is at this time that the community would air their feelings.... This is done orally and without the need of evidential rules. The family and supporters of an aggrieved person are also allowed to state their concerns or opinions.

Elders question people who speak at this time. The purpose of the questioning is to narrow the argument or area of contention. This part of the process is also used to seek to have the party agree to a compromise or action of redress.

If there needs to be a compromise, both sides know the other side's position at this stage in the process. The ambit of the conflict has been verbally expressed and Elders can then direct the discussions towards those issues.

4. Others affected by the decision respond

Any other person or party who has an opinion about the decision is allowed to express their opinion. This acknowledges that other people, apart from the disputants, have an interest in the proceedings and their outcome. This part of the process allows for thorough consultation.

There is no issue of standing. Every person has the right to have their opinion heard. This is done in the light of what Elders have stated about the law.

5. The person or people in conflict are questioned by the Elders

Elders ask the disputants questions at this time to try to get the parties to articulate the real issue. They attempt to get the aggrieved person to articulate a solution that they will be happy with. The involvement of Elders helps an inarticulate person express their grievance. It also helps focus the proceedings by na rrowing down the disputed topics.

This part of the process is working towards a further narrowing of the boundaries of the dispute.

6. The Elders work towards an agreement

The questioning of the parties and the suggestion of compromises, reiterated with statements of traditional law and the realities of postinvasion life eventually lead to the narrowing of the issues and a compromise that is acceptable to both parties.

We see that the process has developed through various stages. First the problem or conflict is expressed by all persons concerned. Elders then speak about what the appropriate laws or values are to establish what the traditional and cultural values are. After that there is a chance for the opposite party to express the concer ns of the others. Then anyone with an interest in the dispute is given the chance to orally express their interests. Then the process develops with the Elders asking questions and making proposals of compromises in an attempt to work towards narrowing the issues. This culminates in an agreement between the parties reached by consultation and input from numerous Aboriginal groups.

Presentations are made orally, which adds to the informality of the proceedings and allows flexibility. It means that emotional responses can be made and can be given value. It also means that the disputants have a chance to speak for themselves and air their own grievances and feelings. This is empowering and useful in the resolution process as the public expression of a grievance can often go a long way in making an aggrieved person feel redress. It means that processes such as written submissions and evidential rules are not required.

This is by no means a perfect process of dispute resolution. The ideal is to have Aboriginal communities develop such processes. This is merely an example of how a dispute resolution process can be created to emphasize cultural values rather than eliminating those values, so that a method of dispute resolution established in the non-Aboriginal community works more effectively.

Implementation

The government has the power to allow the establishment of these schemes. It is able to delegate the responsibility of keeping order. Greater Aboriginal autonomy can be facilitated through government policy and where necessary, legislation. Both these methods of implementation fall within the government's constitutional powers.

The establishment of such processes is also in line with current government policy of self-determination. Although the term self-determination is amorphous, it could be taken at least to allow greater input into decision-making processes and at the most, embody the necessary elements for total autonomy.

Example 1. Traditional communities

Communities that live traditionally already have traditional dispute resolution practices which are employed to resolve disputes between members of the community. The use of traditional methods of dispute resolution in this case is not controversial. The community has a certain amount of autonomy, living away from the non-Aboriginal community.

More controversially though the model could be used in disputes between the community and non-Aboriginal people or groups.

For example, when a mining company is interested in mining on land that has been returned to Aboriginal people under Land Rights Legislation in the Northern Territory, although the community does not own the mineral rights, they do retain a veto right to mining. In this case, the mining company is fully dependent on the permission of the traditional owners for permission to mine the land, so negotiations have to be with the Aboriginal community.

The model allows the Aboriginal community to meet with the mining company in an environment where the power advantages that the mining company would have in the non-Aboriginal community are severely diminished. These advantages lie in the financial resources the mining company has open to them, their access to skilled legal opinion and the fact that they live by the values embodied in the dispute resolution process which the indigenous party does not. The values in the process are alien to the Aboriginal and Torres Strait Islander disputant.

It allows the Elders and community to state what value the land has to them and to explain the culturally different way in which the Aboriginal community views land. It also allows Elders to describe where sacred sites are and why those sites are important. This contributes to a greater understanding of the Aboriginal

culture by the mining companies who in the past have lacked such knowledge. These cultural values are given credibility and are enforced through such expression.

