

Criminal Justice, Democratic Fairness, and Cultural Pluralism:

The Case of Aboriginal Peoples in Canada

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I. INTRODUCTION

The place of criminal justice in democracy has been little studied in recent democratic theory. This is surprising insofar as much of the theory of democracy concerns how shared norms become binding law, and where are shared norms more forcefully expressed or enforced than in the domain of criminal law? Perhaps the reason for democratic theorists' recent neglect of criminal justice and punishment is the fact that there is so little agreement in most democratic societies as to the purpose of punishment. Is it fundamentally retributive in purpose, and therefore appropriately measured out in proportion to the seriousness of the offense? Is its purpose deterrent, so that no greater (and no lesser) punishment should be inflicted than is necessary to dissuade individuals from violating the law? Or is its purpose rehabilitative, to "discipline" in its root meaning as synonymous with "teach"? Or, finally, we might conceive of criminal justice as restorative, with the aim of repairing victims' injuries and reintegrating offenders into responsible membership in the community. There is clearly no settled consensus on these questions in contemporary democracies.¹

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1. A poll commissioned by the American Civil Liberties Union and conducted in 2001 showed that a majority of Americans believes that rehabilitation is the

From the outset, then, this plurality of motivations behind criminal justice and punishment render the relationship between democracy and punishment complex. But the picture soon becomes more complicated when we consider that punishment is the last stage in the criminal justice process. Before a person can be lawfully punished, he or she must have gone through a legally defined procedure to determine guilt. And before that procedure can take place, of course, there must have been legislation to define both criminal procedure and the substance of criminal law. Each of these three functions of a criminal justice system—the definition of criminal wrongdoing, the prescribed process for determining guilt or innocence, and the definition and enforcement of sanctions for criminal misconduct—is potentially available for assessment according to standards of democratic fairness and accountability.² More specifically, the democratic principle of equality can serve as a standard for evaluating each of these functions: Do definitions of criminal behavior effectively discriminate against particular classes of citizens? Are procedures to determine an accused person's guilt or innocence equally applied, and equally appropriate, to all citizens? Are punishments meted out even-handedly

primary purpose of incarceration; 20 percent believe that punishment is its purpose, and 10 percent believe that deterrence is its purpose. American Civil Liberties Union, *New Poll Shows Surprisingly Forgiving Attitude Toward Crime and Punishment: Most Americans Don't Want to Throw Away the Key*, available at <http://www.aclu.org/news/2001/n071901a.html> (July 19, 2001). Disagreement over the purpose of punishment is not only a phenomenon among members of the mass public. In issuing their sentencing guidelines, the seven members of the United States Sentencing Commission had to avoid addressing the principled bases for different sentences, since they did not agree on the principles. Instead, they reached agreement on specific sentences and left it at that. Cass Sunstein cites this as an example of an "incompletely theorized agreement" that is nonetheless legitimate. *Designing Democracy: What Constitutions Do* 53-54 (2001).

2. For a discussion of these three functions of criminal law in relation to Aboriginal peoples in Canada, see Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* 234-35 (1996) (citing H. Archibald Kaiser, *The Criminal Code of Canada, A Review Based on the Minister's Reference*, 26 U.B.C. L. Rev. 41 (1992)) [hereinafter *Bridging the Cultural Divide*].

to all those convicted, or are some classes of convicts punished more severely than others?

The starting point of this article is the widely acknowledged observation that Canada's system of criminal justice has historically failed to meet such standards of democratic fairness in its treatment of persons of Aboriginal descent.³ Canada's Indian Act, for example, once made it illegal for Native peoples to hold their traditional sundance or potlatch rituals, or even to employ a lawyer for a cause against the Canadian government.⁴ The adversarial structure of Canadian trial procedure demands conduct of witnesses and of accused persons that conflicts with the norms of appropriate behavior of many Aboriginal cultures.⁵ There is also evidence of systematically heavier sentences for Aboriginal than for

3. In the Canadian context, the term "Aboriginal" denotes several distinct social and legal categories of persons. The federal Indian Act distinguishes between Indians, Métis, and Inuit. "Indians" include people who have descended from the diverse indigenous communities of the eastern shores and woodlands, the prairies and mountain regions, and the western coastal regions. Under the Indian Act there are "status Indians" or "registered Indians" whom the federal government recognizes as belonging to a particular band or reserve. There is also a category of "non-status Indians" who are clearly of Aboriginal descent but are not recognized as having any special Aboriginal rights or status under Canadian law. "Indians" are also often (and increasingly) referred to as "First Nations," reflecting both the distinctness of their cultures from one another and their presence on Canadian soil prior to the arrival of European settlers (i.e., the English and French "nations" of Canada). Inuits are Aboriginal peoples who occupy the far northern regions of Canada, are culturally similar to one another, and are culturally distinct from the First Nations of the south. Métis people descended from the union of French fur trappers with indigenous women. These unions produced communities of people who developed their own distinctive culture. For a more detailed description of legal and cultural distinctions among Aboriginal people in Canada, see James S. Frideres & René R. Gadacz, *Aboriginal Peoples in Canada: Contemporary Conflicts* ch. 2 (2001). For a comprehensive ethnographical and historical overview, see Alan D. McMillan, *Native Peoples and Cultures of Canada: An Anthropological Overview* (1995).

4. These were among the many oppressive features of the Canadian federal government's Indian Act. The Act has since been amended to eliminate these provisions. For an overview of the Indian Act and its oppressive measures, see 4 Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples, Looking Forward, Looking Back* ch. 9 (1996) [hereinafter *Looking Forward, Looking Back*].

5. See discussion *infra* at p. 471.

non-Aboriginal offenders.⁶ As discussed below, the rate of incarceration for Aboriginal people in Canada is dramatically higher than for non-Aboriginal Canadians, and the gap in incarceration rates continues to increase.⁷

The overrepresentation of Aboriginal persons in the Canadian criminal justice system is widely understood as a symptom of the deeper social and cultural inequalities between Aboriginal peoples and non-Aboriginal Canadians. Thus questions of criminal justice and Aboriginal peoples quickly bleed into questions of democratic (or social, or cultural) justice *for* Aboriginal peoples. And these questions, in turn, are profoundly complicated by the historical relationship between the Canadian state and Aboriginal peoples. Given the long history of colonization, forced migration and settlement on reserves,⁸ treaty violation,⁹ legal discrimination and disenfranchisement,¹⁰ policies of cultural annihilation,¹¹ and impoverishment¹² of Aboriginal peoples in North America, how is it possible to conceive of (let alone achieve) a just relationship between Aboriginal peoples and non-Aboriginal Canadians?

6. I.A.C. Hamilton & C.M. Sinclair, *The Report on Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People* 103 (1991).

7. *Bridging the Cultural Divide*, supra note 2, at 28-29.

8. See *Looking Forward, Looking Back*, supra note 4, vol. I, ch. 6.

9. For a general overview of Canada's non-fulfillment of its treaties with Aboriginal peoples, see *Bridging the Cultural Divide*, supra note 2, vol. I, ch. 6.6.

10. *Id.* vol. I, ch. 9.

11. Perhaps the single most destructive policy of cultural annihilation was the creation of residential schools for Aboriginal children. Children were forcibly removed from their families and educated in schools where they were punished for speaking their native languages or practicing any native traditions. Many children died of tuberculosis in these schools, and many others were physically and sexually abused. The system of residential schools was maintained from the 1870s until the 1980s. For a detailed account of residential schooling, see *Looking Forward, Looking Back*, supra note 3, vol. I, ch. 10. Part of the Indian Act, residential schooling supplemented numerous other policies of cultural suppression and assimilation, including, for example, the legal banning of sundance and potlatch rituals.

12. According to the Canadian federal government agency, Indian and Northern Affairs Canada, 40.9 percent of legally registered Indians in Canada currently live at or below the poverty line. See *Some Fast Facts on the Funding of Aboriginal Programs: Aboriginal People in Canada*, at http://www.ainc-inac.gc.ca/bg/some_e.html (Jan 8, 2001).

As a theoretical problem, the question of justice for Aboriginal peoples in North America is complicated by the fact that most justice discourses rely on concepts whose content has developed within European and Anglo-American legal and philosophical traditions. These concepts have played a central role in the legal and political arguments launched on behalf of the Canadian state in advancing policies that we now recognize as oppressive to Aboriginal peoples.¹³ Dale Turner makes this point especially powerfully:

[A]mong the most devastating landscapes that have been forced upon Aboriginal peoples are the Western European discourses of rights and sovereignty. These intellectual traditions have created discourses on property, ethics, political sovereignty, and justice that have subjugated, distorted, and marginalized Aboriginal ways of thinking. The result has been an Aboriginal intellectual landscape that is shaped by Eurocentric discourses, some of which were purposely designed to exclude Aboriginal ways of thinking.¹⁴

For example, the Canadian federal government's White Paper of 1969 sought, in the name of equal citizenship, to abolish the government's special legal relationship with Aboriginal peoples as expressed through treaties and through the provisions of the Indian Act. Despite the deep flaws in this legal relationship, the White Paper aroused a profound outcry among many Aboriginal people, who saw it as an exercise of forcible assimilation. From this standpoint, the White Paper was a continuation of the project of cultural extinguishment begun under the Indian Act, clothed in more benevolent language. Although the White Paper was abandoned, it contributed to

13. Similar critiques could be made of the federal government of the United States, but that is not my focus in this essay.

14. Dale Turner, *Vision: Towards an Understanding of Aboriginal Sovereignty*, in *Canadian Political Philosophy: Contemporary Reflections* 325 (Ronald Beiner & Wayne Norman eds., 2001).

