NAVIGATING THROUGH NARRATIVES OF DESPAIR: MAKING SPACE FOR THE CREE REASONABLE PERSON IN THE CANADIAN JUSTICE SYSTEM

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> *We [settlers and descendants] came up as Chapter 15 of the story. A little too early perhaps.*[1]

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[1] Michael Asch, "Canadian Sovereignty and Universal History" in Hester Lessard, Rebecca Johnson & Jeremy Webber, eds, *Storied Communities: Narratives of Contact and Arrival in Constituting Political*

I. INTRODUCTION

In the Cree language, many words assume or require a response. For example, when greeting someone, you say "*Tansi*." This does not translate into "hello," but rather closer to "How are you?" The response is "*Manando*" (I am well). The flow and assumptions of conversation embedded in the Cree language reminds us speech always occurs in relation to others. When you speak, it matters who is listening, what they hear and how they choose to respond or not respond. Indifference and disengagement are the most effective forms of silencing. If no one is listening, you can speak all you want, and still be voiceless.

Indigenous laws exist. After centuries of being absent in mainstream Canadian legal and political thought and practice, there are increasing calls for and interest in recovering and revitalizing Indigenous laws, and using them in more formal and explicit ways.[2] While there are ongoing challenges there are also cogent methods Indigenous legal scholars can use to ascertain and articulate Indigenous laws from an internal point of view. Legal scholars can engage with Indigenous legal traditions, using structured methods to do so respectfully and robustly. We can adapt and apply basic skills learned in law school to approach, analyze, and organize Indigenous legal principles in accessible and transparent frameworks, deepen our understanding of background or meta-principles, and develop resources that concretely support Indigenous communities to apply their own legal principles in more formal and explicit ways today.[3] For the past several years I have worked deeply with substantive Indigenous laws from a legal academic standpoint, in partnership with Indigenous organizations and communities across Canada.[4] The results of this and other research demonstrate that, while there is lingering damage from colonialism and decidedly uneven ground, Indigenous legal thought and

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Community (Vancouver: UBC Press, 2011) 29 at 29, paraphrasing a verbal report by Ted Chamberlin during RCAP about where European settlers came up in the story of Gitksan history.

[2] See e.g. Gordon Christie, "Indigenous Legal Theory: Some Initial Considerations" in Benjamin J Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Portland, OR: Hart, 2009) 195; Lisa Chartrand, "Accommodating Indigenous Legal Traditions" (Discussion Paper prepared for the Indigenous Bar Association, 31 March 2005), online: <www.indigenousbar.ca/pdf/Indigenous%20Legal%20Traditions.pdf>; Jeremy Webber, "The Grammar of Customary Law" (2009) 54:4 McGill LJ 579 [Webber, "Grammar of Customary Law"].

[3] Val Napoleon and I have argued this elsewhere. See e.g. Hadley Friedland, "Reflective Frameworks: Methods for Accessing, Understanding and Applying Indigenous Laws" (2012) 11:1 Indigenous LJ 1 [Friedland, "Reflective Frameworks"]; Hadley Friedland & Val Napoleon, "Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions" (2016) 1:1 Lakehead LJ 16.

[4] In January 2012, I coordinated the Accessing Justice and Reconciliation Project [AJR Project] through the Indigenous Law Research Unit [ILRU] at the University of Victoria Faculty of Law, with academic lead, Dr. Val Napoleon. In partnership with the Indigenous Bar Association and the Truth and Reconciliation Commission of Canada [TRC], with generous funding by the Ontario Law Foundation, this ground-breaking project identified specific legal principles responsive to harms and conflicts in 6 Indigenous legal traditions with 7 partner communities across Canada. For more information, see the website: <www.indigenousbar.ca/indigenouslaw/>. For more information about the Indigenous Law Research Unit, see the website: <www.uvic.ca/law/about/indigenous/indigenouslawresearchunit/>.

practice clearly persists.[5] With hard work, the rich normative resources from Indigenous legal traditions can be accessed, understood, and applied today.[6]

However, this article is not about Indigenous laws. Rather, it is about a haunting question: Does any of this matter? Is there space, in the day-to-day reality, *and* in the imagination of contemporary Canada, for Indigenous laws to be revitalized, practiced, and used, within recognized and resourced justice systems and legal institutes, as the Truth and Reconciliation Commission (TRC) has recently called for in their final report on the Indian residential schools in Canada?[7] This will require space for Indigenous legal *thinking* to take root in a public and explicit way, not just for isolated elements, disconnected practices,[8] or vague superficial pan-Indigenous "values."[9]

In other work, I have looked closely at substantive Indigenous laws, primarily focusing on Cree laws.[10] In this article, I examine the broad societal context in which Indigenous laws exist today. This context includes iterative "narratives of despair," perpetuated through the mainstream media, the legal system, and even the political narrative of trauma that aims to push back against these. These

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[5] See John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 23. See also Hadley Friedland, "The Accessing Justice and Reconciliation Project Final Report" (Report prepared for the AJR Project, 4 February 2014), online: <indigenousbar.ca/indigenouslaw/wp-content/uploads/2013/04/iba_ajr_final_report.pdf>.

[6] Mathew Fletcher, an Anishinabek law professor and tribal judge, articulates a pressing need for ways to "access, understand and apply" Indigenous laws in Matthew Fletcher, "Rethinking Customary Law in Tribal Court Jurisprudence" (Occasional Paper delivered at Michigan State University College of Law, Indigenous Law and Policy Centre Occasional Paper Series, November 2006) at 17, online: <www.law.msu.edu/indigenous/papers/2006-04.pdf>.

[7] See Calls to Action #42 and #50 in: Truth and Reconciliation Committee of Canada, *Truth and Reconciliation Committee of Canada Calls to Action* (Winnipeg: TRC, 2015), online: <www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf>.

[8] Napoleon raises this concern in Val Napoleon, *Ayook: Gitksan Legal Order, Law, and Legal Theory* (PhD Dissertation, University of Victoria, Faculty of Law, 2009) [unpublished] at 47 [Napoleon, *Ayook*]. Napoleon uses an example of a treatment of African customary law regarding a modern-day 'witchcraft' killing in a South African murder case.

[9] Fletcher raises this concern in Fletcher, *supra* note 6 at 33. See also Pat Sekaquaptewa, "Key Concepts in the Finding, Definition and Consideration of Custom Law in Tribal Lawmaking" (2007-2008) 32:2 Am Indian L Rev 319 at 328, calling this "essentialism."

[10] See e.g. Hadley Friedland, *The AJR Project Cree Legal Traditions Report* (May 2014), prepared for the Accessing Justice and Reconciliation Project, on file with the University of Victoria Indigenous Law Research Unit, the Indigenous Bar Association, the Truth and Reconciliation Commission of Canada, the Ontario Law Foundation, and the *Aseniwuche Winewak*, online: <indigenousbar.ca/indigenouslaw/wpcontent/uploads/2012/12/cree_summary.pdf> [AJR Project Cree Legal Tradition Report]. I relied on research and interviews conducted by Kris Statnyk, Aaron Mills, and Carol Wanyandie. Maegan Hough and Renee McBeth edited it. See also Hadley Friedland, *Aseniwuche Winewak Justice Project Report: Creating a Cree Legal Process Using Cree Legal Principles* (October 2015), prepared for the Aseniwuche Winewak Nation, (unpublished), on file with the University of Victoria Indigenous Law Research Unit and the *Aseniwuche Winewak* [Aseniwuche Winewak Justice Project Report]. I relied on interviews conducted by Kris Statnyk and Carol Wanyandie and research conducted by Margot Bishop, Margaret Lovely, and Kris Statnyk, funded through the Indigenous Law Research Unit, University of Victoria Faculty of Law.

narratives of despair contribute to maintaining the intractable conflicts, violence, and conditions of vulnerability for Indigenous people. I introduce a representative figure of Cree legal reasoning—the reasonable Cree person, drawn from logical premises and the findings in my research set out in the *AJR Cree Legal Traditions Report* and the *Aseniwuche Winewak Justice Project Report*.[11] Through this figure, I review the current media, legal and political narratives, as well as the spaces within Canadian justice system with potential for Indigenous laws to be rigorously and transparently applied, as well as the false dichotomy between safety and healing. I conclude that intellectual work is needed to expand our narratives or to move beyond these before these laws can be applied. We need serious and sustained engagement with Indigenous legal traditions. We non-Indigenous people need to listen better.

II. THE REASONABLE CREE PERSON

So many societal and academic stories about Indigenous peoples start in the wrong place.[12] The justification for creating space for Indigenous laws to address violence and vulnerability within the criminal justice system tends to start with the massive failure of the justice system in relation to Aboriginal peoples, both in terms of over-incarceration and under-protection.[13] These heartbreaking, terrifying, and demoralizing "two sides of the same coin" are very real.[14] There is a long and continuing history of misunderstandings and reasonable distrust generated by colonialism, systemic and individual racism, cultural differences, entrenched poverty, and social dislocation. I wholeheartedly agree that the "imposition visited upon Indigenous people as part of colonization" and "coercive nature of that encounter" that have "impeded Indigenous peoples' ability to develop and express their distinctive understandings" give us, as Jeremy Webber says, "reason to make space."[15] Yet I wonder about the unintended effects of giving such pride of place to the need for amelioration of relatively recent social issues, often with a gloss of 'cultural difference.' Why don't we focus on what must have been, as a matter of

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[11] AJR Project Cree Legal Traditions Report, *ibid*, and Aseniwuche Winewak Justice Project Report, *ibid*.

[12] Asch, *supra* note 1. Asch argues (at 29), "We [settlers and descendents] are Chapter Fifteen of the story of this place and our stories are to be added to and interact with other stories, but our stories cannot substitute for them". As with land, so with law.

[13] "The justice system has failed […] Aboriginal people on a massive scale" was the opening statement of the Manitoba Justice Inquiry. See Manitoba, Aboriginal Justice Implementation Commission, *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People*, vol 1 (Winnipeg: Inquiry into the Administration of Justice and Aboriginal People, 1999), online: <www.ajic.mb.ca/volumel/chapter5.html#8>. See also James C MacPherson, "Report from the Round Table Rapporteur" in *Aboriginal People and the Justice System: National Round Table on Aboriginal Justice Issues* (1993) at 4 ["Report from the Round Table"]. For some of the statistics on under-protection, see Canadian Centre for Justice Statistics, Statistics Profile Series, *Aboriginal Peoples in Canada* (Ottawa: Canadian Centre for Justice Statistics, 2001) at 6–7, online: <www.statcan.gc.ca/pub/85f0033m/85f0033m2001001-eng.pdf> [Justice Statistics 2001].

[14] Jonathan Rudin, "Aboriginal Peoples and the Criminal Justice System" (2007), Research Paper commissioned for the Ipperwash Inquiry at 64, online: <www.archives.gov.on.ca/en/e_records/ipperwash/policy_part/research/pdf/Rudin.pdf>.

[15] Webber, "Grammar of Customary Law," *supra* note 2 at 616.

logic alone, a long history of successful (or at least adequate) Indigenous social ordering, including legal resources for responding to the universal social and human issues that all laws address?

While the state justice system creates or permits spaces for Indigenous law, the spaces it allows don't seem to ameliorate effectively the systemic and background issues or their impacts. A simply immense amount of studies and inquiries have looked at this issue.[16] For a very long time, we have known that, statistically, Indigenous people are more likely than non-Indigenous people to be victims of crime, especially violent crime and spousal assault.[17] According to a comprehensive study by the RCMP, there were 1017 police-recorded incidents of Indigenous female homicide victims and 164 unresolved files of missing Indigenous females between 1980 and 2012 in Canada.[18] Violence against women is pandemic, yet Indigenous women are three times more likely to be violently victimized than their non-Indigenous counterparts.[19] While homicide rates for non-Indigenous women have decreased, they have increased for Indigenous women over the same time period in Canada.[20]

Indigenous people, including women and youth, are over-represented in prison, and are considered higher risk to reoffend and have higher needs.[21] In 2001, Indigenous women accounted for almost one-quarter of female inmates. In 2014, the Office of the Correctional Investigator's report stated that the Aboriginal inmate population is "growing rapidly" (increasing 47.4% since 2005).[22] In 2015, the same office stated that the Indigenous population has increased 37.3%. Indigenous women now make up 33% of the total inmate population under federal jurisdiction, representing an increase of 109% between 2001 and 2011.[23]

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[16] Between 1967 and 1993, when the Royal Commission of Aboriginal Peoples [RCAP] report was written, there were over 30 government commissioned studies investigating the causes and possible solutions to this massive failure. See Carole Blackburn, "Aboriginal Justice Inquiries, Task Forces and Commissions: An Update" in RCAP Report from the Roundtable, *supra* note 13 at 15. Eight of these were reviewed for the Roundtable on Justice (at 16-38). Many other reports and inquires have been commissioned since, including the Ipperwash and Stonechild Inquiries.

[17] Justice Statistics 2001, *supra* note 13 at 6–7.

[18] Royal Canadian Mounted Police, *Missing and Murdered Aboriginal Women: A National Operational Overview* (Ottawa: RCMP, 2014) at 8–9, online: <www.rcmp-grc.gc.ca/pubs/mmaw-faapd-eng.pdf> [RCMP Missing and Murdered Aboriginal Women].

[19] *Ibid* at 7.

[20] *Ibid* at 10. According to the RCMP report, the proportion of Aboriginal female homicide victims have increased from 8% in 1984 to 23% in 2012 and is "a direct reflection of the decrease in non-Aboriginal female homicides."

[21] Justice Statistics 2001, *supra* note at 10–11.

[22] Canada, Office of the Correctional Investigator, *Annual Report 2013–2014*, by Howard Sapers (Ottawa: OCI, 2014), online: <www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20132014-eng.aspx#sIV>.

[23] Canada, Office of the Correctional Investigator, "Aboriginal Issues," online: <www.oci-bec.gc.ca/cnt/priorities-priorites/aboriginals-autochtones-eng.aspx>.

Napoleon has cautioned that 'narratives of despair' about the current plight of many Indigenous peoples risk foreclosing—or rendering invisible and unexamined—other narratives within both state and Indigenous societies and legal traditions.[24] The reality today is that no legal or other tradition stands alone. We are all exposed and affected by the narratives of others. The Canadian state exists as a massive social fact that is not going anywhere. Given that the state maintains a monopoly on the legitimate use of coercive force, any Indigenous justice process addressing criminal law matters will need to be negotiated and harmonized with state laws as well as require cooperation and resources from state legal actors.