By dealing with the community in this manner the mining company has had to listen to and respect the decision of Elders. This setting also lessens the amount of non-Aboriginal government interference in the outcomes.

Several problems with this approach become evident.

Such negotiations are dependent on the good faith of the non-Aboriginal disputant. Mining companies have not acted with respect towards the Aboriginal community in the past. There is a history of deception and malice in the dealings that mining companies have had with Aboriginal communities in the past. An example of this is the burning of Aboriginal homes at Mapoon in 1963 to make way for mining interests.

A non-Aboriginal litigant may be unable to see how a council of Elders will not be biased. Such distrust is ignorant of the wisdom of Elders. Some Aboriginal communities have allowed mining on their lands when they have seen that it will in some way benefit the community as a whole. They have more control over what areas are mined so the community can ensure that sacred sites are protected and the ecological balance is maintained. Communities often decide that they need the economic benefits of mining parts of their land. If this is done with co-operation and consent, Aboriginal people have been quite willing to negotiate.

...

Dealing with a self-determining community should be done on this level. It should be done by approaching the community with deference to their values and customs. Where possible, negotiations and disputes should be resolved using that community's dispute resolution mechanisms. If the mining company wanted to negotiate with nonindigenous land owners they use the non-indigenous legal system. If they have to negotiate with the Aboriginal community, it should be on the terms and through the legal system of the Aboriginal community.

Example 2. Rural Communities

Rural communities are smaller in population than urban communities. They are marginalised in the areas in which they exist. Communities may be on old missions or on the fringes of town. As in traditional communities, respected Elders are easily identifiable. They have been running grass-root community organisations and have knowledge of tribal groups and customs. They are also involved with community affairs and, as in traditional communities, are probably already involved in the settlements of disputes within the community.

The model allows the community to hear all opinions as to where resources should be allocated. Opinions and reasons would be heard publicly allowing a communal aspect to the decision-making process. The model also allows for grievances against people who are hoarding resources to be publicly aired.

Decisions can then be made after listening to community opinions and decisions. A decision over where money will be spent is the result of community consultation and consensus and therefore more likely to be carried out with cooperation.

This allows community autonomy and is conducive to community unity.

A problem arises if younger members of the community have become too embodied with nonindigenous values and do not have respect for Elders. This is more likely to have occurred where the young person has lived away from the community in non-Aboriginal society. However, methods are used to make people respect the authority of Elders that can be employed in these cases.

For example, as in traditional society, people who are disrespectful to Elders face public accusations of their disrespect and are subject to community pressure to redress their rudeness. Failure to comply with the community's standards and values leads to social ostracism. Despite the fact that mobility to and from Aboriginal and Torres Strait communities is much easier now than in pre-invasion days, the closeness of the indigenous communities makes social pressure to conform extremely powerful.

The model could also be used in rural communities where the community has had a conflict with a non-indigenous group or interest.

Again, the main problem that the implementation of the model may encounter is the unwillingness of the non-Aboriginal party to submit to the jurisdiction of the Aboriginal community or to carry out a decision made by that process in good faith. It will be perceived as a biased procedure and the non-Aboriginal party will most likely not wish to give up the advantage they have through the power imbalance that exists between Aboriginal and non-Aboriginal groups in wider Australian society.

It is acknowledged that the model in this instance will only be useful for non-Aboriginal parties that are sincere about wanting the approval and cooperation of the indigenous community in their ventures.

Example 3. Urban Communities

Urban Aboriginal communities have a large population. The Aboriginal population comes from different tribal groups. Despite this diversity, there is a strong sense of community that allows cultural values to flourish, even though most members of the community have contact with the non-Aboriginal community through schooling or work.

As in rural communities, Elders are still easily identified for their involvement in community affairs and the wisdom of their council. The Aboriginal community knows who to invite to speak at functions, who to consult for community decisions and Elders are already involved with resolving disputes within the Aboriginal community.

Disputes within the community arise over the use of existing property within the community, for example, buildings owned by the local medical centre.