Aboriginal wariness toward political and legal discourses of equal citizenship.¹⁵ One might expect that the ideal of equality had since been unmoored from this assimilationist past, particularly in view of the fact that the Canadian Charter of Rights and Freedoms,¹⁶ incorporated into the Constitution Act of 1982, contains both an explicit equality provision and a recognition of Aboriginal and treaty rights. Yet one might argue, as Patricia Monture-Angus has, that judicial interpretation of the Charter has failed to recognize or protect Aboriginal women's interests in equality *both* as Aboriginal *and* as female.¹⁷ In short, equality discourses have sometimes been played out in the law in ways that not only fail to express, but do active damage to, Aboriginal persons' own understandings of justice and equality.

The same problems attend other concepts that have been central to discussions of how to remedy the harms of colonialism and oppression. Taiaiake Alfred has argued that the concept of sovereignty—which has been central to discussions of indigenous treaty rights, land claims, and Aboriginal self-government—carries meanings that are inimical to Aboriginal peoples' understandings of their relationship to the land and to other human beings. Moreover, he argues, reliance on the concept of sovereignty will guarantee the ongoing subordination of Aboriginal peoples to the Canadian state:

[S]overeignty is an exclusionary concept rooted in an adversarial and coercive Western notion of power. Indigenous peoples can never match the awesome coercive force of the state; so long as sovereignty remains the goal of indigenous politics, therefore, Native communities will

15. For a more detailed discussion of the 1969 White Paper and its policy of assimilation, see *Bridging the Cultural Divide*, supra note 2, vol. I, ch. 7.1; see also Alan Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* 51-52 (2000).

16. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, R.S.C. being Schedule B to the Canada Act 1982 (U.K.) c.11 (1985) (Can.) [Revised Statutes of Canada].

17. Patricia Monture-Angus, *A First Journey in Decolonized Thought: Aboriginal Women and the Application of the Canadian Charter*, in *Thunder in My Soul* 131-51 (1995).

occupy a dependent and reactionary position relative to the state. Acceptance of 'Aboriginal rights' in the context of state sovereignty represents the culmination of white society's efforts to assimilate indigenous peoples.¹⁸

Audra Simpson similarly interrogates the concept of the "nation" expressed in recent theoretical discussions of nationalism and of the rights of minority cultures. Because indigenous conceptions of nationhood are not necessarily attached to particular claims about the control of state apparatus, they do not easily square with received definitions of nations and nationhood.¹⁹ Her project of articulating the conception of nationhood expressed within the Mohawk community of Kahnawakhe is critically important, especially in view of the current emphasis among Aboriginal leaders on the idea that a just relationship between Aboriginal peoples and non-Aboriginal Canadians should be "nation-to-nation" relationships.²⁰

Finally, Patricia Monture-Angus criticizes the use of the term "self-government" to describe Aboriginal political aspirations. The concept of self-government has too often been interpreted to mean nothing more than giving over band governance to Indian officials without relinquishing the power of the Canadian state to define the rules and jurisdictional limits within which those officials must operate. In short, Monture-Angus argues,

[S]elf-government as a goal feels too much like admitting defeat—not only accepting Aboriginal misery but agreeing that a full solution is the Aboriginal ability to self-administer that poverty and oppression. . . . [S]elf-government that only allows Aboriginal people to assume

18. Gerald R. Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* 59 (1999).

19. Audra Simpson, *Paths Toward a Mohawk Nation: Narratives of Citizenship and Nationhood in Kahnawake*, in *Political Theory and the Rights of Indigenous Peoples*, 113-36 (Duncan Ivison et al eds., 2000).

20. See, e.g., Georges Erasmus, *Why Can't We Talk*, *Toronto Globe & Mail*, Mar. 9, 2002, at F6 (emphasizing the importance of "people to people" conversations as well as "nation to nation" negotiations).

some but not all powers of Aboriginal governance actually operates to further imbed destructive colonial relationships in our communities, all the time under the guise of offering real change and hope. Accepting such a limited form of governance continues into the future the false belief of Aboriginal inferiority, and through such solutions the confinement of Aboriginal nations continues.²¹

Although the terms “sovereignty” and “self-determination” also have disadvantages, Monture-Angus finds them closer in meaning to Aboriginal peoples’ aspirations to take responsibility for their own lives and their own communities. She turns to a Mohawk word to express the aspiration that English words fail to capture: *tewatatha:wi*, which she translates as “we carry ourselves.”²²

These Aboriginal scholars’ critiques of core legal and philosophical concepts bear a close resemblance to feminist and other difference-based critiques of liberal conceptions of justice and impartiality during the 1980s and 1990s. The core of these arguments is that prevailing philosophical and legal conceptions of justice, impartiality, and rights lay a false claim to universality. These concepts have been articulated and given theoretical and practical content by members of a privileged class and from a limited social perspective—predominantly that of white, middle- and upper class men. The consequence, intentional or not, is that the concepts have functioned in political argument and in legal practice to reinforce the privilege of this already-privileged class.²³ Parallel debates emerged in

21. Patricia Monture-Angus, *To Break with the Past: Searching for the Meaning of Self-Determination*, in *Journeying Forward: Dreaming First Nations’ Independence* 29 (1999).

22. *Id.* at 36.

23. Iris Young, *Justice and the Politics of Difference* (1990), has been perhaps the most influential argument of this kind. Young’s thinking in that work was influenced by continental philosophies of postmodernism and poststructuralist, as were other important difference-based critiques of liberalism. It is important to note, however, that similar critiques emerged from other intellectual traditions during these years. Catharine MacKinnon’s feminist critique of the concept of privacy (which arguably was influenced by Marxist conceptions of ideological

these years within the feminist movement itself. Women of color and poor women protested that the language and agendas of feminist political action reflected the experience and class interests of the white middle-class women who controlled key feminist organizations.²⁴

The difference-based critique of prevailing conceptions of justice does not, by itself, offer a solution to the problem of language. Rather, it highlights the inadequacy of current discourses of justice to express and respond to oppressed groups' lived experience of injustice. Once we accept the force of this critique, we are faced with the challenge of *reconceiving* justice through concepts and language—and, perhaps most importantly, through new practices—that will not function as Trojan horses for oppressed groups.

In this essay, my aim is to take a small step toward reconceiving an ideal of justice between Aboriginal peoples and non-Aboriginal Canadians. My inquiry begins from the supposition that any future just relationship between Aboriginal peoples and non-Aboriginal Canadians must include three analytically distinct normative (and legal) spaces:

- (1) In keeping with the goal of Aboriginal self-determination (or self-government, or sovereignty, or *tewatatha:wi*)—a goal that was unequivocally endorsed by the Royal Commission on Aboriginal Peoples, and has to a more limited degree been acknowledged by the Canadian state as a valid aspiration for Aboriginal peoples—there must be a normative-legal space governed *exclusively* by the norms

hegemony) also had this logic. See Privacy vs. Equality: Beyond Roe v. Wade, in *Feminism Unmodified: Discourses on Law and Life*, 93-102 (Catharine A. MacKinnon ed., 1999). Some feminist and difference-based critics of liberal justice developed similar critiques from within the liberal tradition. Susan Moller Okin, *Justice, Gender, and the Family* (1989) and Will Kymlicka, *Liberalism, Community, and Culture* (1989) are both of this type. For further discussion of different approaches to the problem of false universalism, see Melissa S. Williams, *Justice Toward Groups: Political not Juridical*, 23 *Pol. Theory* 67 (1995).

24. The earliest and most influential collection of such critiques was Cherrie Moraga & Gloria Anzaldúa, *This Bridge Called My Back: Writings By Radical Women of Color* (1981).

and commitments affirmed by Aboriginal peoples themselves. These norms may be traditional Aboriginal norms (some of which have still to be recovered from the ashes of the cultural destruction wrought by colonialism), or they may be adaptations of the norms of democratic constitutionalism that Aboriginal peoples have come to view as beneficial for their communities, or they may be a hybrid of traditional and modern norms. It is also important to note that the content of these norms will inevitably vary between Aboriginal communities, as the cultures of different Aboriginal peoples are of course very diverse. The distinguishing feature of this normative space, however, is that its content will be based on the choices and judgments of Aboriginal members of the community in question, without oversight or interference from the Canadian state.

(2) The second normative-legal space will be governed by the norms expressed within Canadian institutions and practices of constitutional democracy, in all their pluralism and complexity. This space may (and does) certainly include borrowings from diverse normative traditions, including perhaps Aboriginal ones.²⁵ The distinguishing feature of this space is that, ideally, its content derives from the choices and judgments of Canadian citizens within democratic institutions.²⁶

25. John Borrows, *With You or Without You: First Nations Law (in Canada)*, 41 *McGill Law Journal*, 654-55 (1995). Also note that many models of restorative justice (or community justice, or popular justice) borrow from indigenous practices of conflict resolution. See, e.g., Robert Yazzie, *Navajo Peacemaking and Intercultural Dispute Resolution*, in *Intercultural Dispute Resolution in Aboriginal Contexts: Canadian and International Perspectives* (Catherine Bell & David J. Kahane (forthcoming 2002)); see also *Bridging the Cultural Divide*, *supra* note 2, at 209 (suggesting that the narrative approach characteristic of fact-finding within Aboriginal justice processes may help guide alternative justice models for non-Aboriginal proceedings).