In the past six years, I have addressed many audiences, academic and non-academic, Indigenous and non-Indigenous, and argued that we need to shift our assumptions in order to recognize, like Borrows, that Indigenous people are reasoning people in reasonable legal orders.[25] There are only so many times you can say this out loud and observe this is actually a new realization for most, before you feel a deep sorrow and something close to rage, even as a non-Indigenous person. The weight of radical absence,[26] the immensity of the erasure, denigration and dehumanization hits you. How can this still be a necessary shift in 2016? Yet it clearly is. There is still so much "unlearning" to do.[27]

Borrows has used the Anishinabek trickster figure, Nanabush, to explore Canadian law,[28] and it is high time that the visiting went respectfully in the other direction too. Surely, the common- law's best-loved mythical figure is the 'Reasonable Person.' One of the best judicial descriptions of the 'reasonable person,' by Justice Laidlaw in *Arland and Arland v Taylor*, is as follows:

> […] he is a mythical creature of law whose conduct is the standard by which the Courts measure the conduct of all other persons and find it to be proper or improper in particular circumstances as they may exist from time to time. He is not an extraordinary or unusual creature; he is not superhuman; he is not required to display the highest skill of which anyone is capable; he is not a genius who can perform uncommon feats,

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[24] Val Napoleon, "Indigenous Citizenship and the Law" (Social Diversity and Education Office's Indigenous Education Series Public Lecture delivered at McGill University, 19 February 2013) [unpublished] [Napoleon, "Indigenous Citizenship"].

[25] A discussion of Borrows' shifts can be found Friedland, "Reflective Frameworks," *supra* note 3 at 153.

[26] Boaventura de Sousa Santos, "Beyond Abysmal Thinking: From Global Lines to Ecologies of Knowledge", *Eurozine* (29 June 2007), online: <www.eurozine.com/articles/2007-06-29-santos-en.html>.

[27] Sara Anderson, KAIROS Canada Education Associate, talks about the experiential "Blanket Exercise" she facilitated in many of the TRC events, to educate people about the real history of Indigenous dispossession, resistance and resilience, stating, "It is my hope that more people will be able to begin the process of unlearning the story they've been told their whole lives. Only then will we be able to walk on the path of reconciliation and create a new story for Canada." See Sara Anderson, "Unlearning Canada's History: The Blanket Exercise" (13 May 2015), *Rabble.ca* (blog), online: <rabble.ca/blogs/bloggers/kairos-canada/2015/05/unlearning-canadas-history-blanket-exercise>.

[28] John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 51 and generally.

> nor is he possessed of unusual powers of foresight. He is a person of normal intelligence who makes prudence a guide to his conduct. […] His conduct is the standard "adopted in the community by persons of ordinary intelligence and prudence."[29]

I think we need a reasonable Indigenous person to help us navigate out of the narratives of despair, by moving us beyond just ameliorating current social ills, or accepting unexamined practices, to understanding a process of explicit reasoning through particular Indigenous laws. I think we need to do this with specificity, to avoid pan-Indigenous generalities, and so I will do this through the reasonable *Cree* person.

The reasonable Cree person, as an ordinary person of normal intelligence and prudence, is clearly a cut above the mythical images of Indigenous peoples such as lawless, vanishing, performing, essentialized,[30] or "arcadians or barbarians".[31] At the same time, the reasonable Cree person does not "require the wisdom of Solomon",[32] and thus falls well below the equally mythical creatures of the "wise old elder," or "noble" selfless environmental stewards.[33] Rather, the reasonable Cree person muddles along like the rest of us, an ordinary human actor who is capable of understanding and engaging rationally with laws.

Some legal theorists focus not on the more formal manifestations of law, but rather on the legal reasoning of ordinary actors ordering their affairs *through* law. Lon Fuller argues that law can be seen as a "language of interaction" that creates meaning and predictability in people's social behaviour over time.[34] Gerald Postema maintains systems of law actually depend, for their force, not on traditional notions of habituation and enforcement, but rather, whether they make sense "as practical guides for self-directing agents … only when they are set in context of concrete practices, attitudes and patterns of social interaction."[35] Fuller and Postema suggest that a vital site of legal reasoning is in the daily lives of citizens who use law as a practical guide to reason through and make decisions in their own specific social circumstances. The reasonable Cree person is just this—an ordinary legal actor who uses the Cree legal tradition as a practical guide to think through and make

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[29] *Arland and Arland v Taylor*, [1955] OR 131 at 142, [1955] 3 DLR 358 (CA).

[30] See descriptions of non-Indigenous people's images of Indigenous peoples under these and other categories in Daniel Francis, *The Imaginary Indian: The Image of the Indian in Canadian Culture* (Vancouver: Arsenal Pulp Press, 1992).

[31] James B Waldram, *Revenge of the Windigo: The Construction of the Mind and Mental Health of North American Aboriginal Peoples* (Toronto: University of Toronto Press, 2004) at 300 [Waldram, *Revenge of the Windigo*], talking about the obvious pervasive influence of a "primitivist discourse" of Indigenous peoples as "arcadians or barbarians" on researchers leading to conflicting and contradictory portraits of Indigenous peoples in the mental health field.

[32] *Stewart v Pettie,* [1995] 1 SCR 131 at 150, 121 DLR (4th) 222.

[33] Francis, *supra* note 30.

[34] Lon Fuller, "Human Interaction and the Law" (1969) 14 Am J Juris 1 at 2.

[35] Gerald J Postema, "Implicit Law" (1993) 13:3 Law & Phil 361 at 375–76.

reasonable and principled decisions, when, like the rest of us, she is called to judgment.[36]

III. A LOGICAL STARTING POINT

The reasonable Cree person cannot time-travel, but begins at a logical starting point. The logic goes like this: For thousands of years prior to European contact or 'effective control,' Indigenous peoples lived here, in this place, in groups. We know that when groups of human beings live together, they have ways to manage themselves and all their affairs.[37] This task of coordination is "the most common of common denominators in law."[38] As stated above, Indigenous societies must have faced the inevitable and universal issues of human violence and vulnerability for millennia. Therefore, as a matter of logic alone, the reasonable Cree person's starting point for any inquiry is that, *at some point*, and for a very long time, Cree and other Indigenous peoples managed and responded to these universal human issues successfully enough to maintain civil societies.

It feels a bit embarrassing to even have to point this out as a logical starting point, but it is important to do so, because the myth of Indigenous people as lawless—as people without any internal regulation or intellectual resources for managing their own affairs—has too often been used as a trope for European theorists and jurists to make claims about property and other rights, with no basis whatsoever.[39] There have been devastating political and *legal* consequences for Indigenous societies based on illogical assumptions about an absence of law.[40] Dispensing with illogical starting points doesn't lead the reasonable Cree person to subscribe to a utopian vision of Indigenous legal traditions generally, or of responses to human violence and vulnerability specifically. However, she has no logical reason to think Indigenous laws didn't work well enough for thousands of years.[41] Thus she can approach Cree and other Indigenous legal traditions, not as non-existent or as paragons of perfection, but as reasonable legal orders with reasoning people. That is the logical starting point.

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[36] Jennifer Nedelsky, "Judgment, Diversity, and Relational Autonomy" in Ronald Beiner & Jennifer Nedelsky, eds, *Judgment, Imagination, and Politics: Themes from Kant and Arendt* (Lanham, MD: Rowman & Littlefield, 2001) 103 at 103.

[37] Lon Fuller describes law as "a direction of purposive human effort" consisting in "the enterprise of subjecting human conduct to the governance of rules": Lon Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964) at 130 [Fuller, *Morality of Law*].

[38] Webber, "Grammar of Customary Law," *supra* note 2 at 583.

[39] *Ibid* at 591.

[40] See e.g. James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995) at 65; Michael Asch & Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R v. Sparrow*" (1991) 29:2 Alta L Rev 498 at 507.

[41] In Napoleon, *Ayook*, *supra* note 8, this argument is made persuasively throughout.

IV. THE CREE LEGAL TRADITION AS A REASONING PROCESS

The Cree reasonable person knows that Indigenous and non-Indigenous human beings are reasoning, feeling, imagining, and seeking beings. She knows that we are also vulnerable beings. The reasonable Cree person is not a stand-in for all Cree people, nor does she speak for the Cree people as a whole. What makes the reasonable Cree person *Cree* is not physical location, biological identity, or blood quantum; rather, it is that she reasons with and through the Cree legal tradition. She is a mythological figure of Cree legal thinking.

There is a difference between the common understanding of law and a *legal tradition*, although they are interconnected concepts.[42] It appears the most commonly understood and widely used definition of law is rules pertaining to social conduct. At the very least, theorists seem to agree that rules pertaining to social conduct seem to be a necessary *component* of all law.[43] Joseph Raz adds that people "need not be aware of rules as legal rules in order to be guided by rules which are in fact legal" and argues that "law can and does exist in cultures which do not think of their legal institutions as legal".[44] Yet lists of do's and don'ts are not terribly useful indicators of any law. Rules, or even principles, can become incomprehensible and even meaningless without an understanding of larger narratives they embody or are a part of.[45]

James Boyd White explains that "knowledge of the law is like knowledge of a language": it is impossible to reduce it to a set of rules. Rather, knowledge of it "consists of being able to use it more or less well, in one set of the situations or another."[46] Any first year law student learns this quickly enough. Just knowing the rules is never sufficient. Martin Krygier argues that this aspect of law both embodies particular traditions and is "a profoundly traditional social practice."[47] Participating in such a tradition "involves sharing a way of speaking about the world which, like language...shapes forms and in part envelops the thought of those who speak it and think through it." This will make it "difficult for insiders to step outside of it or for outsiders to enter and participate in it untutored." Legal traditions provide not just

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[42] Law itself is an endlessly debated concept in western societies, with many "diverse, strange and even paradoxical" definitions: HLA Hart, *The Concept of Law*, 2nd ed (Oxford: Oxford University Press, 1997). Hart begins his classic text (at 1) by observing: "Few questions concerning human society have been asked with such persistence and answered by serious thinkers in so many diverse, strange and even paradoxical ways as the question 'What is law?"

[43] See e.g. Joseph Raz, "Can There be a Theory of Law?" in Martin P Golding & William A Edmundson, eds, *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Oxford: Blackwell, 2005) 324 at 325; Fuller, *Morality of Law*, *supra* note 37 at 106; Hart, *ibid* at 3.

[44] Raz, *ibid* at 337. Raz maintains (at 340) that the "concept of law is among the culture-transcending concepts. It is a concept which picks out an institution which exists even in societies which do not have such a concept."

[45] See Robert M Cover, "Nomos and Narrative" (1983) 97:1 Harv L Rev 4 at 4–5.

[46] James Boyd White, "Legal Knowledge" (2002) 115:5 Harv L Rev 1396 at 1397 [White, "Legal Knowledge"].

[47] Martin Krygier, "Law as Tradition" (1986) 5:2 Law & Phil 237 at 239.

social rules, but also "substance, models, exemplars and a *language* in which to speak within and about law."[48]

When we speak about Cree, or other Indigenous legal traditions then, we are talking about more than social rules. We are speaking about the Cree narratives that give social rules meaning, that make them meaningful, and that make sense of the world around Cree individuals and communities. We are speaking about the languages through which this meaning-making occurs. Legal traditions are not only prescriptive, as norms that have "endured in different iterations in different times",[49] but also *descriptive*. Martin Krygier says participation in any tradition, actually "shapes forms and in part envelops the thought of those who speak it and think through it."[50] We not only turn to our legal traditions for information to solve present problems, we actually use them to *think through* the problem in the first place, to decide if it is a solvable problem or a problem at all. This is why legal meaning is actually world-making, why it becomes "the world in which we live".[51]

We are reasoning, feeling, imagining, and seeking beings; we crave meaning from our experiences.[52] White calls us "meaning-making creatures".[53] MacIntyre says that we are "essentially […] story-telling animal[s]".[54] Recent cognitive research has demonstrated these descriptions aren't mere rhetoric. Our need for meaning is not secondary, but rather integral to our "know-how" and our reasoning processes themselves. Current cognitive research shows that stories actually are "a basic principle of the mind. Most of our experience, our knowledge, and our thinking are organized as stories."[55] As well, logical and narrative thinking complement each other. Narrative thinking structures experience itself and makes experience communicable to others.[56] The complex, multi-vocal, living, evolving *reasoning* process that is a legal tradition gives us the necessary narratives to create and share meaning with each other.

Cree and other Indigenous legal traditions were dismissed, displaced, and denigrated for generations by powerful state actors. All judgment of the particular

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[48] *Ibid* at 244.

[49] Katharine T Bartlett, "Tradition, Change, and the Idea of Progress in Feminist Legal Thought" (1995) 1995:2 Wis L Rev 303 at 312.

[50] Krygier, *supra* note 47 at 244.

[51] Cover, *supra* note 45 at 5.

[52] James Boyd White, *Living Speech: Resisting the Empire of Force* (New Jersey: Princeton University Press, 2006) at 41, arguing: "This capacity is the deepest nerve of our life, and our instinct to protect it and its freedom at almost any cost is a right one."

[53] *Ibid* at 41.

[54] Alasdair MacIntyre, *After Virtue: A Study in Moral Virtue*, 3rd ed (Indiana: University of Notre Dame Press, 2007) at 216.

[55] Lorie M Graham & Stephen M McJohn, "Cognition, Law, Stories" (2008) 10:1 Minn J L Sci & Tech 255 at 280.

[56] Krygier, *supra* note 47 at 4.

substantive content of these legal traditions aside, for better or worse, they were part of the narrative processes through which Cree human experiences were made comprehensible and communicable to others, and through which Cree know-how, reasoning, and judgment developed for generations. John Gray argues eloquently:

> What makes us essential… is what is most accidental. Indeed, the very meaning of anyone's life is a matter of local knowledge, and the greatest disaster that can befall any community is that the shared understandings – the myths, rituals and narratives – that confer meaning on the lives of its participants be dissipated in too rapid or too sweeping of cultural change.[57]

To deprive someone of their stories is, as MacIntyre puts it in the case of children, to "leave them unscripted, anxious stutterers in their action as well as their words."[58] The lack of an intelligible narrative to place one's actions and experiences into is an extremely deep loss, community destroying, and potentially life-threatening.[59] It is not rational to dismiss or ridicule most or all of a people's collective reasoning processes, developed over generations, and then dismiss their practices as irrational.