The advantages with using the model is that it reinforces the communal nature of decisionmaking. It empowers the Elders and the community. It allows autonomy of the community.

The advantage in keeping internal disputes away from the non-Aboriginal community is that it prevents the non-Aboriginal community from seeing any discord within the community. The non-Aboriginal community is quick to label any type of internal dispute as evidence that the Aboriginal community is incapable of running its own affairs. Allowing the community to control internal disputes effectively would be evidence that the community is more than capable of resolving conflicts that arise in the administration of its own affairs.

The problems that may arise with the implementation of this model is that traditional Aboriginal values may be eroded by contact with white people. But even in the urban areas, the Aboriginal community is closeknit. Social pressure is still a powerful force.

The model could be used to resolve disputes between an urban Aboriginal community and a non-Aboriginal community or interest, for example, a dispute with the non-Aboriginal community over a housing project.

There is likely to be backlash from the non-Aboriginal community who will not want Aboriginal people to enter into their neighbourhood. They will be putting pressure on local and State Governments to prevent the community developing the project.

Although the non-Aboriginal residents will have no legal remedy if Aboriginal people want to buy land in their area, some kind of dispute resolution procedure will be useful. If the process is successful it will allow the parties to live together with more tolerance.

The value of the model in this situation is that it allows public airing of grievances. And it allows the disputants to [come] face to face. Since a dispute of this kind is often based on ignorance, it may be useful in eliminating negative stereotypes to have the disgruntled non-Aborigines meet with Aboriginal families.

By having to acknowledge the powers of the Elders and seeing the cultural values of community and cooperation, prejudices may be lessened. This may seem a naive suggestion in the face of the blatant racism of most cements of Australian society, but it should be remembered that a lot of racial hate is based on ignorance.

If that ignorance is destroyed, so is the hatred. It cannot be assumed that non-Aboriginal people are necessarily bad. Often people are just uninformed.

As well as the reluctance to submit to the jurisdiction of the Aboriginal community, there may be a reluctance by non-Aboriginal people to see the urban Aboriginal community as an entity. There are misconceptions within the non-Aboriginal community that Aboriginal people who live in urban areas are not real Aborigines or have somehow lost their cultural values. This is based on ignorance. Most non-Aboriginal people are unaware of the nature of the urban Aboriginal community so are in no position to judge.

But as this perception, however misguided, can be a barrier to recognising the Aboriginal community as an entity, there is a danger that non-Aboriginal people will not seek compromise or co-operation from the Aboriginal community in their ventures. Or will gain the approval of a few token members of the community who do not represent the community opinion or interest.

7.9 Aboriginal Criminal Justice - 1988 [162]

Conclusions: Aboriginals are over-represented at every level of the Australian justice system.

- Compared to non-Aboriginals, they were more frequently convicted of person offenses and less frequently convicted of property offenses.
- Researchers and administrators have examined factors contributing to high Aboriginal incarceration rates.
  - State and territorial Governments have been urged to address the situation by upgrading legal and rehabilitative services, examine areas in which justice may fail to be impartial, and develop community justice options such as dispute resolution and community service orders.
  - In addition, efforts are needed to enhance the quality of Aboriginal life, re-empower Aboriginals, and aboriginalize criminal justice administrations.

7.10 Aboriginal Criminal Justice: A Bibliographical Guide- 1986[163]

This bibliography embodies the author's attempt to survey the literature on Aboriginals and the criminal justice system. It incorporates books, articles, official reports, unpublished theses and papers from government departments and agencies, academic institutions and individual researchers. The bibliography has been arranged chronologically under twenty-one subject headings.

7.11 Dispute Settlement Mechanisms-Aboriginal Communities & Neighborhoods? - 1986 [164]

Conclusions:

- Modern community justice mechanisms or dispute settlement programs can be grafted upon customary or existing Australian Aboriginal methods of handling disputes.
- The Aboriginal dispute settlement process can have a complementary relationship with the criminal justice system, and it might be welcome as a diversionary alternative for minor offenses and disturbances of the peace.
- The author considers possible lines of mediation, referral, and processing; a judicial-informal system with an Aboriginal community council and courts; and a community-based autonomous system of community dispute resolution centers.