26. In distinguishing this normative space from the first, I do not answer the question whether Aboriginal persons within the internationally recognized territory of Canada should be understood as Canadian citizens. Although my provisional judgment is that the relationship between Aboriginal persons and non-Aboriginal Canadians is helpfully understood as one of shared citizenship, many Aboriginal persons decline to identify themselves as Canadians. If it is possible to articulate a conception of shared citizenship that could be broadly

(3) The third normative-legal space is that occupied by both Aboriginal peoples and non-Aboriginal Canadians. This is the terrain of shared jurisdictions and shared political, economic, and ethical concerns. The need to give content to this third normative space arises from the fact that living together is a seemingly inescapable feature of our future. In order to avoid relations of domination, the terms of living together must be agreed to by both parties on a basis of equality. This is certainly not the whole of normative space, but it is one that needs attending to. Among other things, the boundary drawing that delineates the scope and jurisdictions of the other two spaces must occur here.

How can we begin to fill the in the substantive content of this third normative-legal space? We have already glimpsed the difficulty of relying on established traditions of political theory to provide this content, since these traditions are predominantly European in their origins. So although it will ultimately be important to refer to core concepts in the Western tradition of political philosophy in filling in the content of this third normative space, it appears risky to begin with that tradition given its role in Aboriginal oppression.

Another possible source for the content of this third normative space is Aboriginal teachings about just relationships. It is important to note that Aboriginal scholars and elders have been working on the project of articulating Aboriginal normative traditions in a language that can inform justice discourses between Aboriginal communities and non-Aboriginal Canadians.²⁷ In order for

affirmed by Aboriginal persons in Canada, it seems clear that the character of this citizenship has yet be fully developed on the level of both theory and practice. For a very helpful beginning toward that end, see John Borrows, *Uncertain Citizens: Aboriginal Peoples and the Supreme Court*, 80 *Canadian B. Rev.* 15 (2001); see also Melissa S. Williams, *Citizenship and Identity: Citizenship as Shared Fate and the Functions of Multicultural Education*, in *Collective Identities and Cosmopolitan Values* (Walter Feinberg & Kevin McDonough eds., forthcoming 2002). These works may offer some resources for thinking about a citizenship that could be shared between Aboriginal peoples and non-Aboriginal Canadians.

27. John Borrows's legal scholarship is especially inspiring in this regard. See, e.g., Borrows, *supra* note 25, at 649-53. (discussing the "case" of *Nanabush v.*

a just relationship to emerge, these traditional teachings will undoubtedly have to inform the ethical principles that fill this shared normative space. There are, however, important obstacles to starting with these teachings. The first is that it is not self-evident which teachings will provide most guidance. There are many different Aboriginal cultural traditions in what is called Canada, and different teachings will undoubtedly be relevant for different communities and different forms of relationship with non-Aboriginal Canadian persons and institutions. A second obstacle that pertains particularly to me as a non-Aboriginal scholar, concerns the grave ethical risks of claiming authority to interpret Aboriginal teachings. Although I would not go so far as to say that no non-Aboriginal scholar could ever claim such authority, I do want to acknowledge the dangers of “appropriation of voice.” In any case, I certainly have insufficient knowledge of Aboriginal traditions to venture any substantial interpretations of them.

Whatever one’s conclusions about these obstacles, it does seem clear that any attempt to fill in the content of the third normative space that *begins* from theory—from received traditions of ethical reasoning—is problematic from the outset because it is non-dialogic. There is ample reason to believe that any successful attempt to articulate the terms of a just relationship between Aboriginal persons and non-Aboriginal Canadians must begin in an exchange that takes both communities’ ethical commitments seriously and treats all participants in the exchange as moral equals.²⁸ In other words, it seems promising to look for the seeds of a just relationship not in theory, but in a *practice* that aims at judgments about justice that can reach across cultural boundaries.

This essay examines a number of Aboriginal justice initiatives that have been undertaken in Canada over the last twenty years or so. These initiatives are responses to

Deer, Wolf et al. analyzed at greater length, *infra* note 78.

28. For further argumentation in support of this approach, see Williams, *supra* note 23.

the grave imbalances in the Canadian criminal justice system as regards Aboriginal persons. As I will outline in next section, the overrepresentation of Aboriginal persons in the criminal justice system is widely understood to be a consequence of both structural and cultural inequality that are the stubborn legacy of colonization. Although not all of these initiatives are characterized as efforts at decolonization—and they all have important limitations as such, in any case—there is a general acknowledgement that the roots of current imbalances in the justice system's treatment of Aboriginal persons lie in the history of unjust policies toward Aboriginal communities. Many of these initiatives seek to diminish the damaging impact of the non-Aboriginal legal system over the lives of Aboriginal persons and to grant greater power to Aboriginal communities.

My interest in these practices is that they constitute laboratories for experiments in ethical hybridity. They are places where the norms and commitments of Aboriginal communities come into contact with those of the non-Aboriginal legal system, with a result that is neither wholly Aboriginal nor wholly non-Aboriginal but—and this is the important bit—is recognized by both communities as (relatively) just. This is not to claim that these institutions are adequate as models of Aboriginal justice. They are not, even if they may be small steps in the right direction. The point, rather, is that they exemplify practices or processes that give some substantive content to that third normative space.

II. ABORIGINAL INITIATIVES IN CRIMINAL JUSTICE

Notwithstanding the fact that many First Nations persons in Canada²⁹ live within reserves governed by band governments elected by band members, Aboriginal people within Canadian territory live under Canadian law. Although the boundaries of some reserves were established

29. For an explanation of the term "First Nations," see *supra* note 3.

by treaties, the form of band government was imposed by the Canadian federal Indian Act, which also strictly limits the range of band governments' jurisdiction and subjects what limited legislative power they have to review by the Minister of Indian and Northern Affairs.³⁰ Band governments are also heavily dependent on transfer payments from the Canadian federal government to carry out their programs, and many public services on reserves are directly administered by non-Aboriginal government agencies. Many Aboriginal persons live off reserve, and those in urban areas lived under the almost exclusive legal authority of non-Aboriginal federal and provincial institutions.³¹

Most significantly for the purposes of this essay, Aboriginal persons in Canada are subject to the same federal Criminal Code that applies throughout the country. But the Canadian criminal justice system's impact on Aboriginal individuals and communities is dramatically different from its impact on non-Aboriginal Canadians. Perhaps the most striking difference is the fact of Aboriginal overrepresentation in Canadian prisons. Although persons of Aboriginal descent constitute about 3 percent of the population in Canada, in 1991 they were 17 percent of the prison population nation-wide.³² In some provinces the disproportion is even greater. In Saskatchewan's provincial prisons, for example, fully 68 percent of inmates in 1991 were Aboriginal; in Manitoba's provincial prisons, the figure was 49 percent.³³ But the

30. Indian Act, R.S.C. 1985, ch. I-5, §§ 81-85.

31. One exception to this rule is the Toronto Aboriginal Legal Services, which is the longest-running alternative justice program for Aboriginal people living in large urban areas. For a description of this program, see *Bridging the Cultural Divide*, supra note 2 at 148-58.

32. See Frideres & Gadacz, supra note 3 at 130.

33. *Id.* at 131 tbl. 5.3. According to 1996 Census data, 11 percent of Saskatchewan's population and 12 percent of Manitoba's population are of Aboriginal descent. Statistics Canada, *Population by Aboriginal Groups and Sex, Showing Age Groups, for Provinces and Territories, 1996 Census—20% Sample Data*, available at <http://www.statcan.ca/english/census96/jan13/saks.htm> (last visited May 6, 2002); <http://www.statcan.ca/english/census96/jan13/man.hm> (last visited May 6, 2002)

disproportionate incarceration of Aboriginal persons tells only a part of the story of the distinctive Aboriginal experience of the Canadian criminal justice system. Aboriginal persons in central and western Canada are much more likely than non-Aboriginals to be the victims of violent crime.³⁴ And if Aboriginal persons are over represented in prisons, they are starkly underrepresented on police forces (whether the federal Royal Canadian Mounted Police, provincial police forces, or municipal police departments). The same is true of justice system workers in general and of judges in particular.³⁵

No serious scholar now disputes the strong connection between these imbalances in the criminal justice system and colonialism's dual legacies of systemic inequality and cultural oppression. The existence of broad and deep structures of material inequality between Aboriginal people and non-Aboriginal Canadians is clear, regardless of which measure of social and economic well being one uses. While the average Canadian has a life expectancy of seventy-two years, for example, the average Aboriginal person lives fifty-four years. The infant mortality rate for Aboriginal persons continues to exceed that of non-Aboriginal Canadians by a considerable margin: in 1991, the general Canadian infant mortality rate was eight per thousand births, while for the Aboriginal population it was thirteen per thousand.³⁶ Average family income for status Indians (those registered as Indians under the federal Indian Act) is about half that of the average Canadian family, and income disparity is increasing. As Frideres and Gadacz summarize: "Aboriginal people have five times the rate of child welfare [dependency], four times the death rate, three times the violent death, juvenile delinquency, and suicide

34. See, e.g., Frideres & Gadacz, *supra* note 3 at 130 tbl. 5.2

35. See Hamilton & Sinclair, *supra* note 6, at 106-07. According to the Final Report of the Aboriginal Justice Commission of the Province of Manitoba, available at <http://www,ajic.mb.ca/bio/sinclair.html> (last visited Feb. 24, 2002), there are now eighteen Aboriginal judges in Canada.