This is why positing a historic utopia cannot adequately capture the importance of Cree legal traditions to human flourishing and social order within Cree communities, and the immensity of the terrible losses wrought by colonialism. In part, it is because of what it, too, erases: the ability to imagine the contemporary, reasonable Cree person; the value of Cree social rules, meaning-making, and world-making narratives; socially embodied generational conversations and debates; and the capacity to confidently respond to universal human and social issues. My own research results—some of which can be found in the *AJR Project's Cree Legal Traditions Report*, the *Aseniwuche Winewak Cree Justice Project Report*, and my explication of a Cree animating or meta-principle, *wah-ko-to-win* (our inter-relatedness)—are "just scratching the surface" of the vast Cree intellectual resources that make up the multi-generational project that is the Cree legal tradition.[60]

The reasonable Cree person may disagree with other reasonable people about the applicability of certain Cree legal principles in certain cases. No complex tradition is ever univocal[61] or internally consistent.[62] Complex traditions such as law

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[57] John Gray, *Enlightenment's Wake: Politics and Culture at the Close of the Modern Age* (London: Routledge, 1995) at 105. Oakeshott takes this one step farther and argues that **"**[c]hange is a threat to identity and every change is an emblem of extinction": Michael Oakeshott, *Rationalism in Politics and Other Essays* (Indianapolis: Liberty Press, 1991) at 410.

[58] MacIntyre, *supra* note 54 at 216.

[59] MacIntyre, *ibid* at 217. Arguing, "When someone complains—as do some of those who attempt or commit suicide—that his or her life is meaningless, he or she is often and perhaps characteristically complaining that the narrative of their life has become unintelligible to them, that it lacks any point".

[60] In the Aseniwuche Winewak Justice Project Report, *supra* note 10 at 28, a community elder commented on his review of the Cree legal principles discussed and identified by stating: "Cree legal principles are just scratching the surface. Need more work."

[61] Frederick L Will, "Reason and Tradition" (1983) 17:4 J Aesthetic Education 91 at 100. See also Bartlett, *supra* note 49 at 317: "Traditions are not unitary, coherent, or integrated wholes."

[62] Bartlett, *ibid*.

never stand alone. Not only are they made up of multiple traditions themselves, but they are also embedded in other traditions, within a broader culture, and ultimately within the material reality that includes the natural world. This means traditions are always facing external changes, bringing change in one way or the other.[63] Vitally, a legal tradition can also change by not responding to new circumstances. Bartlett points out that when a tradition "stops making sense under existing circumstances" it will not continue. This means that "the strength of a legal tradition is not how closely it adheres to its original form but how well it is able to develop and remain relevant under changing circumstances."[64] In other words, legal traditions must change over time. In reference to her work regarding the Gitksan legal order, Napoleon points out:

> the reality is that over time, implicit and explicit Gitksan law will reflect the world around it – including personal, political, economic, and legal relationships with other peoples. This does not mean, however, that Gitksan people will somehow cease to be Gitksan people, but rather that the Gitksan legal order now reflects the realities [of the present].[65]

Tradition is never "fixed, stable, and unchanging", but rather something that "evolves and builds on what preceded it much like the common law."[66]

Just as the Cree legal tradition, like the Gitksan legal tradition, reflects the realities of the present, so too does the reasonable Cree person's legal reasoning. The reasonable Cree person's thinking reflects a long history of Cree legal thought and experience, but also the current political, social, economic and natural realities of today and legal relationships with other peoples. She knows Cree laws hold no simple answers or silver bullets and implementing Cree legal principles is a lot of hard work. She considers, as all legal actors must, whether certain principles are applicable today, and what might need to be changed. She knows each case is different, and so is each community. She is keenly aware of the political context, realities, and resources around her.

The reasonable Cree person is a person of ordinary intelligence and prudence. However, her reasoning emerges from the Cree legal tradition, rather than the common law tradition. While this is the barest sketch of her resources for practical reason, it is enough, for our purposes, to proceed with the reasonable Cree person as a figurative representative of Cree legal thought. And so we can take our reasonable Cree person visiting through the narratives within Canadian popular, legal, and political thinking, and to the existing spaces for addressing the issues she

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[63] Edward Shils, *Tradition* (Chicago: University of Chicago Press, 1981) at 142, 151. Shill's sources of external change include changes in the environment, demographic changes, military intrusion, emigration, trade, and technological advances.

[64] Bartlett, *supra* note 49 at 331.

[65] Napoleon, *Ayook*, *supra* note 8 at 49. Napoleon's date of writing was 2008.

[66] Bartlett, *supra* note 49 at 308. MacIntyre points out that traditions are also embedded in the "larger and longer history of the tradition" as well. These practices also make tradition "intelligible" to us in the present (MacIntyre, *supra* note 54 at 222).

and too many other Indigenous men, women, and children face daily in contemporary Canada. We must explore whether she could be welcome, or even imaginable within them.

The Cree reasonable person is not coming empty-handed to her engagement with Canadian media, legal, and political narratives, regardless of whether this engagement is forced, coerced, or unavoidable. Her mind is not an empty vessel formed in an imaginary *terra nullis*. Rather, she carries with her a "vast storehouse" of experience and solutions that influence her perceptions and reasoning through of this engagement.[67] This is why the concept of the reasonable Cree person can help us more productively and accurately begin a conversation of why it is so vital to access, understand, and apply Cree legal principles to the relatively recent, but also ugly, urgent, and devastating social circumstances of present day.

These dangerous social conditions lead to an important question: Is the reasonable Cree person alive? Napoleon asks how we can confront the appalling violence against and erasure of Indigenous women, while still viewing Indigenous women as active agents.[68] How do we fully acknowledge the horror and danger Indigenous women face; the relentless powerlessness, fear, and grief ricocheting through their lives, loves, and relationships; the mental and emotional toll of existing under the constant threat and actualization of violence, within often bleak conditions of vulnerability? How do we do this while still acknowledging Indigenous women are first and foremost citizens of their First Nations and of Canada—indeed, legal agents, who are capable of and indeed constantly reasoning and acting to reach goals, to build lives, to create safety and often to protect and care for others?[69]

There are no easy answers. I can identify nothing about our Cree reasonable person that would protect her from suffering the fate of far too many Indigenous women and girls across Canada. Nothing.[70] Starting the conversation from a different place and acknowledging her reasoning process does not render her invincible. Because this is just an article, as the author it is in my control to ensure she survives—something I unfortunately cannot do for my own daughter or nieces in real life.

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[67] Krygier, *supra* note 47 at 248, argues the past, in a tradition, is not so much a historical truth or golden moment in time we seek to recover, but rather "a vast storehouse to be searched for solutions to present problems."

[68] I am paraphrasing Napoleon, "Indigenous Citizenship," *supra* note 24 at 17.

[69] *Ibid*.

[70] Contrary to popular belief that "high risk" lifestyles cause the murders of Indigenous women, the *vast* majority of Indigenous female homicide victims are not involved in the sex trade (88%) or otherwise supporting themselves through illegal means (82%). RCMP Missing and Murdered Aboriginal Women Report, *supra* note 18 at 17.

V. NARRATIVES ABOUT VIOLENCE AGAINST INDIGENOUS WOMEN AND CHILDREN

A. The Media Narrative

Bradley Gorham discusses the powerful role of the media in constructing common-sense reality in any society. He argues that much of the knowledge that forms the basis on which we behave is a socially constructed "agreement reality" rather than experiential or "objective reality." As "much of our knowledge—those images and pictures in our heads—comes not from personal experiences but from other people," the media can play a larger role than we might think in our beliefs and assumptions about the world.[71] Gorham calls this the "power of myth" which is "all those unstated, unquestioned, and unnoticed beliefs we assume about the world."[72] A subset of these "social reality beliefs" is stereotypes, defined as "understandings about particular social groups that we have learned from our social world."[73] Media provides us with social information, which includes dominant myths and stereotypes, both constructed as natural and unarguable.[74] This constructed social reality can remain at a pre-reflexive level, deeply informing the scope of our reactions and judgments of objective reality.

Mark Cronlund Anderson and Carmen L Robertson relentlessly demonstrate the pervasive and pejorative colonial, racialized, and essentialized images of Indigenous people in the main stream Canadian media.[75] Their central claim in the book is that since the nineteenth century, mainstream Canadian newspapers have portrayed Indigenous peoples in ways that promote colonial constructs as just plain common sense for the majority of Canadians:

> Colonial representations as common sense, naturalized and totalized, comprise the gist of what reflects Canada's past and present colonial imaginary in the printed press.[76]

These representations consist of endless variations and intersections of three essentialized characteristics: moral depravity, innate inferiority, and a lack of evolution, or "stubborn resistance to progress", continuing, in various forms, to present day.[77]

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[71] Bradley Gorham, "Stereotypes in the Media: So What?" (1999) 10:4 Howard J Communications 229 at 232.

[72] *Ibid*.

[73] *Ibid*. He stresses that "[s]uch meanings and representations are not universally agreed upon".

[74] *Ibid*.

[75] Mark Cronlund Anderson & Carmen L Robertson, *Seeing Red: A History of Natives in Canadian Newspapers* (Winnipeg: University of Manitoba Press, 2011).

[76] *Ibid* at 9.

[77] *Ibid* at 6–7.

Anderson and Robertson discuss more recent news stories about violence and conflicts between Aboriginal people, and it is here where their central insight—that the demeaning images of Aboriginal peoples in the news have become an unquestioned "common-sense" in the Canadian collective imaginary—comes into play for the reasonable Cree person today. Political and legal decision-makers, non-Indigenous and Indigenous alike, read the same mainstream newspapers. Charles Taylor has pointed out that "misrecognition shows not just a lack of due respect. It can inflict a grievous wound, saddling its victims with crippling self-hatred."[78] It is at least worth questioning to what extent this relentless misrecognition has fed back into lateral violence within many Aboriginal communities today, which, in turn, continues to provide ample fodder for news stories to perpetuate this misrecognition. This constructed social reality may make it difficult for many people to *recognize* the complexity of today's painful iterations, let alone the possibility of talking about them honestly, compassionately, and respectfully, according to Cree legal principles.[79]

B. State Law's Narratives

State legal systems tell stories of their own and currently have unique power for stifling discussion and debate about these stories.[80] According to the primary story about law in our society, the law is a stable ground of legal rules and principles, where suffering caused by law or mistakes in the legal process are unfortunate but lesser evils in the overall cost-benefit analysis.[81] Legal racism and inequality are relics of the past, which the legal system is slowly overcoming.[82] The judicial process "knowingly struggles against" and "aspires to an autonomy from distributional inequalities."[83] In Canada, we add to this the *Charter* age of not just formal equality, but substantive equality, where we seek not mere equality of process, but equality of opportunities and outcomes.[84]

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[78] Charles Taylor, "The Politics of Recognition" in Amy Gutman, ed, *Multiculturalism* (New Jersey: Princeton University Press, 1994).

[79] In recent years, there has been a notable shift toward more even handed, fair, and Indigenous led media coverage of Indigenous issues in Canada. See, for example, the work of CBC Aboriginal, online: <www.cbc.ca/news/aboriginal>; and in particular their focus on missing and murdered Indigenous women: <www.cbc.ca/news/aboriginal/topic/Tag/Missing%20and%20Murdered%20Indigenous%20Women>.

[80] Pierre Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field", translated by Richard Terdiman (1987) 38:5 Hastings LJ 805 at 838.

[81] Louis E Wolcher, "Universal Suffering and the Ultimate Task of Law" (2006) 24:2 Windsor YB Access Just 361 at 393.

[82] Richard Delgado & Jean Stefancic, *Critical Race Theory: An Introduction* (New York: New York University Press, 2001) at 91.

[83] Owen M Fiss, "Against Settlement" (1984) 93:6 Yale LJ 1073 at 1078.

[84] Jonathan Rudin, "Aboriginal Justice and Restorative Justice" in Elizabeth Elliot & Robert Gordon, *New Directions in Restorative Justice: Issues, Practice, Evaluation* (Portland, OR: Willan, 2005) 89 at 103–109 [Rudin, "Aboriginal Justice"].

These noble and aspirational narratives are rooted in an even more basic claim of rationality. Adjudication is seen as "a device which gives formal and institutional expression to the influence of reasoned argument in human affairs."[85] It thus "assumes a burden of rationality."[86] In legal practice, courts are obligated to give reasons,[87] and, as already discussed, one of the most familiar conceits in legal reasoning is the "common-law's famous lyricism" of the "reasonable person" who, unsurprisingly, often "turns out to bear a rather suspicious similarity to the judge."[88]

Accessing the state legal system's rationality comes with a significant catch, beyond even 'access to justice' issues. In order to access its power, one must tacitly agree to its "rules and conventions" and submit to what Pierre Bordieu calls the "juridical construction of the issue."[89] This requires a process of "translation"[90] or "conversion"[91] through which ordinary experience is completely redefined into a recognized legal category.[92] This means that whatever the original experience or need is, it "tends to be converted into a claim of right or an accusation of fault or guilt."[93] Lon Fuller spells this out plainly:

> A naked demand is distinguished from a claim of right by the fact that the latter is a demand supported by a principle; likewise, a mere expression of displeasure or resentment is distinguished from an accusation by the fact the latter rests upon some principle.[94]

On top of this conversion, lived experience and need (demand or displeasure) are further narrowed by: first, the need to come to some relatively "black and white" decision; second, the need to conform one's claims to recognized procedures; and finally, the reliance on precedent to reach a decision.[95]

Bourdieu argues that the fact that the original parsing into categories, decision-making, and interpretation of precedent are carried out by actors who are largely from the dominant class in any society, means that the "ethos of legal

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[85] Lon Fuller, "The Forms and Limits of Adjudication" (1978) 92 Harv L Rev 353 at 366 [Fuller, "Adjudication"].

[86] *Ibid*.

[87] *R v Sheppard*, 2002 SCC 26 at paras 5, 15, [2002] 1 SCR 869.

[88] Mayo Moran, *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* (Oxford: Oxford University Press, 2003), as quoted in Allen M Linden, Lewis N Klar & Bruce Feldthusen, *Canadian Tort Law: Cases, Notes and Materials*, 12th ed (Toronto: LexisNexis Canada, 2004) at 181.

[89] Bourdieu, *supra* note 80 at 831.

[90] *Ibid* at 833–834.

[91] Fuller, "Adjudication," *supra* note 85 at 369.