[162] Hazlehurst, K. and A.T. Dunn (1988). Aboriginal Criminal Justice. Phillip Act, AUS: Australian Institute of Criminology, 5p. *cited in* McCold, Ph.D. for the Working Party on Restorative Justice Alliance of Non-Governmental Organizations (NGOs) on Crime Prevention and Criminal Justice (NY), Restorative Justice An Annotated Bibliography, 1997, http://members.ozemail.com.au/~igmnet/restorativejustice/library/Annotated%20Bibliography.html

[163] Hazlehurst, K. (1986). Aboriginal Criminal Justice: A Bibliographical Guide. Canberra, AUS: Australian Institute of Criminology, 271p. cited in McCold, Ph.D. for the Working Party on Restorative Justice Alliance of Non-Governmental Organizations (NGOs) on Crime Prevention and Criminal Justice (NY), Restorative Justice An Annotated Bibliography, 1997, http://members.ozemail.com.au/~igmnet/restorativejustice/library/Annotated%20Bibliography.html

[164] Hazlehurst, K. (1986). Resolving Conflict: Dispute Settlement Mechanisms for Aboriginal *Communities and Neighborhoods?* San Francisco, CA: Institute for Criminal Justice, 16p. cited in McCold, Ph.D. for the Working Party on Restorative Justice Alliance of Non-Governmental Organizations (NGOs) on Crime Prevention and Criminal Justice (NY), Restorative Justice An Annotated Bibliography, 1997, http://members.ozemail.com.au/~igmnet/restorativejustice/library/Annotated%20Bibliography.html

7.12 Justice Programs for Aboriginal and Other Indigenous Communities -1985 [165]

- Papers from the 1985 Australian Aboriginal Criminal Justice Workshop address:
  - legal problems in Australian Aboriginal communities;
  - regulation in Fiji, Papua New Guinea, New Zealand, Canada, and Australia;
  - the impact of colonialization on Aboriginal crime,
  - self-determination in justice matters,
  - legal services,
  - the impact of incarceration, police relationships,
  - the involvement in local social control in Fiji, Papua New Guinea, and New Zealand;
  - the disproportionate involvement in the Canadian justice system;
  - projects that increase involvement in the administration of criminal justice in Australia, future planning needs and research issues, and enabling legislation of some programs.

7.13 Community Justice Centres in New South Wales - Model That Works - 1985 [166]

- This paper describes the operation and effectiveness of voluntary mediation in community justice centers in New South Wales (Australia).
  - Although community justice centers are not specifically aimed at Aboriginal communities, they facilitate such communities resolving disputes in accordance with Aboriginal cultural values.
  - Centers have aided in the resolution of approximately half of their disputes.
  - Extracts from the 1983-84 annual report cover the nature of disputes, the escalation of disputes, and the outcome of intervention.
- **Conclusion:** Centers' effectiveness depends upon disputants having proper legal protection through enabling legislation as well as the careful selection, training, and supervision of mediators.
  - Following the first year's evaluation of the centers, the government has institutionalized the project.

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[165] Australian Institute of Criminology. (1985). Justice Programs for Aboriginal and Other Indigenous Communities. Proceedings, Aboriginal Criminal Justice Workshop. No 1, 29 April to 2 May. Phillip Act, AUS: Australian Institute of Criminology, 320p cited in McCold, Ph.D. for the Working Party on Restorative Justice Alliance of Non-Governmental Organizations (NGOs) on Crime Prevention and Criminal Justice (NY), Restorative Justice An Annotated Bibliography, 1997, http://members.ozemail.com.au/~igmnet/restorativejustice/library/Annotated%20Bibliography.html

[166] Faulkes, W. (1985). Community Justice Centres in New South Wales An Experimental Model That Works. In: K. Hazlehurst (ed.), Justice Programs for Aboriginal and Other Indigenous Communities. Phillip Act, AUS: Australian Institute of Criminology, pp. 143-151. cited in McCold, Ph.D. for the Working Party on Restorative Justice Alliance of Non-Governmental Organizations (NGOs) on Crime Prevention and Criminal Justice (NY), Restorative Justice An Annotated Bibliography, 1997, http://members.ozemail.com.au/~igmnet/restorativejustice/library/Annotated%20Bibliography.html