36. Frideres & Gadacz, *supra* note 3, at 66. Although this gap has been narrowing in recent decades, there has been a disturbing rise in Aboriginal neonatal mortality since 1988. *Id.* at 71.

rate . . . , and twice the rate of hospital admissions of the average Canadian population.”³⁷ In its report on Aboriginal justice in Canada, The Royal Commission on Aboriginal Peoples drew a strong connection between these inequalities and Aboriginal overrepresentation in the criminal justice system:

Cast as a structural problem of social and economic marginality, the argument is that Aboriginal people are disproportionately impoverished and belong to a social underclass, and that their over-representation in the criminal justice system is a particular example of the established correlation between social and economic deprivation and criminality.

Aboriginal people are at the bottom of almost every available index of socio-economic well-being, whether they measured educational levels, employment opportunities, housing conditions, per capita incomes or any of the other conditions that give non-Aboriginal Canadians one of the highest standards of living in the world. There is no doubt in our minds that economic and social deprivation is a major underlying cause of disproportionately high rates of criminality among Aboriginal people.³⁸

The correlation between high levels of criminal activity and membership in an underclass is not the only connection between material conditions and Aboriginal overrepresentation in prisons, however. As the Royal Commission pointed out, the non-payment of fines—whose connection to poverty is self-evident—is a very common reason for the incarceration of Aboriginal persons.³⁹ Aboriginal defendants often find themselves in deeper and deeper trouble with the law as a consequence of their failure to appear for court dates. But this failure may often be related to the structural conditions of Aboriginal

37. *Id.* at 73-74.

38. Bridging the Cultural Divide, *supra* note 2, at 42.

39. *Id.* at 43.

people's lives: many Aboriginal people live in rural or remote areas from which it is difficult (and sometimes expensive) to get to courts in towns and cities. Without transportation, which the justice system seldom if ever provides, it is not surprising that missed court dates are not rare.⁴⁰

For Aboriginal peoples, the link between cultural oppression and material deprivation is deep and strong. The historical relocation of Aboriginal peoples onto reserves has made it difficult to sustain traditional ways of life, which for many peoples involved seasonal migrations over large territories. The loss of traditional ways of providing for material needs, and the replacement of these ways with a money economy, combined with relocation on reserves, generated a high degree of economic dependency on the Canadian state. In many remote reserve areas, neither participation in the mainstream economy nor maintenance of traditional ways of life is possible. Although there are encouraging signs of increasing numbers of Aboriginal economic initiatives and entrepreneurship, the roots of economic disadvantage go deep.

The sense of cultural alienation that arose from these historical changes in Aboriginal life is substantial in itself, but the suppression and destruction of Aboriginal culture was also a conscious and deliberate policy of the Canadian state for over a century. I have discussed some aspects of this policy above. But perhaps the most culturally destructive state policy of all was that of residential schooling, in which Aboriginal children were removed from their families to state- or church-run schools that were often a considerable distance from their homes. In many of these schools, children were permitted only rare visits with their families. They were forbidden to speak their native languages or to practice any traditional Aboriginal ways, and were punished severely for doing so. Beatings were a common form of punishment, and in addition to physical

40. See, e.g., Alvin C. Hamilton, *A Feather Not a Gavel: Working Towards Aboriginal Justice* 49 (2001).

abuse, many children were also subject to systematic sexual abuse.⁴¹

Residential schools had a devastating effect on Aboriginal communities. Parents were denied the ability to raise their children and pass on traditional knowledge and ways of life, and children were deprived of the loving environment of their families and communities. The emotional and psychological harm of these institutions was immeasurable, and Aboriginal communities continue to struggle under the social dysfunction that resulted. Alcohol abuse became rampant in Aboriginal communities only after residential schooling became established. Domestic violence and sexual abuse also became common problems in Aboriginal communities only after residential schooling was widespread.⁴² Not surprisingly, these dysfunctions also figure prominently in Aboriginal persons' involvement in the criminal justice system. Physical assault constitutes a high percentage of crimes committed by Aboriginal persons, and alcohol is a contributing factor in the vast majority of assaults. Despite the risk of stereotyping, it seems reasonable to summarize the consequences of residential schools in these terms: many Aboriginal adults find themselves in a cycle of despair that began with their own victimization as children to physical and/or sexual abuse, their lack of a sense of a promising future because of conditions of their communities and families, a turn to alcohol, and a return to violence, whether as victim or as perpetrator (or both).

Cultural loss is apparent, then, as a background condition of Aboriginal overrepresentation in the criminal justice system. But cultural differences also contribute more directly to this overrepresentation. For example, the adversarial character of mainstream criminal justice stands in tension with several features of Aboriginal culture. In many Aboriginal cultures, for example, the idea of individual integrity and responsibility requires a person

41. Report of the Royal Commission on Aboriginal Peoples, *supra* note 3, vol. 1, ch. 10.

42. *Id.* vol. I, ch. 10.4.

to acknowledge when he or she has acted wrongly. This makes it much more likely that Aboriginal accused will plead guilty to a criminal charge, even when there may be mitigating circumstances that would warrant a lesser charge. It also makes it much more likely that an Aboriginal accused will decline a plea bargain. (A further complication arises from the fact that many Aboriginal languages have no synonyms for "guilt" and "innocence" in their moral discourses, which tend to focus only on whether one has or has not committed a certain act.)⁴³ In some Aboriginal cultures, it is a sign of disrespect to maintain eye contact with a person of authority; but in a trial setting, where eye contact is taken by non-Aboriginals as a mark of truth-telling, this can be a disadvantage for Aboriginal defendants and witnesses. Similarly, many Aboriginal cultures' concepts of personal dignity entail refraining from shows of emotion under stressful circumstances. Again, this may be misread by non-Aboriginal observers who may take it to be a sign of a lack of moral concern.⁴⁴

Another cultural disadvantage for Aboriginal defendants and witnesses is that in Canadian courts communication in an Aboriginal language must be mediated by an interpreter. Thus, even if a judge or attorney speaks the same Aboriginal language as a witness, they must address their questions in English or French and await translation before hearing the witness's response. This requirement makes for laborious and stilted communication, and works against the advantages that could be gained by "indigenizing" the criminal justice system, that is, hiring a larger proportion of Aboriginal persons in the court system.

Although cultural and systemic factors are clearly

43. Bridging the Cultural Divide, *supra* note 2, at 95; Patricia Monture-Okanee, Thinking About Aboriginal Justice: Myths and Revolution, in Richard Gosse, et. al., *Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* 227 (1994).

44. See, e.g., *Canadian Criminal Justice Assoc.*, 4 *Aboriginal Peoples and the Criminal Justice System* pt. IV (2000).

important causes in the overrepresentation of Aboriginal people in the justice system, it is important to acknowledge that overt discrimination has also been a part of this story. Discrimination on the part of police and justice officials has been a palpable factor in the wrongful or overly zealous prosecution of Aboriginal defendants, in the lax investigation or prosecution of cases in which Aboriginal persons were the victims of crime; and in the inappropriate use of force by police in dealing with Aboriginal persons.

Beginning in the mid-1970s, officials in the justice system became increasingly aware of the breadth and depth of the justice system's malfunction with regard to Aboriginal people. In 1975 Canada's Solicitor General held a National Conference on Native People that issued a reform agenda including "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."⁴⁵ This agenda received new force and direction in 1991, when three commissions of inquiry into the justice system's treatment of Aboriginal people issued reports broadly condemning the status quo.⁴⁶ These judgments were reinforced and deepened in the inquiry into Aboriginal justice undertaken by the Royal Commission on Aboriginal Peoples shortly after these reports were issued. These reports increasingly connected the pathologies of the justice system to colonialism past and present. As the Royal Commission's 1996 report states starkly: "It has been through the law and the administration of justice that Aboriginal people have

45. Don Clairmont & Rick Linden, *Developing and Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature* 3 (1998).

46. These were: Law Reform Commission of Canada, *Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice* (1991); Province of Manitoba, *Public Inquiry into the Administration of Justice and Aboriginal People, Report of the Aboriginal Justice Inquiry of Manitoba* (A.C. Hamilton & C.M. Sinclair eds., 1991) (2 vols.); & *Justice on Trial: Report of the Task Force on the Criminal Justice System and Its Impact on the Indian and Metis People of Alberta* (A.C. Hamilton & C.M. Sinclair eds., 1991) (3 vols.).

experienced the most repressive aspects of colonialism.”⁴⁷

As consciousness of the justice system’s failure increased over the last several decades, so did demand for and experimentation with alternative justice programs for Aboriginal people. And as the connection between colonialism and the justice system’s dysfunction became increasingly clear with each successive commission and report, the goal of reform in the justice system has been more closely tied to the agenda of Aboriginal self-government or self-determination. Although justice system reform must begin from the existing rubric of provincial and federal institutions, there is a growing consensus that the goal of reform is to establish a distinct system of justice for Aboriginal people, one that is run by Aboriginal people and governed by Aboriginal communities’ own understandings of justice. Patricia Monture and Mary Ellen Turpel characterized the relevant aspiration as one of “dual respect”: “[W]e must work toward developing a criminal justice system which can both hold the respect of aboriginal peoples and exhibit respect for us.”⁴⁸

III. ALTERNATIVES TO MAINSTREAM CRIMINAL JUSTICE: ELDERS PANELS AND JUSTICE CIRCLES

Aboriginal justice initiatives attempting to address the myriad problems discussed above have taken a number of different forms. Some take the form of diversion programs for adults and young offenders, which take individuals out of the prison system and attempt to assist them in taking

47. Bridging the Cultural Divide, *supra* note 2, at 57. The report continues by quoting Ovide Mercredi, then National Chief of the Assembly of First Nations, in his testimony to the earlier Aboriginal Justice Inquiry of Manitoba:

In law, with law, and through law, Canada has imposed a colonial system of government and justice upon our people without due regard to our treaty and aboriginal rights. We respect law that is fair and just, but we cannot be faulted for denouncing those laws that degrade our humanity and rights as distinct peoples.