[92] Bourdieu, *supra* note 80 at 831.

[93] Fuller, "Adjudication," *supra* note 85 at 369.

[94] *Ibid* at 369.

[95] Bourdieu, *supra* note 80 at 832.

practitioners" and the "immanent logic of legal texts" that justify and determine outcomes, "are strongly in harmony with the interests, values, and world-views of these dominant forces."[96] In this way, class, gender, and racial inequities (which converge with the interests of the dominant class[97]) are perpetuated through the very legal culture that makes such grand claims of liberty, equality, and justice.[98] Individuals are, for the most part, constructed as ahistorical juridical equals. The combination of State law's claim to rationality and unquestioned power to judge authoritatively—along with its power to define what is justiciable—obliterates a great deal of context and experience from legal judgments, including the agency and judgment of Indigenous actors, the broader social realities affecting individuals, all relational networks, and any explicitly Indigenous legal principles.

The courts have a unique power to claim and name any issue in a way that has profound effects on the societal perception of that issue.[99] In cases of violence against Indigenous women and children, courts determine guilt or innocence of individuals, allocate individual responsibility, and select individual punishment for harms done.[100] Where children are involved or impacted, courts determine more complex decisions of child apprehension or custody orders. The focus is on decontextualized individuals, "lifestyles," and "choice," and obfuscates the material circumstances in which these choices are made.[101] This focus also ignores the impacts of and impacts on those individuals' relational networks completely. Families and communities are reduced to a factor in the "best interests of the child" analysis, a small consideration in sentencing or a regrettable afterthought. This reinforces the media's narratives, because Indigenous individuals are juridically constituted as individual offenders or victims. Without a meta-principle like *wah-ko-to-win*, the problem can be reduced to one of "crime" or individual "high-risk lifestyles" or Indigenous women's failures to protect themselves or their children.

C. The Trauma Narrative

The primary counter-narrative to these dominant ones explains violence and victimization against women and children in Indigenous communities as an aspect of intergenerational trauma, resulting from massive social upheaval inflicted

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[96] *Ibid* at 842.

[97] Delgado & Stefancic, *supra* note 82 at 7.

[98] Bourdieu, *supra* note 80 at 842.

[99] *Ibid* at 848.

[100] Val Napoleon, "Who Gets to Say What Happened? Reconciliation Issue for the Gitxsan" in David Kahane & Catherine Bell, eds, *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004) 176 at 177.

[101] Marlee Kline, "Complicating the Ideology of Motherhood: Child Welfare Law and First Nation Women" (1993) 18 Queen's LJ 309 at 321. See 319–330 for a broader discussion of how the law focuses on individual characteristics and obfuscate the material conditions within which choices are made.

deliberately or recklessly by colonial mechanisms.[102] The idea that the current appalling rates of violence and victimization in many Indigenous communities is linked to intergenerational trauma is widespread, and widely accepted and used by both non-Indigenous and Indigenous scholars, politicians, and activists.[103] Several hazy terms have been used to describe this. There is the "legacy" in reference to intergenerational abuse stemming from the residential schools in Canada, [104] "'historical trauma,' 'historical legacy,' 'American Indian holocaust' […] 'intergenerational post-traumatic stress disorder,' [and] the soul wound".[105]

James Waldram explains the central contentions of all these terms are that Indigenous people have

> experienced generations of unresolved trauma and grief, including 'disenfranchised grief' that cannot be acknowledged or mourned, and [have] internalized dysfunctional emotions and behavior to the point where they [have] become normative.[106]

The result of colonialism has been that Indigenous people's "soul, their very essence" has become wounded. This is exacerbated by other factors such as an "obligation to share ancestral pain" and "acculturative stress". [107] A good example of this is found in a study purporting to explain the "intergenerational transmission" of trauma.[108] The authors call for a new "model of historic trauma transmission" that they believe will better explain current "maladaptive social and behavioral problems" and "endemic" complex post traumatic stress disorder (PTSD) in Indigenous communities. They assert "hidden collective memories" of trauma or "collective non-remembering" of epidemics throughout North America from the 1400s to the 1800s make Indigenous peoples "more susceptible to the deeper feeling of grief and trauma in their day to day lives."[109] Regional and cultural diversity, contested historical 'truths' and very different colonial experiences across Canada all

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[102] John Borrows writes cogently about the massive social upheaval created by colonial policies and actions that goes far beyond residential schools in John Borrows, "Crown and Aboriginal Occupations of Land: A History & Comparison" (Research Paper prepared for the Ipperwash Inquiry, Section 2, 15 October 2005) at 57–76, online: <https://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/pdf/History_of_Occupations_Borrows.pdf>.

[103] Waldram, *Revenge of the Windigo*, *supra* note 31 at 234 and 316–319.

[104] The Aboriginal Healing Foundation described its mission as supporting the healing needs from the "legacy of abuse" from the residential schools: Aboriginal Healing Foundation, "Vision, Mission, Values", online: <www.ahf.ca/about-us/mission>. "The legacy" is used extensively throughout Schedule N of the Indian Residential Schools Settlement Agreement: Canada, *Indian Residential Schools Settlement Agreement*, Schedule N at 1, online: <www.residentialschoolsettlement.ca/settlement.html> [Schedule N].

[105] Waldram, *Revenge of the Windigo*, *supra* note 31 at 225.

[106] *Ibid*.

[107] *Ibid*.

[108] Cynthia C Wesley-Esquimaux & Magdalena Smolewski, *Historic Trauma and Aboriginal Healing* (Ottawa: Aboriginal Healing Foundation, 2004), online: <www.ahf.ca/downloads/historic-trauma.pdf>.

[109] *Ibid* at iii–iv.

disappear into one "meta-narrative" of historical trauma[110] set against an idyllic pre-contact era devoid of any trauma at all, where all Indigenous people were somehow all interconnected.[111]

Waldram argues that it is clear Indigenous peoples use trauma "not always as a pathological condition, but as a metaphor for their historical relationship with the European settler society."[112] The disjunction between this metaphorical use of trauma and the clinical diagnosis of PTSD, as well as the difficulties inherent in unpacking the concrete mechanics of how such a concept as "historical trauma" is actually transmitted are important (and puzzling) questions that remain largely unexamined.[113]

More importantly, for our purposes here, while this meta-narrative of trauma certainly makes the case for the ongoing damage of historic oppression and the need for healing,[114] it does not make the case for Indigenous agency or judgment in the face of current violence and victimization risks. While acknowledging the immense social suffering Indigenous peoples have endured (and continue to endure) due to colonialism, the trauma narrative does not challenge the notion of Indigenous peoples as "simply victims, passively accepting their fate as colonized beings, internalizing pathology to the point where it becomes the norm in families and communities".[115]

Recognizing Indigenous agency, judgment, and responsibility is a crucial difference between a political narrative of trauma and a "trauma-informed" approach to current social ills, which recognizes the impacts of trauma and responds with empathy and hope.[116] Waldram argues that both post-colonial theory and sound therapeutic practice calls for "decentring historical analysis" and retelling the story of trauma in a way that describes "not simply the trauma but the ways in which the individual dealt with and also opposed it."[117] Otherwise, the individual remains a "passive recipient and damaged product of oppression, thus entrapping her in a narrative of decline".[118] Judith Herman also maintains that it is essential that therapists avoid infantilizing trauma survivors and instead insist that, while she is

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[110] Waldram, *Revenge of the Windigo*, *supra* note 31 at 227.

[111] *Ibid* at 223.

[112] *Ibid* at 236.

[113] *Ibid*.

[114] *Ibid* at 229.

[115] *Ibid* at 227.

[116] See e.g. Susan J Ko et al, "Creating Trauma-informed Systems: Child Welfare, Education, First Responders, Health-care, Juvenile Justice" (2008) 39:4 Professional Psychology Research & Practice 396. A trauma-informed perspective also underlies the philosophy of healing or problem-solving courts, discussed later in this chapter.

[117] Waldram, *Revenge of the Windigo*, *supra* note 31 at 228.

[118] *Ibid*.

"not responsible for the injury that was done to her, she is responsible for her recovery." [119]

When "trauma transmission" subsumes continuing violence and victimization, there is another overlooked aspect of stopping that trauma. Herman stresses that taking responsibility has an added dimension for survivors who have harmed others, or committed atrocities themselves, whether in desperation, under duress, or in conditions of "slow degradation". Understanding the extreme circumstances these decisions were made under is *not* enough.[120] Rather, "the survivor needs to mourn for the loss of her moral integrity and to find a way to atone for what cannot be undone." Acknowledging responsibility and finding appropriate forms of restitution for one's own actions does not exonerate the perpetrator, but actually "reaffirms the survivor's claim to moral choice" and opens the way "to the assumption of power and control" in the present.[121] In other words, the abdication of accountability is not conducive to healing. Rebuilding one's moral integrity requires accepting one's own agency and judgment in both past and present circumstances. This need is all the more pressing in the context of colonization, where Indigenous people's moral agency, intellectual capacity, and legal reasoning have been systemically devalued or dismissed by the dominant settler society for so long.

The "intergenerational trauma" narrative that has been widely adopted by Indigenous groups and allies reintroduces some crucial context and de-emphasizes individual culpability, but does nothing to seriously challenge the dominant media narratives of depravity and incapacity. The notion that Indigenous individuals and communities are suffering from intergenerational trauma, which is manifested in dysfunction and despair, and flows from generation to generation, actually fits seamlessly. It simply explains more sympathetically the reasons for the depth and breadth of dysfunction and failure. This story is compelling, and with every front-page horror or tragedy, it becomes more so. Like every lie that proves itself, it contains a grain of truth in the honest compassion for painfully vulnerable and obviously suffering women and children in and from Indigenous communities. A cry of "racism" or cultural imperialism will do nothing to allay it. It simply polarizes the discussion further, so the conversations of colonial disruption and loss speak past the conversations of present horrors and loss as if these contend or cancel the other out. Unfortunately, the trauma narrative is fast becoming as much of a narrative of despair as the dominant media and legal narratives. These are not narratives that can accommodate the reasonable Cree person. Let us turn now to the possible spaces within the current justice system that might welcome her.

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[119] Judith Herman, *Trauma and Recovery: The Aftermath of Violence—From Domestic Violence to Political Terror* (New York: Basic Books, 1997) at 192.

[120] *Ibid*.

[121] *Ibid* at 193.

VI. SPACES FOR INDIGENOUS LAWS IN THE CANADIAN JUSTICE SYSTEM:

A. The Supreme Court's *Gladue* Principles and Directives:

In *R v Gladue*,[122] the Supreme Court recognized that:

> for many if not most aboriginal offenders, the current concepts of sentencing are inappropriate because they have frequently not responded to the needs, experiences, and perspectives of aboriginal people or aboriginal communities.[123]

In particular, the Court explained:

> 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.[124]

The Court found that the unique circumstances of Aboriginal offenders include their systemic and background factors as well as the "types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection."[125] In particular, the Court said Aboriginal understandings, ideals and conceptions of sentencing procedures and sanctions were important for Canadian courts to consider.

While acknowledging there was huge diversity between Aboriginal individuals and communities, the Court found there was enough evidence to acknowledge that in most Aboriginal societies, there was (1) a "primary emphasis upon the ideals of restorative justice" [126] and (2) a "common underlying principle" of the "importance of community-based sanctions."[127] Thus, considering restorative ideals "is extremely important to the analysis under s. 718.2(e)"[128] as is applying community based sentences whenever appropriate. The Court insightfully explained:

> It is often the case that neither aboriginal offenders nor their communities are well served by incarcerating offenders, particularly for less serious or

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[122] *R v Gladue*, [1999] 1 SCR 688, 171 DLR (4th) 385 [*Gladue*].

[123] *Ibid* at para 73.

[124] *Ibid* at para 70.

[125] *Ibid* at para 66.

[126] *Ibid* at para 70.

[127] *Ibid* at para 74.

[128] *Ibid* at para 70.

> non-violent offences. Where [community-based] sanctions are reasonable in the circumstances, they should be implemented. [129]

The Court stated strongly that, "In all instances, it is appropriate to attempt to craft the sentencing process and the sanctions imposed in accordance with the aboriginal perspective."[130]

A year later, in *R v Wells*,[131] the Supreme Court addressed the challenge of applying what had come to be known as *Gladue* principles in cases of serious and violent offences. The Court held that the more serious the crime, the less the background circumstances of the offender and the principles of restorative justice will apply to determining a fit sentence, and stressed that:

> Notwithstanding what may well be different approaches to sentencing as between aboriginal and non-aboriginal conceptions of sentencing, it is reasonable to assume that for some aboriginal offenders, and depending upon the nature of the offence, the goals of denunciation and deterrence are fundamentally relevant to the offender's community. […] [T]o the extent that generalizations may be made, the more violent and serious the offence, the more likely as a practical matter that the appropriate sentence will not differ as between aboriginal and non-aboriginal offenders, given that in these circumstances, the goals of denunciation and deterrence are accorded increasing significance.[132]

The Ontario Court of Appeal actually distinguished Aboriginal offenders from other racialized offenders who face similar systemic racism and background factors such as poverty and social dislocation. In *R v Borde*,[133] Rosenberg JA stressed that, while *Gladue* imposes an affirmative duty on judges to inquire into these factors in the case of Aboriginal offenders, it does not preclude them from doing so for non-Aboriginal offenders, as sentencing principles generally are "broad and flexible" enough to consider these in appropriate cases. However, he pointed out:

> An important part of the *Gladue* analysis hinged on the fact that the traditional sentencing ideals of deterrence, separation, and denunciation are often far removed from the understanding of sentencing held by Aboriginal offenders and their community. […] The importance that the Supreme Court attached to sentencing conceptions of Aboriginal communities results from the specific reference to Aboriginal offenders in s. 718.2(e). In this regard, Aboriginal communities are unique.[134]

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[129] *Ibid* at para 74.

[130] *Ibid* at para 74.

[131] 2000 SCC 10, [2000] 1 SCR 207 [*Wells*].

[132] *Ibid* at para 42.

[133] *R v Borde* (2003), 63 OR (3d) 417, 172 CCC (3d) 225 (CA) [*Borde* cited to OR]

[134] *Ibid* at para 32.