Id. (quoting 1 Report of the Aboriginal Justice Inquiry of Manitoba 1).

48. P.A. Monture-Okanee & M.E. Turpel, *Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice*, 26 U.B.C. L. Rev. 239 (1992).

responsibility for their actions through a combination of Western therapeutic approaches (e.g., alcohol and drug addiction treatment programs) and traditional teachings. Other initiatives focus on “indigenizing” the justice system by increasing the number of Aboriginal persons in the justice system’s varied roles, such as police officers, court workers, and justices of the peace (or “peacemakers,” as they are called in some Aboriginal communities). Prison reform has also been an important focus in recent years, including especially programs that bring elders into the prisons to counsel Aboriginal inmates and to teach them about traditional ways of life.⁴⁹

My focus in the remainder of this article, however, is on two types of initiatives that transfer some aspects of the role of the judge in mainstream Canadian law to members of Aboriginal communities: elders panels and sentencing circles. Both practices have become increasingly common in remote Aboriginal communities and developed initially in the Yukon and Northwest Territories in the early 1990s.⁵⁰ Court officials—judges, defenders, prosecutors—normally fly or drive into these communities for a day or two, try cases, and then move on to another community. Consequently they are seldom able to learn many of the particular features of the different communities they visit, nor to establish relationships of trust with people in the community. As the Royal Commission stated in its report on Aboriginal justice:

Despite the best intentions of all those involved, . . . the notion that a judge, Crown, and defense counsel—none of

49. One generalization it may be reasonable to make about Aboriginal cultures, despite their diversity, is the principle of respect for elders. Elders are not merely people who have become old, but who demonstrate their wisdom by living “in a good way.” Many elders have spent the greater portion of their lives learning about traditional teachings as well as passing these teachings on to younger generations. The central place of elders in Aboriginal communities was one of the aspects of Aboriginal culture most severely damaged by residential schools, which deprived young people of the opportunity to learn traditional ways and deprived elders of the activities of teaching and guiding.

50. Bridging the Cultural Divide, *supra* note 2, at 109.

whom live anywhere near the settlements they are visiting, none of whom have more than a passing knowledge or acquaintance with it, and none of whom, in most cases, are Aboriginal or speak the local language—can provide any sort of real justice strains all notions of common sense.⁵¹

Elders panels and sentencing circles emerged as a way of bringing important local knowledge to the judgment of particular cases. In the former, community elders or clan leaders advise the judge about local norms and circumstances that they believe are relevant to the outcome of a case. In the latter, members of the community—including the accused and his or her family members, the victim and his or her family members, and elders—gather to discuss the offense with the accused and to reach a consensus about the appropriate sentence. In every case, however, the judge (who is virtually never Aboriginal) has full discretion to use or not to use elders panels or sentencing circles, and to follow or not to follow their recommendations.⁵² This is consistent with the Criminal Code's general openness to judicial discretion in sentencing; according to the Code, judges may hear new information in the sentencing stage of a proceeding, and this information is not subject to the same standards of evidence as during the trial itself.⁵³ Victim statements, for example, are a fairly common element of sentencing hearings.

Sentencing circles and elders panels, however, have more than a fact-gathering significance in the pursuit of justice; arguably they rest on a fundamentally different conception of what justice is than the conception internal to

51. *Id.* at 109.

52. In practice, however, most judges do follow the recommendations of sentencing circles and elders panels. The Crown, however, may (and not infrequently does) appeal these sentences, a fact which angers and alienates Aboriginal communities. See, e.g., Alphonse Janvier, *Sentencing Circles*, in Gosse, et. al., *supra* note 43, at 301.

53. Ross Gordon Green, *Justice in Aboriginal Communities: Sentencing Alternatives* 46 (1998).

conventional proceedings.⁵⁴ Many commentators argue that these alternative practices rest on a *restorative* rather than a retributive conception of justice.⁵⁵ In this view, the goal of the justice process is not to punish the criminal but to repair the harms that resulted from the wrongdoer's actions. These include the harms to the victim, but also to relationships within the community involving the accused, the victim, and their family members. Much of the conversation in sentencing circles focuses first on explaining to the accused what the harmful consequences of his or her action were, and then on what sorts of changes the accused must make in his or her life in order to repair that damage. Because drug and alcohol abuse is a common factor in many criminal cases, sentences often require the accused to participate in rehabilitation programs. In this way, the restorative conception of justice aims also at restoring the accused to a condition of physical and moral well being.

Both sentencing circles and elders panels have a great

54. Chief Justice Bayda of Saskatchewan Court of Appeal elegantly elaborates this point:

A sentencing circle is much more than a fact-finding exercise with an aboriginal twist. While it may and does serve as a tool in assisting the judge to fashion a "fit" sentence, and in that respect serves much the same purpose as a pre-sentence report, a sentencing circle transcends that purpose. It is a stocktaking and accountability exercise not only on the part of the offender but on the part of the community that produced the offender. The exercise is conducted at a quintessentially human level with all interested parties in juxtaposition speaking face to face, informally, with little or no regard to legal status, as opposed to a clinical, formal level where only those parties with legal status participate and only at their respective traditional physical, cultural and ceremonial distances from each other. The exercise permits not only a release of information but a purging of feelings, a paving of the way for new growth, and a reconciliation between the offender and those he or she has hurt. The community to which the offender has accounted assumes an authority over and responsibility for the offender—an authority normally entrusted to professional public officials to whom the offender does not feel accountable.

Id. at 71 (quoting *The Queen v. Taylor*, [1997] 163 Sask. R. 29, at 54 [Saskatchewan Court of Appeal]).

55. For a helpful overview of the contemporary theory and practice of restorative justice, see Kent Roach, *Changing Punishment at the Turn of the Century: Restorative Justice on the Rise*, *Can J. Criminology* 249 (2000).

deal in common with non-Aboriginal experiments with restorative justice in local communities during the 1960s and 1970s.⁵⁶ There is much debate in the literature on sentencing circles as to whether they constitute a distinct institutional form from other restorative justice models, and whether Aboriginal sentencing circles can provide insights into restorative justice that have relevance for non-Aboriginal communities. Many commentators argue that restorative justice defines the core of Aboriginal conceptions of justice per se. I am somewhat skeptical of these claims because they run a considerable risk of essentializing "Aboriginality," and in doing so to ignore the tremendous diversity within and among Aboriginal cultures. Such generalizations about Aboriginal culture also minimize the extent to which Aboriginal people in Canada have accepted some of the core principles of non-Aboriginal understandings of justice. It is not my purpose to enter into these debates here. However, there is one distinctive feature of elders panels and sentencing circles that is worth noting: the important place of traditional norms and spirituality in judgments both about wrongdoing and about healing. This feature does set alternative justice practices apart from restorative justice (or community justice) practices in non-Aboriginal communities, which do not tend to include explicitly spiritual elements.

Although Canadian law does not mandate judges to use sentencing circles, a body of law is developing that gives judges increasing guidance as to when they are most appropriate. An important case in setting out criteria for the use of sentencing circles is *R. v. Joseyounen*, a case decided by Judge Claude Fafard in the Provincial Court of Saskatchewan. Fafard, who has many years' experience of judging in Aboriginal communities, distinguished seven factors that support the use of a sentencing circle in a particular case:

56. Id.

[1] The accused must agree to be referred to the sentencing circle. . . . [2] The accused must have deep roots in the community in which the circle is held and from which the participants are drawn. . . . [3] There must be elders or respected non-political community leaders willing to participate. . . . [4] The victim is willing to participate and has been subjected to coercion or pressure in so agreeing. . . . [5] The court should try to determine beforehand, as best it can, if the victim is subject to battered spouse syndrome. If she is, then she should have counseling made available to her and be accompanied by a support team in the circle. . . . [6] Disputed facts have been resolved in advance. . . . [7] The case is one in which a court would be willing to take a calculated risk and depart from the usual range of sentencing.⁵⁷

More recently, in *R. v. Gladue*, the Supreme Court of Canada gave a strong reading to section 718.2(e) of the Criminal Code. This section, which was a 1996 amendment to the Criminal Code, directs judges to consider alternatives to imprisonment in making their sentencing decisions for all offenders, but then adds, "with particular attention to the circumstances of aboriginal offenders." The Court interprets this section as not merely advisory but as imposing a positive burden upon judges to take explicit notice of the circumstances of Aboriginal offenders in reaching sentencing decisions. These circumstances should include "background and systemic factors" that shed light on the question whether incarceration would best serve the offender's interest in rehabilitation and the interests of the community. The Court acknowledged that although these factors are also relevant in the sentencing of non-Aboriginal offenders, there is a special burden on judges where Aboriginal offenders are concerned:

Closely related to the background and systemic factors which have contributed to an excessive aboriginal incarceration rate are the different conceptions of

57. *The Queen v. Joseyounen*, 6 W.W.R. 438, 442-45 (Sask. Prov. Ct., 1995).

appropriate sentencing procedures and sanctions held by aboriginal people. A significant problem experienced by aboriginal people who come into contact with the criminal justice system is that the traditional sentencing ideals of deterrence, separation, and denunciation are often far removed from the understanding of sentencing held by these offenders and their community. . . . [M]ost traditional aboriginal conceptions of sentencing place a primary emphasis upon the ideals of restorative justice.⁵⁸

The Court specifically mentions healing and sentencing circles as among the innovative approaches that can be considered by sentencing judges. Without prescribing these particular practices, the Court directs judges to attend to the importance of “community-based sanctions” in Aboriginal communities. “In all instances, it is appropriate to craft the sentencing process and the sanctions imposed in accordance with the aboriginal perspective.”⁵⁹ The Court then went on to state that this standard of appropriateness is no mere recommendation: “Section 718.2(e) is . . . remedial in nature. Its purpose is to ameliorate the serious problem of overrepresentation of aboriginal people in prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing. There is a *judicial duty* to give the provision’s remedial purpose real force.”⁶⁰

The interest of circle sentencing practices, in short, lies in their conscious and explicit purpose in reaching judgments that are recognizably just from both Aboriginal and non-Aboriginal perspectives. In other words, they are practices that deliberately seek to provide content to the third normative-legal space discussed above. Judge Barry Stuart of the Yukon Territorial Court expressed these aspirations very clearly in his important decision in *R. v. Moses*:

58. *The Queen v. Gladue*, [1999] 1 S.C.R. 688 para. 70 [Decisions of the Supreme Court of Canada].

59. *Id.* para. 74.

60. *Id.* para. 93.

The circle has the potential to accord greater recognition to Aboriginal values, and to create a less confrontational, less adversarial means of processing conflict. Yet the circle retains the primary principles and protections inherent to the justice system. The circle contributes the basis for developing a genuine partnership between Aboriginal communities and the justice system by according the flexibility for both sets of values to influence the decision making process in sentencing.⁶¹

Let me turn, then, to reviewing three different cases, each of whose resolution was mediated by a sentencing circle or elders panel.

A. Hollow Water

The community holistic circle healing (CHCH) program, developed by members of the northern Manitoba Ojibway community of Hollow Water, is widely regarded as one of the most successful examples of Aboriginal justice that has emerged in recent years. The program began in the mid-1980s when social service workers in the community arrived at the judgment that many of its problems—suicide, alcohol and drug abuse, domestic violence—were deeply connected to sexual abuse. Community workers eventually came to believe that 75 percent of community members had been victims of sexual abuse, and 35 percent were victimizers.⁶²

The CHCH program is overseen by an “assessment team” constituted by sexual abuse workers, a band councilor, a local band constable, alcohol counselors, a public health nurse, a law enforcement officer, a representative from the Roman Catholic church, workers from the provincial child protection agency, and the local school principal.⁶³ It consists of a 13-step process that begins with a victim’s disclosure of abuse and focuses on

61. *The Queen v. Moses*, 71 C.C.C. (3d) 347 (Yukon Territory Terr. Ct., 1992).

62. Rupert Ross, *Duelling Paradigms? Western Criminal Justice versus Aboriginal Community Healing*, in Gosse, et. al., *supra* note 43, at 243.

63. Green, *supra* note 53, at 86-87.

protecting the victim from further abuse, getting the victimizer to take moral responsibility for the abuse, and implementing a community-based “healing contract” through which the offender seeks to repair the damage caused by the abuse.⁶⁴ This “healing contract” is developed within a sentencing circle that includes the victim, the victimizer, their families, community elders, members of the assessment team, other interested members of the community, the presiding judge, and prosecuting and defense attorneys. The sentencing circle is held only after the offender has entered a “guilty” plea in court, at which point the CHCH team requests that the court adjourn sentencing for four months so that they can develop a sentencing plan. Subsets of the assessment team work with the victim, the victimizer, and their families to ensure that each person is receiving the counseling they need and to protect against intimidation and the risk of suicide.

Under a protocol negotiated between CHCH and the Manitoba Department of Justice in 1991, the province considers community-based sentencing as an alternative to incarceration. In an early case, which normally would have produced a sentence of eight to ten years, the judge imposed a suspended sentence of three years imprisonment, conditional upon the offenders’ compliance with the “healing contract” developed within the sentencing circle and laid out by the CHCH assessment team.⁶⁵ Subsequently, it appears that many cases of sexual abuse were resolved without the involvement of the mainstream justice system. A 1995 new article reported that since the

64. The thirteen steps are:

(1) effecting disclosure, (2) protecting the child/victim, (3) confronting the victimizer, (4) assisting the victimizer’s spouse, (5) assisting the family or families directly affected and the community, (6) calling together the assessment team, (7) getting the victimizer to admit and accept responsibility, (8) preparing the victimizer, (9) preparing the victim, (10) preparing all family [members], (11) organizing a special gathering, (12) implementing the healing contract, and (13) conducting the cleansing ceremony.

Id. at 87.

65. Id. at 90.

program began only five offenders had been incarcerated for sexual abuse, but forty-eight had enrolled in the CHCH treatment program.⁶⁶ One difference between the CHCH approach and that of the mainstream justice system is that while the CHCH team believes that five years of supervision by the team and by the community is necessary before the victimizer can be fully reintegrated into the community, the maximum probation period recognized by law is three years. Nonetheless, the community seems to have considerable success in keeping offenders in their programs for the full five year period.

In the first sentencing circle held under the provincial protocol agreement with CHCH, there were two circles of participants: an inner circle of about 40 people who were most immediately concerned in the case (victims, victimizers, assessment team members, judge, and attorneys), and an outer circle of approximately 200 community members. The circle began with a sunrise and pipe ceremony, including a traditional sweetgrass (cleansing) ceremony in which all the members of the inner circle participated. As prescribed for all sentencing circles in Hollow Water, the meeting proceeded in four cycles in which an eagle feather was passed from one person to the next around the inner circle, beginning with the judge. As each person's turn came to hold the feather, he or she would speak to the topic that was the focus for that cycle. The first cycle is focused on the reasons why each person was present at the gathering. The second is focused on the victim: on the harm caused by the abuse and her or his specific needs for healing. The third cycle is focused on the victimizer, encouraging him or her to take responsibility for the harm caused by the abuse. The final cycle is for recommendations as to what the victimizer should do to make amends for the abuse to the victim, his or her family, and to the community, as well as to address problems of drug or alcohol abuse, anger management, and so on.⁶⁷ In

66. *Id.*

67. The first sentencing circle in Hollow Water began at seven a.m. and ended at nine p.m. Because the circle was taking such a long time, the participants

Hollow Water circles as elsewhere, it is extremely rare for circle participants to recommend incarceration as part of the “healing plan.”

A number of features of traditional Aboriginal culture (and specifically Ojibway culture) figure centrally in the Hollow Water approach. First, the form of the circle itself has important symbolic significance, representing wholeness and the connectedness of all life and of every individual to the community. Second, the number four—represented, among other places, in the four cycles of the eagle feather around the inner circle—signifies the four directions, the four elements, the four aspects of human beings (physical, spiritual, emotional, and mental), and the four peoples of the earth (red, yellow, black, white). The practice of having each person speak in turn while holding the eagle feather (or, in some traditions, a “talking stick”) is also traditional in many Aboriginal cultures and is a practice that demonstrates equal respect for each person: everyone has the chance to speak, and participants show respect by listening while another is speaking. And of course the pipe, sunrise, and sweetgrass ceremonies all connect the sentence circle to traditional practices and spirituality rather than to non-Aboriginal practices that solemnize justice proceedings.

The substance of the “healing contracts” overseen by CHCH through the victimizer’s five-year program bears many resemblances to some non-Aboriginal approaches to treatment. The idea that a therapeutic approach to offenders is more effective than a punitive approach is central to many mainstream understandings of abuse. This is something that some advocates for Aboriginal justice initiatives emphasize, in part as a way of buttressing the credibility of their programs in the eyes of the non-Aboriginal public. But the focus on the healing process as one which involves rebuilding a healthy relationship between the offender and the community and between the offender and the victim does distinguish the

Hollow Water approach from mainstream clinical psychology. As Berma Bushie, the Hollow Water resident whose leadership was critically important in establishing the CHCH program, has explained, non-Aboriginal psychologists have been resistant to the CHCH attempt to rebuild relationships between offenders and victims. Instead, they focus on working separately with victims and offenders in a therapeutic process. Bushie responds:

[T]he reality is that victims and offenders live in this community and it is a very small community. There is only one main road and there is no way that you can separate victims from offenders. It is impossible. So, if you work with these people in total isolation of each other and they never come together to resolve their own issues, that is the way it is going to be out there in the community.⁶⁸

Another connection between the community-based sentencing and Aboriginal culture lies specifically in the practices through which offenders seek to make amends with the community as a whole for the damage done by their abuse. In one case, the offenders were commercial fishers. Their sentence included a provision whereby, once they had met their legal quota of fish for commercial sale, they would leave their nets in the water and distribute any additional catch to members of the community. Berma Bushie recalls:

I remember one of them saying "Oh, I was so scared to go to that house because I didn't know if they would take the fish from me." Her own image of herself was of a bad person, and it was such a lift for her when people would take the fish and thank her for it . . . "[W]hat it does for a person to give[!] Our ways are so simple, and yet I think we don't pay enough attention to what we get out of them."⁶⁹

Another offender attempted to repair his relation to the

68. Ministry of the Solicitor General of Canada, *The Four Circles of Hollow Water* 167 (1997).

69. *Id.* at 169.

community by regularly donating things to be sold in raffles for community fundraising.⁷⁰ While not incompatible with mainstream understandings of justice—it is useful to bear in mind that community service is often a part of judicial sentencing—it is clear that members of the Hollow Water community experience these elements of sentencing as closely tied to Aboriginal understandings of community.

*B. R. v. Bernard*⁷¹

This case involved two members of the Mi'kmaq First Nations community at Pictou Landing, Nova Scotia. Under the influence of alcohol, one pointed a rifle at the other, who grabbed it and struck the first man over the head. The result was a skull fracture, but without permanent cognitive damage. This incident occurred on sacred ground within the reserve.