Twelve years after *Wells*, in 2012, the Supreme Court revisited the *Gladue* principles, in the context of their application for Aboriginal offenders that breach long-term supervision orders in *R v Ipeelee*.[135] Justice Lebel affirmed much of what was set out in *Gladue* and reiterated, even more strongly, the importance of considering Aboriginal communities' differing perspectives and conceptions of sentencing:

> The *Gladue* principles direct sentencing judges to abandon the presumption that all offenders and all communities share the same values when it comes to sentencing and to recognize that, given these fundamentally different world views, different or alternative sanctions may more effectively achieve the objectives of sentencing in a particular community.[136]

It is interesting that LeBel J linked the consideration of Aboriginal values and worldviews to the more *effective* achievement of sentencing objectives in particular communities.

There is strong, unambiguous language in *Gladue, Wells*, and *Ipeelee*, about the need to consider Aboriginal community's needs, experiences, and perspectives, including their understandings, values, worldviews, and differing conceptions of appropriate sanctions and *procedures*. The Ontario Court of Appeal cited the existence of these differing conceptions to distinguish Aboriginal offenders from other offenders suffering similar background circumstances. Despite this guidance, the *Gladue* analysis has, in practice, changed very little in the way of actual sentencing practices. The imperative of a *Gladue* analysis has largely been reduced unquestioningly to "*Gladue* Reports," which still focus primarily on social context evidence, such as common historical experiences and social disadvantages,[137] or even simply adding "*Gladue* factors," upon request, to standard pre-sentencing reports; and the report process is rife with practical problems of the costs, skills, and time to complete them.[138] In addition, even if the law requires *Gladue* reports, they rarely (if ever) have a practical effect on reducing or altering the sentence imposed for serious and violent crimes,[139] leading to a palpable lack of utility by offenders and defence counsel in such cases.[140]

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[135] *R v Ipeelee*, 2012 SCC 13, [2012] 1 SCR 433.

[136] *Ibid* at para 74.

[137] For a guide to the content recommended to include in *Gladue* reports, see Jay Istvanffy, *Gladue Primer* (Victoria, BC: Legal Services Society, 2011), available online: <www.legalaid.bc.ca/resources/pdfs/pubs/Gladue-Primer-eng.pdf>.

[138] See e.g. the discussion of the issues of implementation in Manitoba and the differences between this and the Gladue Court in Toronto, in David Milward & Debra Parkes, "*Gladue*: Beyond Myth and Towards Implementation in Manitoba" (2011) 35:1 Man LJ 84 at 85–86. See also Jonathan Rudin, "Aboriginal Over-representation and *R. v. Gladue*: Where We Were, Where We Are and Where We Might be Going" (2008) 40 SCLR (2d) 687.

[139] See e.g. *Gladue, supra* note 122; *R v Jacko,* 2010 ONCA 452, 101 OR (3d) 1; *Ipeelee, supra* note 135.

[140] See Milward & Parkes, *supra* note 138; Rudin, *supra* note 138. Anecdotally, after *Ipeelee,* one Alberta judge told me of Aboriginal offenders begging him to waive the *Gladue* report requirement, because

B. Current Access to Justice and Community Justice Initiatives for Aboriginal People

In addition to the *Gladue* principles being implemented through Gladue reports, there are initiatives across Canada that potentially ameliorate the current issues the mainstream justice system poses for Aboriginal individuals and, to some extent, Aboriginal communities. There appear to be four main alternative or supplementary models: Court worker Services, Problem-solving/Therapeutic courts, Aboriginal courts and Community based Restorative Justice or Healing Programs.

First, there are Court worker Programs to assist and support Aboriginal individuals to navigate the mainstream justice system in criminal and some youth and family court matters. The purpose of the Aboriginal Courtwork Program is "to help Aboriginal people in conflict with the criminal justice system obtain fair, equitable, culturally-sensitive treatment."[141] Court workers provide information, act as a liaison and even represent Aboriginal individuals in court matters, and may refer clients to legal resources, legal counsel and other health, educational, employment or community support services.[142] According to Justice Canada's website, the federal government has provided funding to provinces to run these programs since 1978, through "Access to Justice Services Agreements."[143] Most Aboriginal court worker programs are contracted by provinces to Aboriginal run agencies or bands to deliver services,[144] such as Native Counselling Services of Alberta,[145] the Ontario Federation of Indian Friendship Centres,[146] and Aboriginal Legal Services of Toronto in Ontario[147] and The Mi'kmaq Legal Support Network in Nova Scotia.[148]

Second, there are Problem-solving or Therapeutic courts across Canada, that Aboriginal individuals can and do access, even though many are not designed specifically or exclusively for Aboriginal people. Therapeutic courts are part of the regular court system, but aim to manage or resolve underlying socio-economic or

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they were experienced enough to know it would not reduce their sentence, and waiting for a writer was simply prolonging their time stuck in remand. They wanted to get sentencing over with so they could be transferred to a provincial or federal institution with better living conditions and access to programming.

[141] Canada, Department of Justice, "Aboriginal Courtwork Program," online: <www.justice.gc.ca/eng/fund-fina/gov-gouv/acp-apc/index.html> [Aboriginal Courtwork Program].

[142] *Ibid*.

[143] *Ibid*.

[144] *Ibid*.

[145] Native Counselling Services of Alberta, "Programs", online: <www.ncsa.ca/online/>.

[146] Aboriginal Courtwork Program, *supra* note 141.

[147] Aboriginal Legal Services of Toronto, "About", online: <http://www.aboriginallegal.ca/#!about/mainPage>.

[148] Mi'kmaq Legal Support Network, "Our Eskasoni", online: <www.eskasoni.ca/departments/12/>.

health issues that lead to repetitive criminal behaviour.[149] They include drug treatment courts, mental health courts, domestic violence courts, community courts, youth courts, and Aboriginal courts.[150] Problem-solving courts vary, but are distinctive in their active judicial interaction with and supervision of offenders, their non-adversarial, interdisciplinary team approach to address "recycling problems" underlying criminal behaviour,[151] and their holistic and collaborative decision-making and sentencing practices to "promote pro-social behaviours and positive change" in individual offenders.[152] In Canada, there are currently addiction or drug treatment courts, community or integrated courts that deal with offenders with poverty-related issues—including homelessness, addiction, and mental illness—mental illness courts, and domestic violence courts.[153]

Third, there are Aboriginal courts. These are sometimes seen as a subcategory of problem-solving or therapeutic courts and share most of the above common features and approach.[154] In addition to these, Aboriginal courts may "facilitate the trial court's ability to consider the unique systemic and individual factors that contribute to an Aboriginal person's criminal behaviour" and have knowledge and links to services for Aboriginal people within a particular community.[155] They may incorporate Aboriginal language, culture, and resources, and allow more time than a regular trial court to "seek alternatives to prison that are informed by Aboriginal understandings of justice."[156] In this, Aboriginal courts can be seen as a further actualization of the *Gladue* principles by actors in the mainstream justice system. Unfortunately, one way Aboriginal courts often differ from other problem-solving courts is additional funding. For example, there is no additional funding provided to the First Nations Courts in New Westminster,

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[149] Glen Luther, Mansfield Mela & Victoria J Bae, *Literature Review on Therapeutic Justice and Problem Solving Courts* (Saskatoon: University of Saskatchewan, 2013) at 12, online: <www.usask.ca/cfbsjs/documents/Lit%20Review%20MHC%20Saskatoon%20Academic%20Dec%202013.pdf >.

[150] Susan Goldberg, *Problem-solving in Canada's Courtrooms: A Guide to Therapeutic Justice* (Ottawa: National Judicial Institute, 2011) at 7–16, online: <https://www.nji-inm.ca/index.cfm/publications/?langSwitch=en>. See also Provincial Court of British Columbia, "Problem Solving Courts", online: <www.provincialcourt.bc.ca/about-the-court/court-innovation/problem-solving-courts>. In the United States, there are also unified family courts and re-entry courts for sex offenders and other offenders re-entering society after imprisonment. See Bruce J Winick & David B Wexler, eds, *Judging In a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Durham, NC: Carolina Academic Press, 2003) at 5. Domestic violence raises a unique set of issues and there is growing literature on best practices and innovative approaches in specialized court processes across Canada. See Jane Ursel, Leslie M Tutty & Janice LeMaistre, eds, *What's Law Got to Do With It? The Law, Specialized Courts and Domestic Violence in Canada* (Toronto: Cormorant Books, 2008) generally and especially "Criminal Justice: Different Models of Specialization" at 69–196.

[151] Winick & Wexler, *ibid*.

[152] Goldberg, *supra* note 150 at 8–9.

[153] *Ibid*.

[154] *Ibid* at 10–11.

[155] *Ibid* at 11.

[156] *Ibid*.

Duncan, or Kamloops.[157] There is also no assessment process for suitability, like there is for drug courts and domestic violence courts.[158]

Finally, there are many community-based restorative or healing programs for Aboriginal people operating across Canada. These range from community justice panels or justice committees, to sentencing circles, peacemaking circles, family group conferencing and mediation, to intensive healing programs or processes offenders participate in for an extended period of time. Many of these programs describe themselves as: using or integrating traditional or culturally appropriate methods; relying on elders; involving extended family and community; focusing on underlying causes of behaviours; healing, repairing, and restoring relationships, peace, harmony, and order in the community. They are often connected to the mainstream justice system, pre- or post-charge. They may provide sentencing guidance to the court, and the offender's participation may be an alternative measure or a condition of a peace bond, probation order, or conditional sentence. However, many are not restricted to these circumstances, and will accept voluntary participants who are not currently involved in a formal criminal or family justice matter. According to the Department of Justice's "Aboriginal Justice Strategy" website, the federal government currently funds approximately 275 community based justice programs that serve over 800 communities across Canada.[159]

Most of these initiatives have certain things in common. They are fully or partially funded within the existing mainstream justice system and operate as part of or in conjunction with it. With very few exceptions,[160] they do not deal with serious or violent crimes. To the best of my knowledge, the vast majority of problem-solving and Aboriginal courts in Canada deal only with summary offences. Most take an interdisciplinary approach to social and health issues underlying specific criminal behaviours, and non-legal professionals are heavily involved. Most are informed by and integrate psychological and social science research into their approach. They strive to treat individual offenders with empathy and respect. They usually allow or even encourage individual offenders to tell their story and take an active role in finding their own solutions. Most, if not all, provide support for or connect

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[157] A Provincial Court Judge described this difference in response to an audience question about the differences between his experiences sitting on the Vancouver drug treatment court and the Duncan First Nations court at the International Conference on Therapeutic Jurisprudence hosted by the School of Social Work, University of British Columbia, 9–10 October 2014.

[158] *Ibid*. In response to an audience questions contrasting the Vancouver drug treatment court and the new First Nations Court in Duncan, in addition to lack of funding, the Judge also named the lack of individualized assessment and a lack of resources to help offenders actually implement their "healing plans."

[159] Canada, Department of Justice, "Community Based Justice Fund", online: <www.justice.gc.ca/eng/fund-fina/acf-fca/ajs-sja/cf-pc/index.html>.

[160] Dr. John Hylton names a handful of community-based healing programs across Canada that deal with domestic violence and sexual violence. These include "Hollow Water in Manitoba, Waseskun House in Quebec, the Canim Lake Family Violence Program in Canim Lake, British Columbia, and a community-based healing process on the Mnjikaning First Nation in Ontario." See John Hylton, *Aboriginal Sexual Offending in Canada* (Ottawa: Aboriginal Healing Foundation, 2006) at 42.

individual offenders to helping resources to heal, recover from, or manage their underlying issues.

These programs have varying degrees of public records. Obviously, the in-court work of court workers, problem-solving courts, and Aboriginal courts are public and recorded, so transcripts could technically be accessed. On the other hand, there are no public records for the majority of community-based justice programs. This can be for practical, ethical, or principled reasons. For example, mediation or therapeutic processes come with ethical confidentiality obligations, and the T'suu T'ina Peacemaking Circles make a point of burning all records once a peacemaking process is complete.[161] Among other things, this means it is difficult or impossible for anyone outside the direct participants in the process to access or understand *how* decisions are made and the reasoning behind the decisions.

This is a crucial point, because, arguably, some Indigenous legal principles are compatible with or are even being *practiced* within many of these spaces.[162] It is just happening in implicit or unspoken ways[163] or through what is couched in the language "traditions" or "values," without examining what these things actually do for or mean to participants in interactional settings.[164] Many community justice programs refer broadly to Indigenous understandings and conceptions of justice, and even their own laws.[165] However, the Indigenous legal principles and *reasoning* behind these practices and conversations are not being made explicit or examined. There is nowhere to find, as envisioned in the *Aseniwuche Winewak Justice Report*, a public record of decisions based on Indigenous legal principles to learn from,

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[161] Judge LS Tony Mandamin, "Peacemaking and the Tsuu T'ina Court" in Wanda D McCaslin, ed, *Justice as Healing, Indigenous Ways: Writings on Community Peacemaking and Restorative Justice from the Native Law Centre* (St Paul, MN: Living Justice Press, 2005) 349 at 354.

[162] Napoleon and I argue implicit Indigenous legal reasoning is exactly what is happening in these spaces in Val Napoleon & Hadley Friedland, "Indigenous Legal Traditions: Roots to Renaissance" in Markus D Dubber and Tatjana Hornle eds, *The Oxford Handbook of Criminal Law* (Oxford: Oxford University Press, 2014) 225 at 235–237.

[163] Val Napoleon et al, "Where is the Law in Restorative Justice?" in Yale Belanger, ed, *Aboriginal Self Government in Canada: Current Trends and Issues,* 3rd ed (Saskatoon: Purich, 2008).

[164] Justin B Richland, *Arguing with Tradition: The Language of Law in Hopi Tribal Court* (Chicago: Chicago University Press, 2008) at 61, argues the conversations within Hopi courts, even when largely guided by and based on state or tribal laws that are not Hopi in origin, are doing more Hopi legal and political work than recognized. The same may be argued for the Cree Court in northern Saskatchewan, presided over by Cree-speaking judge, Gerald Morin. While the Cree court is, officially, a provincial circuit court that operates and applies state law, the fact it is conducted almost entirely in Cree arguably creates space where important values and principles embedded in Cree language inform the legal process. The judge may also "emphasize traditional Cree values regarding respect for one's family and community in addition to the sentencing principles in the *Criminal Code* and/or Y*outh Criminal Justice Act*": <www.sasklawcourts.ca/index.php/home/provincial-court/cree-court-pc>.