With the guidance of the Mi'kmaq Justice Institute, the second individual pleaded guilty to the unlawful possession of a weapon. The Institute constituted a "justice circle" that included elders and other members of the community, representatives from the Justice Institute, and treatment counselors. On the basis of these discussions, the Circle made recommendations to the sentencing judge, most of which were supported by both prosecuting and defense attorneys and accepted by the court. The sentencing plan was arrived at through a consensus among participants, in accordance with traditional Mi'kmaq practice.

Of particular interest in this case was the inclusion of a Captain of the Mi'kmaq Grand Council in the justice circle. This person was included as a representative of the Mi'kmaq community, considered as an injured party because the offense occurred on sacred ground.

70. *Id.*

71. *The Queen v. Bernard*, N.S.J. No. 547 (Nova Scotia Sup. Ct., Dec. 21, 1998).

C. South Island Tribal Council

The third example I wish to examine is not a case in criminal law but is illustrative of institutional innovations aimed at case resolutions that are recognizably just from both Aboriginal and non-Aboriginal perspectives. The South Island Tribal Council is comprised of leaders of thirteen communities belonging to the Coast Salish Nation in southern Vancouver Island in present-day British Columbia. In a 1988 case, the Council resolved a dispute over child custody by relying on traditional teachings and practices while also attending to the demands of non-Aboriginal law. Several commentators, including the Royal Commission on Aboriginal Peoples, identify this case as an important example of Aboriginal dispute resolution and a model for Aboriginal justice in other cases.⁷²

The case involved a child whose mother was a member of the Nuu-chah-nulth Nation, which is not a Coast Salish people. His father, however, was a member of the Coast Salish Nation. When the child's mother died, his maternal aunt sought custody so that he would be raised within the traditions of her people and become eligible for privileged membership status within the Nuu-chah-nulth Nation. Similarly, his father wanted the child to attain privileged status within the Coast Salish Nation by being raised in its traditions, and he also sought custody. In a custody proceeding conducted under the provincial Family Relations Act, the South Island Tribal Council attained intervener status and requested that the matter be referred to a council of elders. The court agreed, subject to the requirement that the council of elders be acceptable to both families, that the mediation would occur in a neutral place, and that it be held in the evenings so that both families could attend. The elders council reached the judgment that primary custody of the child should go to the father, but that the child should also be raised to know his mother's family and her people's traditions.

72. See Bridging the Cultural Divide, *supra* note 2, at 210-14.

Judge Edward O'Donnell, the presiding judge in this case, made the following comment in accepting the elders council's resolution of the case:

Before dealing with the form of the actual Order, I personally would like to add a few words because of the historical significance of this process by which this agreement and this court judgment has been arrived at. . . . This method of resolving disputes has shown that traditional native methods and institutions can and do operate effectively in this day and age. The entire process has demonstrated that it is possible for the native institutions and our courts to cooperate and work together for the benefit of all parties.⁷³

As both the Royal Commission and Michael Jackson noted in their commentary on this case, there is reason to wonder whether this resolution of the case could have been reached through the adversarial process of mainstream custody hearings.

Another commentator on the case, Bruce G. Miller, adopts a more skeptical stance toward it. He raises the concern that Jackson's description of the South Island Tribal Council and the elders council it constituted in this case rests on a romanticized image of Aboriginal communities:

[T]he analysis of the case reflects an Edenic view of a society without a past in which serious conflict arose. Consensus . . . is treated unproblematically. . . . Nor is there any consideration of who the elders were, how they were selected, or what the relations of power in the existing state of relationship was between them and the litigants. . . . Elders, instead, are treated as an undifferentiated commodity.⁷⁴

73. Quoted in Michael Jackson, *In Search of the Pathways to Justice: Alternative Dispute Resolution in Aboriginal Communities*, 26 U.B.C. L. Rev. 206 (1992) (Special Edition: Aboriginal Justice).

74. Bruce G. Miller, *The Problem of Justice: Tradition and Law in the Coast Salish World* 180-81 (2001).

Miller's cautionary point is well taken and forms the basis for his further critique of the South Island Justice Project for which this case provided some precedent. The ultimate failure of that project, he argues, is traceable at least in part to its tendency to rely upon a unitary and essentialized characterization of Coast Salish traditions and teachings. At the same time, Miller's suggestion that the South Island Tribal Councils resolution of the custody case involved covert power relations is itself speculative. If the case was genuinely resolved by consensus, it does seem to offer an intriguing model for discovering solutions to conflicts that can be recognized as just across cultural boundaries.

IV. JUSTICE ACROSS CULTURES?

Recall the observation at the outset of this article that the criminal justice system consists of three primary stages or functions: the definition of legal norms of criminal wrongdoing; the definition of the process by which an accused person is found to be guilty or innocent; and the definition and application of sanctions for a criminal act. Ostensibly, sentencing circles and elders panels in criminal cases apply only to the third of these functions, the definition of the consequences for an offender of his or her wrongdoing. These practices are usually invoked only after a determination of guilt for an act defined as criminal by non-Aboriginal law. Indeed, this is a common point of criticism of alternative sentencing: that while it has the benefit of keeping some Aboriginal offenders out of a prison system that is damaging both to them and to their communities, it is still a part of a colonial system in which non-Aboriginal legal norms are imposed upon Aboriginal communities.

This might be a damning critique of alternative justice practices were it not for the fact that the crimes at issue in these cases are clearly wrongs within Aboriginal tradition

as well as within the Canadian Criminal Code. Theft, assault causing injury, sexual abuse, domestic violence—all of these violate contemporary and traditional Aboriginal norms just as surely as they violate non-Aboriginal norms. For these offenses, there is no real cultural conflict as to the definition of criminal behavior.

In what way, then, are the judgments of elders panels or sentencing circles examples of *intercultural* justice? First, as noted above, virtually all sentencing circles include practices that clearly arise from within Aboriginal culture and are alien to non-Aboriginal justice practices. Sweetgrass ceremonies, traditional songs, the use of the eagle feather or “talking stick” to take turns in speaking, and cleansing ceremonies such as the ones that end CHCH sentencing plans—all of these derive from Aboriginal cultural tradition.

At one level, the incorporation of these practices into the sentencing stage may seem to be “merely” symbolic and not to have any substantive impact on the content of the sentence itself. Of course, symbolism is important, but it seems to have more to do with the perceived *legitimacy* of a judgment than with its *justice*. At another level, though, and through community members’ explanations to the offender of how his or her actions damaged others’ lives, using Aboriginal traditions to structure the sentencing circle sends the message that the norms being enacted there are not alien to the community but are its own norms, with roots in long-standing tradition and Aboriginal ways of life. The use of traditional ceremonies within alternative sentencing practices signifies that the judgment is not imposed from outside but is the community’s own judgment.

What about the content of the sentences or outcomes? Do they incorporate the substance of Aboriginal cultural commitments and norms? In many cases involving sentencing circles or elder panels, much of the sentencing plan consists in participating in counseling for drug or alcohol addiction or for anger management as well as community service through which the offender makes some

amends or reparations for the harms his or her action inflicted on others. But while they address problems that plague Aboriginal communities, these are not distinctively Aboriginal responses to crime. Many courts require addiction or anger management treatment as a condition of probation for non-Aboriginal offenders, and the performance of community service is a common component of sentences for non-violent offenders in the mainstream system.

But as noted above, in the sentencing plans that emerge from elders panels or sentencing circles, the particular forms of community service, and the particular content of addiction treatment, often do have distinctive Aboriginal content. In communities with long-standing traditions of fishing, the sharing of one's catch with other members of the community may itself be an affirmation of Aboriginal tradition and of communal membership, as in the CHCH case discussed above. Following an addiction treatment program may include learning about elements of traditional spirituality as part of a healing process. While a non-Aboriginal judge may require participation in a treatment program as part of a sentence, he or she would probably not be concerned to ensure that sweat lodge ceremonies were available as part of that program. For an Aboriginal sentencing circle, however, this might be an extremely important consideration in specifying which treatment program the offender should join. Again, although the *idea* of restorative justice is not foreign to non-Aboriginal criminal justice proceedings, the *content* of practices that are affirmed as restorative by a sentencing circle or panel in an Aboriginal community will almost certainly include some that refer explicitly to Aboriginal cultural practices or conceptions of community.

In addition to the clear presence of Aboriginal norms in the sentencing process and in defining the content of sentencing plans, it is important to recognize that Aboriginal justice initiatives may subtly inform the other two functions of the criminal justice system, norm definition and the procedure for determining guilt or

innocence. For the latter, we need only recall that many alternative sentencing programs require an accused to enter a guilty plea before convening the sentencing process. This requirement serves in part to signal the accused's consent to submit to the alternative process rather than being sentenced through mainstream processes. But as we saw above, it also affirms a norm common to many Aboriginal cultures that individual dignity and integrity requires the individual to acknowledge that he or she has committed a wrongful act. It also circumvents the cultural biases of the adversarial criminal trial with respect to Aboriginal persons, discussed above.

How do alternative justice practices inform law's norms themselves? Of course, they do not do so explicitly: the judgments of particular justice circles or elders panels cannot redefine legal standards in positive law. However, in both *R. v. Bernard* and the Coast Salish custody case discussed above, the judgments of the Aboriginal panels implicitly read specific Aboriginal cultural content into the legal standards being applied. In the Coast Salish case, the elders panel effectively reinterpreted the standard of "the best interests of the child" to include the child's interest in becoming a fully privileged member of an Aboriginal band. Clearly this interest was not contemplated by the British Columbian legislature in passing the Family Relations Act nor could it be an interest for a non-Aboriginal child.

In *R. v. Bernard*, the inclusion of a Chief of the Mi'kmaq Nation in the justice circle as a *secondary victim* was explicitly intended to express the wrong to the community that arose from the fact that the offense occurred on sacred ground. This action redefined the offender's crimes to include not the wrong cited by the Crown, but also the wrong of desecrating sacred ground. I have searched the Canadian Criminal Code in vain for any provision that would treat the commission of a crime on sacred ground as a distinct wrongful act. Yet, although the sentence in this case did not explicitly connect any particular component to this wrong against the community, the presiding judge did give the circle's acknowledgment of

the wrong specific and favorable mention in his decision.⁷⁵

Now, if one agrees that in these cases the use of Aboriginal justice initiatives had the effect of incorporating Aboriginal cultural norms into all of the functions of the criminal justice process, the question remains how it is possible that these judgments were recognizable as just from a non-Aboriginal perspective. As we have seen, although there is convergence between Aboriginal and non-Aboriginal norms on the wrongness of certain acts—assault, sexual abuse, et cetera—there are also some distinctly Aboriginal norms in play in the three cases discussed above that are not expressed in non-Aboriginal law. How can these be recognized by officials of the non-Aboriginal justice system as valid bases for legal judgment?

I believe there are at least three answers to this question. The first begins with the space for judgment that is left by law's indeterminacy. Now, at first glance it may seem somewhat paradoxical to invoke legal indeterminacy as a resource for cultural responsiveness. It is a central theme of critical legal studies (and, by extension, of critical race studies) that legal indeterminacy is what creates opportunities for judges to fill in the content of law with rules that systematically advantage already-privileged groups.⁷⁶ Yet these cases suggest that legal indeterminacy can be a double-edged sword. If law's indeterminacy is resolved in practice in a way that gives conscious attention to cultural difference, it can be a tool for combating cultural marginalization.

British Columbia's Family Relations Act, for example, makes clear that in custody cases "a court must give paramount consideration to the best interests of the child."⁷⁷ Although the Act does specify "education and training" as relevant factors to be weighed in a judgment concerning the child's best interest, it is no more specific

75. Bernard, N.S.J. No. 547 at para. 8.

76. See Roberto Mangabeira Unger, *The Critical Legal Studies Movement* 6-8 (1983).

77. Family Relations Act, R.S.B.C., ch. 128, § 24 (1996) [Revised Statutes of British Columbia].

than this. What constitutes a child's "best interests" in the sphere of education and training is indeterminate; the judge must exercise her judgment here. This openness or indeterminacy in the law is what made it possible for the judge in the Coast Salish custody case to enable the elders panel to inform the court as to the child's culturally-situated interests in education and training.⁷⁸

Similarly, the federal Criminal Code instructs courts that "a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender,"⁷⁹ both in general and specifically in cases involving Aboriginal defendants. Yet this instruction leaves open a great deal of discretion for judges. It is precisely the absence of specificity in the law that makes it possible to use sentencing circles and elders panels both to provide the information necessary to determine "relevant . . . circumstances" and to suggest constructive alternatives to incarceration. The injunction to seek alternatives to incarceration is itself similarly open-textured, which is what makes it possible for judges to accept a wide array of treatment programs—including those with options for Aboriginal spiritual teachings as a part of recovery—as part of sentencing plans.

The second answer to the question how these cases can generate decisions that are recognizably just from both Aboriginal and non-Aboriginal cultural and legal perspectives can be summed up with Cass Sunstein's concept of "incompletely theorized agreements," in which parties agree on a judgment without agreeing on all the reasons for that judgment.⁸⁰ Now, arguably, legal indeterminacy is a subcategory of "incompletely theorized agreements," in which there is agreement on certain

78. It is important to note, however, that the history of Canadian courts' interpretation of the "best interests of the child" has generally worked against cultural recognition of First Nations. For a critical overview of this jurisprudence, see Marlee Kline, *Child Welfare Law, "Best Interests of the Child," Ideology, and First Nations*, 30 *Osgoode Hall L.J.* 375 (1992).

79. Criminal Code, R.S.C., ch. C-46, § 718.2 (1985) (Can.).

80. Cass R. Sunstein, *Incompletely Theorized Agreements*, in *Legal Reasoning and Political Conflict* 35-61 (1996).

general principles that can guide judgment in particular cases without there necessarily being agreement on a range of more general or abstract principles *or* on specific applications of the lower-order principle at hand. But “incompletely theorized agreements” can also operate at the level of complete specificity. Thus, it may be possible for a non-Aboriginal judge and an Aboriginal sentencing panel to agree that a particular offender should go through a certain treatment program, but have radically different reasons for thinking so. Insofar as law does not demand that judges or sentencing circles declare all their reasons for preferring a particular sentencing outcome, it leaves open the possibility that they can agree on a particular practice without having to agree on the reasons behind the practice. This leaves Aboriginal communities free to affirm a community service component of a sentence because it affirms certain traditional values and a judge free to affirm the same community service because it seems likely to have a deterrent effect or because the judge sees it as appropriately retributive.

A third answer to the puzzle of how intercultural justice is possible is the fact that legal reasoning rests so heavily on analogy.⁸¹ Much of the Aboriginal cultural content in these judgments can be translated without too much difficulty into parallel norms and reasons that are at play in non-Aboriginal mainstream and legal culture. As we have seen, many commentators characterize Aboriginal justice initiatives as directly analogous to both historical and contemporary restorative justice programs. The human capacity for creative reasoning through the medium of new analogies is what makes intercultural normative translation possible: it enables us to see the respects in which an other’s practice is like our own practice in ethically relevant respects.⁸²

81. Cass Sunstein’s work is again very instructive on this point. See *id.* at 62-100.

82. Again, this is work that John Borrows executes beautifully in the dialogues he constructs between First Nations law and mainstream Canadian law. In one essay, he “translates” a story of origins involving the Trickster

These features of the law—its judicious silences; its indeterminacy; the room it leaves for creative analogy—make it possible for people from different cultures to focus not on their points of normative disagreement, but on their points of agreement, at whatever level of abstraction or concreteness those might occur. The open spaces within our concepts, norms, and rules are critically important resources for renegotiating the terms of our relationships in a way that does not recreate domination. Although it is certainly true that these spaces within non-Aboriginal laws and norms can be (and historically have been) filled with a content that is inimical to the most basic interests of Aboriginal peoples, the possibility of a just relationship turns on this not being *necessary*. What is needed, it seems clear, is an engagement in real-world practices that aim at constituting a just relationship even when participants have no clear conception of what justice will look like once the practices are completed. Incrementalism; a tolerance for uncertainty and ambiguity; patience; and above all, a commitment to non-domination: these are the watchwords for justice-building practices.

Let me end these reflections with an important caveat: there are important ways in which these cases *do not* exemplify a just relationship between Aboriginal peoples and non-Aboriginal Canadians. In focusing on what they teach us about what justice might look like, I do not mean to minimize how much they tell us about what justice does not look like. First, notwithstanding *Gladue*, use of sentencing circles and elders panels is subject to the discretion of the judge. This effectively preserves the colonial relationship between Aboriginal peoples and the Canadian state, as many observers have noted. Second, we must not forget that it is non-Aboriginal Canadian law (the Criminal Code, or, in the Coast Salish case, the British

Nanabush into the normative concerns of Canadian common law concerning environmental protection. Borrows writes, “the Nanabush story is translated into the language of legal culture to create a recognizable conversation with Canadian law and to criticize Canadian law for its reluctance to engage in legal conversations with First Nations.” Borrows, *supra* note 25, at 653 n.115

Columbian Family Act) that sets the normative terms for these cases. Aboriginal peoples have had little or no meaningful role in defining the legal content of normatively acceptable behavior as set out in this law, and many Aboriginal people, again, feel the imposition of this law as another example of colonialism. Third, sentencing circles' judgments in many cases include components of anger management counseling, drug and alcohol addiction treatment, family therapy, et cetera. Yet while judges have authority to approve sentencing circles' recommendations, they do not have authority to order the federal or provincial governments to provide financial or institutional support for services of this kind. Community-based sentences impose heavy responsibilities on Aboriginal communities without necessarily securing the resources necessary to fulfill those responsibilities. This constraint reminds us, once again, of the close connection between cultural marginalization and systemic material inequality for Aboriginal peoples. Finally, it is important to note that in practice some Aboriginal justice practices may not adequately protect vulnerable individuals and groups within Aboriginal communities. Some commentators have expressed concern that the restorative model places too much weight on the offender's needs, at the expense of the victims' needs. To this extent, the criminal justice system must cautiously attend to the consequences of these programs for vulnerable individuals, especially women and children.⁸³

In short, because of the narrow legal, institutional, and material constraints under which they occur, contemporary Aboriginal justice alternatives remain a pale shadow of democratic inclusion in the practice of self rule. They are no panacea for the legacies of colonialism. Nonetheless, as I hope the above suggests, they are ameliorative, and they offer some insights into how we can begin to conceptualize

83. For an instructive critique of alternative sentencing on these grounds, see Emma LaRoque, *Re-examining Culturally Appropriate Models in Criminal Justice Applications*, in *Aboriginal and Treaty Rights in Canada, Essays on Law, Equity and Respect for Difference* 75-96 (Michael Asch ed., 1997).

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a good relationship between Aboriginal peoples and non-Aboriginal Canadians. They may not, by themselves, get us very far toward the realization of that relationship, but they do seem, at least, to point us in some promising directions.