[165] See e.g. Mandamin, *supra* note 161 at 350–53; Ted Palys & Wenona Victor, "Getting to a Better Place *Qwi:qwelstóm*, the Stó:lō Nation and Self-Determination" in *The Law Commission of Canada's Legal Dimensions Initiative Regarding Indigenous Legal Traditions* (Vancouver: UBC Press, 2005) at 20; Joe Pintarics & Karen Sveinunggaard, "Meenoostahtan Minisiwin: First Nations Family Justice—'Pathways to Peace'" (2005) 2:1 First People's Child & Family Rev 67 at 71.

analyze, and build on in future cases.[166] Further, nothing seems to be being built further beyond or even upon the cautious successes of the models that already exist. There are more programs, but neither the jurisdiction nor the scope of these courts or programs is expanding. Some would argue that this is with good reason.

C. Challenges and Critiques of Community Justice and Healing Programs

There have been ongoing calls, and implementation of, culturally sensitive, community-controlled services and healing initiatives. The concept of healing has become pervasive in both public and professional discourse.[167] Waldram describes the Aboriginal "healing movement" as "the most profound example of social reformation since Confederation."[168] There have been numerous government agreements with Indigenous communities that create greater Indigenous control over community justice programs[169] and children services delivery.[170] There are also numerous healing programs operating across Canada, many of which were initially funded in whole or in part by Aboriginal Healing Foundation grants.[171]

If breaking the silence about internal violence is any indication, at least some of these programs seem to be making a difference. Braithwaite points out that in the Healing Circles in Hollow Water forty-eight adults out of a community of six hundred admitted responsibility for sexually abusing children, of whom forty-six admitted as a result of their participation in healing circles and only two as a result of being referred to a court of law for failing to participate. He argues:

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[166] Aseniwuche Winewak Justice Project Report, *supra* note 10 at 6.

[167] James B Waldram, ed, *Aboriginal Healing in Canada: Studies in Therapeutic Meaning and Practice* (Ottawa: Aboriginal Healing Foundation, 2008) at 6, online: <www.ahf.ca/downloads/aboriginal-healing-in-canada.pdf> [Waldram, AHF Study].

[168] *Ibid*.

[169] For examples of community justice projects currently supported by the Department of Justice across Canada, see Canada, Department of Justice, "Programs and Initiatives", online: <www.justice.gc.ca/en/ps/ajs/programs.html>. In 2005, there were 88 agreements with the Department of Justice, serving over 280 Aboriginal communities, which allowed communities to develop their own restorative justice practices. See also the summary of initiatives across Canada in Hylton, *supra* note 160 at 40–41.

[170] The Royal Commission on Aboriginal People lists several changes in government policies in the 1980s and 1990s that focused on "supporting increased Aboriginal control of the development, design and delivery of child and family services." These included allocated funding from the Department of Indian and Northern Affairs to 36 agencies, which covered 212 bands. See *Report of the Royal Commission on Aboriginal Peoples: Gathering Strength*, vol 3 (Ottawa: Supply and Services Canada, 1996) at 23. Agencies and services were also established under a tripartite agreement in Manitoba with the Four Nations Confederacy, sponsored jointly by bands and government in Ontario, developed regionally in BC and Nova Scotia, and agreed on with individual bands under a provincial mandate in Alberta and Saskatchewan (at 30). According to the Alberta Child and Youth Advocate's website, there are currently eighteen delegated First Nations agencies operating in Alberta. See Alberta, Office of the Child and Youth Advocate, online: <advocate.gov.ab.ca>.

[171] See Aboriginal Healing Foundation, "Funded Projects", online: <www.ahf.ca/funded-projects>.

> What is more important than the crime prevention outcome in Hollow Water is its crime detection outcome. When and where has the traditional criminal process succeeded in uncovering anything approaching forty-eight admissions of criminal responsibility for sexual abuse of children in a community of just six hundred?[172]

However, uncritically assuming this example of increased comfort with help-seeking is universal or typical is foolhardy. At best, current community initiatives actually operate within legislated perimeters and must adhere to the applicable government regulations, which are becoming increasingly standardized.[173] There are three major concerns that create considerable risk of failure in both community-controlled justice programs and child protection agencies. While there is not the same voluminous discussion about healing programs, it is fair to extrapolate there may be similar factors at play. These three concerns are incommensurate resources and responsibility, lack of accountable and transparent decision-making processes, and romanticization and essentialization of culture and tradition. These concerns all contribute to a profound concern about safety.

D. Incommensurate resources and responsibility

Increased community control over justice, healing, and child protection takes place in the present context of a trend of "responsibilization" by neo-liberal governments where the "responsible individual" and "responsible communities" are supposed to manage and control themselves for the benefit of the government.[174] Responsibility for risk management is also increasingly localized.[175] There is, no doubt, a policy shift geared toward increasing devolution and privatization of child protection services.[176] Community control is occurring in this context, often without resources for supporting the work of care. The funding formula for on-reserve Aboriginal children is still 22% less than for other children, now subject of a current human rights decision that found this was discriminatory.[177] It is worth keeping in mind the long battle of jurisdiction between the federal and provincial governments over child

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[172] John Braithwaite, "Restorative Justice and Social Justice" (2000) 63:1 Sask L Rev 185 at 201.

[173] For an excellent discussion on the trend of increasing standardization for Community Justice programs, see Rudin, "Aboriginal Justice," *supra* note 84 at 103–109. For child protection, see Gerald Cradock, "Risk, Morality, and Child Protection: Risk Calculation as Guides to Practice" (2004) 29:3 Science, Technology & Human Values 314.

[174] Chris Anderson, "Governing Aboriginal Justice in Canada: Constructing Responsible Individuals and Communities Through 'Tradition'" (1999) 31 Crime L & Soc Change 303 at 312–14.

[175] Cradock, *supra* note 173 at 322–23.

[176] Hester Lessard, "The Empire of the Lone Mother: Parental Rights, Child Welfare Law, and State Restructuring" (2001) 39:4 Osgoode Hall LJ 717 at 758.

[177] This case was launched by the First Nations Child and Family Caring Society in 2007. The Canadian Human Rights Tribunal started hearing evidence in 2013 and heard final submissions in October 2014. On 26 January 2016 the tribunal released its decision, finding the government of Canada had discriminated against Aboriginal children living on reserve. See *First Nations Child and Family Caring Society of Canada v Canada (Minister of Indian Affairs and Northern Development)*, 2016 CHRT 2, [2016] CHRD No 2.

welfare provision on reserves were about neither level of government wanting to fund them.[178]

In a similar vein, community justice projects struggle with a complete lack of funding for community consultation and development before implementing justice projects,[179] and inadequate, uncertain funding for existing ones.[180] This results in "unrealistic expectations"[181] and a lack of "proper infrastructure of personnel and program policies and procedures."[182] Even programs that operate successfully for a long time lack the "recognition and security" that funding, policy, and legislative commitments bring.[183] Chris Anderson points out these initiatives download responsibilities on Aboriginal communities and essentially expect them to "do more with less resources", despite the fact that "in virtually all Aboriginal communities these original expenditures were grossly insufficient to begin with."[184] Finally, community control of justice and child protection does nothing to address the material conditions of poverty that form the context of many child protection matters[185] and criminal offences.[186]

E. Lack of Accountable and Transparent Decision-Making Processes

Deeply connected to the consistent lack of funding for either community consultation or development of policies and procedures is the lack of accountability and transparency in the decision-making processes of community-controlled initiatives.[187] It goes without saying that the development of transparent policies and procedures takes time and some expertise or consultation. Despite many reports

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[178] Though this lack of services is often mentioned, the impact of it, except during "life and death situations" is rarely discussed directly: see Tae Mee Park, "In the Best Interests of the Aboriginal Child" (2003) 16 Windsor Rev Legal Soc Issues 43 at 44. But see brief mention of this in Lessard, *supra* note 176 at 742, where she points out "Aboriginal communities were subjected to the harshest impacts of the residual model without any of the moderating effects of the preventive, support, and advocacy services available more generally to non-Aboriginal Canadians."

[179] Rudin, "Aboriginal Justice," *supra* note 84 at 101.

[180] Hylton, *supra* note 160 at 42.

[181] Rudin, "Aboriginal Justice," *supra* note 84 at 100.

[182] Hylton, supra note 160 at 42.

[183] *Ibid*.

[184] Anderson, *supra* note 174 at 315.

[185] Marlee Kline, "Child Welfare Law, 'Best Interests of the Child' Ideology, and First Nations" (1992) 30:2 Osgoode Hall LJ 375 at 425 [Kline, "'Best Interests of the Child' Ideology"].

[186] Jane Dickson-Gilmore & Carol LaPrairie, *Will the Circle Be Unbroken? Aboriginal Communities, Restorative Justice, and the Challenges of Conflict and Change* (Toronto: University of Toronto Press, 2005) at 55–56.

[187] Angela Cameron, "Stopping the Violence: Canadian Feminist Debates on Restorative Justice and Intimate Violence" (2006) 10:1 Theoretical Criminology 49 at 58.

recommending the importance of this aspect for community justice programs, this vital governance issue continues to be ignored in funding agreements.[188]

This basic lack of accountability or procedures for contestation or transparency is exacerbated by the increasing governmental push for standardization and 'equality' between community initiatives. In child protection services, Gerald Cradock describes how the government's increasing reliance of standardized risk assessment forms in child protection, in tandem with increasing localization of responsibility, in effect "separates responsibility (local) from accountability (central)". Essentially this results in an artificial split where 'facts' are centrally determined while "value-laden remedies remain the responsibility of local communities."[189] Rudin points out community justice funding is offered on a "take it or leave it" basis in discreet areas that do not necessarily match with the needs of community members in front of service providers. This means that, in order to remedy actual need, staff may adjust to acting in a "clandestine manner".[190] The logical result of this complicated mess of separating responsibility and accountability is local staff who must rely on their own judgment, without having any supportive, comprehensible framework for self or community evaluation of that judgment.[191] Even if they are not corrupt, there is no way to counter that perception if it arises within the community.

This all contributes to serious accountability and transparency concerns with many community controlled restorative justice initiatives, including a lack of objective evaluations or enforceable obligations[192] as well as serious lack of "procedural safeguards" for victims[193] or offenders.[194] There is no "formal processes to challenge decisions made in this context."[195] This opens the door for political interference, and the perpetuation of abuse and/ or marginalization of vulnerable individuals through dysfunctional power relationships. In community justice initiatives, this has led to several documented cases of adult victims of intimate violence being re-victimized, including "victim blaming, threats of physical violence, physical violence and coercion."[196] In the context of Aboriginal controlled

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[188] Rudin, "Aboriginal Justice," *supra* note 84 at 101. Hylton's report repeats this is one of the major problems with community controlled programs: Hylton, *supra* note 160 at 125.

[189] Cradock, *supra* note 173 at 323.

[190] Rudin, "Aboriginal Justice," *supra* note 84 at 108.

[191] Dickson-Gilmore & LaPrairie, *supra* note 186 at 183–85, have found that a lack of evaluation is an issue generally: "It is now well established that evaluation of Aboriginal community restorative justice projects is unusual, even where it is held out as a condition of funding. Where evaluation does occur, it too often avoids addressing some of the more troubling or sticky issues that arise." They also note (at 185) that, from available data, "projects appear to be consistently unable to provide general knowledge and understanding about their form and function to the communities they intend to service."

[192] *Ibid* at 102–03.

[193] Cameron, *supra* note 187 at 58.

[194] Anderson, *supra* note 174 at 313.

[195] *Ibid* at 320.

[196] Cameron, *supra* note 187 at 57.

child protection agencies, this has "led to poor placements and politically controlled decision-making that left children in dangerous situations."[197] In the most extreme cases, this has resulted in the deaths of children in care of these agencies,[198] but there has also been horrific abuses suffered as well.[199]

F. Romanticization and Essentialization of Tradition and Culture

If there is no time or resources to develop policies and procedures for accountability and transparency in community initiatives, then it cannot be shocking there is certainly no time or resources for the opportunity to "rigorously or critically examine" local cultural norms and practices.[200] This obscures the fact that people are constantly making choices about how to interpret 'traditional' values,[201] and choices as to what parts and forms of Indigenous 'culture' will be put into practice in the contemporary situation.[202]

In a study of five Aboriginal Healing Foundation funded healing projects, Waldram suggests that, while the study of what constitutes a 'traditional' practice is complex, it is also largely irrelevant to its use in healing programs. More importantly, "the very idea of traditionality, in the contemporary context, provides an emotional safe place for troubled individuals where they can link their troubles to a historic past."[203] However, in the context of community based violence and victimization, it is questionable whether the uncritical acceptance of traditionality always creates the same sense of safety. There is such a strong political push and legitimate longing for healing and for Indigenous children to remain within their own families, communities and culture, that people may focus on romanticized versions of 'traditional culture' without critically evaluating how the family and community are actually functioning.

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[197] Anne McGillivray & Brenda Comaskey, *Black Eyes All of the Time: Intimate Violence, Aboriginal Women, and the Justice System* (Toronto: University of Toronto Press, 1999) at 136.

[198] See e.g. "The Giesbrecht Report" concerning the death of Lester Deslarjais while under the care of Dakota Ojibway Child and Family Services, as cited in John Borrows & Leonard I Rotman, *Aboriginal Legal Issues: Cases, Materials and Commentary*, 2nd ed (Ontario: LexisNexis Canada, 2003) at 871. See also the Thomas J Gove, *Report of the **Gove Inquiry** into Child Protection in British Columbia* (Vancouver: Queen's Printer, 1995), online: <www.qp.gov.bc.ca/gove/>; Office for Children and Youth, *Report to the Attorney General of British Columbia under Section 6 of the Office for Children and Youth Act on the Director's Case Review Relating to the Nuu-chah-nulth Child Who Died in Port Alberni on September 4, 2002* (Victoria: Queen's Printer, 2006), online: <www.rcybc.ca//Groups/Investigation%20Reports/reporttoAG_nuu-chah-nulth.pdf>.

[199] See e.g. the case of 13 year old Jane Doe, *Jane Doe (Trustee of) v Awasis Agency of Northern Manitoba* (1990), 72 DLR (4th) 738, [1990] 4 CNLR 10 (Man CA) [*Jane Doe*].

[200] As suggested as a method for considering implicit Aboriginal law in Aboriginal justice projects practices, in Napoleon et al, *supra* note 163.

[201] *Ibid* at 19.

[202] Anderson, *supra* note 174 at 318.

[203] Waldram, AHF Study, *supra* note 167 at 6.

An extreme example of this is found in Marlee Kline's well known article about Aboriginal child welfare. Although she argues there are responsibilities for and communal practices of child –raising in Aboriginal communities that non-Aboriginal people cannot understand, she quotes, as a source of this insight, an unnamed Alberta elder, who actually says, *in the quote,* that there *used* to be such community practices, and people used to act on such responsibilities, but it is unfortunately *no longer the case.*"[204] This glaring contradiction is not unusual. Waldram found:

> The sum total of the Aboriginal mental health literature is a series of conflicting and contradictory portraits of seriously disturbed individuals living disordered lives in dysfunctional communities, suffering from cultural anomie, marginality and maladaptation, yet continuing to bask in the warm, inherently therapeutic glow of historical cultural traditions, psychically brought forward even by individuals without any experience whatsoever of these traditions. These two portraits do not mesh, and I would suggest neither is accurate, yet their co-existence is easily predictable from the perspective of primitivist discourse.[205]

These contradictions and accompanying willful, or wishful blindness has real consequences for the safety of women and children today. For example, I saw this played out repeatedly in my previous work in both children's services *and* as a community liaison for an Aboriginal community. A painful, but important example is the number of times I have listened to a well meaning person say that children need to connect with elders, while sitting beside someone who, had already or immediately afterwards disclosed to me about their sexual victimization *by* an elder or elders. [206]

McGillivray and Comaskey point out that "[c]hildren's bodies need protecting as much as their culture, and culture means little when it ignores or condones their injury."[207] I have met far too many Indigenous youths, now in non-Indigenous care, who were moved from relative to relative and were victimized by so many of them that they refuse to have anything to do with Indigenous people or cultural activities. In fact, I am sad to say that I encountered this particular issue so often in my work with adolescents that I developed a standard strategy to respond to it. One young girl had panicked tantrums at the *sight* of a visibly Indigenous person.

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[204] The quotation describing past responsibilities and practices toward children concludes with the elder stating: "It's unfortunate now that there is so many things that have entered into the native way of life, that we have lost these values of the family home." Kline, "'Best Interests of the Child' Ideology", *supra* note 185 at 411. Pointing this out does not mean I am dismissing all the points Kline raises in this article. The challenge is precisely that there is this level of contradiction or willful blindness in the middle of such meticulous and thorough research and carefully thought out writing.

[205] Waldram, *Revenge of the Windigo*, *supra* note 31 at 305.

[206] Rupert Ross mentions his own shock, when, after giving what he assumed would be a shocking hypothetical example of abuse by an elder, he immediately was told three virtually identical stories by three women from different reserves across Canada. See Rupert Ross, *Returning to the Teachings: Exploring Aboriginal Justice* (Toronto: Penguin Books, 1996) at 47–48, 230 [Ross, *Returning to the Teachings*].

[207] McGillivray & Comaskey, *supra* note 197 at 137.

Another was shocked to hear non-Indigenous people could also be abusive or abused.

Obviously, this complicated hate of a person's own ethnicity or culture not only contributes to issues of troubled identity and self-image, but is reinforced or enflamed by individual and systemically racist messages received within broader Canadian society. In regard to the goal of preserving the cultural identity of Aboriginal children, Bunting argues that "[t]o see identity as something that is acquired through genetics and maintained through symbolic rituals oversimplifies cultural identity."[208] She argues for an approach to culture that recognizes culture as "a contested and dynamic process rather than a static or abstract concept that is assessed rather than lived."[209] This includes a need to recognize the continuum of experiences of Indigenous children themselves.[210]

VII. SAFETY FIRST?

This all brings us to safety. While the healing discourse is widely accepted and there are some community-controlled justice, healing, and child protection programs across Canada, there remain considerable barriers to success and safety. I was quite young when I had my first experience, as a non-Indigenous person, of asking a professional for help, only to have them refuse to act to protect Indigenous children. That incident involved a client of mine calling me at two in the morning, telling me her very violent and intoxicated husband had beaten her up and physically thrown her out of the house but still had their two children with him, whom he was threatening to harm, in order to teach her a lesson. I advised her to call the police, and she told me she had, twice, but they refused to help.[211] When I phoned, despite initially refusing, the police finally agreed to come down after some intense negotiations and the children were okay that night. This experience has deeply shaped my understanding that, for many, if not most Indigenous people, calling for help is a crapshoot. They simply do not have *reliable* access to the state actors who hold the monopoly on the legitimate use of coercive force. This experience also illustrates how intertwined women's and children's safety actually are in many cases.

There is much written about Indigenous women and the pervasive and dangerous intimate violence they face, but most of the focus on Indigenous children is their need to remain within family, community and culture.[212] There are good

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[208] Annie Bunting, "Complicating Culture in Child Placement Decisions" (2004) 16 CJWL 137 at 142.

[209] *Ibid* at 146.

[210] Chan Durrant Limited, "A Review of the Office of the Children's Advocate" (Calgary, Alberta: Minister of Children's Services, 2000) at 2–3, as cited in Bunting, *ibid* at 144.

[211] I have written about this elsewhere. Hadley Friedland, "Different Stories: Aboriginal People, Order, and the Failure of the Criminal Justice System" (2009) 72:1 Sask L Rev 105 at 113.

[212] See e.g. Kline, "'Best Interests of the Child' Ideology", *supra* note 185.

reasons for this,[213] yet if many Indigenous women residing on reserves report encountering "significant conditions of endangerment" and have "reported profound fear of victimization and death",[214] what about Indigenous children? It is beyond question that children are the most vulnerable group in society.[215] They are also the most victimized group, even based on reported crimes alone.[216] Their profound voicelessness is perpetuated and reinforced by societal norms and law itself, which completely leaves them at adults' mercy.[217] In Anne McGillvray and Brenda Comaskey's study of violence against Indigenous women, childhood emerged as a central issue. Over four decades and several regime changes in child protection, from Indian agents and residential schools to Indigenous controlled child protection agencies, the major consistency was that "children tried and failed to get protection."

Almost twenty years after the incident described above, I too became an adult who Indigenous children tried and failed to get help from. Two small children I know well came to me one night to tell me they were scared to go home because their dad was drinking. Their dad was also someone I loved, who had been recently convicted of severe intimate partner violence, and was attending a local healing program as a community-based alternative to incarceration. After ensuring the children were physically safe for the night, I phoned, not the police, not child welfare, but the lead therapist of the healing program. I explained the situation and what the children had told me. This approach seemed ideal to me; I believed their cry for help would be responded to from a holistic, healing place. I felt at peace thinking their safety was in the hands of trained professionals already working with the family and well aware of the level of violence that had occurred in the past. Months later, a thankfully non-fatal crisis occurred and child welfare became involved. In the aftermath, as I joined in the planning and support around the family, I was stunned to learn the professional therapists in the healing program had done nothing at all with the information I had given them *months* earlier. They had not talked to the children, they had not passed on the information to child welfare, and they had not told me they were not going to respond to the children's pleas for help so I could decide on what further action to take myself. They had done nothing at all to assess or address the children's physical safety in their own home. It was with a sinking heart I realized that it was my trust in a *healing* program that had led me to join the legion of adults who had failed these two little ones particularly, and Indigenous children generally.

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[213] See the very thoughtful and nuanced discussion of the complicated reality Indigenous children in care face in Ardith Walkem, *Wrapping Our Ways Around Them: Aboriginal Communities and the CFCSA Guidebook* (Lytton, BC: Nlaka'pamux Nation Tribal Council, 2015), online: <www.nntc.ca/docs/aboriginalcommunitiesandthecfcsaguidebook.pdf>.

[214] Gillian Balfour, "Falling Between the Cracks of Retributive and Restorative Justice: The Victimization and Punishment of Aboriginal Women" (2008) 3:2 Feminist Criminology 101 at 104.

[215] Michael Freeman, "Whither Children: Protection, Participation, Autonomy?" (1994) 22 Man LJ 307 at 307.

[216] David Finkelhor, *Childhood Victimization: Violence, Crime and Abuse in the Lives of Young People* (New York: Oxford University Press, 2008) at 3.

[217] Freeman, *supra* note 215 at 307.

Many feminist theorists have called for closer study of healing and restorative justice projects. Angela Cameron has echoed a women's shelter network's call for a moratorium on new restorative or Aboriginal justice projects that address intimate violence until further research is done to analyze their safety for women and children.[218] There is a striking lack of empirical or other research that addresses safety and efficiency of healing programs for situations involving intimate violence or sexual victimization.[219] My experience with a healing program's non-response to the issue of children's fears and safety from a parent in the program illustrates the dangers inherent in assuming some end goal of healing negates any need for assessing and effectively addressing safety issues in the present. While calls for "breaking the silence" are strong, Dr. Hylton argues cogently that

> if victims are encouraged to disclose the abuse they have suffered, adequate and appropriate services must be available for victims and offenders. If not, many will be left even more severely damaged.[220]

How does this happen? Are community-based healing and victims' immediate safety diametrically opposed? Must we resign ourselves to choosing one or the other?

Based on my research results found in the *AJR Project Cree Legal Traditions Report* and the *Aseniwuche Winewak* Justice Project Report, I feel comfortable stating this is *not* the case within the Cree legal tradition. In *Creating New Stories*, a critical insight into Cree legal principles related to reconciliation is that creating safety was crucial:

> Our children, our young women and our young men, need to and deserve to be protected and live in communities they feel safe in and proud to be a part of today. If we or our families are not in a safe place, then none of the other principles we discuss can have positive effect. Safety is foundational.[221]

This makes intuitive sense. For example, the first stage of trauma recovery is establishing safety. It is hard to impossible to heal if you are not safe from continued violence and victimization or the threat thereof.[222] The centrality of safety was reinforced by the community feedback about using Cree legal principles in the

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[218] Cameron, *supra* note 187 at 59.

[219] *Ibid*. See also Hylton, *supra* note 160 at 70–71; Dickson-Gilmore & LaPrairie, *supra* note 186 at 183.

[220] Hylton, *supra* note 160 at 140.

[221] Hadley Friedland & Lindsay Borrows, "Creating New Stories: Indigenous Legal Principles of Reconciliation" (2 April 2014), online: <https://keegitah.wordpress.com>.

[222] Herman, *supra* note 119 at 2, says the first fundamental stage of trauma recovery is "establishing safety." Only then can trauma survivors go on to the next phases, "reconstructing the trauma story and restoring the connection between survivors and their community." Child psychologist Dr. Mary Korpach has stressed that, while there are several effective interventions to alleviate the trauma symptom of hyper-arousal in children, these will not work unless the child is actually in a safe place: Mary Korpach, "Child Development Essentials" (Presentation at the CLE BC Access to Justice for Children Conference in Vancouver, BC, 13–14 May 2015). It is sadly remarkable how often this step seems completely overlooked or ignored in Indigenous healing contexts.

Aseniwuche Winewak Justice Project Report. Sixteen out of eighteen participants rated the procedural step of "Taking Appropriate Safety Measures for Individuals and Community" as very important (5/5) and two rated it 4/5 for importance.[223] The rich discussions regarding how to maintain safety,[224] and the importance placed on the duty to warn others and duty to prevent future harms,[225] also illustrated how important maintaining individual and community safety is to people within the community itself. Safety clearly matters deeply to people within Cree communities. Establishing safety is both foundational for trauma recovery and a foundational Cree legal principle. Yet conditions of endangerment and vulnerability, for both women and children, continue at an alarming rate.

In a significant way, the current false dichotomy between safety and healing within Indigenous communities proceeds from characterizing Indigenous and state justice as diametrically opposed rather than acknowledging the limits imposed by the state's presumptive monopoly on the use of coercive force. This is exacerbated by the barriers described above—namely, systemic devolution of responsibility without corresponding resources, support for rigorously understanding the principles underlying cultural practices, or assessing and building capacity within communities. The dominant media and state law narratives also play a role. At best, state law's narratives are inadequate and unreliable. At worst, state law is seen as "a tool for government oppression"[226] so turning to it in order to access its resources are fraught with risks of real or perceived victimization. If community-based initiatives fail in their immense task of protection and healing, the media quickly picks up these failures and the pervasive moral devaluation of Indigenous people in the dominant media narrative continues. This, in turn, heightens the stakes and tensions at the community level.

One can see how even well intentioned community leaders and competent outsider professionals could grow so defensive and feel so embattled they might ignore or avoid information that signals safety concerns. They may truly fear these concerns coming to light might subject a vulnerable family to an unreliable, often vicious system, or reflect negatively on their own ability to handle such cases, so risk losing further capacity. Otherwise caring, intelligent, and responsible adults in Indigenous communities may operate from similar fears. When accountability becomes viewed as a threat and transparency as a risk, community-based programs can end up modeling and reinforcing an added level of silencing rather than providing adequate and appropriate responses to breaking the silence within

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[223] Aseniwuche Winewak Justice Project Report, *supra* note 10.

[224] *Ibid*.

[225] *Ibid*.

[226] TRC final report at Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: TRC, 2015) at 202, online: <www.trc.ca/websites/trcinstitution/File/2015/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf> [TRC Final Report].

communities.[227] There are currently no public procedural and normative frameworks for healing, justice and protection initiatives that support them to work through these complex issues in a principled transparent way, or demonstrate *how* they have done so to community members, justice system professionals and the general public.

VIII. THE REASONABLE CREE PERSON'S PLACE IN THE CURRENT JUSTICE SYSTEM

What would the reasonable Cree person, as a representative figure of Cree legal thought and practical reason, think of the mainstream justice system, and the available narratives and the spaces for applying Cree practical reason? Could she see herself actively taking part of it?

Lon Fuller argued that the capacity of law to be a practical guide to reason with is actually a crucial aspect of fidelity to law.[228] We reason through a legal tradition's precepts when they are broadly congruent with a *meaning* that we, as reasoning, feeling, imagining, seeking beings who are vulnerable, *can think through our lives with*, or, at least, *think we can live with*. Not exactly an exacting standard. We don't have to necessarily agree with every law—we can indeed harbour deep disagreements, and still live with precepts and practices for the simple reason we see, at some level, the value of being part of an ordered community.[229]

Pragmatically, we may live with precepts we may not understand or agree with simply because they don't really affect our lives enough to bother us, or because we don't believe we have the power to change them. Crucially though, we will never have *fidelity* toward a legal tradition that is incompatible with our life itself, or gives an intolerable meaning to our way of life, experiences, or histories. This is not to say we won't obey the law, out of overlapping moral claims, pragmatism, fear of coercion, exhaustion, or even habit and a dearth of alternatives, but we will never *reason* through our world with its intolerable rules. That would be masochistic. The gap in legitimacy and enforcement is formidable.

What mere amelioration or the cultural difference argument misses, and what the trauma narrative does not respond to, is the fact that the reasonable Cree person would likely find most of Canadian law not so much incomprehensible as deeply *unreasonable*. Canadian law is set against a background mythology, perpetuated by the mainstream media, of narratives of Indigenous people as backward, deficient and depraved, which the reasonable Cree person knows herself, her ancestors and her relatives not to be, and which gives an intolerable meaning to her way of life, experience, and history. The juridical construct of individuals as

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[227] For example, in the horrific case of *Jane Doe*, *supra* note 199, the legal issue was the child welfare agency responsible for her wellbeing actually applying to seal case records for their own self-protection.

[228] Fuller, *Morality of Law*, *supra* note 37 at 39–41. (Fuller argued "fidelity" to a system of law is engendered when the law is legitimate (met his criteria for internal morality) and when those subject to it can reason through its rules.)

[229] Jeremy Webber, "Legal Pluralism and Human Agency" (2006) 14:1 Osgoode Hall LJ 167 at 177.

ahistorical individuals completely responsible for themselves and only responsible for themselves (and their children, but only if it is a child protection matter rather than their own incarceration) is a further absurdity.

Relationships aren't considered, and the court's decision about an individual rarely, if ever, explores all the individual's relationships in the decision, as resources or as deeply affected parties, regardless of the seriousness of the offence. The principles of denunciation and deterrence aren't implemented in a reasonable way, where the offender and community could actually learn and understand what was done wrong and what community standards are. If you add in Gladue reports or problem-solving courts, you get a little more reasonable, if you have a good-hearted judge listening and seeking to understand the offender's story. Problem-solving and Aboriginal courts may provide more guidance and supportive supervision for some offenders but only in a smattering of cases. Community-based restorative justice or healing programs may include more consideration of family and community members, but if they solely focus on one legal principle—healing—without blending it or balancing it with others when necessary, they remain insufficient for safety and won't make sense as a stand alone for many, if not most cases. Very few, if any, of the most reasonable options can be used to deal with the serious or violent offences that cause the worst trauma, that break a community apart and leave ripples of grief, loss, fear, and anger in their wake. It just doesn't make sense.

Who could actually think through their lives with this, particularly with the impacts of "wounds of mass systemic harms, both past and present"[230] and extreme levels of violence to contend with? Who could imagine these resources for practical 'reason' leading to a more peaceful and ordered community? When you start from the perspective of the Cree reasonable person, steeped as she is in Cree legal *thought*, rather than cultural difference, it is clear why the TRC, and so many Indigenous people, see Indigenous justice processes using the Indigenous legal principles as being more reasonable and *effective* in maintaining safety, peace, and order in Indigenous communities. For this to happen however, we need to establish more symmetrical and respectful relationships between Indigenous laws and legal actors and state laws and legal actors. This requires us to go beyond both the ugly narratives of the primitivist discourse and even the seemingly more hopeful narratives of amelioration and healing, to a different starting place altogether.

IX. RESTARTING THE CONVERSATION: RECOVERING INDIGENOUS LEGAL TRADITIONS

On its face, despite the serious limitations and barriers that do exist, there seems to be some spaces provided, even directed, by the Canadian mainstream justice system for considering Indigenous experiences, perspectives, understandings, and conceptions of justice. How do we reconcile the clear directive from the Supreme

[230] Wanda D McCaslin, "Reflections on Justice as Healing" in Wanda D McCaslin, ed, *Justice as Healing, Indigenous Ways: Writings on Community Peacemaking and Restorative Justice from the Native Law Centre* (Minnesota: Living Justice Press, 2005) iii.

Court and these multiple sites of informed and longstanding attempts at amelioration with the alarming and demoralizing statistics that tell us rates of serious and violent crime by and against Indigenous people keep growing?

This question has been on many minds and hearts. There are generally two main streams of thought, despite the internal or even opposing variations within each. The first stream is the *immensity* of the problems Indigenous peoples are struggling with, that often manifest themselves as crime. These underlying issues are simply too large or intractable for any ameliorative attempts to have much impact for a very long time. They took generations to create, and they will take generations to repair. The second is the *focus* of ameliorative efforts. Ameliorative efforts tend to be on sentencing and treatment after the fact, but this is misguided or insufficient to address the real sources of the underlying issues, whether this is framed as systemic racism, socio-economic circumstances, population growth, ratio of youth, intergenerational trauma, continuing economic and environmental injustices, inadequate or substandard educational, early intervention and children protection services, colonialism writ large, or any combination of the above.

I think there is truth in both these streams of thought. I deeply respect and appreciate the efforts of the many people that continue to work toward and fight for justice in these areas. The related question that concerns me though, is a little different: How do we acknowledge the depth and the breadth of the current social suffering and terrible danger too many Indigenous people live with or die from, and also navigate out of the current narratives of despair? Can we step away from the emphasis on amelioration to ground the conversation in a more respectful, symmetrical, and, I would argue, *accurate* way?

Why aren't Indigenous legal traditions taking root and growing in Canada? What is missing? Certainly, as we see with Aboriginal courts and community justice projects, more long term and secure resources are needed. However, I also think there is an intellectual deficit at play. If we want better answers, maybe we need to be asking better questions. In order to establish a firm foundation for accessing, understanding, and applying Indigenous laws today, opening up jurisdictional space and directing adequate resources is necessary, but not sufficient. We also need the kind of intellectual work within Indigenous legal traditions that I have demonstrated in my research engaging with the Cree legal tradition. We need to be able to imagine the reasonable Cree person, and we need narratives and resources for practical reason that would be tolerable for her to use to reason through life's problems, instead of being useless or even harmful.

How, as a society, to respond to the reality of human violence and human vulnerability in Indigenous communities raises urgent questions at the very core of law's concerns.[231] Identifying legitimate answers to this question is important to

[231] H.L.A. Hart asserts that our human vulnerability means that one of "the most characteristic provision[s]" of any system of law or morals must include the prohibition or restriction of "violence in killing or inflicting bodily harm": Hart, *supra* note 42 at 194. Although he rejects force as a necessary identifying mark of law, on this point, Fuller agrees with Hart, stating, "given the facts of human nature, it is perfectly obvious that a system of legal rules may lose its efficacy if it permits itself to be

Indigenous communities for several practical reasons. To the extent self-governance is a long term goal, Indigenous communities will need legitimate processes for addressing these issues, because human violence and human vulnerability will never be completely eradicated in any society. They are both part of our human condition.[232] As Hylton argues, the "immediate threats to the well-being of Aboriginal women and children […] undermine the prospects for [long-term] positive social development in Aboriginal communities."[233] In the immediate situation, the violence and vulnerability that are both especially acute at this point due to a confluence of many historical, social, and systemic reasons must be addressed somehow because otherwise there is no end in sight.

The latest research on childhood victimization strongly suggests that strengthening norms and enforcement against intimate violence correlates positively with reduced rates of such violence.[234] This leads me to ask: What if the opposite is also true? What if part of the continuing fear, trauma, and violence today is linked to the erosion of Indigenous legal traditions, which, while not perfect, would appear to have worked well enough for thousands of years prior to European contact?[235] Rupert Ross has argued compellingly that at least some of the trauma and dislocation correlated to the "collision with Western culture" and Indigenous cultures is the pervasive devaluation of Indigenous culture by the dominant society, and acknowledging the rich complexity and gifts within these cultures could make a powerful difference today.[236] The same can be said about Indigenous laws.

Because violence and vulnerability are issues all societies face, logic alone dictates that Indigenous societies had ways to deal with these issues prior to the arrival of Europeans. Logically, these legal traditions must have provided principled ways to address social problems and order human affairs.[237] These legal traditions,

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challenged by lawless violence." See Fuller, *Morality of Law*, *supra* note 37 at 108. I interpret this as logically extending to intimate violence and child victimization, at least theoretically, if not in practice.

[232] Hart, *ibid*.

[233] Hylton, *supra* note 160 at 99.

[234] Finkelhor, *supra* note 216 at 10. Finkelhor argues there is "considerable evidence that strengthened norms and sanctions play and important role in discouraging crime and offensive behaviour. As norms changed regarding spousal assault, evidence suggests its incidence has declined. As norms have changed with regard to corporal punishment, that has declined too. […] This is all evidence that when norms are clear and strict, offenses are discouraged." He argues that shifting norms related to all kinds of child abuse is a likely cause of the real decline in child victimization in North America in recent years (at 138–39).

[235] See generally Napoleon, *Ayook*, *supra* note 8.

[236] See Ross, *Returning to the Teachings*, *supra* note 206 at 47–48; Rupert Ross, "Telling Truths and Seeking Reconciliation: Exploring the Challenges" in *From Truth to Reconciliation: Transforming the Legacy of Residential Schools* (Ottawa: Aboriginal Healing Foundation, 2010) 143 at 156–58, online: <www.ahf.ca/downloads/from-truth-to-reconciliation-transforming-the-legacy-of-residential-schools.pdf>.

[237] Fuller describes law as "a direction of purposive human effort" consisting in "the enterprise of subjecting human conduct to the governance of rules": See Fuller, *Morality of Law*, *supra* note 37 at 130.

like all legal traditions, also provide a specific way of not just solving, *but articulating and reasoning through social problems* in the first place.[238] The prevalent political and legal narratives that focus on cultural practices rather than legal reasoning within Indigenous traditions may inadvertently continue the mischief of reducing "thought to practice."[239] Recovering and reclaiming Indigenous legal reasoning may enable Indigenous communities to use these collective intellectual resources in a more explicit and targeted way today,[240] thereby strengthening vital norms about safety and well-being within communities, and developing legitimate and effective responses to pressing social issues, such as violence and victimization. This is why my question is deeply related to amelioration. It just doesn't start or end there, but rather, in the deeply rooted and enduring existence and intrinsic value of Indigenous legal traditions for Indigenous peoples, and for rebuilding relationships of mutual respect between peoples.

X. CONCLUSION

> *Establishing respectful relationships […] requires the revitalization of Indigenous law and legal traditions.*[241]

In this article, I introduced the concept of the reasonable Cree person, as a representative figure of Cree legal thought, based on logic and my extensive research engaging with the Cree legal tradition. The lack of acknowledgement and recognition of Indigenous legal thought is a deep absence in current conversations about the horrifying rates of violence, victimization, and death Indigenous women and children suffer, as well as the over-incarceration of Indigenous offenders. These conversations instead tend to focus solely on amelioration, with a side of unexamined cultural difference. I outlined the current grim statistics about the growing rates of under protection and over-incarceration, and violence by and against Indigenous people in Canada.

I also reviewed the dominant media, legal and political narratives about these issues and outlined some of the main ways the courts and mainstream justice system have attempted to ameliorate these issues. While there are significant directives and spaces within the mainstream justice system for Indigenous perspectives and conceptions of justice, these spaces are not growing, and public and explicit application of specific Indigenous legal principles and Indigenous legal *thinking* is largely absent. Even in community justice initiatives, there is a lack of

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[238] See generally Cover, *supra* note 45; White, "Legal Knowledge," *supra* note 46.

[239] H Patrick Glenn, "The Capture, Reconstruction and Marginalization of 'Custom'" (1997) 45 Am J Comp L 613 at 620, quoting Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983) at 208.

[240] Ross argues that, despite contemporary realities and challenges, including abuse of these teachings and a desire for punishment by many Aboriginal people, bringing back traditional teachings to prominence is the "one best way for communities to deal with the problems that show up as charges in criminal courts": Ross, *Returning to the Teachings*, *supra* note 206 at 15.

[241] TRC Final Report, *supra* note 226 at 16.

transparency, explicit reasoning, and there are significant barriers to success. This all contributes to the continuing lack of safety for Indigenous women and children within their own communities.

In recent years, there has been increased interest in engaging with Indigenous legal traditions, and we need transferable methodologies for serious and sustained engagement with Indigenous laws in order for them to be more accessible, understandable, and applicable. We now have outcomes of one methodology for doing so, which demonstrate that this methodology does work to increase access, understanding, and applicability.[242] However, this article is not about those outcomes. Rather, it is about how these outcomes might be recognized or received within the dominant narratives and available spaces to deal with violence and vulnerability within the current Canadian justice system. I have to conclude, sadly, that the reasonable Cree person would not likely recognize herself in the current narratives and spaces available to her, any more than the justice system recognizes her at present.

For the TRC's calls to action about recognizing and using Indigenous justice systems in Canada to become a reality, Indigenous participants and justice system professionals involved would need to be able to recognize the existence of Indigenous legal principles, and be able to imagine people actively engaging with Indigenous legal reasoning through these principles, in a way that could conceivably begin to bridge the gap between legitimacy and enforcement that currently exists. How well we answer practical questions about relationships and harmonization between state law and Indigenous laws will depend on how well we do the needed intellectual work first. Making space for Indigenous peoples to reclaim the language of law and recognizing Indigenous legal reasoning is an active process. It is absolutely necessary if we are going to have reasoned conversations about a reasonable legal order for Canada's future.

I believe this is possible. Judith Herman has described how veterans transformed the public and professional recognition of traumatic stress by collectively "insisting upon the rightness, the dignity of their distress."[243] The heart of my work has been to acknowledge distress but also insist upon the rightness and dignity of colonialism survivors' decision-making. Indigenous legal decision-making has gone unrecognized or misrecognized for far too long in Canada. If nothing else, I hope my own research stands as a demonstration that, if we work hard enough at it, non-indigenous people can learn to learn. We can listen better. I hope the reasonable Cree person would recognize herself and her legal reasoning in these pages, would feel heard, valued and welcome in this space. I hope I have learned to learn enough

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[242] See e.g. AJR Cree Legal Traditions Report, *supra* note 10; Aseniwuche Winewak Justice Project Report, *supra* note 10. In addition to the Cree Legal Traditions Report, the AJR Project produced six other reports based on five other legal traditions, including Anishinabek, Coast Salish, Mi'kmaq, Secwepemc, and Tsilhqot'in. These were returned to partner communities and are on file at the ILRU. The IlRU continues to apply this method to work with Indigenous communities who want rigorous and transparent research to articulate and revitalize their own laws.

[243] Herman, *supra* note 119 at 27.

to contribute, in at least some small way, to establishing respectful relations in Canada.